

## VU Research Portal

### Knowing what we know now. International Crimes in Historical Perspective

de Haan, W.J.M.

**published in**

Journal of International Criminal Justice  
2015

**DOI (link to publisher)**

[10.1093/jicj/mqv032](https://doi.org/10.1093/jicj/mqv032)

**document version**

Publisher's PDF, also known as Version of record

[Link to publication in VU Research Portal](#)

**citation for published version (APA)**

de Haan, W. J. M. (2015). Knowing what we know now. International Crimes in Historical Perspective. *Journal of International Criminal Justice*, 13(4). <https://doi.org/10.1093/jicj/mqv032>

**General rights**

Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal

**Take down policy**

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

**E-mail address:**

[vuresearchportal.ub@vu.nl](mailto:vuresearchportal.ub@vu.nl)

# Knowing What We Know Now

## International Crimes in Historical Perspective

Willem de Haan\*

### Abstract

*The purpose of this article, on the basis of a specific Dutch example, is to discuss some methodological problems that criminologists and/or criminal lawyers face when dealing with atrocities committed in the past. Can we legitimately apply contemporary concepts to describe/explain historical events? Or are we guilty of a 'sin' of anachronism because we ascribe meanings to actions that these did not (or could not) have at the time they were performed? Generally, most criminologists turn their attention to contemporary phenomena and, therefore, do not have to worry about the time dimension. However, when studying international crimes, which are often historical events, this should not happen. When dealing with crimes of a previous regime, we should be aware of some methodological problems linked to the use of (contemporary) concepts to describe and explain events of the past. Legal scholars may also encounter problems when applying contemporary concepts to past atrocities.*

### 1. Introduction

In April 1998, it became publicly known that Hendrikus Colijn (1869–1944) — Dutch Prime Minister from 1925 to 1926 and from 1933 to 1939 — had been involved in the killing of civilians during a series of military actions in the late 19th and early 20th century in an effort to consolidate Dutch colonial rule over territories that, today, form part of the Republic of Indonesia. Colijn's involvement in the 'pacification' was disclosed by historian Herman Langeveld.

\* Professor of Criminology and Senior Research Fellow, Faculty of Law, VU University, Amsterdam. A shorter version of this article in Dutch has previously been published in C. Kelk, F. Koenraedt and D. Siegel (eds), *Veelzijdige gedachten. Liber amicorum Prof.dr. Chrisje Brants* (Boom/Lemma, 2013) 85–94. I would like to thank Antoon de Baets, Piers Beirne, Barbara Henkes, Bart van Klink, Chris Lorenz, Klaas Rozemond, Elies van Sliedregt, Sergey Vasiliev, Harmen van der Wilt and the editors of this *Journal* for their helpful comments. [w.j.m.de.haan@vu.nl]

In his biography of Colijn,<sup>1</sup> he quoted from personal letters in which the 25-year-old lieutenant Colijn tells his wife and parents about a raid on the palace of the Raja in the town of Tjakra Negara (1894) on the island of Lombok. He writes to his wife:

I have seen a woman with a child of about six months on her left arm and a long lance in her right hand, storming at us. One of our bullets killed mother and child. We were not allowed to show mercy. I had to have nine women and three children, who were asking for mercy, rounded up and shot. It was unpleasant work but there was no other way. The soldiers enjoyed piercing them with their bayonets. It was terrible work. I'll stop now.<sup>2</sup>

In a letter to his parents, he goes on:

After the eighth attack, a few remained who were asking for mercy — thirteen, I believe. The soldiers looked questioningly at me. Thirty of my men were dead or wounded. I turned around to light a cigar. There were some heartbreaking cries and when I turned around again, those thirteen were dead, too.<sup>3</sup>

Disclosure of these passages led to what historian Jan Blokker called a 'War on Colijn'.<sup>4</sup> What started as a scholarly discussion, escalated into a clash about the reputation of the former prime minister. It was Colijn's biographer Langeveld who — unintentionally — triggered it. In an interview with him, entitled 'Colijn's behavior was wrong, even for that era', it was suggested that: 'following the standards of the contemporary Yugoslavia-tribunal he [Colijn] would have been a war criminal'.<sup>5</sup>

In an indignant reaction to this claim, fellow historian Jan de Bruijn argued that by accusing Colijn — retrospectively — of war crimes, Langeveld had committed a form of 'a-historic moralism'.<sup>6</sup> From a historical perspective, he argued, contemporary values and norms should not be applied to events that took place in the past. Rather, what has happened or been done in the past should be seen in the context of that time. So, even if we find that, according to contemporary standards, the Dutch colonial army acted unacceptably, we should take into account that, a century ago, public opinion looked at this differently and generally accepted what we today would consider war crimes. Thus, from a historical perspective, Colijn should not be seen as a war criminal but as 'a child of his time'.<sup>7</sup>

1 H. Langeveld, *Schipper naast God. Hendrikus Colijn 1869-1944* (Balans, 1998).

2 H. Colijn in a letter to Helena Colijn-Groenenberg, 24 November 1894. In Langeveld, *supra* note 1, at 59 (Translation, W.d.H.).

3 *Ibid.*

4 *De Volkskrant*, 1 May 1998.

5 *De Volkskrant*, 16 April 1998. In a reaction to a complaint by Langeveld, journalist Jeroen Trommelen admitted that the comparison with the Yugoslavia tribunal had not been made by him. Trommelen had used the comparison as a journalistic device to link the interview to current affairs (H. Langeveld, personal communication).

6 J. de Bruijn, 'Inleiding', in H. Colijn, *De Slag om Tjakra Negara, een verslag in drie brieven* (VU Uitgeverij, 1998).

