

**The London School of Economics and Political Science**

*The Cinematic Jurisprudence of Gender Crimes: The ICTY and Film.*

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for the degree of Doctor of Philosophy, London, May 1, 2015.



## **Declaration**

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## **Abstract**

In 2011, the International Criminal Tribunal for the former Yugoslavia (ICTY) produced and released a documentary film entitled “Sexual Violence and the Triumph of Justice.” The documentary available on the Tribunal website is the first film produced by the Tribunal in a series of documentaries arranged thematically and geographically. In declaring a triumph of justice and by highlighting the work of feminist lawyers and judges, the official narrative seeks to reassure the international community that progress is being made in holding individuals responsible for gender crimes. The availability of the online streaming of proceedings, documentary production and visual archives allow for greater visibility of the Tribunal, including its work on sexual violence. However, these visual resources also mask what occurs off screen. My thesis problematises this official progressive narrative by turning to fictional filmic narratives about sexual violence perpetrated during the Bosnian conflict. By bringing together the literature on gender crimes and the embryonic research on film and war crimes trials, I argue through a case study of the ICTY that fictional films can show us what the law is refusing or unable to make visible.

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### Introduction to the Thesis

In her lecture *Crimes of War, Crimes of Peace*, Catharine MacKinnon reminds us that “Behind all law is someone’s story – someone whose blood, if you look closely, leaks through the lines. It is not only in the common law that the life of the law is experienced.”<sup>1</sup> The stories of the Bosnian conflict and the horrendous crimes and atrocities which were perpetrated during this war are numerous and can be found in a range of mediums.<sup>2</sup> This thesis focuses on two of these mediums – law and cinema. It carries out a comparative investigation into the formal legal process of a criminal trial for the prosecution of gender crimes and the representation of such crimes in film. Through a feminist analysis, I argue that while criminal trials are an important and necessary part of the process of transitional justice; their representational and narrative capabilities are limited. I also assert that these limitations have affected the way in which women have been able to tell their stories in the courtroom and how these stories are seen and heard.

This research is situated within current debates between feminist scholars specialising in international criminal law and the emerging literature on law-and-film scholarship. The first of these strands has generated a vast quantity of literature in the past twenty years with feminist scholars writing from a variety of standpoints outlined below. The second strand is less well developed, and explores the interactions of war crimes trials and film. This literature largely focuses on the shared didactic aims of the two mediums and the power of film to spread the “shadow” of these trials. The originality of this thesis is its turn to the visual medium to explore and imagine different stories and accounts than that presented in the law.

Within feminist scholarship of international criminal justice, three main standpoints have emerged, first with the International Criminal Tribunal of the former Yugoslavia (ICTY) declaring a “triumph of justice” over the prosecution of so-called gender crimes.<sup>3</sup> The prosecution of those responsible for gender crimes at the international level has been termed a success and key achievement of international criminal justice.<sup>4</sup> Alongside the Tribunal’s jurisprudence on gender crimes, the key roles played by female personnel in the

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<sup>1</sup> Catharine A MacKinnon, *Are Women Human? And Other International Dialogues* (Harvard University Press 2007) 141.

<sup>2</sup> For a discussion of literature from the Balkans and about the Balkan conflicts see: Catherine Baker, *Sounds of the Borderland: Popular Music, War and Nationalism in Croatia since 1991* (Ashgate Publishing, Ltd. 2013); Dubravka Žarkov, *The Body of War: Media, Ethnicity, and Gender in the Break-up of Yugoslavia* (Duke University press 2007).

<sup>3</sup> Documentary. *Sexual Violence and the Triumph of Justice*. Available to watch in full online at <http://www.icty.org/sid/10949> accessed 1 September 2014.

<sup>4</sup> The definition of “gender crime” is set out in full in the next chapter.

ICTY, the inclusion of rape in the Statute of the ICTY and the introduction of the best practices rules of procedure and evidence, have all been flagged as important landmarks towards international accountability for crimes previously marginalised by war crimes tribunals. While the importance of these developments must not be underestimated, the declaration of a “triumph of justice” by the Tribunal sits uncomfortably with the many critiques which have emerged from feminist and other viewpoints.

The second standpoint and major critique of the Tribunal’s work has come from critical feminist legal scholars who have called the project of prosecuting rape in war crimes proceedings into question. These scholars argue that the trials essentialise women’s experience of conflict by making wartime rape hypervisible.<sup>5</sup> This claim is underpinned by the progressive narrative and belief that gender crimes are being successfully prosecuted at the international level. Thirdly, some scholars and practitioners have criticised the current prosecution strategies across the different international courts and tribunals and rules governing these international prosecutions. Some feminists go even further by arguing that the law is inherently limited and that the legal narratives which emerge from war crimes trials silence and obfuscate women’s experiences and limit these to sexual violence.

My thesis contributes to these debates by turning to fictional films about sexual violence perpetrated during the Bosnian conflict (1992-1995). By turning to cinematic narratives, I seek to address whether this artistic medium helps to fill in some of the gendered gaps left by the law. I also address the following research questions: do the representations of gender crimes in selected films mirror those recorded by the Tribunal? Do alternative or even subversive discourses emerge? What does film show us that the law does not let us see? By bringing together the literature on gender crimes in international criminal law and the embryonic research on film and war crimes trials, I argue through a case study of the ICTY that fictional films can show us what the law is refusing or unable to make visible. These important cultural discourses can show us some of the stories which are silenced by the law. Further, the films may also become part of the way through which the Tribunal’s legacy is judged in the future.

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<sup>5</sup> Janet Halley, 'Rape at Rome: Feminist Interventions in the Criminalization of Sex-related Violence in Positive International Criminal Law' (2008) 30 *Michigan Journal International Law* 1; Janet Halley, 'Rape in Berlin: Reconsidering the Criminalisation of Rape in the International Law of Armed Conflict' (2008) 9 *Melbourne Journal of International Law* 78; Karen Engle, 'Feminism and its (dis) contents: Criminalizing Wartime Rape in Bosnia and Herzegovina' (2005) 99 *American Journal of International Law* 778.

The turn to film is grounded in feminist approaches to international law which seek to use feminist methods in their analysis. The sections below set out some of the methodological decisions which have been taken in this thesis: first, the focus on women, secondly, the methodology of fiction, and thirdly, the turn to cinema. The methods are explored in subsequent chapters of this thesis as set out at the end of this introduction in the thesis structure.

### **The Focus on Women**

In my thesis I explore the representations of women and their experiences in both the Tribunal jurisprudence and in “cinematic jurisprudence”.<sup>6</sup> The issue of representation or the “task of seeing women” has become a central concern for feminist scholars of international criminal law.<sup>7</sup> Feminist scholars of international relations, international law and transitional justice have sought to highlight the gendered bias in their fields by asking questions about women’s roles in conflict.<sup>8</sup> Drawing on a long tradition of feminist jurisprudence and scholarship, Doris Buss states that: “Asking ‘where are the women,’ thus begins to challenge why and how some subjects and actions are visible and others are not, and it introduces new characters and hence new narratives in the stories about conflict that can be told.”<sup>9</sup> Elsewhere, influenced by Buss’ work, Susana Sacouto has claimed “visibility as a feminist goal” and has argued that the feminist critiques of international prosecutions of gender crimes can be understood in terms of visibility or lack thereof.<sup>10</sup>

Following in these methodological footsteps, this research focuses on the visibility and invisibility of women’s experiences and the prosecution of gender crimes. Whilst recognising that using the category “women” can be problematic, this thesis retains this

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<sup>6</sup> Anthony Chase, *Movies on Trial: The Legal System on the Silver Screen* (New Press 2002). The term is defined later in the thesis at page 18.

<sup>7</sup> Doris E Buss, 'The Curious Visibility of Wartime Rape: Gender and Ethnicity in International Criminal Law' (2007) 25 Windsor Yearbook of Access to Justice 3, 4.

<sup>8</sup> Doris Buss and others, *Sexual Violence in Conflict and Post-Conflict Societies: International Agendas and African Contexts* (Routledge 2014) 6. Cynthia Cockburn, 'Gender Relations as Causal in Militarization and War: A Feminist Standpoint' (2010) 12 International Feminist Journal of Politics 139; Cynthia Enloe, *Bananas, Beaches and Bases: Making Feminist Sense of International Politics* (Univ of California Press 2014); Bell, Christine, and Catherine O'Rourke. "Does Feminism Need a Theory of Transitional Justice? An Introductory Essay." International Journal of Transitional Justice 1, no. 1 (2007): 23.

<sup>9</sup> Ibid 7.

<sup>10</sup> Susana SáCouto, 'Victim Participation at the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia: A Feminist Project?' (2011) 18 Michigan Journal of Gender & Law 303.

focus for two main reasons.<sup>11</sup> First, as Hilary Charlesworth and Christine Chinkin note in their introduction to the seminal book, *Boundaries of International Law*, "...employing the category of 'women' can be a valuable method of highlighting the commonality of the marginalisation of all women in the international legal system."<sup>12</sup> This is not to say that all "women" are the same or have similar life experiences, but rather that the focus on women's experiences is valuable in terms of assessing the law's treatment and impact on a group of persons traditionally marginalised and underrepresented in the international legal system and institutions.

Secondly, women and girls are rendered particularly vulnerable during and following times of war, mass atrocity and natural disasters in ways specific to their gender.<sup>13</sup> Shulamit Reinharz has argued for example that women's experiences of the Holocaust differed from that experienced by men and boys.<sup>14</sup> Rashida Manjoo, the Special Rapporteur on Violence against Women, has highlighted that women continue to experience gender-targeted violence in war, such as rape, sexual slavery and other abuses.<sup>15</sup> Despite substantive developments in international instruments and jurisprudence from war crimes trials, women continue to be disproportionately and differentially targeted on the basis of their sex and/or gender.<sup>16</sup> These gendered harms are not only crimes of violence but also result in differential consequences for women, such as unwanted pregnancies or childcare burdens discussed in the subsequent chapters of this thesis.

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<sup>11</sup> I recognise in this thesis that just as there is no monolithic "Woman", there are many types of feminisms within international law including liberal, socialist and radical feminism; feminist critical theorists, post-modernist feminism, and Third World feminisms. I agree with Marieka Zalewski when she explains that "feminism is better understood as numerous sets of practices, theories and perspectives which take gender as an important and often central category of analysis." Marysia Zalewski, "Well, What is the Feminist Perspective on Bosnia?" (1995) *International Affairs* 339, 341. On the different feminisms in legal theory and studies see: Nicola Lacey 'Feminist Legal Theory and the Rights of Women' in Karen Knop, *Gender and Human Rights* (Oxford University Press 2004).

<sup>12</sup> Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press 2000) 2.

<sup>13</sup> Inter-American Commission on Human Rights. Re: Women and girls victims of sexual violence living in 22 internally displaced persons camps. Precautionary Measures no. MC-340-10. Haiti December 22, 2010. Commission on the Statute of Women: Gender equality and the empowerment of women in natural disasters. 2012. States that "natural disasters often have different impacts on men and women in regards to the associated risks and vulnerabilities, due to gender inequality, gender stereotypes and discrimination against women."

<sup>14</sup> Sonja Maria Hedgepeth and Rochelle G Saidel, *Sexual Violence against Jewish Women during the Holocaust* (UPNE 2010).

<sup>15</sup> Rashida Manjoo and Calleigh McRaith, 'Gender-based Violence and Justice in Conflict and Post-conflict areas' (2011) 44 *Cornell International Law Journal* 11, 11.

<sup>16</sup> Security Council Resolution 1820 (2008) which states "Women and girls are particularly targeted by the use of sexual violence, including as a tactic of war to humiliate, dominate, instil fear in, disperse and/or forcibly relocate civilian members of a community or ethnic group."

Thus while recognising that men and boys are also targeted and affected by gender crimes and that the term gender encompasses more than women and men, this thesis self-consciously and unapologetically retains its focus on women by adopting a feminist methodology.<sup>17</sup> It is hoped that in future projects this focus can be widened to include gender crimes perpetrated against men and boys and against those who are targeted on the basis of their sexual orientation or gender identities.

### **Feminist Methodologies: Fiction and Imagination**

The focus on the visibility of women's experiences is underpinned by the feminist methodologies which inform this project. The use of feminist analyses over the last twenty years has led to a profound change in the understanding of the gendered nature of international law. Feminist critiques of international law in the 1990s built on the understanding of women's oppression and subjugation as gendered to challenge women's marginalisation in the international legal system. As part of the investigation, scholars have emphasised that feminist interventions must also be linked to and grounded in feminist methodology and methods.

Feminist legal theory at the domestic level has developed a range of methods to challenge "...the very structure or method of modern law, which is hierarchically gendered."<sup>18</sup> Feminist scholars, critical legal theorists and others have used methods to "...dig beneath the surface of legal and social arrangements."<sup>19</sup> In international law this methodology has been termed an "archaeological dig" with feminist scholars looking for "silences" in the legal literature and in the transcripts of legal proceedings.<sup>20</sup> Feminist scholars of international criminal law have long been making the argument that war crimes trials silence women's accounts of atrocity. As I set out in the subsequent chapters of this thesis, these scholars have persuasively sought to illustrate how formal legal processes, partly through procedural and evidential rules, are gendered in their application and interpretation. Through an archaeological dig and analysis of trial transcripts of war crimes proceedings, they have looked for what is not said to complement the "official history" of

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<sup>17</sup> On sexual violence against men in conflict see for example: Eric Stener Carlson, 'The Hidden Prevalence of Male Sexual Assault During War Observations on Blunt Trauma to the Male Genitals' (2006) 46 *British Journal of Criminology* 16; Pauline Oosterhoff, Prisca Zwanikken and Evert Ketting, 'Sexual Torture of Men in Croatia and other Conflict Situations: an Open Secret' (2004) 12 *Reproductive Health Matters* 68; Sandesh Sivakumaran, 'Sexual Violence against Men in Armed Conflict' (2007) 18 *European Journal of International Law* 253.

<sup>18</sup> Nicola Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Hart Publishing 1998) 2.

<sup>19</sup> *Ibid* 13.

<sup>20</sup> Charlesworth and Chinkin, *The Boundaries of International Law: A Feminist Analysis* (n.12) 18.

what is said in the judgments. Another method which has been developed in international law has been termed “world travelling”.<sup>21</sup> This method is based on a long feminist trajectory of drawing on different disciplines to expose the law’s links with political, economic and cultural systems. Further, it obliges feminist scholars to acknowledge their own subject position and to be reflexive about their scholarship.

Alongside these methods and as a part of envisioning new boundaries, feminist legal scholars and critical race scholars have turned to fiction as a source, method and performance.<sup>22</sup> There is a long legal tradition of looking at the boundaries between fact and fiction in legal studies. The importance of fiction is grounded in the work of legal scholars who have argued that it is nearly impossible to draw the boundaries between fact and fiction in legal discourse. This is because fictions “fill in gaps” in narratives and plug the holes in empirical evidence.<sup>23</sup> According to L.H. LaRue, “...we create fictions by the way we craft our narratives; when we select and order the facts, we erect an artificial construction of reality than can be incomplete or misleading.”<sup>24</sup> For LaRue there is no strict dichotomy between fact and fiction because all stories are produced at least partly from our imagination. In feminist scholarship, the turn to fiction is underpinned by a political project which seeks to imagine alternative ways in which the law can be interpreted and constructed. As Nicola Lacey explains, “In at least some of guises, feminist legal theory has a strong normative, reconstructive, or even utopian voice: it engages not only in analysis and critique of current law, but also in reformist or imaginative argument about how law might be otherwise.”<sup>25</sup>

Feminist academics, lawyers and writers have looked to fictional narratives as a means of challenging the dominant claims made by formal legal scholars. They have looked beyond the proceedings to non-legal documents and accounts in order to make their critiques. Some scholars have looked to literature as a means of uncovering stories silenced by legal accounts. As Judith Resnik and Carolyn Heilbrun have stated: “The silencing of women has

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<sup>21</sup> Hilary Charlesworth, 'Feminist Methods in International Law' (1999) *American Journal of International Law* 379. In this article she sets out these various methods in more detail.

<sup>22</sup> Richard Delgado, 'Storytelling for Oppositionists and Others: A Plea for Narrative' (1989) *Michigan Law Review* 2411; Daniel G Solorzano and Tara J Yosso, 'Critical Race Methodology: Counter-storytelling as an Analytical Framework for Education Research' (2002) 8 *Qualitative Inquiry* 23.

<sup>23</sup> Lon L Fuller, 'Legal Fictions' (1930) 25 *Ill L Rev* 363.

<sup>24</sup> Lewis H LaRue, *Constitutional Law as Fiction: Narrative in the Rhetoric of Authority* (Penn State Press 2010).