7 As a case in point, Lieutenant Colijn was awarded the Military Willems Order for courage, prudence and fidelity.

In reaction to De Bruijn, Blokker countered that acts of historical figures might have been considered immoral or criminal by their contemporaries even at the time they were committed. He referred to Langeveld who, in his biography of Colijn, had shown that in fact at least one eye witness did acknowledge and morally condemn the atrocities that took place. In 1902, captain J.J.B. Fanoy wrote in a letter that ‘the horrors of our clean-up continue in the form of killing the wounded and captives, shooting the unarmed, etc., etc.’<sup>8</sup> Fanoy even specifically called Colijn’s acts ‘cold-blooded murder’ and noted that the lieutenant had a reputation for being ‘one of the worst executioners.’<sup>9</sup> Blokker argued that one therefore cannot maintain — like De Bruijn — that what we consider crimes of war today were necessarily seen as ‘normal’ at the time. Neither does the fact that Lieutenant Colijn was never indicted prove that his comportment was acceptable for his contemporaries. One cannot possibly maintain that these acts were not war crimes just because they were not labelled as such at the time they were committed. Elsbeth Ety, professor of literary criticism, retorted that De Bruijn’s claim — that from a historical perspective Colijn should be seen as ‘a child of his time’ — reveals a double standard, if only because: ‘No one ever said that of Eichmann or Karadzic.’<sup>10</sup> In her view, Colijn is ‘a criminal in the context of any time.’<sup>11</sup>

## 2. A Legal Thought Experiment

The claim that Colijn would be a war criminal according to the standards of today’s law as expressed by the International Criminal Tribunal for the former Yugoslavia (ICTY) is clearly anachronistic. Nonetheless, we could consider it as a hypothesis and — also hypothetically — verify whether Lieutenant Colijn would have been convicted by the ICTY.<sup>12</sup> Such an experiment could be conceived in two ways: either as if the historical atrocities in which Lieutenant Colijn was involved, had taken place within the ‘contemporary’ context of former Yugoslavia, or as if the ICTY had jurisdiction over crimes committed in the past, setting aside the limits of its mandate both in time and space.

In the first scenario, the question to be answered would be: Is there sufficient evidence and are there sufficient legal grounds to conclude that Lieutenant Colijn (or someone temporarily behaving like he did), would indeed be convicted by the ICTY? Most relevant to the answer to this question is the ICTY’s jurisprudence in the so-called *Čelibići* case,<sup>13</sup> named after the concentration camp in which the war crimes were committed for which camp commander

8 Quoted by Langeveld, *supra* note 1.

9 *Ibid.*

10 *NRC Handelsblad*, 18 April 1998.

11 *Ibid.*

12 Statute of the International Criminal Tribunal for the Former Yugoslavia, UN Doc. S/RES/827 (1993), 25 May 1993, as last amended by UN Doc. S/RES/1877 (2009), 7 July 2009.

13 Judgment, *Mucić et al.* (IT-96-21-A), Appeals Chamber, 20 February 2001.

Mucić stood trial. The ICTY convicted Mucić for war crimes that had been committed by his subordinates, on the basis of the doctrine of command or superior responsibility, i.e. under certain conditions a superior — military or civilian leader — can be held criminally responsible for international crimes committed by his subordinates.<sup>14</sup>

The doctrine of command or superior responsibility, which originated in international humanitarian law, entered the realm of criminal law after World War II when it proved to be useful for the prosecution and trial of the masterminds of mass atrocities and international crimes.<sup>15</sup> More recently, the doctrine has been incorporated into the statutes of the ad hoc international criminal tribunals and into the Rome Statute of the International Criminal Court (ICC).<sup>16</sup> Since then, it has been applied by international criminal tribunals such as the ICTY which — in the *Čelebići* case — convicted camp commander Mucić on the grounds that there had been a line of command; that he as a commander knew or had to know that his subordinates had committed or were about to commit the crimes; and that he as a commander neither took measures to prevent the crimes, nor punished the perpetrators. In his function as a commander, he was, therefore, held responsible for these crimes even though he was only indirectly involved in them.<sup>17</sup> The conviction of the camp commander Mucić was the first on the basis of ‘superior responsibility’ since the war tribunals of Nuremberg and Tokyo.

Like camp commander Mucić, lieutenant Colijn carried superior responsibility in a line of command. As the quotations from the letters to his wife and his parents prove, he knew that his subordinates were about to commit an atrocity and he also knew that they already had committed a similar atrocity under his command and even possibly on his own orders. Moreover, he had not taken sufficient measures to prevent the atrocities, nor to punish the perpetrators for committing them. In theory, then, these facts could suffice to prove the three constituent elements of command responsibility: he was in command and control, had reason to know what (had) happened and failed to take the reasonable and necessary steps to punish the perpetrators or prevent future atrocities.

14 E. van Sliedregt, ‘System Criminality at the ICTY: Individual Responsibility & Collective Criminality’, in W.N. Nollkaemper and H.G. van der Wilt (eds), *System Criminality* (Cambridge University Press, 2009) 183–200.

15 See H.G. van der Wilt, *Command Responsibility* (Oxford Bibliographies Online, 2013).

16 Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998, entered into force on 1 July 2002 (‘ICCSt’).

17 Judgement, *Delalić et al.* (IT-96-21-T), Trial Chamber, 16 November 1998, § 1285, at 441–443 (convicting Mucić and sentencing him to 7 years’ imprisonment). The *Čelebići* case was appealed (in 2001), retried in the first instance (also 2001) and re-appealed (in 2003). See Judgement, *Mucić et al.* (IT-96-21-A), Appeals Chamber, 20 February 2001, at 306–307; Sentencing Judgement, *Mucić et al.* (IT-96-21-Tbis-R117), Trial Chamber, 9 October 2001 (sentencing Mucić to 9 years’ imprisonment); Judgment on Sentence Appeal, *Mucić et al.* (IT-96-21-Abis), Appeals Chamber, 8 April 2003, § 61 (upholding the sentences imposed by the Trial Chamber).