<sup>25</sup> Nicola Lacey 'Feminist Legal Theory and the Rights of Women' in Knop, *Gender and Human Rights* (n.11) 42.

not, however, been complete: stories have and do emerge. Women break out of the roles given to them, as they make their way toward generating their own stories – sometimes even before they can be heard.”<sup>26</sup> Feminist scholars and critical race scholars have also used literary forms of expression in order to highlight the limits of legal language. As Nicola Lacey states:

The resort to polemical or self-consciously literary forms of expression also reflects the idea that the very conceptual framework of legal scholarship makes it impossible to say certain kinds of things: that the way in which particular intellectual disciplines and discourses have developed makes it impossible to conceptualize certain types of harm or wrong, or to reveal certain kinds of interest or subject position.<sup>27</sup>

In other cases, fiction is used as a device or form of performance. For example, the Feminist Judgments project spearheaded by a number of academics in the United Kingdom turns to fictional performance to challenge judicial decisions and responses in a range of domestic legal matters.<sup>28</sup> This project built on similar endeavours undertaken in Canada and in the United States, with academics, activists and legal scholars providing a commentary to a legal decision and writing alternative judgments from feminist perspectives.<sup>29</sup> Baroness Hale has noted about the judgments:

First, it is remarkable how plausible they mostly are, not only as judicial writing but also as examples of how a different judgment might properly have been written in that case and at that time. Secondly, it makes such a difference how the story is told. Feminist judges will take different facts from the mass of detail to tell the story in a different way, to bring out the features which others discard, and to explain the features which others find difficult to understand. The third is context.

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<sup>26</sup> Carolyn Heilbrun and Judith Resnik, 'Convergences: Law, Literature, and Feminism' (1990) Yale Law Journal 1913, 1916; Marie Aristodemou, *Law and Literature: Journeys from Her to Eternity* (Oxford University Press 2000).

<sup>27</sup> Nicola Lacey 'Feminist Legal Theory and the Rights of Women' in Knop, *Gender and Human Rights* (n.11) 18.

<sup>28</sup> Rosemary Hunter, Clare McGlynn and Erika Rackley, *Feminist Judgments: From Theory to Practice* (Oxford: Hart 2010). Similar projects are now occurring in Ireland and internationally.

<sup>29</sup> See: Jack M Balkin, *What Brown v. Board of Education Should Have Said: The Nation's Top Legal Experts Rewrite America's Landmark Civil Rights Decision* (NYU Press 2002); Jack M Balkin, *What Roe v. Wade Should Have Said: The Nation's Top Legal Experts Rewrite America's Most Controversial Decision* (NYU Press 2005).



Feminist judges will set the story in a different context, a context which they understand but others may not.<sup>30</sup>

In the context of international criminal law, feminist scholars such as Janet Halley and Karen Engle have used literary accounts to challenge current and “mainstream” feminist engagements with international criminal justice. Drawing on a long tradition of “law and literature” studies, the authors have turned to non-legal narratives to highlight the multiple and complex constructions of gender crimes contained therein.<sup>31</sup> Unsettled by the focus of feminist lawyers and scholars on criminal accountability for wartime rape, Engle has sought to question “...whether increasing the number of convictions for sex crimes should be a central goal of international feminist advocacy.”<sup>32</sup> Through a reading of Ernest Hemingway’s novel on the Spanish Civil War, *For Whom the Bell Tolls*, and in Halley’s case, the contemporaneous diary *Rape in Berlin*, the authors voice discontent with what they believe to be a unique and harmonious feminist discourse on criminalising sexual violence and prosecuting these crimes in international tribunals.

In addition, Karen Knop has approached the Women’s International War Crimes Tribunal for the Trial of Japan’s Military for Sexual Slavery (Tokyo Women’s Tribunal), as an instance of performing “the act of going back in time and taking another path.”<sup>33</sup> The Tokyo Women’s Tribunal sought to prosecute those responsible, including Emperor Hirohito, for the sexual slavery and rape as crimes against humanity perpetrated against so-called “comfort women”. The Tribunal performed its judging exercise “...as if it were a reopening or a continuation of the official IMTFE and subsidiary trials.”<sup>34</sup> Knop argues that in doing so the Tribunal not only created legitimacy by adopting a consistent legal approach to the original Tokyo Tribunal, but also, created fictions which have effects for international criminal justice:

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<sup>30</sup> Baroness Hale, ‘Foreword’ in Hunter, McGlynn and Rackley, *Feminist Judgments: From Theory to Practice* (n.28).

<sup>31</sup> Karen Engle, ‘Judging Sex in War’ (2008) 106 Michigan Law Review 941; Halley, ‘Rape in Berlin: Reconsidering the criminalisation of rape in the international law of armed conflict’ (n.5)

<sup>32</sup> Engle, ‘Feminism and its (dis) contents: Criminalizing wartime rape in Bosnia and Herzegovina’ (n.5) 816.

<sup>33</sup> Karen Knop, ‘The Tokyo Women’s Tribunal and the Turn to Fiction’ in Fleur Johns and others ed. *Events: The Force of International Law* (Routledge, Abingdon 2011) 145, 145. See also the documentary on the Women’s Tribunal *Breaking the History of Silence* (2001). Judgment on the Common Indictment and the Application for Restitution and Reparation, (4 Dec. 2001) (Women’s Int’l War Crimes Tribunal for the Trial of Japan’s Military Sexual Slavery).

<sup>34</sup> Ibid Knop 146.

Specifically, the tribunal is the factional story of the IMTFC trying the accused for rape and sexual slavery as crimes against humanity based on the comfort women system. It thereby also adds a prequel to the story of prosecution of gender-related offences in international law, a story often taken to begin only with the international criminal tribunals for the former Yugoslavia and Rwanda in the 1990s.<sup>35</sup>

Through the Tokyo Women's Tribunal and other works such as the Feminist Judgments projects, feminist scholars have highlighted how the narratives of judgments and other legal discourses could have been different. Although these alternative discourses may not have the official hallmark of legal testimony heard in an UN created war crimes tribunal or in a national court, they are an integral part of the strategies of feminist politics to break silences and provide alternative, plausible and inclusive legal accounts.

While feminist legal scholars have sought to highlight alternative narratives of women's experiences through literary sources in international criminal law (ICL), it is striking that in looking for what is absent, fictional film has not to date been the subject of much feminist enquiry.<sup>36</sup> The fictional visual medium seems to call out for an academic feminist analysis, given its ability to represent the stories through sight and sound.<sup>37</sup> Drawing on this work, this thesis focuses on cinematic narratives rather than photographs, artwork or other visual mediums such as documentary and theatre.<sup>38</sup> The turn to cinematic narrative is based on the power of fictional film to shape the ways in which we see and understand the world,

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<sup>35</sup> Ibid 149.

<sup>36</sup> With the important exception of Orit Kamir, 'Cinematic Judgment and Jurisprudence: A Woman's Memory, Recovery and Justice in a Post-Traumatic Society (a study of Polanski's *Death and the Maiden*)' in Austin Sarat, Lawrence Douglas and Martha Merrill Umphrey, *Law on the Screen* (Stanford University Press 2005) and more recently Olivera Simic and Zala Volcic, 'In the Land of Wartime Rape: Bosnia, Cinema and Reparation.' (2014) 2 Griffith Journal of Law & Human Dignity. On celebrity campaigns to "Stop Rape Now" including the media and advertisement video campaign see: Karen Engle, 'Celebrity Diplomacy and Global Citizenship' (2012) 3 Celebrity Studies 116.

<sup>37</sup> For a look how fiction can bring to life socio-economic rights through such a lens see Christine Chinkin and Shelley Wright, 'The Hunger Trap: Women, Food, and Self-Determination' (1993) 14 Michigan Journal of International Law 262.

<sup>38</sup> For examples of this work see: Olivera Simic 'But I Want to Speak Out: Making Art from Women's Testimonies' (2014) 40 Australian Feminist Law Journal 51; Vikki Bell, 'Contemporary Art and Transitional Justice in Northern Ireland: The Consolation of Form' (2011) 10 Journal of Visual Culture 324; James Parker, 'The Soundscape of Justice' (2011) 20 Griffith Law Review 962; Daniel Joyce 'Photography and the Image-Making of International Justice' (2010) 4 Law and Humanities 229; Honni Van Rijswijk, 'Towards a Feminist Aesthetic of Justice: Sarah Kane's *Blasted* as Theorisation of the Representation of Sexual Violence in International Law' 36 Australian Feminist Law Journal (2012) 107.

including international criminal justice. Further, by turning to fictional accounts, we might see alternative realities or ways of imagining the stories which law tells.

### **Cinematic Jurisprudence: International Criminal Law and Fictional Film**

The idea that a film can be analysed for its legal content has been termed cinematic jurisprudence. This was first defined by Antony Chase as "...a way of looking at law through the lens of cinema that projects an alternative view of legality, one every bit as likely to undermine ruling ideas about fairness and formal legal equality as to reinforce them."<sup>39</sup> This definition has been developed further in the work of Orit Kamir on law, film and feminism. She states that:

A film can be read as passing such cinematic judgment when, in addition to portraying an on-screen fictional legal system, it offers alternative cinematic constructions of subjects and societies, of justice and judgment. In its cinematic judgment, a law film may echo the worldview encoded in its fictional legal system, allowing legal and cinematic mechanisms to reinforce each other in the creation of a community and worldview. Alternatively, a law film may constitute a community and value system that criticizes or undercuts those supported by its fictional legal system. Moreover, as a rich, multi-layered text, a law film can perform both these functions concomitantly, through different means and on different levels, evoking complex and even contradictory responses towards social and legal issues presented on screen.<sup>40</sup>

Kamir has thus identified three ways in which law-and-film scholars have looked at cinema. First, she highlights how law and film imitate each other, contributing to the mutual construction of both mediums. Secondly, she highlights how cinema can be read as a form of jurisprudence, informing legal thinking through its alternative cinematic reconstructions of cases and legal systems. Finally, she notes how film and the law ask audiences to carry out judging exercises of the stories or accounts proffered during a trial or on screen. Some scholars of law and popular culture have gone as far to say that "Legal reality can no longer be properly understood, or assessed, apart from what appears on screen."<sup>41</sup> Kamir echoes

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<sup>39</sup> Chase, *Movies on Trial: The Legal System on the Silver Screen* (n.6).

<sup>40</sup> Orit Kamir, *Framed: Women in Law and Film* (Duke University Press 2006) 3.

<sup>41</sup> Richard K Sherwin, *When Law Goes Pop: The Vanishing Line Between Law and Popular Culture* (University of Chicago Press 2000), Preface ix.

this view arguing that “...more people are likely to be influenced by cinematic judging and jurisprudence than by theoretical legal texts or even juridical rhetoric.”<sup>42</sup>

In the context of international criminal justice, scholars have argued that representations of war crimes trials or the events on trial have shaped the way a society evaluates the legacy of legal responses to atrocity.<sup>43</sup> Whilst the images can be partially controlled when they are produced by the Tribunals, the fictional accounts representing the events on trial or the proceedings themselves are outside the legal power of the institutions. As Lawrence Douglas notes in some cases, films create memories of the trials which are in fact legally inaccurate. In the context of his work on the Nuremberg Tribunal he argues that:

It is difficult, then, to predict how the didactic trial itself will become digested by history and become an artefact of collective memory. The Nuremberg Trial remains remembered in American popular imagination through the vehicle of the famous Hollywood movie, *Judgment at Nuremberg*, which, in fact, had nothing to do with the trial before the International Military Tribunal.<sup>44</sup>

In other contexts, scholars have argued that cinematic representations have resulted in a negative legacy.<sup>45</sup> According to Neil Boister and Robert Cryer in their conclusion to the functions and legacies of the IMTFE:

The view of the trials as victor’s justice has been resonant. A Japanese film entitled *The Great East Asia War and the International Tribunal*, made in 1958, portrayed Tojo [convicted and executed for waging an aggressive war] in a positive light, and the 1998 film *Puraido: Unmei no Tokyo* (*Pride: The Moment of Destiny*) portrayed Tojo as a gentle but heroic liberator of Asia. More ambitiously, Kinoshita, Junji’s play *Kami to Hito to no Aida* (*Between God and Man*) portrays the trial as a farce.<sup>46</sup>

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<sup>42</sup> Kamir, *Framed: Women in Law and Film* (n.40) 3.

<sup>43</sup> Christian Delage, 'Creating an International Court: A Movie Project' (2011) 5 *Law and Humanities* 177; Madoka Futamura, *War Crimes Tribunals and Transitional Justice: The Tokyo Trial and the Nuremberg Legacy* (Routledge 2007).

<sup>44</sup> Lawrence Douglas, 'The Didactic Trial: Filtering History and Memory into the Courtroom' (2006) 14 *European Review* 513, 520.

<sup>45</sup> Kinoshita Junji, based his fictional play *Between God and Man: A Judgment on War Crimes* on scenes from an actual trial and based the dialogue on transcripts from the proceedings. Junji Kinoshita and Eric J Gangloff, *Between God and Man: A Judgment on War Crimes* (University of Tokyo Press 1979).

<sup>46</sup> Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (Oxford University Press 2008) 325.

In addition to undermining war crimes trials through negative or erroneous depictions, films may serve to call the law to account for its failures to indict certain crimes. In her analysis of *Death and the Maiden* (1994) originally a play by Ariel Dorfmann, and then filmed by Roman Polanski, Kamir, draws attention to the rape as torture of women in Pinochet's Chile.<sup>47</sup> Her analysis relies on the work of Robert F. Barsky, who has stated:

What *Death and the Maiden* helps us understand is that the very fact of being a victim of rape and torture (ironically) makes Paulina an 'outsider' to the legal process ostensibly in place to redress such injuries... The film could be read as her attempt to impose her outsider justice by continuously reacting against linguistic and procedural barriers set up by traditional forces.<sup>48</sup>

Significantly, cinema can draw attention to narratives and discourses which have been silenced or marginalised by official legal proceedings. Movies therefore not only reinforce the dominant discourse of the law, but also provide forms of "outsider jurisprudence", allowing audiences to judge fictional or real legal cases and systems.<sup>49</sup>

This thesis does not argue that films can provide justice "better" or better justice than international law, nor does it explore the role of cinema as an alternative form or measure in transitional justice settings.<sup>50</sup> What I seek to argue is that film helps to fill in some of the gaps left by war crimes trials and that cinema shows us things that the law and legal proceedings does not and cannot let us see. It can provide us with a form of "outsider jurisprudence" which in turn influences the way the legacy of the Tribunals is viewed. In the next sections of this introduction, I set out the reason why I have focused on the ICTY (rather than the ICTR or another international court) and the outline of the thesis structure.

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<sup>47</sup> Kamir, 'Death of the Maiden: Challenging Trauma and Feminist Judgment and Justice.' in *Framed: Women in Law and Film* (n.40) 185. Although *Death in the Maiden* was a play written by Ariel Dorfman (and before that a composition by Franz Schubert, Kamir draws a distinction between film and theatre on the basis that 'film becomes a different thing from the historical event which illustrates it.' She cites the work of George Bluestone in support. George Bluestone, *Novels into Film* (Univ of California Press 1968).

<sup>48</sup> Robert F Barsky, 'Outsider Law in Literature: Construction and Representation in *Death and the Maiden*' [1997] *SubStance* 66.

<sup>49</sup> Kamir, *Framed: Women in Law and Film* (n.40) 185.

<sup>50</sup> Brian Phillips, 'In the Land of Celebrity Humanitarianism: Reflections on Film and Transitional Justice in Bosnia-Herzegovina' (2013) 7 *Studies in Social Justice* 285.

### The ICTY as a Case Study

International criminal justice has developed since the International Military Tribunal of Nuremberg to prosecute those most responsible for serious international crimes.<sup>51</sup> The commission of war crimes, crimes against humanity, genocide and aggression have been recognised as posing a danger to peace and security and the “delicate mosaic” of common peoples thus befitting international condemnation and punishment.<sup>52</sup> Following a hiatus of nearly 50 years, the creation of the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) marked the beginning of modern international criminal justice.<sup>53</sup> Since then the Rome Statute 1998 established a permanent International Criminal Court (ICC) which is situated in the Hague and there have been a number of “hybrid” or “internationalised” courts such as the Special Court for Sierra Leone (SCSL),<sup>54</sup> Extraordinary Chambers in the Courts of Cambodia (ECCC),<sup>55</sup> Regulation 64 Panels in the Courts of Kosovo and the Special Panels of the Dili District Court (East Timor). The *ad hoc* tribunals (the ICTY and ICTR), hybrid courts and the ICC have since developed case law both substantively and procedurally in areas of

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<sup>51</sup> The Nuremberg Tribunal was established under the Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis (8 August 1945), 82 UNTS 279. The IMTFE was established for the “Trial and punishment of the major war criminals in the Far East” arising from World War II; article 1, Charter of the International Military Tribunal for the Far East; TIAS No. 1589.

<sup>52</sup> Rome Statute of the International Criminal Court, adopted July 17, 1998, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, June 15–July 17, 1998, U.N. Doc. A/CONF.183/9 (1998). Preamble.

<sup>53</sup> The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, established May 25, 1993, by Security Council Resolution 837 UNDOC S/RES/827 (1993) and the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens Responsible for Genocide and other such Violations in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994, established by Security Council Resolution UNDOC S/RES/955 November 8, 1994.

<sup>54</sup> The SCSL was established “To prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.” Article 1, Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, signed on 16 January 2002.

<sup>55</sup> The ECCC was established by an agreement between the United Nations and the Government of Cambodia for the prosecution of “Senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, International Humanitarian Law and custom, and International Conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.” Article 1, Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, with the inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006).

international humanitarian law (IHL) which comprises the laws of war or laws regulating the conduct of hostilities, also known as *jus in bello*<sup>56</sup> and international criminal law (ICL).<sup>57</sup>

International criminal law is a body of law developed from various sources, including at its origins the laws and customs of war, which seeks to protect individuals *hors du combat* and especially civilians in conflict situations.<sup>58</sup> In addition, ICL protects people from gross human rights violations through *inter alia.*, the prohibition of genocide and crimes against humanity.<sup>59</sup> Although there is no one agreed upon definition of international criminal law, the term is often understood as encompassing the prosecution of individuals for “core” international crimes: war crimes, grave breaches of the Geneva Conventions, crimes against humanity, genocide and aggression with some authors using the generic term “war crimes” to refer to all of the above.<sup>60</sup> The novelty or uniqueness of ICL is that individuals can be held criminally liable and responsible in international or national courts for these crimes.<sup>61</sup> The different courts and tribunals use a mix of different laws, and in the case of the ICTY use civilian and common law principles. This thesis focuses on a specific part of the practice of international criminal courts and tribunals, namely the prosecution of a

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<sup>56</sup> The laws of war regulate the conduct of war and set down principles on the treatment of prisoners of war, civilians in occupied territories, sick and wounded personnel, prohibited methods of warfare and human rights situations in armed conflict. The laws of war were first codified at the Hague Conferences of 1899 and 1907 and later in the Four Geneva Conventions of 1949 (also known as the Red Cross Conventions). The foundations of the Geneva Conventions are that persons not actively engaged in warfare should be treated humanely. In 1977 two additional conventions to the 1949 Conventions expanded upon these protections. Further they create a distinction between those who can be legitimately targeted and killed in war and those who are protected. Even combatants must not be subject to unnecessary suffering under these protections. See Malcolm Shaw, *International law 5th Ed* (Cambridge: Cambridge University Press 2003) 1054-1081.

<sup>57</sup> See for example, Theodor Meron, 'War Crimes in Yugoslavia and the Development of International Law' (1994) *American Journal of International Law* 78; William Schabas and Gideon Boas, *International Criminal Law: Developments in the Case Law of the ICTY*, vol 6 (Martinus Nijhoff Publishers 2003).

<sup>58</sup> Convention (IV) Relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.

<sup>59</sup> Robert Cryer, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press 2010) 1.

<sup>60</sup> Ibid page 2. For a technical discussion of the differences between the laws and customs of war and grave breaches see Gabrielle Kirk McDonald, 'Grave Breaches of the 1949 Geneva Conventions' in Gabrielle Kirk MacDonald and Olivia Q Swaak-Goldman, *Substantive and Procedural Aspects of International Criminal Law. Commentary*, Vol 1 (Kluwer Law International 2000) 71. Judge McDonald notes that “...it can reasonably be concluded that every grave breach is a specific severe violation of international humanitarian law and can be regarded as a war crime, while not every war crime is automatically a grave breach.”

<sup>61</sup> This does not preclude separate legal action in other international courts in order to determine State responsibility. For example the *Bosnia v Serbia* case before the ICJ. *The Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* [2007] Judgment, ICJ General List No. 91. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* [2015] Judgment, 3 February 2015.

number of so-called “gender crimes” at the ICTY. The ICTY is the first international criminal tribunal to emerge since the International Military Tribunal of Nuremberg (Nuremberg Tribunal) and the International Military Tribunal of the Far East (Tokyo Tribunal). Since its establishment in 1993, the ICTY has been credited with a number of important developments in the field of international criminal law.<sup>62</sup> It is important to note while the ICTY has adopted an adversarial trial format, it incorporates parts of the civilian system and there is no trial by jury. Instead, the proceedings are adjudicated by a panel of appointed judges.

This thesis focuses on the prosecution of gender crimes at the ICTY for a number of reasons. First, the ICTY has been congratulated, alongside its sister tribunal the ICTR, for producing landmark jurisprudence on gender crimes. Following sustained pressure from women’s groups, survivors and journalists, gender crimes in Bosnia were investigated and documented in the Commission of Experts’ report which led to the setting up of the Tribunal.<sup>63</sup> Richard Goldstone, the first Chief Prosecutor of the ICTY has commented that the media attention and international reaction “...against sexual violence was a key element in the motivation for the establishment of the tribunal.”<sup>64</sup> Thus the concern over and awareness of sexual violence was part of the “unique characteristics” of the Tribunal which from its very conception had been concerned “to ensure that there would be prosecutions for gender crimes.”<sup>65</sup> The widespread media reporting of an estimated 20,000 rapes during the Bosnian conflict (6 April 1992-12 October 1995) thus formed part of the impetus behind the creation of the ICTY.

According to Tribunal figures, 78 individuals or 48 percent of the 161 accused have had charges of sexual violence included in their indictments.<sup>66</sup> As it stands in February 2014: 30 individuals have been convicted of sexual violence under Article 7(1) of the ICTY Statute

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<sup>62</sup> These developments include the extension of individual criminal liability for non-international armed conflicts in the *Tadic* decision. *Prosecutor v. Tadic*, IT-94-1-T, Judgment (May 7, 1997).

<sup>63</sup> Christine Cleiren played a vital role investigating rape and sexual assault. She appointed a forty member all female team of lawyers, health specialists and interpreters to interview hundreds of women in cities across Bosnia and Croatia. Michael P Scharf, *Balkan Justice: The Story Behind the First International War Crimes Trial since Nuremberg* (Carolina Academic Pr 1997) 48.

<sup>64</sup> Richard J Goldstone, 'Prosecuting Rape as a War Crime' (2002) 34 Case Western Reserve Journal of International Law 277, 278. For an alternative critical account arguing that Western inaction in a conflict was the impetus behind the establishment and that the Tribunal was created as a form of “send in the lawyers” see Kingsley Chiedu Moghalu, *Global Justice: The Politics of War Crimes Trials* (Stanford University Press 2008) 10.

<sup>65</sup> Ibid Goldstone, 'Prosecuting Rape as a War Crime' (n.64).

<sup>66</sup> According to statistics on the Tribunal website 'In Numbers' <http://www.icty.org/sid/10586> accessed 1 September 2014.



(direct perpetration). Four individuals have been convicted for failing to prevent or punish the actual perpetrators of the crimes, under Article 7(3) of the Statute. According to the Tribunal, 13 individuals have had indictments withdrawn or the accused has deceased before the trial; 14 individuals have been acquitted; 14 individuals are in on-going proceedings and six individuals have been referred to a national jurisdiction.<sup>67</sup> The ICTY is thus considered by Kirsten Campbell to have made: "...important contributions to the prosecution of sexual violence in armed conflict, both in terms of its extensive doctrinal developments and its unprecedented number of prosecutions in this area."<sup>68</sup> According to Kirsten Campbell, accountability of sexual violence in the Yugoslavian conflict is now seen as a core achievement of the ICTY.<sup>69</sup> In the Tribunal's own words it has played a "landmark" role in prosecuting gender crimes.

Secondly, the development in prosecuting sexual violence at the ICTY has made the Tribunal the focus of scholarly debates between feminist scholars. The *Prosecutor v. Kunarac* (also known as the *Foca* case), was the first "thematic prosecution" where the accused persons were charged with crimes solely perpetrated against women.<sup>70</sup> This case has become a microcosm where feminist scholars of different standpoints have expressed their views on the merits and consequences of thematic prosecutions with some critical scholars such as Janet Halley and Karen Engle expressing their discomfort with the direction of feminist work in international criminal justice. In doing so, Halley has argued that rape is now "hypervisible" and that feminists should consider "taking a break from feminism."<sup>71</sup> The ICTY's legacy is thus contested within the "ghetto" of feminist legal scholarship.<sup>72</sup>

Thirdly, given the decision to focus on visual sources, the selection of the ICTY is practical as well as theoretical. The contemporary interactions between the moving image and the law

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<sup>67</sup> Ibid.

<sup>68</sup> Kirsten Campbell, 'The Gender of Transitional Justice: Law, Sexual Violence and the International Criminal Tribunal for the Former Yugoslavia' (2007) 1 International Journal of Transitional Justice 411.

<sup>69</sup> Ibid.

<sup>70</sup> Margaret M DeGuzman, 'An Expressive Rationale for the Thematic Prosecution of Sex Crimes' in Morten Bergsmo eds. *Examining Thematic Prosecutions and the Challenges of Understanding and Proving International Sex Crimes* (Torkel Opsahl Academic EPublisher 2012).

<sup>71</sup> Janet Halley, *Split Decisions: How and Why to Take a Break from Feminism* (Princeton University Press 2006).

<sup>72</sup> Hilary Charlesworth, 'Talking to Ourselves: Feminist Scholarship in International Law' in Sari Kouvo and Zoe Pearson eds. *Feminist Perspectives on Contemporary International Law* (Hart Publishing 2011).

can be readily explored due to the extensive use of video technology by the Tribunal.<sup>73</sup> The Tribunal's proceedings are recorded, streamed and archived and are made available by the Press Office to members of the public and to the press. This facilitated easy comparison between the trials that occurred and the fictional accounts about gender crimes considered in this thesis, including the fictional portrayal of the proceedings.

Beyond the availability of recording of the proceedings, the decision to focus on the ICTY is predicated on the wealth of fictional filmic material on gender crimes. This is particularly the case in the context of the ICTY. There have been a number of films about the Rwandan genocide as listed by Alexandre Dauge-Roth in his book on *Writing and Filming the Genocide of the Tutsis in Rwanda* including films about women's experiences of the genocide.<sup>74</sup> However, these films do not focus exclusively on gender crimes in the same ways as films about Bosnia. This comes as a surprise given that it was the ICTR which produced the first landmark decision on gender crimes in the *Prosecutor v. Akayesu*, begging the question as to why this is the case.<sup>75</sup>

In contrast to Rwanda, numerous documentary and fictional films have focused on gender crimes and the Bosnian conflict. Film is and has long been an important medium in Bosnia, with Sarajevo hosting one of Europe's largest film festivals each year. The festival was set up in 1995 during the siege of Sarajevo. Artists, including filmmakers, are spokespersons and leaders in opening spaces of dialogue on issues surrounding war crimes prior to and

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<sup>73</sup> On the increasing use of digital technology in domestic trials see: Linda Mulcahy, 'The Unbearable Lightness of Being? Shifts towards the Virtual Trial' (2008) 35 *Journal of Law and Society* 464; Judy Radul, 'What Was Behind Me Now Faces Me – Performance, Staging, and Technology in the Court of Law' (2007) *Eurozine*.

<sup>74</sup> Alexandre Dauge-Roth, *Writing and Filming the Genocide of the Tutsis in Rwanda: Dismembering and Remembering Traumatic History* (Lexington Books 2010) 27. There are films which hint at rape during the genocide (*100 days*, 2001, Nick Hughes); and documentary films which focus on the experiences of women during (*Valentina's Nightmare*, 1997, PBS) and in the aftermath of the genocide, most notably the Academy Award nominee *God Sleeps in Rwanda*, 2005, Kimberlee Acquaro and Stacy Sherman, *Women Make Movies* and *My Neighbour My Killer*, 2009, Anne Aghion.

<sup>75</sup> *Prosecutor v Akayesu*, ICTR-96-4-T, Judgment (Sept 2, 1998). There may be a number of reasons why this is the case. First, it may be because Rwanda does not have the same tradition of cinematic activism as Bosnia, with cinema holding an important place in the former Yugoslavia (on this see the film *Cinema Komunisto* 2010). Secondly, this lack of cinematic narrative may point to critiques made by Black feminist scholars that black women's lives continue to be devalued and their stories marginalised by the media. In contrast, international films about the Bosnian conflict often have a young, beautiful, 'white' female protagonist whose experiences can be read as 'universal'. The ethnic dimension of the conflict, including these women's Muslims identities, is often downplayed in these films. Without further research, however, these observations remain speculative.

post-conflict.<sup>76</sup> The fictional films representing gender crimes and their aftermath in Bosnia are rich, numerous and in some cases, high profile. Angelina Jolie and Juanita Wilson have both depicted sexual slavery and the factual circumstances which formed the central focus of the *Prosecutor v. Kunarac*.<sup>77</sup> Hans Christian Schmid's film *Storm* instead depicts the trial proceedings and witness testimony (or rather its silencing) in the ICTY echoing the circumstances of the *Prosecutor v. Lukic*.<sup>78</sup> The *Lukic* case is also featured in Jasmila Zbanic's most recent film on Visegrad – *For Those Who can Tell no Tales*.<sup>79</sup>

Significantly, the impact of film on how we think about consequences of gender crimes has been made explicit in Jasmila Zbanic's first film *Grbavica* produced in 2006.<sup>80</sup> In this film, also known as *Esma's Secret*, she narrates the story of one woman who was a victim of rape(s) during the Bosnian war and who conceived a child, now a teenager in the film. The film is credited with contributing to legislative change on rape compensation laws in Bosnia. According to Ingvill Mochmann and Stein Larsen:

How important it is to provide information to society concerning children born of sexual exploitation and abuse is clearly seen by the impact of the film "Grbavica". The film produced in 2006 told the story of a relationship between a Bosnian woman who had been raped by a Serbian soldier during the civil war [sic] in Bosnia-Herzegovina, and gave birth to a daughter. This film created a shock in society and raised the awareness of the topic in society. A positive consequence of the movie was that rape victims were acknowledged as victims of war and do now receive a small pension.<sup>81</sup>

*Grbavica* demonstrates that popular fiction can create awareness and even have a normative impact where law fails to address these problems. At the same time, it also

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<sup>76</sup> Iavor Rangelov, *Nationalism and the Rule of Law: Lessons from the Balkans and Beyond* (Cambridge University Press 2013) 138.

<sup>77</sup> *As If I Am Not There* (2010); *In the Land of Blood and Honey* (2011).

<sup>78</sup> *Storm* (2009).

<sup>79</sup> *For Those Who Can Tell No Tales* (2013).

<sup>80</sup> *Esma's Secret – Grbavica* (2006).

<sup>81</sup> Ingvill C Mochmann and Stein Ugelvik Larsen, 'Children Born of War: The Life Course of Children Fathered by German Soldiers in Norway and Denmark during WWII—Some Empirical Results' (2008) *Historical Social Research/Historische Sozialforschung* 347, 361.

raises questions over the legal and political responses to rape given that the film was released in 2006 following legal decisions such as *Furundzija* and *Kunarac (Foca)*.<sup>82</sup>

Alongside these examples, there are numerous other films on the aftermath of the conflict which are not analysed in this thesis due to temporal and spatial limitations. These films speak to other gendered consequences of the war. In some cases these are economic, with women having to cope with, survive and adapt to the new circumstances post-conflict. Aida Bejic's film *Snejig* (2008) tells the story of a village of women who are left to provide for themselves economically as a result of the death or disappearance of the men – husbands, fathers and sons.<sup>83</sup> The economic situation also forms the emphasis of her film *Children of Sarajevo* (2012) in which a woman attempts to care for her younger brother after they were both placed in an orphanage following the death of their parents in the war.<sup>84</sup> The number of different cinematic representations of gender crimes and their consequences in Bosnia, the views of filmmakers on this issue and in some cases, their explicit interaction with the Tribunal, makes the ICTY a rich case study for this comparative analysis.

### **Thesis Structure**

The next two substantive chapters of this thesis set out the story of gender crimes in international criminal law and the feminist engagements with these crimes. Taken together they challenge the official story told by the Tribunal and the claims made by critical feminist lawyers that these crimes are hypervisible. Chapter two of this thesis provides an overview of the development of “gender crimes” in international criminal law. The term gender crime is defined, and the history of gender crimes from their marginalisation in Nuremberg and Tokyo to prosecutions in the ICTY, ICTR and the hybrid tribunals, is charted. The chapter provides an overview of the landmark procedural and substantive developments in the field and explains why the ICTY has declared a “triumph of justice” in its documentary.