We must also ask, on the basis of what he says in his letters, whether there are any defences available to Colijn that would negate or mitigate his responsibility. In the letter to his wife, Colijn wrote that '*we were not allowed to show mercy*', which could be interpreted as calling on a superior order (*Befehl ist Befehl*) as a justification for the actions. Article 7(4) ICTY Statute rules out a superior order as a defence, but it may be used in mitigation of punishment. The Tribunal has also recognized that a superior order, together with other circumstances (e.g. prospects of execution), may constitute a form of duress that the defendant could not be expected to withstand because of the dire consequences to himself. There is nothing in Colijn's letters to show that this was the case or that he had any reason to fear such consequences: he simply alludes to not being allowed to show mercy — a mindless following of orders which, given that he himself was in a superior position, would also be unlikely to result in mitigation of punishment.

The same passage could also be interpreted as meaning: 'it was impossible to show mercy', which could be invoking a higher loyalty, i.e. his duty to protect his men. Their safety might have been endangered by the — intentional or accidental — killing of a woman and her child 'by one of our bullets'. He might have had reasons to fear the consequences because, as he wrote to his parents: 'Thirty of my men were dead or wounded'. This is then an appeal to a form of necessity — in this case military necessity. Even though ICTY jurisprudence recognizes the relevance of the principle of military necessity in relation to war crimes, it nevertheless requires that the actions were reasonable and proportionate. That might (just) apply to the killing of the woman, although the action taken seems hardly proportionate (a woman with a baby in her arms and a lance against a body of men armed with rifles), while killing the baby as well could probably have been avoided. It certainly does not apply to the other women and children who were rounded up and shot. The letter to his parents ('a few remained who were asking for mercy — thirteen, I believe') clearly implies that the few who had survived the skirmishes were either surrendering or wounded, or possibly both, so that there was no military necessity in the first place.

Finally, self-defence has been recognized by the ICTY as a valid ground for excluding criminal liability, provided that the acts constitute a reasonable, necessary and proportionate reaction to the attack, i.e. that the act of self-defence took place in response to an attack on a protected person or property and was proportionate to the degree of danger.<sup>18</sup> The killing of defenceless women and children who have been 'rounded up' and of a surrendering or wounded enemy is not a form of self-defence (for there is no attack). Conceivably, self-defence could apply to the woman with the lance, but again the same arguments apply as for military necessity.

It is therefore highly likely that, on the basis of the facts and circumstances and supposing that the evidence were beyond reasonable doubt, Lieutenant Colijn would, hypothetically, have been held responsible for the crimes

18 Judgement, *Kordić and Čerkez* (IT-95-14/2-T), Trial Chamber, 26 February 2001, § 449.

committed by his subordinates. The ICTY would, therefore, have found him guilty of war crimes.

In the second scenario, assuming that the ICTY had jurisdiction over crimes committed in the past, the relevant international law instruments in force at the time of the offence would be The Hague Conventions 1899 and 1907 and, more specifically, the so-called ‘Martens clause’ contained in their preambles, which states that ‘populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience’.<sup>19</sup> Given that Martens based this formulation on a legal idea that was already common at the time when the atrocities in Tjakra Negara were committed, it is arguable that the acts to which Colijn admitted in his letters were unlawful under international law even at the time of their commission and that they violated what was then already international humanitarian law in force.

If anything, the legal thought experiment makes clear that Colijn cannot simply be considered and/or excused as ‘a child of his time’. From a contemporary perspective, he may be seen as a ‘criminal in the context of any time’ and the events in which he was involved may, retrospectively, be seen as crimes of war.<sup>20</sup> Yet, historians consider it senseless to judge events that received their moral meaning in a specific historical context on the basis of what we know now. To some it is a matter of ‘a-historic moralism’ to label actions of historical figures such as Colijn as war crimes. To others, the use of the concept of ‘war crimes’ in order to describe events that took place in the past is ‘*unzeitgemäss*’ or even ‘senselessly anachronistic’.

Like ‘a-historic moralism’, the accusation of ‘senseless anachronism’ could be brushed aside as merely rhetorical — an effort to disqualify moral criticism and protect the moral reputation of Prime Minister Colijn. However, if we take the accusation seriously, it raises questions: What exactly is anachronism? And what is the problem with it?

In what follows, I will discuss to what extent criminologists are guilty of ‘senseless anachronism’ when they use contemporary concepts to describe or explain historical international crimes, i.e. atrocities that were committed in a distant past. I will argue that talk about international crimes that have been committed by historical figures should not simply be dismissed under the

19 Preamble, Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 29 July 1899, 26 *Martens Nouveau Recueil* (ser. 2) 949, entered into force 4 September 1900; Preamble, Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907, 3 *Martens Nouveau Recueil* (ser. 3) 461, entered into force 26 January 1910. For an evaluation of the clause, A. Cassese, ‘The Martens Clause: Half a Loaf or Simply Pie in the Sky?’ 11 *European Journal of International Law* (2000) 187–216.

20 Provided that these acts were *criminal* at the time they were committed, i.e. the breaches were criminalized and a regime of individual responsibility was established by law which was ‘written, clear and certain’. I will deal with retroactivity and the legality principle later on when discussing the issue of ‘legal anachronism’.

banner of 'a-historic moralism' or 'senseless anachronism', but rather can be reasonably explained and justified. But first, I will explain briefly what historians mean by 'anachronism'.