Chapter three argues that while there has been progress in the prosecution of some of these crimes, the declaration of triumph is clearly premature given the ongoing marginalisation of women's harms and problems associated with prosecuting these crimes and securing convictions. Drawing on the practice and jurisprudence of international and hybrid courts and tribunals the chapter illustrates how women's experiences continue to

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<sup>82</sup> *Prosecutor v. Furundzija*, IT-95-17/1-T, (July 21, 2000).

<sup>83</sup> *Snow* (2008).

<sup>84</sup> *Children of Sarajevo* (2012).

be silenced by “less visible” obstacles such as procedural decisions and errors at the investigation and charging stages. While the “visible obstacle” of including these crimes in the Statutes has been overcome, the definitions, legal categorisation and technical classifications of these crimes analysed in this chapter play an important role in the later film analysis chapters where these definitions are drawn upon and critiqued. Taken together they provide the substantive backdrop to the film analysis chapters which follow. Before delving into the film analysis, the next chapter provides a bridge between the progress narrative and film chapters.

In terms of substantive content, the fourth chapter of this thesis contextualises the relationship between war crimes trials and film and sets out how war crimes trials have used film in their practice. It argues that the media, the moving image, conflict and international criminal justice are increasingly entangled.<sup>85</sup> Chapter four explores the way in which modern war crimes tribunals use film as part of their outreach and legacy functions. Numerous documentary films are discussed as evidence of the courts’ and tribunals’ interaction with the filmic medium. I argue that while documentary films and streaming allow the public access to the proceedings, these images should not be taken at face value and instead, we need to critically consider the framing of these scenes in order to see what is not shown on the camera. Chapter four also sets out the methodological choices and the methods used to carry out the film analysis. It justifies the turn to film and the films selected for the analysis.

In the next three chapters of the thesis I carry out a close analysis of three fictional feature films which together form a chronology of the Bosnian war. The films depict the events of the war, the trials and the aftermath. In the fifth chapter I conduct a comparative analysis of the *Foca* judgment and Juanita Wilson’s depiction of the events in her film *As If I’m Not There*. It is noteworthy that Wilson’s film accurately and faithfully depicts the experiences of the women as recorded during the trial with the elements of the crimes of rape, sexual slavery and outrages upon human dignity clearly visible on screen. The film goes beyond this, however, by providing viewers with an aftermath and challenges law’s promise of closure.

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<sup>85</sup> Kinglsey Chiedu Moghalu, 'Image and Reality of War Crimes Justice: External Perceptions of the International Criminal Tribunal for Rwanda' (2002) 26 *Fletcher Forum of World Affairs* 21; Thomas Verfuss, 'Trying Poor Countries' Crimes in a Rich City-The Problems of the Press from the Former Yugoslavia' (2004) 2 *Journal of International Criminal Justice* 509.

The sixth chapter analyses the film *Storm*, a German production, set in the ICTY. The film centres on the relationship between a female prosecutor, Hannah, and a female witness, Mira. While *As If I'm Not There* allows viewers to see the events (crimes) on screen, *Storm* is a second phase in the chronology where viewers are offered a privileged spectating position into the internal workings of the Tribunal. The gendered relations in operation within the Tribunal form a focus of the analysis of this film, which was scripted with the help of a female prosecutor working at the ICTY. The film allows viewers to see the political decisions which are made behind closed doors and which affect the prosecutions (in this case plea bargains) resulting in the silencing of women's voices in the Tribunal.

The seventh chapter turns to a film about the aftermath of the Bosnian conflict. Set in Sarajevo after the official end of the Bosnian war the film forms the third and last section of the chronology.<sup>86</sup> *Grbavica*, tells the emotional story of a relationship about a mother and child in post-war Bosnia. While the war has ended, Jasmila Zbanic's film clearly shows us that the consequences are on-going in a society which remains deeply marked by continued economic and physical violence. The film is credited with changing Bosnian compensation laws, which previously excluded survivors of rape from its scope and reinforces arguments that the arts can form an important part of the transitional process following the end of conflict.

## Conclusion

The fictional films analysed in this thesis represent life events which actually took place with the main characters and survivors – Samira, Mira and Esma – forming a “composite of real-life victims.”<sup>87</sup> The films provide viewers with a different account and different focus than the legal narratives which emerge in the trials and which are centred on the individual criminal responsibility of the accused. By placing these women's narratives and experiences as front and centre, the fictional accounts also greatly differ from the ICC and ICTY documentaries in which “...victims are presented predominantly in two ways: either as suffering bodies without voices of their own or as people desperately seeking intervention from the ICC.”<sup>88</sup>

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<sup>86</sup> The General Framework Agreement for Peace in Bosnia and Herzegovina, signed on 14 December 1995 is more commonly referred to as the Dayton Agreement. The talks were held in Dayton Ohio, with the aim of bringing peace and stability to the region. Bosnia and Herzegovina is a State made up of two parts: the confederation of Bosnia and Herzegovina and the Republica Sprska.

<sup>87</sup> Alicia Gaspar De Alba, *Desert Blood: The Juárez Murders* (Arte Publico Press 2005) Preface v.

<sup>88</sup> Wouter G Werner, 'We Cannot Allow Ourselves to Imagine What It All Means: Documentary Practices and the International Criminal Court' (2013) 76 Law & Contemporary Problems 319, 330.

In the following chapters and through an analysis of three particular films, I argue that on one hand, film is a complementary discourse to law. My thesis is that film can reflect and disseminate the claims and legal jurisprudence of the Tribunals. It can reinforce the factual and legal findings in the trials and further reinforce the rule of law by depicting legal responses to atrocity. On the other hand, feature film and its multi-layered narratives, can provide viewers with subversive narratives, exposing law's limitations and its complicity with silencing certain voices. It can show us what occurs behind the smoke and mirrors of the online proceedings and present an alternative narrative to the official progress discourse. Beyond this, the films indict law and the international legal response to the Bosnian conflict, putting these very systems on trial.

## Chapter 2

### **“The Official History”: Prosecuting Gender Crimes in International Criminal Law (ICL)**

#### **Introduction**

In 2011, the International Criminal Tribunal for the former Yugoslavia (ICTY) produced and released a documentary film entitled *Sexual Violence and the Triumph of Justice*. Through a number of talking head interviews and montage of clips taken from the proceedings at the ICTY, the documentary tells the story of how “gender crimes” were prosecuted in the first war crimes tribunal established since Nuremberg and Tokyo. The documentary also highlights the prominent interventions of female judges in the proceedings and the landmark legal achievements. The triumphant tone of the ICTY documentary encapsulates a narrative about progress which has emerged regarding the project of international criminal justice.<sup>89</sup> More specifically, the film marks a celebration of the culmination of efforts to prosecute and convict those responsible for rape, sexual violence and sexual slavery as crimes against humanity for the first time. These landmark judgments are rightly celebrated by the documentary. However, as the Tribunal winds to a close and as academics and practitioners turn their attention to the Tribunal’s legacy – this progressive narrative must be scrutinised.<sup>90</sup>

In this chapter and the next I argue that while there have been many achievements in enumerating and prosecuting certain gender crimes, the narrative of progress as celebrated by the Tribunal does not tell the whole story. Before embarking on this critique, this chapter sets out the developments in prosecuting gender crimes in international criminal law. The aim of this chapter is to define some key terms, such as “gender” and “gender crimes” which are used throughout the thesis. The following sections then explore the jurisprudential developments which led to the first convictions of individuals for gender crimes. While the later chapters of this thesis focus on the ICTY, this chapter provides a

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<sup>89</sup> Moghalu, *Global Justice: The Politics of War Crimes Trials* (n.64) xii “...most books and commentary on this subject offer a crusading, advocacy-laden perspective – which often leads to a conflation of what the law on war crimes actually is with what it *ought* to be.” Frederic Mégret, ‘From “Savages” to “Unlawful Combatants”: A Postcolonial Look at International Humanitarian Law’s “Other”’ in Anne Orford eds *International Law and Its “Others”* (Cambridge: Cambridge University Press 2006) 269. More generally see Christine Schwöbel, *Critical Approaches to International Criminal Law: An Introduction* (Routledge 2014), Tor Krever, ‘International Criminal Law: An Ideology Critique’ (2013) *Leiden Journal of International Law* 26 (3): 701.

<sup>90</sup> Office of the Prosecutor “Information Sheet: Prosecuting Sexual Violence Legacy Project” September 2014 [http://www.icty.org/x/file/Outreach/sv\\_files/psv\\_legacy\\_project\\_is.pdf](http://www.icty.org/x/file/Outreach/sv_files/psv_legacy_project_is.pdf) last accessed 15 March, 2015.



wide brush drawing examples from the *ad hoc* tribunals, ICC and hybrid tribunals where relevant. Examples however are predominately taken from the ICTY especially where these issues are discussed again in later chapters.

### **Defining and Including Gender Crimes in ICL**

Since the 1970s the term gender has been used in order to question “...the genesis of women’s oppression and social subordination.”<sup>91</sup> The term is used to denote social constructions of biological sex, and is often equated with, and reduced to, the category of women. The definition of gender has subsequently developed, bringing with it new understandings informed by theories of performativity and links to sexuality as well as to biological sex.<sup>92</sup> However, within international law, gender has a narrow meaning and has been described by Hilary Charlesworth as “insipid and bland” with “little cutting edge”.<sup>93</sup> She explains that while the UN has followed the second wave feminists in drawing a distinction between “sex” and “gender” it has failed to register the feminist critiques which have highlighted that “sex” is not a natural category.<sup>94</sup>

Despite this limited and reductionist understanding, since the first mention of the term at the United Nations Third World Conference on Women 1985 (Nairobi),<sup>95</sup> international law has at least slowly come to recognise gender as a category upon which legal claims can be predicated.<sup>96</sup> Refugee claims can be made on the basis of gender-based persecution and human rights claims for gender discrimination can be brought before regional and international courts.<sup>97</sup> Moreover, in the last ten years, courts and treaty bodies have used

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<sup>91</sup> Gayle Rubin, 'The Traffic in Women: Notes on the "Political Economy" of Sex' in Rayna Reiter, ed *Toward an Anthropology of Women* (New York: Monthly Review Press, 1977) 157. For a history of the word 'gender' see Donna J Haraway, *Simians, Cyborgs, and Women: The Reinvention of Nature* (Routledge 2013) 127-148.

<sup>92</sup> Judith Butler, *Gender Trouble and the Subversion of Identity* (New York and London: Routledge, 1990).

<sup>93</sup> Charlesworth, *Talking to Ourselves: Feminist Scholarship in International Law*. (n.72).

<sup>94</sup> Ibid 30.

<sup>95</sup> 'Women, by virtue of their gender, experience discrimination in terms of denial of equal access to the power structure that controls society and determines development issues and peace initiatives. Additional differences, such as race, colour and ethnicity may have even more serious implications in some countries, since such factors can be used as justification for compound discrimination.' Report of the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace, Nairobi, 15-26 July 1985, United Nations, New York, 1986, para 46.

<sup>96</sup> See for example: UNHCR Guidance note on Refugee Claims relating to Sexual Orientation and Gender Identity. 21 November 2008.

<sup>97</sup> On refugee claims see for example: *Re Fauziya Kasinga*, Board of Immigration Appeals. Interim Decision 3278 (BIA); 21 I. & N. Dec. 357, 1996 BIA LEXIS 1. On gender discrimination in the European Court of Human Rights see for example, *Airey v Ireland (No1)* (1979–80) 2 EHRR 305, *Abdulaziz, Cabales and Balkandali v United Kingdom* A 94 (1985).

a gender framework to expound principles of due diligence and positive obligations in order to hold States responsible for failing to protect women from domestic violence,<sup>98</sup> human trafficking,<sup>99</sup> rape as torture,<sup>100</sup> and violations of reproductive rights.<sup>101</sup>

The Rome Statute 1998 establishing the International Criminal Court (ICC) is the first international treaty to use the term “gender”.<sup>102</sup> Building on the progress achieved in the ICTY Statute (which enumerated rape as a crime against humanity for the first time in Article 5(g) 1993),<sup>103</sup> the ICTR Statute (which referred to rape, enforced prostitution and any form of indecent assault as violations of Article 3 common to the 1949 Geneva Conventions in Article 4(e) 1994), the Vienna Conference on Human Rights<sup>104</sup> and the Beijing Platform for Action,<sup>105</sup> women’s rights advocates “...ensured that history did not pass women by yet again” by fighting for the inclusion of a range of gender crimes in the jurisdiction of the Court.<sup>106</sup> For the first time sexual and gender-based crimes, and a crime which can only be committed against women (forced pregnancy) are mainstreamed throughout the Statute,<sup>107</sup> and Article 8 makes it clear that the enumerated crimes are not exhaustive.<sup>108</sup> As noted by Fatou Bensouda, the current Chief Prosecutor of the ICC, “The codification of a mandate to end impunity for these acts is indeed a significant step in the right direction. It was high time that such crimes cease to be regarded as ‘inevitable-by-products’ of war and receive the serious attention they deserve.”<sup>109</sup> Significantly, ICC the Statute also recognises that victims of sexual and gender-based violence need special

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<sup>98</sup> *Opuz v. Turkey* (Application no. 33401/02) 9 June 2009; *Jessica Lenihan Gonzales v. United States* Inter-Am. Ct.H.R. Case No. 12.626, Decision of Merits July 21, 2011.

<sup>99</sup> *Rantsev v. Cyprus and Turkey* (Application no. 25965/04) 7 January 2010.

<sup>100</sup> *Aydin v Turkey* (1997) 25 EHRR 251; *Penal Castro Castro v. Peru* Inter-Am. Ct. H.R. (ser. C) Judgment of August 2, 2008; *Rosendo Cantu et al. v. Mexico* Inter-Am. Ct. H.R (ser C.) Judgment of August 31, 2010; *Ines Fernandez v. Mexico* Inter-Am. Ct. H. R. Judgment of August 30, 2010.

<sup>101</sup> *KL v. Peru*, Communication No. 1153/2003, November 2005. Human Rights Committee.

<sup>102</sup> The term gender is mentioned six times in the Rome Statute in Articles 7(1)(h), 7(3), 23(1), 42(9), 54(1)(b), 68(1).

<sup>103</sup> In fact it was Security Council Resolution 827 (1993) establishing the ICTY which first “expressed alarm” at the commission of various crimes including the rape of women.

<sup>104</sup> Vienna Declaration and Programme of action. UN Doc. A/CONF.157/24 (Vienna, 12 July 1993).

<sup>105</sup> Beijing Declaration and Platform for Action. UN Doc. A/CONF. 177/20 (15 Sept. 1995).

<sup>106</sup> Barbara Bedont and Katherine Hall-Martinez, 'Ending Impunity for Gender Crimes under the International Criminal Court' (1999) 6 *Brown Journal of World Affairs* 65.

<sup>107</sup> For a detailed consideration of the technicalities of gender crimes and the ICC Statute see: Anne-Marie de Brouwer and others, *Sexual violence as an International Crime: Interdisciplinary Approaches* (Intersentia 2013)

<sup>108</sup> Article 8 (2)(b)(xxii) Rome Statute 1998 recognises that crimes of similar gravity can be prosecuted by the Court.

<sup>109</sup> Fatou Bensouda “Gender and Sexual Violence under the Rome Statute”, in Dianne Luping, 'Investigation and Prosecution of Sexual and Gender-based Crimes before the International Criminal Court' (2009) 17 *American University Journal of Gender, Social Policy & Law* 431, 433.

protection and procedures in order to testify.<sup>110</sup> It further affirms that appropriate measures must be taken to ensure the effective investigation and prosecution of any crime in the jurisdiction of the court “...in particular where it involves sexual violence, gender violence or violence against children.”<sup>111</sup>

The ICC Statute provides a definition of the term gender in the context of gender-based persecution as a crime against humanity. Article 7(3) of the Rome Statute defines the term gender as referring “...to the two sexes, male and female, within the context of society. The term ‘gender’ does not indicate any meaning different from the above.” Published in 2014, the ICC Policy Paper on *Sexual and Gender Based Crimes* (hereafter 2014 ICC Policy Paper) states that this definition “...acknowledges the social construction of gender, and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and to girls and boys.”<sup>112</sup> As shorthand those working within the international institutions have adopted the term gender crimes championed most famously by Catharine Mackinnon, the former Gender Advisor at the ICC.<sup>113</sup> Reference to gender crimes reflects an understanding that differentiated crimes are encompassed within this term.

The 2014 ICC Policy Paper provides further clarity on the distinctions between, and within, the term gender crimes. According to the ICC policy document:

Gender-based crimes are those committed against persons, whether male or female, because of their sex and/or socially constructed gender roles. Gender-based crimes are not always manifested as a form of sexual violence. They may include non-sexual attacks on women and girls, and men and boys, because of their gender.

This differentiates them from sexual violence which are acts of a sexual nature and/or which are directed against sexual organs, which in turn is not limited to physical violence “and may not involve any physical contact, for example, forced nudity. Sexual crimes, therefore, cover both physical and non-physical acts with a sexual element.” While the

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<sup>110</sup> Article 68 Part 6 Rome Statute 1998.

<sup>111</sup> Art. 54(1)(b) Rome Statute 1998.

<sup>112</sup> ICC Policy Paper on Sexual and Gender-Based Crimes. June 2014, 3. Available online at <http://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf> accessed 1 February 2015.

<sup>113</sup> Article 42 (9) Rome Statute states that ‘The Prosecutor shall appoint advisers with legal experience on specific issues, including but not limited to, sexual and gender violence, and violence against children.’ The term gender crime is used by many Tribunal personnel including Patricia Sellers and Rhonda Copelon. Rhonda Copelon, ‘Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law’ (2000) 46 McGill Law Journal 217.

policy document does not define reproductive crimes, these offences are recognised as affecting a person's reproductive capacity and include for example, forced maternity, forced sterilisation or forced abortion.<sup>114</sup> The use of the term gender also reflects the need for a "gender analysis" to better understand sexual and gender-based crimes. According to the 2014 ICC Policy Paper:

Gender analysis examines the underlying differences and inequalities between women and men, and girls and boys, and the power relationships and other dynamics which determine and shape gender roles in a society, and give rise to assumptions and stereotypes. In the context of the work of the Office, this involves a consideration of whether, and in what ways, crimes, including sexual and gender-based crimes, are related to gender norms and inequalities.<sup>115</sup>

While the inclusion of the term gender is seen as an important development in the ICC, the manner in which it has been defined and limited has been criticised for its exclusion of gay, lesbian and transsexual persons.<sup>116</sup> It has further been criticised for its failure to adequately recognise the ways in which gender intersects with other identity categories such as race, sexuality, class or age.<sup>117</sup> Patricia Viseur Sellers has explained the limitations as follows:

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<sup>114</sup> See Colleen Duggan and Ruth Jacobson, 'Reparation of Sexual and Reproductive Violence: Moving from Codification to Implementation' in Ruth Rubio Marin eds. *The Gender of Reparations* (Cambridge University Press, New York 2009). On forced abortion see Paloma Soria, Viviana Waisman and Keina Yoshida. "Forced Abortion in International Law and International Legal Jurisprudence" Opinion prepared for the Unidad Fiscal de Coordinación y Seguimiento de las causas por violaciones a los Derechos Humanos cometidas durante el terrorismo de Estado (Office of the Prosecutor, Argentina). September 2010. Available only in Spanish. [file:///H:/memo\\_aborto\\_forzoso.pdf](file:///H:/memo_aborto_forzoso.pdf) last accessed 1 March 2015.

<sup>115</sup> 2014 ICC Policy Paper. (n.112).

<sup>116</sup> Valerie Oosterveld, 'The Definition of Gender in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice' (2005) 18 *Harvard Human Rights Law Journal* 55. However, some experts now consider that this provision can be interpreted in more inclusive ways. See para 26 of the ICC Policy Paper where it states that the 'Office will take into account the evolution of internationally recognised human rights.' This paragraph cites the efforts of the UN Human Rights Council and the UN High Commissioner on Human Rights to put an end to the violence and discrimination against lesbian, gay, bisexual and transsexual persons.

<sup>117</sup> Dianne Otto, 'Holding up Half the Sky, but for Whose Benefit? A Critical Analysis of the Fourth World Conference on Women' (1996) 6 *Australian Feminist Law Journal* 7. See General recommendation No. 28 -- forty-seventh session, 2010 - The Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women. "The term 'gender' refers to socially constructed identities, attributes and roles for women and men and society's social and cultural meaning for these biological differences resulting in hierarchical relationships between women and men and in the distribution of power and rights favouring men and disadvantaging women. This social positioning of women and men is affected by political,

Gender in the popular sense – not necessarily in an academic sense.. – is shorthand for women and girls... It is readily understood that gender is a code word... Gender – and judicial institutions’ perception of gender strategies – inhabits Article 7(3)’s definition of gender that is inscribed in the Rome Statute. Gender depends on the meaning given to males and females in the context of a society. So we often speak in “reductionist” terms, reducing gender to women, and when we refer to gender strategy reducing it to sexual violence committed against women and girls.<sup>118</sup>

Despite these limitations, Mackinnon has argued that the notion of gender crimes creates a new paradigm in international law, since these crimes are explicitly recognised as gender-based.<sup>119</sup> Further, the differentiation and enumeration of specific gender crimes is considered to be an important achievement.

### **Prosecuting Sexual Violence as International Crimes**

It is well documented that historically, crimes against women have been subjected to a “monumental oversight” during the prosecution of war crimes by international tribunals.<sup>120</sup> As Kelly Askin uncovered, at the Nuremberg Tribunal, the prosecution failed to indict any of the Nazis for gender crimes against women despite the existence of ample documentary evidence and international instruments condemning rape.<sup>121</sup> Judge Gabrielle Kirk McDonald, the former President of the ICTY has stated, although rape has happened throughout time, “...in Nuremberg it was just blinked at” and was not prosecuted.<sup>122</sup> Mackinnon has emphatically stated that: “The fact that injuries to women as such were

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economic, cultural, social, religious, ideological and environmental favours and can be changed by culture, society and community.”

<sup>118</sup> Patricia Viseur Sellers, 'Gender Strategy is Not Luxury for International Courts' (2009) 17 American University Journal of Gender, Social Policy and Law 301.

<sup>119</sup> Catharine Mackinnon 'Creating International Law: Gender as a New Paradigm' paper presented at the London School of Economics, Thursday 8 December 2011. <http://www.lse.ac.uk/humanRights/events/2011/macKinnon.aspx> last accessed 16 March, 2015.

<sup>120</sup> Many scholars begin with prohibition of rape in the Hague Conventions 1907 or the 1474 trial of Sir Hagenbach to argue that rape has long been a violation of international humanitarian law but highlight how it was not prosecuted as such in the post WWII international military tribunals. Luping, 'Investigation and Prosecution of Sexual and Gender-based Crimes before the International Criminal Court' (n.109) 436; Patricia Viseur Sellers, 'Sexual Violence and Peremptory Norms: The Legal Value of Rape' (2002) 34 Case Western Reserve Journal of International Law 287. See 'A history of silence: The Nuremberg and Tokyo Trials' in Nicola Henry, *War and Rape: Law, Memory, and Justice* (Routledge 2011), 28-60.

<sup>121</sup> Kelly Dawn Askin, *War Crimes against Women: Prosecution in International War Crimes Tribunals*, vol 1 (Martinus Nijhoff Publishers 1997). For example the word 'rape' is absent from the 179 page judgment of the International Military Tribunal of Nuremberg. See Catherine Niarchos, 'Women, War, and Rape: Challenges facing the International Tribunal for the former Yugoslavia' (1995) 17 Human Rights Quarterly 649.

<sup>122</sup> Documentary. *Sexual Violence and the Triumph of Justice*. 2 minutes 30 seconds.

invisible at Nuremberg, the fact that gender as a feature of humanity that could be systematically violated was not recognized there, has helped to keep women from being full human beings under international law.”<sup>123</sup> Feminist scholars have argued that the failure to prosecute those responsible for the sexual slavery, rape, forced abortion and forced sterilisation of Jewish and gypsy women during the Holocaust has led to the obfuscation of gendered harms during the Holocaust in legal literature.<sup>124</sup>



Screenshot 1: “in Nuremberg it was just blinked at” 2:30.<sup>125</sup>

It was in the International Military Tribunal of the Far East (IMTFE), also known as the Tokyo Tribunal, that Japanese defendants were convicted of the war crime of rape for the first time.<sup>126</sup> Even though rape was prosecuted, scholars have brought attention to the fact that the so-called Rape of Nanking was considered in only one short paragraph in the

<sup>123</sup> MacKinnon, *Are Women Human?* (n.1) 177.

<sup>124</sup> According to Patricia Viseur Sellers in the subsequent trials “...most concentration camp cases confirmed the common practice wartime medical experiments, especially the gender-based violence of forced sterilization, castrations and fertility experiments conducted against men and women in several concentration camps administered by the Nazi regime.” Citing the Trial of Obserturbannfuher Rudolf Franz Ferdinand Hoess, VII Law Reports of Trials of War Criminals 11, 1947 (crimes committed in the Auschwitz camp); the Trial of Joseph Kramezr and II 44 Others, Law Reports of War Criminals I (crimes committed in Birkenau) in Patricia Viseur Sellers, *The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as Means of Interpretation* (Women's Human Rights and Gender Unit (WRGU) 2007) 8.

<sup>125</sup> Sexual Violence and *the Triumph of Justice* © UN ICTY.

<sup>126</sup> Rape was charged as ‘inhumane treatment’ and ‘failure to respect family honour and rights’. General Iwane Matsui, Commander Shunroku Hata, and Foreign Minister Hirota were held criminally responsible for rape, as was Yamashita in separate and controversial trial proceedings. On Yamashita see: Ann Marie Prévost, ‘Race and War Crimes: The 1945 War Crimes Trial of General Tomoyuki Yamashita’ (1992) *Human Rights Quarterly* 303.

judgment.<sup>127</sup> Moreover, none of the 28 Japanese war criminals were prosecuted for the human rights violations suffered by the so-called “comfort women”. This is despite the fact that research has brought to light the mention of the comfort women system by the Chinese and Dutch governments during the proceedings. It would take five decades for the crimes perpetrated against comfort women to be recognised as war crimes and crimes against humanity by a Women’s Tribunal created by civil society.<sup>128</sup> Intersecting factors including sexism, self-interest and colonialism colluded in order to silence women’s experiences of the crimes perpetrated by the Nazis and Japanese forces.<sup>129</sup>

A turning point for international level recognition came with the promulgation of the 1949 Geneva Conventions which explicitly recognised for the first time that women shall be especially protected against any attack on their honour, in particular rape, enforced prostitution and indecent assault.<sup>130</sup> These Conventions delineate legal behaviour from illegal behaviour during war, making it explicit that violence against women of this type is a war crime.<sup>131</sup> However, these were not determined to constitute a ‘grave breach’ at the time. It was not until the establishment of the ICTY and the ICTR following the atrocities perpetrated in the former Yugoslavia and Rwanda that gender crimes were prosecuted as torture, war crimes, crimes against humanity and acts of genocide.

### **The “Extraordinary Advances” in Prosecuting Sexual Violence**

Since Nuremberg and Tokyo, the developments of international criminal law have led to “extraordinary advances” in the prosecution of gender crimes as war crimes, crimes against

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<sup>127</sup> On the marginalisation of the ‘rape of Nanking’ see: Theodor Meron, ‘Rape as a Crime under International Humanitarian Law’ (1993) *American Journal of International Law* 424; Iris Chang, *The Rape of Nanking: The Forgotten Holocaust of World War II*, vol 997 (New York: Basic Books 1996). See also fictional films such as *The Flowers of War* (2011); *John Rabe* (2009); *Nanking* (2007).

<sup>128</sup> Christine Chinkin, ‘Women’s International Tribunal on Japanese Military Sexual Slavery’ (2001) *American Journal of International Law* 335. There seems to be one documented case of prosecution for comfort women: Washio Awochi, was prosecuted by a Dutch court for forcing a Dutch woman into prostitution. Case No 76. Netherlands Temporary Court Martial at Batavia (judgment Delivered on 25<sup>th</sup> October, 1946). For a recent case see: *Isabelita Vinuya et al. v. Executive Secretary of Philippines et al. Supreme Court of Manila*. GR No. 162230 April 28, 2010.

<sup>129</sup> Nicola Henry has argued that even where rape was mentioned in these proceedings, it was drawn on to “...construct a narrative of victorious masculinity, as opposed to any concern or understanding for women’s human rights.” Henry, *War and Rape: Law, Memory, and Justice* (n.120) 44.

<sup>130</sup> On the historic prohibitions of rape in international humanitarian instruments see Patricia Viseur Sellers, ‘The Cultural Value of Sexual Violence’ (1999) 93 *American Society of International Law Proceedings* 312.

<sup>131</sup> Article 27. Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.

humanity and genocide.<sup>132</sup> Since the 1990s, feminist scholarship, intense lobbying and the introduction of female judges and personnel have all contributed to the recognition of harms disproportionately and differentially suffered by women and girls in conflict. The enumeration of rape as a crime against humanity in the Statutes of the ICTY and ICTR for the first time and the early appointment of Patricia V. Sellers as the Gender Advisor to the *ad hoc* Tribunals ensured that unprecedented attention would be afforded to these crimes.



Screenshot 2: Gender Advisor to the ICTY and ICTR Prosecutor Patricia V. Sellers. 20.12.<sup>133</sup>

The Gender Advisor (pictured above) carried out critical work to include gender crimes in the indictments and to create a working environment free from gender discrimination. Further, interventions by Judge Elizabeth Odio Benito at the ICTY and Judge Navanethem Pillay at the ICTR ensured that the prosecution teams included harms committed against women in their case strategies. In the still below from the documentary *Sexual Violence and the Triumph of Justice* we see Judge Elizabeth Odio Benito, former judge of the ICTY, provide a reminder to the prosecution lawyers that rape had been listed for the first time in the history of humanitarian law as a crime and that “there would be no justice unless women are part of that justice.”<sup>134</sup>

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<sup>132</sup> Kelly D Askin, 'Prosecuting Wartime Rape and other Gender-related Crimes under International Law: Extraordinary Advances, Enduring Obstacles' (2003) 21 Berkeley Journal of International Law 288.

<sup>133</sup> *Sexual Violence and the Triumph of Justice* © UN ICTY.

<sup>134</sup> 8:40 minutes of *Sexual Violence and the Triumph of Justice* documentary. See also *Prosecutor v Dragon Nikolic*, Indictment No. IT-94-2-PT (1994).





Screenshot 3: Judge Odio Benito providing a reminder to the Court. 8.19.<sup>135</sup>

Following these reminders to include gender crimes in the charges, there have been a number of “landmark cases” on crimes of sexual violence.<sup>136</sup> According to the ICTY statistics “almost half of those convicted by the ICTY have been found guilty of elements of crimes involving sexual violence” against both men and women. More concretely, since 1998 jurisprudence has emerged from the *ad hoc* tribunals holding those responsible with *inter alia*, rape as a crime against humanity;<sup>137</sup> sexual violence and rape as a violation of the laws and customs of war;<sup>138</sup> sexual violence as a component of genocide;<sup>139</sup> rape and sexual violence as torture as crimes against humanity;<sup>140</sup> and sexual violence as enslavement as a crime against humanity.<sup>141</sup> In 2012, Charles Taylor was convicted by the

<sup>135</sup> *Sexual Violence and the Triumph of Justice* © UN ICTY.

<sup>136</sup> The ICTY has identified its own “landmark” case load as including: the *Tadic* case, the first ever trial for sexual violence against men; the *Celebici* case, establishing rape as torture; *Furundizija*, in which the charges were made up solely of sexual violence in a single indictment; *Kunarac*, which established rape and enslavement as crimes against humanity and finally, *Krstic* in which the links between rape and ethnic cleansing were established ICTY Outreach Programme. Crimes of Sexual Violence: Landmark cases. Last accessed 15 March 2015. <http://www.icty.org/sid/10314>. *Prosecutor v. Tadic* IT-94-1-T, (May 7, 1997); *Prosecutor v. Delacic et al.*, IT-96-21-T, (Nov. 16, 1998); *Prosecutor v. Furundzija*, IT-95-17/1-T, (July, 21, 2000); *Prosecutor v. Kunarac, Kovac and Vukovic*, IT-96-23 (October 22, 2001); *Prosecutor v. Krstic*, IT-98-33-T, (August 2, 2001).

<sup>137</sup> *Prosecutor v. Akayesu*.

<sup>138</sup> Such as outrages upon personal dignity, as a violation of Common article 3, as persecution, inhumane acts or enslavement.

<sup>139</sup> *Prosecutor v. Akayesu*, *Prosecutor v. Muhimana*, ICTR-95 -1B-T, (April. 25, 2005); *Prosecutor v. Gacumbitsi*, ICTR-2001-64-T, (June 17, 2004).

<sup>140</sup> *Prosecutor v. Kvočka et al.*, IT 98-30/&-T (Nov. 2, 2001).

<sup>141</sup> *Prosecutor v. Kunarac*.