### 3. What is Anachronism?

Currently, 'anachronism'<sup>21</sup> is considered as an error in chronology caused by relating an event, custom or circumstance to the wrong time period or, more seriously, by describing past deeds in terms that were not available to the agents themselves.<sup>22</sup> Anachronism can, thus, be defined as 'the impropriety of depicting past phenomena in terms of present values, assumptions, or interpretative categories', which arises from a lack of awareness that the past differs in fundamental respects from the present.<sup>23</sup>

A prominent example of anachronism is the use of the word 'holocaust'. In 2001, historian Dan Diner noted that, until 'well into the 1970s', the scholarly literature on the Second World 'would grant the Holocaust a modest (if any) mention' but that by the end of the 20th century, it 'tends to fill the entire picture'.<sup>24</sup> The word 'holocaust' was coined by Raphael Lemkin in 1944 to capture the special character of the genocide of European Jewry.<sup>25</sup> Subsequently, it was used as an English translation for 'Shoah' in the preamble to the 1948 Israeli Declaration of Independence. It became, however, generally known only much later, following media productions like the Golden Globe and Emmy Award winning American TV series entitled *Holocaust* (1978). It was only by the end of the 20th century that the Holocaust gradually became the dominant symbolic representation of evil and 'for an increasing number of Americans, and for significant proportions of Europeans as well, the most widely understood and emotionally compelling trauma of the twentieth century'.<sup>26</sup> Following a process of dramatization and universalization, the word holocaust is now 'regularly invoked by people who want to draw public attention to human rights abuses, social inequalities suffered by racial and ethnic minorities and women, environmental disasters, AIDS, and a whole host of other things'.<sup>27</sup> In addition, the word holocaust is also used anachronistically to describe other mass killings in the past, like the famine

21 Originally, the term 'anachronism' comes from the Greek words *ana* (against) and *chronos* (time).

22 N. Jardine, 'Uses and Abuses of Anachronism in the History of the Sciences', 3 *History of Science* (2000) 251–270, at 261.

23 S. Syrjämäki, *Sins of a Historian: Perspectives on the problem of anachronism* (Academic Dissertation, University of Tampere, 2011), at 23.

24 D. Diner, *Beyond the Conceivable: Studies on Germany, Nazism, and the Holocaust* (University of California Press, 2000), at 1, quoted in J. Alexander, 'The Social Construction of Moral Universals', 5 *European Journal of Social Theory* (2002) 5–85, at 27.

25 R. Lemkin, *Axis Rule in Occupied Europe* (Carnegie Endowment for International Peace, 1944).

26 Alexander, *supra* note 24, at 34.

27 A. Rosenfeld, 'The Americanization of the Holocaust', 90 *Commentary* (1995), at 35. Quoted in Alexander, *supra* note 24, at 51.



during and after the Japanese occupation of the Dutch East Indies (1943–1946) that has been called the (East) ‘Indian Holocaust’<sup>28</sup> or the Spanish Civil War (1936–1939) that has been called ‘The Spanish Holocaust’.<sup>29</sup>

These, and other, examples of anachronisms raise two sets of questions: First, is any form of anachronism ‘senseless’ (and ‘senseless anachronism’, therefore, a pleonasm)? Or can we distinguish between ‘senseless’ and useful forms of anachronism? And second, does each and every form of anachronism inevitably imply ‘a-historic moralism’? Or, if well-founded moral judgments of historical events are possible, can the study of war crimes by historical figures simply be dismissed in terms of ‘a-historic moralism’ or ‘senseless anachronism’?

### A. Useful Anachronisms

Anachronisms are abound in art, literature and the audiovisual media. In many instances, anachronisms are not errors made as a result of the artist’s ignorance. Artists may intentionally telescope time. A striking example of such an intentional use of anachronism was a televised reconstruction of the first day of the war in Indonesia.<sup>30</sup> What happened in 1947 was brought to the viewer by live correspondents in Djakarta, The Hague and Washington. It was as if (colour) television already existed in those days.

While in art, literature and the media anachronisms are accepted or, at least tolerated, in academia, anachronism tends to be considered a grave error, although there are exceptions to this. Historian Peter Burke, for example, has argued that anachronism may, indeed, be productive for historians.<sup>31</sup> Generally, however, within historiography, the methodological fallacy of ‘anachronism’ is considered to be so serious that it has been called the ‘historical sin of sins’.<sup>32</sup> Projecting ideas into the heads of historical actors by attributing knowledge to them about a later course of events that, chronologically, would be impossible for them to have had, is unacceptable. Historians are not supposed to ‘understand the agent to be doing something which he would not — or even could not — himself have accepted as an account of what he was doing’.<sup>33</sup> In this case, the methodological fallacy is ‘that the unavailability [of specific concepts] prevented the individuals

28 J. Hendriks, *De Indische Holocaust* (Uitgever Hendriks, 1999).

29 P. Preston, *The Spanish Holocaust: Inquisition and Extermination in Twentieth-Century Spain* (WW. Norton, 2012).

30 21 July 2012, after a book by Ad van Liempt, *Nederland valt aan. Op weg naar een oorlog met Indonesië 1947* (Balans, 2012).

31 P. Burke, ‘Triumphs and Poverities of Anachronism’, 10 *Scientia Poetica* (2006) 291–298.

32 E. Manuel, ‘The Use and Abuse of Psychology in History’, in F. Gilbert and S. Graubard (eds), *Historical Studies Today* (WW. Norton, 2000) 211–237, at 128 (quoted by Syrjämäki, *supra* note 23, at 93, note 211).

33 Q.R.D. Skinner, ‘Meaning and Understanding in the History of Ideas’, 8 *History and Theory* (1969) 3–52, at 6.

belonging to the given context from formulating certain propositions and beliefs.<sup>34</sup> When we impose concepts or categories onto a period in which they were absent or still unknown, history becomes a 'pack of tricks we play on the dead'.<sup>35</sup>

Having been caught in the act of committing such a methodological fallacy makes one feel ashamed for being so stupidly 'unscientific' and showing such a total lack of awareness of the fact that the past differs, fundamentally, from the present. But a closer look at the literature<sup>36</sup> shows that this does not have to be the case. Even historians do not consider every form of anachronism a mortal sin. According to some, for example, definitions of anachronism that describe 'past deeds and past works in terms that were not available to the agents themselves' or ascribe 'to past thinkers concepts they had no linguistic means to express', have set the bar too high.<sup>37</sup> One reason for this is that, even when the historian tries to keep strictly in line with his subject's perspective, anachronisms are unavoidable because the historian is tied to the present and has knowledge that contemporary actors did not possess. The historian knows, for example, the course and outcome of events which, at the time, were uncertain and unpredictable.<sup>38</sup> In this sense, it is impossible to escape the present and, indeed, most historical explanations are based on descriptions and classifications that were not available to their objects.<sup>39</sup> However, the fact that the historian is tied to the present does not imply that 'anything goes' or that historians may freely project their contemporary concepts, theories and perspectives onto a 'defenseless past'.

There are many different types of anachronism,<sup>40</sup> but the distinction between descriptive and judgmental anachronism seems to be the most relevant for a discussion of anachronism and international crimes.<sup>41</sup> It is important not only to be aware of the problem of anachronism but also to carefully distinguish between anachronisms that are simply inevitable and anachronisms that are not inevitable but may be legitimate or even desirable.

34 B. Mitrovic, 'Attribution of Concepts and Problems with Anachronism', 49 *History and Theory* (2011) 303–327, at 310.

35 Skinner, *supra* note 33, at 14.

36 Since anachronism is a central issue within historiography, it is surprising that the literature on this topic is rather limited. Syrjämäki, *supra* note 23, at 34.

37 S.G. Brush, 'Anachronism and the History of Science: Copernicus as an Airplane Passenger', 8 *Scientia Poetica* (2004) 255–264, at 256; quoted by Syrjämäki, *supra* note 23, at 36.

38 As an observer who was born later, the historian cannot take the perspective of an innocent participant because that would make writing history impossible: as every history presupposes not only a beginning but also an end. *Ibid.*, at 249.

39 A. Tucker, 'Temporal Provincialism: Anachronism, Retrospection and Evidence', 10 *Scientia Poetica* (2006) 299–317, at 303.

40 See e.g. C. Condren, 'A Reflection on the Problem of Anachronism in Intellectual History', 8 *Scientia Poetica* (2004) 265–272. Condren makes a distinction between seven types of anachronism.

41 A distinction between descriptive and judgmental anachronism has been made before, but Condren makes this distinction more explicitly and clearly than anybody else (Syrjämäki, *supra* note 23, at 42).

If the historian has the ambition to describe and explain past deeds, 'then description and explanation will demand categories not available to the agents themselves'.<sup>42</sup> Descriptive anachronism is inevitable because in the language, we use concepts constantly emerge, change their meaning and/or disappear.<sup>43</sup> Would it, however, also be legitimate to describe, for example, people as homosexuals, even if they lived in a time when the concept of homosexuality had not yet entered the vocabulary? This form of *descriptive anachronism* would be legitimate only if homosexuality were defined in terms of the behaviour of people having sex with people of the same sex.<sup>44</sup> It would not be allowed to describe people as homosexuals in order to project the modern *idea* of homosexuality on an earlier period, or to impose modern values on a pre-modern world. In that case, we would commit a form of *judgmental anachronism*. But maybe in cases of serious violations of human rights even such a form of anachronism could be legitimate.

In a discussion of the work of historian Quentin Skinner, he is claimed to have stated that 'we cannot (logically) denounce the Chilean junta for failing to uphold basic human rights, because they never had any intention of doing so'.<sup>45</sup> In response to this claim, it has been argued that:

Of course we can criticize the Chilean junta for not upholding basic human rights (and we should), but it would be ... "bizarre" to say that the junta failed in (its efforts) to uphold human rights, or to accuse the junta being incompetent in this matter, because it never made such an effort. We do think that it would have been able and fully competent to uphold human rights had it only wished to do so. In other words it is perfectly in line with Skinner's thought to condemn the junta's ignorance or maliciousness on the matter.<sup>46</sup>

In cases like this, anachronistic use of contemporary concepts, theories and perspectives alien to the historical agents is not only 'perfectly legitimate', it may even be desirable. Past agents may have deceived themselves about their motives or simply have possessed a more limited understanding of the processes they took part in or witnessed than historians enjoying the benefit of hindsight.<sup>47</sup> In other words, anachronistic 'unfaithfulness' to the concepts and categories of past agents does not always constitute a historically incoherent interpretation of past deeds. In some cases, retrospective application of contemporary theories and conceptual frameworks to historical events will allow a better understanding of historical events than was possible

42 N. Jardine, 'Ethics and emics (not to mention anemics and emetics) in the history of the sciences', 42 *History of Science* (2004) 261–279, at 262.

43 C. Lorenz, *De constructie van het verleden. Een inleiding in de theorie van de geschiedenis* (6th edn., Boom, 2006).

44 A. Haddock, 'Anachronism and the Individuation of Concepts', 8 *Scientia Poetica* (2004) 265–272, at 265–266; quoted by Syrjämäki, *supra* note 23, at 38.

45 J.V. Femia, 'An Historicist Critique of 'Revisionist' Methods for Studying the History of Ideas', 20 *History and Theory* (1981) 113–134, at 120, note 30.

46 Syrjämäki, *supra* note 23, at 101.

47 Tucker, *supra* note 39, at 301–302.

while they were taking place.<sup>48</sup> In these instances, understanding the past in contemporary terms, rather than in its own terms, can even be considered as a manifestation of historical sophistication. Next, I will show how this works when legal theories and conceptual frameworks are applied to historical events, which is what criminologists of international crimes are often tempted to do.