Special Court of Sierra Leone for 11 counts, including sexual violence as part of the war crime of committing acts of terror and as outrages upon personal dignity.<sup>142</sup>

In addition to convicting the individuals responsible for the crimes, the Tribunals have made important and symbolic statements which confirm that these crimes are of the most serious kind. For example, in their decision convicting Jean Paul Akayesu at the ICTR, the Trial Chamber stated “Rape and sexual violence constitute one of the worst ways of harming the victim as he or she suffers both bodily and mental harm.”<sup>143</sup> Richard Goldstone has noted that this pronouncement is significant as the judges “...referred to “he” as well as “she” highlighting that sexual violence affects both men and women.”<sup>144</sup> The ICTY and ICTR have thus prosecuted men and women for crimes of sexual violence and have recognised men and women as victims of sexual violence.<sup>145</sup>

In addition, the *ad hoc* Tribunals and internationalised courts have developed increasingly sophisticated case law condemning acts of sexual violence which include mutilation of genitalia and other body parts;<sup>146</sup> forced nudity;<sup>147</sup> enforced fellatio;<sup>148</sup> enforced acts of incest;<sup>149</sup> and public displays of sexual violence against women.<sup>150</sup> They have further documented and convicted those responsible for sexual slavery as a crime against humanity for the first time drawing attention to how women and girls are held and raped, transferred around properties, sold, and forced to carry out household chores in ways which illustrate that women are targeted in specific ways due to their gender.<sup>151</sup>

### *Modes of Liability*

The jurisprudence above is underpinned by important developments of the different modes of liability under which individuals can be prosecuted in international courts. While

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<sup>142</sup> *Prosecutor v. Charles Taylor*. SCSL-03-01-T. (May 18, 2012). The Trial Chamber found: “witnesses testified that the perpetrators of rape or sexual slavery forced women and girls to undress, sometimes in public, as a prelude to the rape; that many women and girls were raped or gang raped in public, frequently in front of neighbours or members of their community and/or in the presence of husbands and/or relatives who were forced to watch. Several witnesses testified that an object, such as a piece of wood, was inserted into the vaginas of victims after the rape or gang rape. The Trial Chamber considers that these actions resulted in further humiliation and degradation of the victims, thus aggravating the crime of outrages upon personal dignity.” para 1196.

<sup>143</sup> *Prosecutor v. Akayesu*, para 687 and 731.

<sup>144</sup> Goldstone, ‘Prosecuting Rape as a War Crime’ (n.64) 277.

<sup>145</sup> The first conviction relating to sexual violence involved male prisoners in *Prosecutor v. Tadic*.

<sup>146</sup> *Prosecutor v. Akayesu* para 733.

<sup>147</sup> *Ibid.* para 10A.

<sup>148</sup> *Prosecutor v. Delacic et al.*

<sup>149</sup> *Prosecutor v. Ranko Cesic*, IT-95-10/1-S, (March 11, 2007), paras 13-14 regarding Incident 4.

<sup>150</sup> *Prosecutor v. Niyitegeka*, ICTR-96-14-T, (May 16, 2003) para. 416.

<sup>151</sup> *Prosecutor v. Kunarac*.

in the majority of cases the accused is charged for physically committing the rapes or sexual violence, in some cases the courts and tribunals have convicted individuals where the acts have been carried out by others (indirect perpetration). The development of joint criminal enterprise (JCE), which has been referred to as the “darling” mode of liability of prosecution teams, is an integral part of the story of the prosecutions of sexual violence at the ICTY and ICTR.<sup>152</sup> Patricia V. Sellers has argued that JCE “...provides a useful, lucid framework for joint liability, especially for participant/perpetrators who are physically far removed from the locations of sexual assault crimes, including military and political leaders.”<sup>153</sup>

Under this mode, the prosecution teams at the ICTY and ICTR are able to charge individuals even where they are materially or causally remote from the location where the crimes were committed. While JCE was not provided for expressly in the ICTY Statute, the Tribunal in *Tadic* found that it was “firmly established in customary international law.”<sup>154</sup> The Appeals Chamber found that there were three different types of joint criminal enterprise in international law: basic, systematic and extended. The Appeals Chamber defined the three types as follows:

First, in cases of co-perpetration, where all participants in the common design possess the same criminal intent to commit a crime (and one or more of them actually perpetrate the crime, with intent). Secondly, in the so-called “concentration camp” cases, where the requisite mens rea comprises knowledge of the nature of the system of ill-treatment and intent to further the common design of ill-treatment... With regard to the third category of cases, it is appropriate to apply the notion of “common purpose” only where the following requirements concerning mens rea are fulfilled: (i) the intention to take part in a joint criminal enterprise and to further – individually and jointly – the criminal purposes of that enterprise; and (ii) the foreseeability of the possible commission by other members of the group of offences that do not constitute the object of the common criminal purpose. Hence, the participants must have had in mind the intent, for instance, to ill-treat prisoners of war (even if such a plan arose extemporaneously) and one or

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<sup>152</sup> For reference as the ‘darling’ of prosecution teams see: Antonio Cassese, 'The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise' (2007) 5 Journal of International Criminal Justice 109, 109.

<sup>153</sup> Sellers, *The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as Means of Interpretation* (n.124) 16.

<sup>154</sup> *Prosecutor v Tadic*, Appeal Judgment, para 220.

some members of the group must have actually killed them. In order for responsibility for the deaths to be imputable to the others, however, everyone in the group must have been able to predict this result.<sup>155</sup>

As it has come to be known, JCE III, where an individual can be held responsible for unplanned crimes where these crimes are foreseeable, has been a controversial but effective means of securing convictions of high level perpetrators for sexual violence. For example, in the case of *Kvočka*, four of the accused were found guilty of gender crimes on the basis that:

In the Omarska camp, approximately 36 women were held in detention, guarded by men with weapons who were often drunk, violent and physically and mentally abusive and who were allowed to act with virtual impunity. Indeed, it would be unrealistic and contrary to all rational logic to expect that none of the women held in Omarska, placed in circumstances rendering them especially vulnerable would be subjected to rape or other forms of sexual violence. This is particularly true in light of the clear intent of the criminal enterprise to subject the targeted group to persecution through such means as violence and humiliation.<sup>156</sup>

Additionally, in the *Prosecutor v. Karemera*, the ICTR convicted both the accused (the Minister of the Interior in the Interim Government and the President of the Mouvement Revolutionnaire National pour la Democratie et le Developpement party) for, amongst other things rape and sexual violence committed against women and girls during the Rwandan genocide.<sup>157</sup> Mathieu Ndirumapatse was found guilty even though he was out of the country at the time the sexual violence was committed and Edouard Karemera was convicted although he did not individually take part in the rapes or sexual violence. Instead, they were held responsible under the doctrine of superior responsibility and “extended” joint criminal enterprise (JCE III). While this judgment has been heralded as a “milestone” in prosecuting sexual violence, the findings of guilt under the extended form of JCE or JCE III have been criticised by scholars and practitioners.<sup>158</sup>

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<sup>155</sup> Ibid.

<sup>156</sup> *Prosecutor v. Kvočka*, para 327.

<sup>157</sup> *Prosecutor v. Karemera* ICTR-98-44, (Sept. 29, 2014).

<sup>158</sup> Mohamed Elewa Badar “‘Just Convict Everyone!’ – Joint Perpetration: From Tadic to Stakic and Back Again’ (2006) International Criminal Law Review 293; Case of NUON Chea et al., 002/19-09-2007-ECCC/SC, Case 003 Defence Submission in Intervention or Amicus Curiae Brief on JCE III Applicability, 12 January 2015; more generally on command responsibility and joint criminal

While the concept was used extensively at the ICTY and the ICTR, the subsequent backlash suggests that JCE III will no longer play a central role in holding perpetrators to account for gender crimes committed by others.<sup>159</sup> This need not alarm those working to secure accountability for gender crimes, with Patricia V. Sellers presciently arguing that “...only future ICC prosecutions and judgments can unearth the long term legal acceptance and feasibility of JCE liability.”<sup>160</sup> Instead, she suggests that the *Blaskic* case, where the accused was held responsible for inhumane acts including sexual violence under the doctrine of superior responsibility, resulted in a reaffirmation by the ICTY that “...gender-based violence, in particular rape can be characterized as foreseeable crimes” in circumstances similar to *Krstic* and *Kvočka*.<sup>161</sup> This suggestion seems to be reflected in the 2014 ICC Policy Paper which cites the cases of *Krstic* and *Prlić* in the section on superior responsibility.<sup>162</sup> In the cases of *Krstic* and *Kvočka*, the ICTY found the accused responsible for acts including rape on the grounds that these acts were a natural and foreseeable part of the campaign for ethnic cleansing.

Thus while the days of using JCE III to prosecute and convict individuals for gender crimes may be in the past, given the ECCC’s rejection of JCE III and the ICC’s move away from the doctrine,<sup>163</sup> the alternative principles of indirect perpetration (command and superior responsibility) should ensure that individuals far from the scene of the crime but who are most responsible can still be held individually criminally liable for these crimes.

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enterprise see the edited collection: Shane Darcy and Joseph Powderly eds, *Judicial Creativity at the International Criminal Tribunals* (Oxford 2010).

<sup>159</sup> The ICC Policy Paper 2014 does not mention Joint Criminal Enterprise in its section on modes of liability and instead focuses on Article 25 and 28 (command and superior responsibility). See also ECCC Pre-Trial Chamber Decision on the Appeals Against the Co-Investigating Judge's Order on Joint Criminal Enterprise (JCE), Criminal Case File No 002/19-09-2007/OCIJ (PTC38) (20 May 2010). On the continuing uncertainty between the model to adopt see: Pre Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean Pierre Bemba Gombo. ICC-01/05-01/08. 15 June 2009. See also Robert Cryer ‘Command Responsibility at the ICC and ICTY: In Two Minds on the Mental Element’ July 20, 2009, EJIL talk! Last accessed 15 April, 2015. <http://www.ejiltalk.org/command-responsibility-at-the-icc-and-icty-in-two-minds-on-the-mental-element/>

<sup>160</sup> Sellers, ‘The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as Means of Interpretation’ (n.124) 17.

<sup>161</sup> *Prosecutor v. Blaskic*, IT-95-14-T, (March 3, 2000), para 721.

<sup>162</sup> 2014 ICC policy paper (n.112). *Prosecutor v. Krstić*, para. 616. *Prosecutor v. Prlić et al.*, IT-04-74-T, (May 29, 2013), paras. 72, 284, 437, 834, and 1014.

<sup>163</sup> Stefano Manacorda and Chantal Meloni, ‘Indirect Perpetration versus Joint Criminal Enterprise Concurring Approaches in the Practice of International Criminal Law?’ (2011) 9 *Journal of International Criminal Justice* 159. See also footnote 159.

### Clarity and Influence

Along with the developments outlined above, there have been other dividends to the prosecution of gender crimes, with the judgments cited as precedents by regional and national courts. In the field of international criminal law, hybrid tribunals (which use a mixture of international and domestic law) have used the definitions and decisions of the *ad hoc* Tribunals to find individual responsibility for gender crimes committed in the particular context of the conflict.<sup>164</sup> For example, the Special Court of Sierra Leone (SCSL), found that “forced marriage” constitutes a separate crime against humanity from enslavement under “other inhumane acts”.<sup>165</sup> Forced marriage and rape is also the subject of case 002/02 in the ECCC where the accused Nuon Chea and Khieu Samphan have already been convicted for crimes against humanity and sentenced to life imprisonment. In this judgment the Chamber found some evidence of arranged and involuntary marriage and held that the regulation of marriage was a policy.”<sup>166</sup>

Furthermore, the prosecution of gender crimes at the international level has had an impact on domestic courts.<sup>167</sup> Following Security Council Resolution 1503 (2003) splitting the prosecutorial duties of the ICTY and the ICTR, the ICTY was mandated to “...concentrate on the prosecution and trials of the most senior leaders suspected of being most responsible for crimes within the ICTY’s jurisdiction and to transferring cases involving those who may not bear this level of responsibility to competent national jurisdictions.”<sup>168</sup> This has resulted in the ICTY relinquishing jurisdiction to national courts in Bosnia in the cases of at least six individuals indicted for gender crimes.<sup>169</sup> In 2006, a Trial Panel in the war crimes chamber of the Court of Bosnia and Herzegovina sentenced Stankovic to 16 years

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<sup>164</sup> Valerie Oosterveld, 'Lessons from the Special Court for Sierra Leone on the Prosecution of Gender-Based Crimes' (2009) 17 American University Journal of Gender, Social Policy & Law 407.

<sup>165</sup> *Prosecutor v. Brima, Kamera, Kanu*, SCSL-04-16-A, Appeal Chamber Decision (Feb. 22, 2000). See also Neha Jain, 'Forced Marriage as a Crime against Humanity Problems of Definition and Prosecution' (2008) 6 Journal of International Criminal Justice 1013.

<sup>166</sup> Case No 002/02 ECCC (April 4, 2014) para 130.

<sup>167</sup> Jenia Iontcheva Turner, 'Nationalizing International Criminal Law' (2005) 41 Stanford Journal of International Law 1.

<sup>168</sup> Security Council resolution 1503 (2003).

<sup>169</sup> On rule 11b bis see Simpson, *Law, War & Crime: War Crimes, Trials and the Reinvention of International Law* (Polity 2007) 52-53. The accused transferred include: Gojko Jankovic, Radovan Stankovic, Zeljko Mejakic, Momcilo Gruban, Dusko Knezevic, Dusan Fustar. ICTY website 'In Numbers' <http://www.icty.org/sid/10586> Accessed April 1, 2015.

imprisonment for multiple counts of crimes against humanity, including rape, enslavement and torture in the *Foca* municipality.<sup>170</sup>

In Argentina, where a rich jurisprudence has developed on international crimes, the federal courts have convicted those responsible for rape as torture or rape as a crime against humanity in numerous cases.<sup>171</sup> For example, in the *Molina* case, the judges cited both the jurisprudence of regional human rights courts, and the *ad hoc* tribunals when convicting Molina for the rapes of two women in the clandestine detention centre “La Cueva” during the military dictatorship.<sup>172</sup> These are important developments since the complementarity principle enshrined in the Rome Statute makes it clear that national courts are primarily responsible for prosecuting international crimes.<sup>173</sup>

In addition to the domestic impact, the developments have led to a cross-fertilisation and recognition under human rights law of violations of women’s rights. Within human rights law, the definition of enslavement established in *Kunarac* was referred to by the European Court of Human Rights, to find Member States responsible under Article 2 of the ECHR for the death of a woman who had been subjected to human trafficking.<sup>174</sup> With regard to the Inter-American System of Human Rights, Juan Pablo Pérez-León Acevedo has argued that the Inter-American Court of Human Rights has influenced the international tribunals and in turn, ICL has influenced the Court of San Jose.<sup>175</sup> For example, in the *Celebici* case, the ICTY cited the Inter-American Commission case of *Raquel Mejia v. Peru*, to help interpret the element of “severe pain and suffering” in the context of rape as torture.<sup>176</sup> More recently, the Inter-American Court of Human Rights has referenced both the *Akayesu* and *Celebici*

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<sup>170</sup> *Prosecutor’s Office of Bosnia and Herzegovina v Stanković*, First Instance Verdict, X-KRZ-05/70 (2006). Claire Garbett, ‘Localising Criminal Justice: An Overview of National Prosecutions at the War Crimes Chamber of the Court of Bosnia and Herzegovina’ (2010) 10 Human Rights Law Review 558.

<sup>171</sup> For the list of cases see Paloma Soria Montanez, ‘Looking Forward: The Prosecution of Sex Crimes in National Courts’ in Morten Bergsmo eds. *Examining Thematic Prosecutions and the Challenges of Understanding and Proving International Sex Crimes* (n.70).

<sup>172</sup> Tribunal Oral en lo Criminal Federal de Mar del Plata, *Molina, Gregorio Rafael*, 2086, Judgment, July 2010, 19–20.

<sup>173</sup> Article 17 Rome Statute. Jann K Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (Oxford University Press 2008); Susana SáCouto and Katherine Cleary, ‘The Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the International Criminal Court’ (2009) 17 American University Journal of Gender, Social Policy & Law 337.

<sup>174</sup> *Rantsev v. Cyprus and Russia*, para 68.

<sup>175</sup> Juan Pablo Pérez-León Acevedo, ‘International Criminal Law Sources in the Jurisprudence of the Inter-American Court of Human Rights: Some Comparative Considerations’ Centro de Derechos Humanos de Nuremberg, December 2008 at [http://www.menschenrechte.org/lang/en/strafergerichtsbarkeit/inter\\_am\\_syst\\_paper](http://www.menschenrechte.org/lang/en/strafergerichtsbarkeit/inter_am_syst_paper) accessed 3 June 2014.