### B. *Legal Anachronism*

What for historians is senselessly anachronistic may be compared with what, within a legal perspective, is seen as illegitimate retroactivity.<sup>49</sup> Legally, it is not allowed to consider crimes as actions that, at the time they were committed, were not prohibited and punishable by law. To do so would be a violation of the principle of legality, which holds that a person may only face criminal charges for an act that was prohibited by criminal law at the time the act was committed. In the well-known formulation: *nullum crimen, nulla poena sine praevia lege poenali* — no crime without prior law.

In international criminal law, however, it has been considered admissible in exceptional situations to adjudicate and convict defendants for actions that, at the time they were committed, were tolerated, approved, propagated or even enforced by the state. At the Nuremberg trials, for example, some lawyers invoked the principle of legality by claiming ‘that the genocidal actions committed during the Third Reich did not constitute crimes because they were not violations of laws in effect at that place and time’.<sup>50</sup> This claim was overruled, however, by the counter-claim ‘that it was more significant that these actions were criminal under Germany’s treaty obligations and pre-existing German criminal law...’.<sup>51</sup> Neither were there laws that could conceivably be construed as setting aside existing criminal laws in Germany during the Nazi-era, such as proscription of murder. In fact, there existed only a vague order in writing from Hitler who allowed for killing disabled people. This order did not constitute law in any legal sense, however, even if the order could be and has been regarded as legitimizing the killings by those who executed them.

In fact, the prosecution went beyond the charges of conspiracy, conducting a war of aggression and violating the rules of war by also accusing the Nazi officials of ‘crimes against humanity’. This category of crimes was officially recognized in the Charter of London and the Control Council Law No 10, but did not exist before (or during) the war. Ultimately, the Nazi officials would be

48 We must, however, not confuse this kind of benevolent ‘retrospection’ with forms of pernicious ‘anachronism’. *Ibid.*, at 311–312.

49 A. de Baets, ‘The Impact of the *Universal Declaration of Human Rights* on the Study of History’, 48 *History and Theory* (2009) 20–43.

50 D. Maier-Katkin, D.P. Mears and T.J. Bernard, ‘Towards a Criminology of Crimes Against Humanity’, 13 *Theoretical Criminology* (2009) 227–255, at 228.

51 *Ibid.*

tried and convicted not only for war crimes but also for crimes against humanity.<sup>52</sup>

Since then, in international criminal law, there has been a tendency to relax the principle of legality in exceptional situations. If necessary, the principle of 'necessity knows no law' may be applied and suspects may be indicted and convicted on the basis of legal concepts that did not yet exist or, at least, were not common at the time the crimes they were accused of were committed. In these cases, a violation of the legality principle is seen as not only morally justified, but even legally acceptable.

After a long process of 'crystallization of *opinio juris*' with regard to such a rule or principle, at the beginning of the 21st century, a customary rule providing that no statute of limitations applies to international crimes became generally accepted.<sup>53</sup> Already in 1966, the United Nations had decided that persons could be prosecuted for acts that, at the time they were committed, were 'criminal according to the general principles of law recognized by the community of nations'.<sup>54</sup> In 1968, a Convention of Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity was adopted, which guaranteed imprescriptibility for war crimes and crimes against humanity. From then on, these crimes could be prosecuted and punished irrespective of the date of their commission and even if they did not constitute a violation of the domestic criminal law of the country in which these crimes were committed. However, only after 102 states ratified the ICC Statute as of 1 September 2006,<sup>55</sup> did a widespread and general practice emerge of not applying statutes of limitation to international crimes. Since then, 'extension or suspension of prescription periods with regard to crimes that have not yet become imprescriptible is generally accepted'.<sup>56</sup>

In various countries, domestic criminal law has followed this example by ending prescription for crimes against humanity. In Argentina, for example, domestic courts have affirmed the existence of a rule of customary international law banning statutes of limitations for international crimes. After the Supreme Court of Argentina ruled in 2005 that the amnesty laws of the

52 I. Buruma, 'The Twisted Art of Documentary', *The New York Review of Books*, 25 November 2010, 42–45, at 42, note 2.

53 R.A. Kok, 'Statutory Limitations in International Criminal Law' (PhD dissertation, Center for International Law, Amsterdam, 2007), at 337.

54 Art. 15(2) International Covenant on Civil and Political Rights, 1966.

55 Art. 29 ICCSt.

56 Kok, *supra* note 53, at 340: 'However, this is not yet the case for retroactively eliminating statutes of limitation to crimes that had already become prescribed. Retroactive application is not yet required by customary law and does not constitute a general principle of law. Nevertheless, there are examples in domestic law of application of so-called suspension statutes retroactively. This solution is based on the idea that suspects of international crimes should not benefit from statutes of limitation during the period that they are systematically left unpunished by a particular political regime. In this approach, statutes of limitation are deemed not to have run during periods where there is no realistic prospect of international crimes being prosecuted. Consequently, the issue of retroactive application of new rules does not arise here.'

1990s<sup>57</sup> were unconstitutional, because these crimes are ‘imprescriptible’, prosecutions and trials of suspects for human rights violations during the military dictatorship of 1976–1983 have been resumed.<sup>58</sup>

In general, within the context of international criminal law, the legality principle tends to be applied more leniently and flexibly than within domestic legal systems.<sup>59</sup> By declaring that no statute of limitations applies to international crimes, retroactivity seems no longer *anathema*. There is, at least, a tendency to invalidate prescription for international crimes, even when these crimes were committed in a more distant past. By invalidating prescription for these crimes, the principle of legality may be overruled and, providing the suspected perpetrators are still alive, they may be prosecuted and adjudicated.

### C. Historical Imprescriptibility

Even in cases in which suspected perpetrators themselves are no longer alive, there seems to be room/need for redressing ‘historical injustices’.<sup>60</sup> Legal historian Antoon De Baets<sup>61</sup> refers to the evolution of a ‘right to truth’, which emerged as a legal concept in various jurisdictions and has been recognized by a number of human rights treaties. This evolution of a right to truth as one of the emerging principles in international law has been reconstructed in the following way.<sup>62</sup> Its origins can be traced to Articles 32 and 33 of the 1977 Additional Protocol I to the Geneva Convention of 1949 that grant families the right under international humanitarian law to know the fate of their relatives. However, enforced disappearances of persons during periods of extreme state-sponsored mass violence, particularly in various countries of Latin America, led to the identification and recognition of a right to the truth. In 1988, the Inter-American Court of Human Rights recognized the rights of relatives of victims of forced disappearance to know their fate and whereabouts and to obtain clarification of the facts relating to the violations. In 1998, the court held that the right to the truth applies to any kind of gross human rights violation. The UN Working Group on Enforced and Involuntary Disappearances and the UN Human Rights Committee expanded the right to the truth to

57 In 1990, President Carlos Menem issued a pardon for crimes against humanity that had been committed during the military dictatorship 1976–1983. The pardon included the leaders of the military junta who had already been convicted in 1985.

58 M.K. O’Donnell, ‘New Dirty War Judgments in Argentina: National Courts and Domestic Prosecutions of International Human Rights Violations’, 84 *New York University Law Review* (2009) 333–374.

59 M. Swart, ‘Judicial Lawmaking in the Context of International Criminal Tribunals’ (PhD diss., University of Leiden, 2006), at 327.

60 Historical injustice may be defined as ‘a wrong done either to or by past people’. J. Thompson, *Taking Responsibility for the Past: Reparation and Historical Injustice* (Polity Press, 2002), at x.

61 A. de Baets, ‘Historical imprescriptibility’, *Storia della Storiografia* (2011) 59–60, 128–149.

62 I take this reconstruction from Y. Naqvi, ‘The right to the truth in international law: fact or fiction?’ 88 *International Review of the Red Cross* (2006) 245–273.

include details of serious violations of human rights and the context in which they occurred.<sup>63</sup>

The 'right to truth' grants to victims of serious human rights violations and their relatives a fundamental (indefeasible, non-suspendable and imprescriptible) right to know the truth about the circumstances of those crimes and, in the case of a death or disappearance, the fate of the victims. This right also holds when the perpetrators have died, not been prosecuted or been granted amnesty.<sup>64</sup>

Victims of human rights violations and their relatives may claim their right to truth until they die. The right to truth is not only a right of victims and their relatives, but also a right of society at large. Because the public interest in the truth is not strictly legal, but historical, imprescriptibility becomes 'virtually endless'.<sup>65</sup> Regardless of how much time has gone by, it will never be too late to ask for the historical truth.

Even though the process of truth seeking has no legal consequences, in moral terms, it remains meaningful to investigate the circumstances in which human rights violations took place. In this way, justice can be done concerning what has happened in the past. This also applies to the excesses that took place during the Dutch colonial wars and, more specifically, during the above-mentioned military actions in Lombok in 1894 in which Lieutenant Colijn was involved.

#### 4. Historical Justice

It can no longer be maintained that historical events are to be seen strictly within their own historical context and to be judged exclusively according to the values and norms of that time. Stressing the contemporaneity of values and norms will not work, if only because painful episodes in history and uncomfortable historical events defy being laid to rest. Such episodes simply will not go away; they continue to haunt us, thereby playing on our feelings of guilt and forcing us to realize that the past is not over (yet). In this way, they live on in the 'here and now', influencing what we think (or try to forget) as well as what we do (or try to avoid).

In order to do justice to the past, we need, historiography needs, to rethink some of the central concepts of historiography, including the notion of

63 United Nations (2006), *International Convention for the Protection of All Persons from Enforced Disappearance*, Art. 8, 24.2. See the Symposium on Enforced Disappearances published in 12 *Journal of International Criminal Justice* (2014) 731–808. See also S. Garibian, 'Ghosts Also Die: Resisting Disappearance through the 'Right to the Truth' and the *Juicios por la Verdad* in Argentina', 12 *Journal of International Criminal Justice* (2014) 515–538.

64 For a discussion of whether and when the ICC might defer to national reconciliation programs that involve amnesties, see D. Robinson, 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court', 14 *European Journal of International Law* (2003) 481–505.

65 *Ibid.*, at 294.

anachronism and the linear conception of historical time on which it is based.<sup>66</sup> According to the linear perspective, every moment in time is imagined as a fixed position on a chronological continuum. Anachronisms contradict this linear notion of time to which most historians still subscribe.

Doing justice to the past, however, requires 'a "radical critique" of this dominant concept of historical time'.<sup>67</sup> Such a radical critique has been offered by the French philosopher of science Michel Serres, who considers a linear notion of time to be naïve and unrealistic because, in reality, time is turbulent and chaotic. In his view, a strict adherence to temporal linearity is not merely inadequate. More importantly, it causes problems in how we think about historical processes. As Serres argues in no uncertain terms: 'All of our difficulties with the theory of history come from the fact that we think of time in this inadequate and naive way'.<sup>68</sup>

By way of an example, Serres describes how the life and work of historical figures are continually being 'historicized' by locating them outside the 'here and now' despite the fact that, in reality, '[f]ew people and even fewer thoughts are completely congruent with the date of their times'.<sup>69</sup> On the other hand, certain points of view are considered contemporary not because they *are* embedded in the temporal present, but because they *are made* contemporary by presenting them as such. Rather than locating historical acts and events on a linear time scale, Serres proposes a '*multi-temporal*' perspective.