<sup>176</sup> *Prosecutor v. Delacic et al.*, para. 486.

cases in order to find Mexico and Peru responsible for sexual violence perpetrated by State agents.<sup>177</sup>

### **The Procedural Landmarks: Facilitating Progress**

The jurisprudential breakthroughs at the *ad hoc* Tribunals have been facilitated by specific rules of evidence and procedure. Even before the ICTY was established, feminist scholars voiced concern over the rules which would govern trials involving gender crimes. Feminist legal scholars set out to create best practice rules which would avoid some of the pitfalls of domestic prosecutions of sexual violence and rape discussed in the next chapter. In the early days of the establishment of the Tribunal, feminist scholars and activists submitted a detailed proposal to the judges of the ICTY in order to influence the rules adopted for the prosecution of rape and other gender crimes. The proposal aimed to “...enhance the possibility that what may be the first international prosecution of rape will be effective, tolerable and just for survivors without sacrificing the legitimate rights of the accused.”<sup>178</sup> Ronda Copelon’s team called for a restriction of the liberal rules of evidence in cases of sexual violence. They stated:

...certain aspects of sexual violence require strict limits to protect against the introduction of traditional stereotypes and misconceptions masquerading as evidence. These include traditional beliefs that women invite and fabricate rape and that the “good” woman is chaste and resists to the utmost. These prejudices have given rise to rules requiring corroboration of the victim’s testimony and permitting introduction of evidence of her prior sexual conduct to show consent as well as lack of credibility.<sup>179</sup>

The creation of the Tribunal gave the authors of the proposal an opportunity to draw on their experiences and scholarship of domestic evidentiary measures, which according to Rosemary Hunter have “always” singled out the evidence of victims of rape and sexual violence for special treatment.<sup>180</sup>

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<sup>177</sup> *Rosendo Cantu v. Mexico* para. 119 footnote 134; *Miguel Castro Castro v. Peru* Inter-Am. Ct.H.R (ser. C) No 160 para. 306 (Nov. 25, 2006).

<sup>178</sup> Jennifer Green and others, 'Affecting the Rules for the Prosecution of Rape and Other Gender-Based Violence Before the International Criminal Tribunal for the Former Yugoslavia: A Feminist Proposal and Critique' (1994) 5 *Hastings Women's Law Journal* 171. Preface.

<sup>179</sup> *Ibid*, 171.

<sup>180</sup> Rosemary Hunter, 'Gender in Evidence: Masculine Norms vs. Feminist Reforms' (1996) 19 *Harvard Women's Law Journal* 127.



As a result of the concerted efforts and lobbying by feminist organisations, lawyers and academics, the rules of the ICTY have been referred to as “ground-breaking” and “a prototype” of the first international procedural rules to govern evidence of sexual violence.<sup>181</sup> Kate Fitzgerald has argued that the rules are an “...explicit rejection of standards of evidence which have traditionally discriminated against women in court and impeded their access to criminal justice systems domestically.”<sup>182</sup> Similarly, Christine Chinkin and Hilary Charlesworth have noted that the Rules of Procedure and Evidence (RPE) are “...significant in its response to many criticisms of the treatment of rape victims in national legal systems.”<sup>183</sup>

The prototype rules are mainly contained in Rule 96 of the RPE. Rule 96 (i) provides that “in cases of sexual assault no corroboration of a victim’s testimony shall be required.” This means that the prosecution does not have to produce witnesses (other than the survivors) or forensic evidence to corroborate these claims.<sup>184</sup> In addition, Rule 96 (iv) provides that “prior sexual conduct of the victim shall not be allowed in evidence.”<sup>185</sup> In the *Celebici* case, the Trial Chamber stated that the rationale behind the rule is to “adequately protect victims from harassment, embarrassment and humiliation.”<sup>186</sup> The judges added that admission of such evidence would “lead to a confusion of issues, therefore offending the fairness of the proceedings,” that it would amount merely to an attempt to “call the reputation of the victim into question,” and that it would cause “further distress and emotional damage to the witness.”<sup>187</sup>

In addition to the above, Rule 96 regulates the issue of consent in proceedings involving charges of rape. Initially, rule 96 (ii) made consent irrelevant: the accused could not argue that sexual intercourse had taken place but was consensual. However, following huge controversy and claims that this would affect the accused’s rights to a fair trial, the rule was

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<sup>181</sup> Sellers, 'Gender Strategy is Not Luxury for International Courts' (n.118) 306. Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia. Original version, 11 February 1994. The rules and subsequent amendments are available online on the Tribunal website: <http://www.icty.org/sections/LegalLibrary/RulesofProcedureandEvidence>

<sup>182</sup> Kate Fitzgerald, 'Problems of Prosecution and Adjudication of Rape and other Sexual Assaults under International law' (1997) 8 European Journal of International Law 638, 639.

<sup>183</sup> Charlesworth and Chinkin, *The Boundaries of International Law: A Feminist Analysis* (n.12) 324.

<sup>184</sup> Sellers, 'Gender Strategy is Not Luxury for International Courts' (n.118) 307.

<sup>185</sup> In the *Celebici* trial, the defence attempted to reference the prior sexual conduct of a prosecution witness testifying about sexual violence. The Trial Chamber ordered that the reference be removed from the record. *Prosecutor v. Delacic et al*, Decision on the Prosecution’s Motion for the Redaction of the Public Record, (June 5, 1997).

<sup>186</sup> ICTY Website ‘Innovative Procedures’ <http://www.icty.org/sid/10313> accessed 1 April 2015.

<sup>187</sup> Ibid.

modified following a number of plenary sessions.<sup>188</sup> The rule now provides that consent shall not be taken into account if the victim has been subjected to or threatened with or has reason to fear violence, duress, detention or psychological oppression, or if they reasonably believed that if they did not submit, another might be so subjected, threatened or put in fear.<sup>189</sup> The accused can only present evidence of consent after an application to the court in which a Chamber will decide whether the evidence is relevant and credible. This application occurs *in camera*.

Catharine Mackinnon has noted that the ICTR (at least initially) “... grasped that inquiring into individual consent to sex in a clear context of sexual coercion made no sense at all” but the picture has since become confused.<sup>190</sup> This is because, as Valerie Oosterveld has argued, there is, as yet “...no single, agreed-upon set of elements for the crime of rape under international criminal law, rather there are four approaches to defining the elements of rape.”<sup>191</sup> While the RPE have been celebrated as bringing in best practice rules, as discussed further in the next chapter, the definition of the crime of rape and the issue of consent continues to cause uncertainty and contestation.

### **Special and Protective Measures**

Another major innovation and means of securing evidence is the availability of a range of special and protective measures for witnesses testifying in war crimes trials. The problem of witness intimidation and fears of re-victimisation has led to the implementation of special measures to facilitate the ordeal of testifying in court.<sup>192</sup> Both in domestic and international spheres, scholars and practitioners have found that reassuring a witness pre-

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<sup>188</sup> Anne-Marie de Brouwer and others, *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Intersentia 2013) 122.

<sup>189</sup> Amended 3 May 1995. Part (iii) reads before the evidence of the victim’s consent is admitted, the accused shall satisfy the Trial chamber *in camera* that the evidence is relevant and credible. Revised 30 Jan 1995.

<sup>190</sup> MacKinnon, *Are Women Human?* (n.1) 241.

<sup>191</sup> Valerie Oosterveld, 'The Gender Jurisprudence of the Special Court for Sierra Leone: Progress in the Revolutionary United Front Judgments' (2011) 44 *Cornell International Law Journal* 49, 54.

<sup>192</sup> On the issue of witnesses more generally see: Patricia M Wald, 'Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal' (2002) 5 *Yale Human Rights & Development Law Journal* 217; Nicola Henry, 'Witness to Rape: The Limits and Potential of International War Crimes Trials for Victims of Wartime Sexual Violence' (2009) 3 *International Journal of Transitional Justice* 114; Anne de Brouwer, 'Reparation to Victims of Sexual Violence: Possibilities at the International Criminal Court and at the Trust Fund for Victims and their Families' (2007) 20 *Leiden Journal of International Law* 207; Eric Stover, *The Witnesses: War Crimes and the Promise of Justice in the Hague* (University of Pennsylvania Press 2011). Victims at the ICC are free to choose their own legal representation and under Article 75 of the Rome Statute victims may be provided reparations by the court. Conor McCarthy, *Reparations and Victim Support in the International Criminal Court*, vol 88 (Cambridge University Press 2012); Carla Ferstman, 'The Reparation Regime of the International Criminal Court: Practical Considerations' (2002) 15 *Leiden Journal of International Law* 667.

trial that protective measures are in place is vital to securing their live evidence and testimony. As Christine Chinkin sets out in her *amicus curiae* brief presented in the *Tadic* case:

The culture and environment of criminal proceedings can be especially intimidating for survivors of sexual assault. A victim of rape is often stigmatized as though her behaviour were wrong. These witnesses must provide intimate details of what was done to them that are humiliating and degrading. Some women may come from cultures where sexual matters are not openly discussed, and certainly not in front of males and in open court. Witnesses who are identified may be vulnerable to rejection from within their own community, as well as to hostility from the defendant, his family, or associates. Survivors may have maintained silence within their own families and communities about what has occurred, feeling ashamed and unable to risk isolation. They may feel that speaking out could impact upon their standing and marriageability within their own community, or in a new community to which they have relocated. In some Muslim communities, for example, virginity is regarded as a pre-requisite for marriage.<sup>193</sup>

In the first case of an international crime to be tried since the Nuremberg and Tokyo Tribunals, the ICTY in the *Tadic Protective Measures Decision*, recognised that “...rape and sexual assault often have particularly devastating consequences” and that “...traditional court practice and procedures have been known to exacerbate the victim’s ordeal during trial which can result in a feeling of ‘being raped a second time’.”<sup>194</sup> Consequently, Rule 75 and Rule 79 of the RPE enshrine a number of protective measures for witnesses called to testify at the ICTY.<sup>195</sup>

According to Sara Sharratt, at the ICTY since 2009 60 women have testified in 18 different cases about having been sexually assaulted during the conflict and out of this number only

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<sup>193</sup> Christine Chinkin, 'International Tribunal for the Former Yugoslavia: Amicus Curiae Brief on Protective Measures for Victims and Witnesses' (1996) 7 Criminal Law Forum 179, 184.

<sup>194</sup> *Prosecutor v Tadic, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses*, IT-94-1, (August 10, 1995) para 46. In the *Tadic* case, it was also established for the first time that the Tribunal can grant defence witnesses temporary impunity. See Scharf, *Balkan Justice: The Story behind the First International War Crimes Trial since Nuremberg* (n.63) 103.

<sup>195</sup> i) Taking the witness’ name and/or identifying information off the Tribunal’s public record  
ii) Modifying the image of the witness’ face and/or voice in televised proceedings  
iii) Assigning the witness a pseudonym  
iv) Allowing the witness to testify in closed session  
v) Allowing the witness to testify remotely via video.

four testified openly without any protective measures and using their own name.<sup>196</sup> Approximately 87 percent testified with voice and image distortion whilst 28, nearly half testified in closed session. The author criticises the assumption that women who are raped are in need of protection such as protective measures. She argues that:

Survivors of rape and sexual violence are thus testifying most of the time under protective measures and often behind closed doors, reinforcing and rendering women in general as rapeable and vulnerable and what this author calls ghosts. Testifying behind closed doors or only about rape and sexual violence supports the discourse that it is the worst thing or the defining event that can happen to women and that rape is shameful.<sup>197</sup>

However, in the *Foca* case, the availability of protective measures was a key measure to obtaining the testimony of the 16 witnesses called to take the stand. According to Tejshree Thapa, the crime analyst and investigator in the case, “...there was a moment about six weeks before the trial came when I thought none of them were coming. It took a lot of effort... just to get them to come.”<sup>198</sup> In her extended interview in the documentary *Sexual Violence and the Triumph of Justice*, Wendy Lobwein, the former Director of the Witness and Victims Unit (WVU), speaks about the challenges of getting the women to testify at the Tribunal. She speaks about the distress the women had in coming to the Hague to testify, including their fear of reprisals following the end of the non-international armed conflict where many perpetrators and victims continue to live side by side.

Wendy Lobwein’s interview thus challenges the prevailing idea that women have too much shame to testify and instead, points to the context of continuing violence which is depicted in the films. Further, she underlines that alongside the risk to the person danger of the witnesses, many women had to face telling their families about the sexual violence they had suffered during the war. In one case, a woman brought her son and husband to the ICTY, in order for them to learn about her suffering for the first time when she testified in the court. In another “extreme case”, one witness had to be relocated to a secret country where she is permitted limited contact with her family because of security concerns.

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<sup>196</sup> Sara Sharratt, *Gender, Shame and Sexual Violence: The Voices of Witnesses and Court Members at War Crimes Tribunals* (Ashgate Publishing, Ltd. 2011) 99.

<sup>197</sup> Ibid 100.

<sup>198</sup> John Hagan, *Justice in the Balkans: Prosecuting War Crimes in the Hague Tribunal* (University of Chicago Press 2010) 186.

Despite these dangers and fears, Wendy Lobwein states that not one of the women took up the option of testifying remotely via a courtroom monitor. Instead, the women wanted to be present in the courtroom and to give direct testimony using the screen as a form of protection from the public. Lobwein's comments are supported by the trial lawyers who have emphasised the strength and agency of the women testifying at the Tribunal. Peggy Kuo, one of the prosecutors in the *Foca* case, has stated a number of times that the women, many of whom were in their early twenties, were empowered by the proceedings. In relation to one witness who had been nervous to confront the perpetrator, she recalls:

...as the defendant was being brought in and as she was sitting at the witness stand, she glanced over. It was really amazing because she looked and she sat up. We could see her getting angry and strong, and we could almost read her thoughts, as if thinking, "You did this horrible thing to me and you thought you could get away with it, but look at me now. I am here in the courtroom and am about to tell the court and the whole world what you did to me, and you can't say anything while you are surrounded by armed guards." It was a great empowering moment for all of us to see that the process we were bringing about was having an immediate effect on individuals. She was able to testify and we were not planning to ask her to identify the defendant until later. But, she seemed so anxious to point him out that we asked her early in her testimony. After we got that over with, we were able to continue with her testimony calmly.<sup>199</sup>

Sara Sharratt's interviews also reveal that a number of women found looking the perpetrator in the eye a satisfying and empowering situation.<sup>200</sup> Whilst the protective measures in place enabled women to testify, they had the unintended effect of rendering the *Foca* case, a trial "without a face".<sup>201</sup> The pixelated images, distorted voices and the voice of the translator robbed the witnesses' voices of emotion and anger. Further, Peggy Kuo has argued that the pixilation meant that those outside of the courtroom were unable to see the power dynamics between the witnesses, lawyers and the accused.<sup>202</sup>

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<sup>199</sup> The trial chamber gave no positive probative weight to the in court identifications. *Prosecutor v. Kunarac*, para 561 and 562. Peggy Kuo, 'Prosecuting Crimes of Sexual Violence in an International Tribunal' (2002) 34 Case Western Reserve Journal of International Law 305.

<sup>200</sup> Sharratt, *Gender, Shame and Sexual Violence: The Voices of Witnesses and Court Members at War Crimes Tribunals* (n.196) 115.

<sup>201</sup> Peggy Kuo in *I Came to Testify*. PBS documentary 2011.

<sup>202</sup> Peggy Kuo, 'Prosecuting Crimes of Sexual Violence in an International Tribunal' (n.199).



Screenshot 4: Witness 87 pixelated in the *Foca* case 25: 19.<sup>203</sup>

## Conclusion

The visibility of gender crimes in the indictments and prosecutions is necessary to ensure that sexual and gendered harms are not considered an inevitable form of violence and warfare. In the *Akayesu* case, the judges at the ICTR emphasised: “The need for the prosecution of these crimes as a key component to stopping the global violence against women. Rape and sexual violence must be punished and be seen to be punished, if the cycle of sexual violence and other forms of violence is to be halted.”<sup>204</sup> War crimes trials and numerous UN Security Council Resolutions have sought to send out the message that these crimes are serious international crimes reaching the threshold of the most serious violations of humanitarian norms.<sup>205</sup> The advances in prosecuting those responsible for sexual violence in the context of mass atrocity have thus been lauded as a “triumph” of feminist engagements and practice in international law. These successes include the inclusion of these crimes in the Statutes, the conviction of individuals under different modes of liability and the introduction of best practice procedural rules, including special and protective measures.<sup>206</sup>

<sup>203</sup> *Sexual Violence and the Triumph of Justice* © UN ICTY.

<sup>204</sup> *Prosecutor v. Akayesu*, para 417.

<sup>205</sup> UN Security Council Resolutions: 1325 (2000), 1820 (2008), 1888 (2009), 1889 (2009), 1960 (2010) and 2106 (2013).