The right to historical truth demands that linearity be replaced by a more complex notion of time. An example is the notion of 'spectral time' developed by the French philosopher Jacques Derrida. He treats time as 'spectral', arguing that (traumatic) historical events do not belong to the past but continue to haunt us as specters in the present.<sup>70</sup> Some have countered that Derrida does not succeed in escaping linearity altogether. In this view, Derrida's deconstructive analysis subscribes every step of the way to the same linear structure of time that it has called into question. This is, among other reasons, due to its 'inability to keep temporally loaded terms out of its articulation'.<sup>71</sup> It may, therefore, be preferable to follow Serres in his critique of linear time. In his view time passes, but not in the metaphysical Derridean sense. According to Serres, time can best be described as a topological sheet that wraps itself around the world. In order to illustrate this notion of topological time, he uses the example of a handkerchief:

66 B. Bevernage, 'Time, Presence, and Historical Injustice', 47 *History and Theory* (2008) 149–167, at 167.

67 *Ibid.*

68 M. Serres and B. Latour, *Conversations on Science, Culture, and Time* (The University of Michigan Press, 1995), at 59.

69 *Ibid.*, at 61.

70 Spectral comes from 'spectre' (ghost, horror).

71 D. Wood, *The Deconstruction of Time* (Northwestern University SPEG Studies in Historical Philosophy, 1989), at 113.



If you take a handkerchief and spread it out in order to iron it, you can see in it certain fixed distances and proximities. If you sketch a circle in one area, you can mark out nearby points and measure far-off distances. Then take the same handkerchief and crumple it, by putting it in your pocket. Two distant points suddenly are close, even superimposed. If, further, you tear it in certain places, two points that were close can become very distant. (-) As we experience time ... it resembles this crumpled version much more than the flat, overly simplified one.<sup>72</sup>

Although it may be true that Derrida's notion of spectral time does not succeed in escaping linearity altogether and that Serres's supple, adaptable, multi-directional, both horizontally and vertically, notion of topological time is more realistic, the notion of 'spectral time' may still be useful. Recognizing the spectrality of time can shed special light on the problematic and complex relations to the past in situations where societies in transition try to carry on with life after violent conflict.<sup>73</sup> Indeed, it can shed some clarifying light on the complex and difficult relationships with the past as they emerge, for example, in transitional justice.

## 5. Conclusion

Generally, most criminologists study contemporary phenomena and, therefore, feel they do not have to worry about the time dimension of their theoretical perspective. This attitude cannot be maintained in the study international crimes that are often historical events. When research focusses on 'state crimes of previous regimes',<sup>74</sup> and the study of 'old crimes' from new perspectives,<sup>75</sup> we should be aware of methodological problems implicated in the use of contemporary concepts to describe and explain historical events. This awareness becomes even more urgent when we use concepts that are defined in international criminal law.

I have tried to show that the methodological fallacy of 'anachronism' cannot be avoided but that there are good arguments to 'anachronistically' consider events in the past as international crimes regardless of whether or not contemporaries could consider them as such. In order to try to *understand* the motives of perpetrators of these crimes against humanity, we need to locate them in the social, cultural and political contexts in which these events took place. However, to *judge* the events in which they were involved, there is no reason to strictly limit ourselves to the values and norms that were held at the time.

From a modernist historical perspective, applying contemporary standards to past events would be considered a senseless anachronism because a

72 Serres and Latour, *supra* note 68, at 60.

73 Bevernage, *supra* note 66, at 166.

74 S. Cohen, 'Knowledge, Accountability, and the Policing of the Past', 20 *Law & Social Inquiry* (1995) 7–50.

75 M. Puniskis, 'Old Crimes, New Perspectives', *Crime, Law and Social Change* 54 (2010) 299–302.

contemporary concept is being applied to a context to which it does not belong. From a post-modern historical perspective, however, concepts and contexts have no such degree of fixity to begin with and it is, therefore, justifiable to make sense of events in terms that did not exist in the past as well as to ascribe to actions meanings they did not have at the time.<sup>76</sup> Strictly speaking, it could be argued that giving up the linear notion of time renders the notion of anachronism itself senseless. However, I do not want to suggest that we should discard the notion of anachronism entirely, because it may continue to serve as a reminder that we need to rethink the notion of time in order to do justice to the past. A reminder that may be especially needed for criminologists for whom 'the past is not something they think about very often'.<sup>77</sup>

Historical truth and justice require the application of both past and contemporary perspectives to historical events because, even if international crimes did not yet exist legally in the sense of being already criminalized in international law, the acts and events to which these concepts refer were committed in reality.<sup>78</sup> And their consequences live on into the present. We have to relate to them in terms of truth and justice, if only because not to do so also implies a moral stance.

Retrospective moral judgments of past events are justifiable if these judgments have a sufficient factual basis, are carefully and reasonably made, and offer a contribution to public historical debate.<sup>79</sup> Thus, if applied with awareness and reflexivity, anachronisms do make sense and may, therefore, be justified.

In short, it does make sense to define past wrongs 'anachronistically' as crimes, even if (most) contemporaries at the time did not consider them such. Moral judgments of historical events need not be solely based on values and norms that were dominant in the past, but may, and in fact must, also take current considerations into account. We can legitimately do this, without running the risk of being 'senselessly anachronistic' or becoming 'a-historically moralistic'.

76 M. Bevir, 'Why Historical Distance Is Not A Problem', 50 *History and Theory* (2011) 24–37.

77 P. Lawrence, 'History, criminology and the 'use' of the past', 16 *Theoretical Criminology* (2012) 313–328, at 314.

78 de Baets, *supra* note 61, at 295.

79 *Ibid.*, at 297.