<sup>206</sup> See also Christine Chinkin, 'Reconceiving Reality: A Ten-Year Perspective' (2003) 97 American Society of International Law Proceedings 55, 55. “...initiatives have met with considerable success, for example in the inclusion of gender crimes within the jurisdiction of the international criminal

In its initial document looking at the ICTY's legacy regarding gender crimes, the Tribunal lists its achievements but also states that "...the ICTY's work has exposed ongoing obstacles in prosecuting sexual violence crimes, such as inconsistent approaches during investigations and prosecutions, the tendency to mischaracterize gender crimes as 'incidental' and the challenges of linking sexual violence crimes to senior officials."<sup>207</sup> Once launched the full document states that it will assess the overall picture of prosecuting sexual violence in the former Yugoslavia as reflected in the jurisprudence of the ICTY. It purports to also explore various procedural issues including the strategies for overcoming obstacles to secure convictions; an examination of prosecutorial discretion; evidentiary issues in sexual violence cases; lessons learned from the acquittals for sexual violence charges at the ICTY; and sentencing and enforcement of sentences for sexual violence crimes. The document will therefore provide a detailed legal examination of the Tribunal's work on prosecuting sexual violence recognising that the word "triumph" may not accurately reflect the overall picture.

In the next chapter I will argue that the declaration of a "triumph of justice" by the ICTY is hyperbolic and premature. Similarly, the claims made by critical feminist scholars such as Janet Halley and Karen Engle that these crimes have become hypervisible also seem to lack the empirical basis upon which these claims have been made. Adjusting the frame, the next chapter sets out some of the ways in which women's narratives have been silenced by the practice and procedure of the international courts.

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tribunals, the successful prosecution of such crimes by the ad hoc international criminal tribunals, the adoption of the Optional Protocol to the Convention on the Elimination of Discrimination against Women (CEDAW) and the introduction of external gender forums at the international financial institutions."

<sup>207</sup> Office of the Prosecutor of the International Criminal Tribunal for the former Yugoslavia, *Information Sheet: Prosecuting Sexual Violence Legacy Project* (September 2014).

### Chapter 3 Adjusting the Frame: Behind the Official Discourse

#### Introduction

This chapter shifts the focus from the achievements explored in the last chapter, to some of the critiques which have emerged in the field of ICL from within the institutions, and from feminist legal scholars working outside the courts and tribunals. Those working within international institutions have become aware that without an integrated gender strategy, the specific rules on gender crimes become futile in the face of more general procedural rules which are invoked by the participants to render gender crimes invisible. Those committed to prosecuting individuals for the perpetration of gender crimes thus face so-called “less visible obstacles” from the pre-investigative stage onwards as reflected later in the film analysis chapter on the film *Storm*. As Beth Van Schaak explains:

These obstacles are less visible than defects in positive law because they emerge in the practice of international criminal law at crucial yet shrouded stages of the penal process: investigation, charging, pre-trial plea negotiations, trial preparation, the provision of protective measures, and appeals. Most importantly, strong positive law is irrelevant where a commitment to gender justice does not infuse all stages of the development and implementation of a prosecutorial strategy.<sup>208</sup>

On one hand, this chapter continues the story of gender crimes in ICL by focusing on the practice of the international courts. It draws attention to the on-going definitional problems and argues that despite the enumeration of gender crimes in the statutes, prosecuting crimes such as rape and forced pregnancy remain problematic. It further considers the less visible obstacles which operate to exclude women’s narratives from the adversarial criminal proceedings. At a second level, the chapter delves into some of the theoretical critiques of the prosecution of sexual violence at the domestic and international level. Feminist legal scholars have argued that beyond procedure and practice, the law is inherently limited when it comes to including women’s stories in the courtroom. Accusations of sexism, stereotyping and essentialism have led feminist legal scholars to reconsider the current methods of prosecuting sexual violence and have raised fundamental questions about criminal law’s capacity to deal effectively with these crimes.

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<sup>208</sup> Beth Van Schaack, 'Obstacles on the Road to Gender Justice: The International Criminal Tribunal for Rwanda as Object Lesson' (2009) *American University Journal of Gender, Social Policy & the Law* 356, 358.



As will soon become evident, the examples drawn from the domestic literature are taken mainly from common law countries. This is because the original version of the RPE drafted by the judges was based, with very few exceptions, on the common law system.<sup>209</sup> This is not to say that there is not a blend of the two systems or that the procedures are fixed. As one prominent judge has stated the Tribunal “...should go down one road or the other and not keep crossing from side to side.”<sup>210</sup> Although the Tribunal’s rules have developed to incorporate aspects of the two systems the main tenants of the adversarial trial have been adopted with regard to the questioning of witnesses and the trial format (with the notable absence of a jury).<sup>211</sup> The international literature reflects this bias, with feminist legal scholars critiquing the use of adversarial trial techniques in prosecutions of gender crimes. The use of some civilian techniques, such as the intervention by Judge Elizabeth Odio Benito, illustrates that a blend of the systems could have advantages for the trial process. However, a detailed reflection on this comparative issue remains outside the scope of this thesis.

### **One Step Forwards, Two Steps Back? Definitions and Interpretations**

In the last chapter I set out how the enumeration of gender crimes in the statutes and the recognition of these crimes *de jure* are seen as important achievements in the field of international law. Significantly, it should be noted that the definition of rape in international criminal law is wider than in many domestic jurisdictions in terms of *actus reus*, with anal and oral rape included within its definition. This in and of itself could be considered another example of progress. However, the agonising over the definition(s), elements and contours of the crime of rape betray the unease which courts and tribunals have with adjudicating this particular crime. This section provides an overview and interrogation of the definition of two particular crimes now enumerated in the Rome Statute: rape and forced pregnancy. The brief consideration illustrates the continued

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<sup>209</sup> Vladimir Tochilovsky, ‘The Nature and Evolution of the Rules of Procedure and Evidence’ in Karim AA Khan, Caroline Buisman and Christopher Gosnell, *Principles of Evidence in International Criminal Justice* (Oxford University Press 2010); Antonio Cassese, ‘The ICTY: A Living and Vital Reality’ (2004) 2 *Journal of International Criminal Justice* 585; Alex Whiting ‘The ICTY as a Laboratory of International Criminal Procedure’ in Albertus Henricus, Joannes Swart and others, *The Legacy of the International Criminal Tribunal for the former Yugoslavia* (Oxford University Press 2011) 87.

<sup>210</sup> Patricia M Wald, ‘ICTY Judicial Proceedings-An Appraisal from Within’ (2004) 2 *Journal of International Criminal Justice* 466.

<sup>211</sup> Doris Buss, ‘Performing Legal Order: Some Feminist Thoughts on International Criminal Law’ (2011) 11 *International Criminal Law Review* 409; Richard May and Marieke Wierda, ‘Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha’ (1998) 37 *Columbia Journal of Transnational Law* 725.

difficulties that exist with prosecuting these crimes and how these problems may be linked to the definitions in the statutes.

### *The Definition of Rape in ICL*

The definition and the elements of the crime of rape in international criminal law have been discussed extensively by feminist legal theorists who largely fall into two camps. Catharine Mackinnon has advocated an approach in which coercive circumstances are inherent in the contexts of conflict and genocide (the *Akayesu* approach), while others have called for an approach mirroring domestic frameworks in which lack of consent remains an element of the crime of rape.<sup>212</sup> Rather than provide a comprehensive review of these debates and the critiques, this section aims to highlight some of the judicial uncertainty which has shrouded the prosecution of this crime in practice as set out below.<sup>213</sup>

The first breakthrough decision by an international criminal tribunal on rape perpetrated against women was the *Akayesu* case before the ICTR.<sup>214</sup> The ICTR initially adopted a broad approach to defining rape as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence which includes rape is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive.”<sup>215</sup> In line with some feminist critiques of consent, the *Akayesu* definition focuses on the circumstances and contextual factors in which the physical invasion took place rather than on consent or lack thereof. As Niamh Hayes has noted “When considered in light of one incident held to be rape in *Akayesu* – the forcing of a piece of wood into the vagina of a dying Tutsi woman – any discussion of consent appears utterly misguided.”<sup>216</sup>

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<sup>212</sup> Engle, 'Feminism and its (dis) contents: Criminalizing Wartime Rape in Bosnia and Herzegovina' (n.5); Halley, 'Rape in Berlin: Reconsidering the Criminalisation of Rape in the International Law of Armed Conflict' (n.5);

<sup>213</sup> For a review see: Clare McGlynn and Vanessa E Munro, *Rethinking Rape Law: International and Comparative Perspectives* (Routledge 2010).

<sup>214</sup> This case recognised rape as a crime against humanity and rape and sexual violence as genocide, when perpetrated with the specific intent. For a discussion of “genocidal rape” see: Beth Van Schaack, ‘Engendering Genocide: The *Akayesu* Case Before the International Criminal Tribunal for Rwanda’ (2008)

Available at: <http://digitalcommons.law.scu.edu/facpubs/629> last accessed April 15, 2015.

<sup>215</sup> *Prosecutor v. Akayesu*, para 688. The Trial Chamber further states that there was no common definition of rape in common law and that “the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts.” para 597.

<sup>216</sup> Niamh Hayes ‘Creating a Definition of Rape in International Law: The Contribution of the International Criminal Tribunals’ in Shane Darcy and Joseph Powderly, *Judicial Creativity at the International Criminal Tribunals* (n.158) 134.

In the ICTY it seemed at first that the Tribunal would follow the approach of the ICTR in the *Prosecutor v. Delacic et al.*<sup>217</sup> This case resulted in the first conviction of an accused for rape as torture (charged as Grave breaches of the Geneva Conventions and violation of Common Article 3) under Article 3 of the Statute. The Trial Chamber held “the rape of any person to be a despicable act which strikes at the very core of human dignity and physical integrity” and convicted the accused under the *Akayesu* definition.<sup>218</sup> However, soon after the *Furundzija* case adopted a more restrictive definition of rape based on a mechanical definition of body parts. This definition required “coercion or force or threat of force against the victim or a third person.”<sup>219</sup> The Tribunal did emphasise however that while consent was an element of the crime of rape “any form of captivity vitiated consent.”<sup>220</sup> This definition was severely criticised and was quickly revisited by the ICTY in the *Foca* case.<sup>221</sup>

The trial chamber in the *Foca* case thus had two divergent definitions of rape to consider in its adjudication of rape in the indictment.<sup>222</sup> In terms of the *actus reus* considered that the definition in *Furundzija* “although appropriate to the circumstances of that case” was too narrowly stated. The trial chamber found that coercion or force or threat of force against the victim or a third person is not required under international law and that the underlying principle or “common denominator” between national legal systems is the “basic principle of penalising violations of sexual autonomy.”<sup>223</sup> Following this the Tribunal restated the definition of rape as:

... the *actus reus* of the crime of rape in international law is constituted by: the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the

<sup>217</sup> *Prosecutor v. Delacic et al.*, para 479. The ICTR also upheld the *Akayesu* definition in the subsequent case of *Prosecutor v. Musema* ICTR 96-13-T (Jan 23, 2000).

<sup>218</sup> *Ibid* para 495.

<sup>219</sup> *Prosecutor v. Furundzija*, para 185. The Tribunal in that case defined the *actus reus* of rape as follows:

(i) the sexual penetration, however slight:

(a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or

(b) of the mouth of the victim by the penis of the perpetrator;

(ii) by coercion or force or threat of force against the victim or a third person.

<sup>220</sup> *Ibid* para 271.

<sup>221</sup> Ines Peterson and Wolfgang Shomburg ‘Genuine Consent to Sexual Violence under International Criminal Law’ (2007) 101(1) *American Journal of International Law* 121.

<sup>222</sup> *Prosecutor v. Kunarac*, pages 145-158.

<sup>223</sup> *Prosecutor v. Kunarac*, para 440.

mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs *without the consent of the victim*. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs *without the consent of the victim*.<sup>224</sup>

While largely upholding the definition in *Furundzija*, both the trial and appeal chambers departed from the definition by substituting the element of coercion or force, for the element of lack of consent (which forms part of both the *actus reus* and *mens rea*). According to Niamh Hayes this decision and the subsequent decision of *Gacumbitsi* "...were to fundamentally shift the contention to the issue of *mens rea*, specifically, the role of non-consent as an element of the international crime of rape."<sup>225</sup> The definitional quandaries thus involve the issue of the *actus reus* (physical invasion/mechanical body parts) and the *mens rea* (relevance of non-consent). However, while consent was introduced as an element, the appeals chamber clarified that in most cases where rape and sexual violence are charged as crimes against humanity and war crimes, consent will be irrelevant raising questions as to why it was re-introduced in the first place.

Whilst influential this decision and the subsequent decision on appeal, did not settle the matter and the definitions of rape were revisited yet again by the ICTR three years later in the *Prosecutor v. Muhimana*. Holding the accused responsible for rape as a crime against humanity, the trial chamber found that the definitions in *Akayesu* and *Kunarac* were compatible and that they "substantially aligned."<sup>226</sup> The decision according to Philip Weiner "...left more questions about the elements of rape under international law open and undecided."<sup>227</sup> The Appeals Chamber has since explicitly tackled the issue of the differing definitions in the case of *Gacumbitsi* where it held that "...non-consent and knowledge thereof are elements of rape as a crime against humanity. The import of this is that the Prosecution bears the burden of proving these elements beyond a reasonable doubt."<sup>228</sup> It also clarified that consent becomes irrelevant when and where the circumstances are coercive. It stated that "...the Trial Chamber is free to infer non-consent

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<sup>224</sup> Ibid para 460.

<sup>225</sup> Niamh Hayes 'Creating a Definition of Rape in International Law: The Contribution of the International Criminal Tribunals' in Shane Darcy and Joseph Powderly, *Judicial Creativity at the International Criminal Tribunals* (n.158) 141.

<sup>226</sup> *Prosecutor v. Muhimana*, para 543.

<sup>227</sup> Phillip Weiner, 'The Evolving Jurisprudence of the Crime of Rape in International Criminal Law' (2013) 36 Boston College International and Comparative Law Review 1207, 1216.

<sup>228</sup> *Prosecutor v. Gacumbitsi*, Appeal Judgment, para 153.

from the background circumstances, such as an on-going genocide campaign or the detention of the victim.”<sup>229</sup> The jurisprudential wrangling at the *ad hoc* Tribunals has since been reflected in the definition of rape at the ICC where the *Akayesu* terminology of invasion is used alongside the *Kunarac* definition which incorporates lack of consent as an element.<sup>230</sup>

The practical effect of re-introducing consent as an element has been that defence teams have argued that women consented to rape despite a background of sexual enslavement. This was the case in the *Prosecutor v. Kunarac* (the *Foca* case) where two of the accused argued that the rapes were in fact, consensual.<sup>231</sup> These defences related to two sisters who were teenagers at the time of the war. Witness FWS-87 the younger of the two sisters was 15 and a half when the events occurred. Both sisters were hiding in the forest before they were transported to Buk Bjela with their mother and then on to Foca High School. At Foca High School the sisters recounted that witness 87 was taken out and raped. She was then transported along with witness 75 and later witness A.S. around a number of the houses and raped by numerous men including the defendant, Kunarac. Although she spent time at various apartments and houses, she was held for the longest time at the house of the defendant, Kovac. It was in Kovac’s apartment that she was forced to strip, and to dance on a table to music while a gun was pointed at her. She also told the court that Kovac forced her to go to a café with him where other witnesses would claim that he would introduce her as his girlfriend. Witness D.B. the elder sister was 19 years old when the events took place. In her testimony she told the court how she was taken to Kunarac’s house together with witness FWS-75 ten days after her arrival at Partizan. Two men and a boy raped her. She was then told to shower and get ready for the commander, Kunarac who also raped her. She was threatened and told to take an active role in seducing the commander.<sup>232</sup>

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<sup>229</sup> *Ibid.*

<sup>230</sup> 1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body. 2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.

<sup>231</sup> *Prosecutor v. Kunarac*, para 420.

<sup>232</sup> *Prosecutor v. Kunarac*, para 219.

The trial chamber ultimately rejected the defence counsels' arguments: namely, that witness FWS-87 and Kovac were in love and that Kunarac had a mistaken belief that DB was consenting. The trial chamber attempted to clarify the issue of consent or lack thereof as an element of the *actus reus* of the crime. In this case the trial chamber and the appeals chamber made it clear that while lack of consent is an element of the crime which the Prosecution has to prove beyond a reasonable doubt, once the conditions identified in Rule 96(ii) are present (i.e. coercive circumstances), then "any apparent consent which might be expressed by the victim is not freely given."<sup>233</sup>

The introduction of consent into the elements of the crime of rape meant that Witness 87 was accused in cross-examination of being Kovac's girlfriend and D.B was also asked questions about whether or not she seduced Kunarac. These questions seem absurd in the context of the experience of these women who were raped, tortured and held in sexual slavery. While Richard Goldstone has argued that "...the broad gender sensitive definition, combined with the specific exclusion of sex and prior sexual history and the curtailment of the defense of consent are significant achievements"<sup>234</sup> the jurisprudence on rape points to ongoing conceptual difficulties within ICL to the detriment of women victims and survivors in the courtroom. The introduction of consent as an element for the crime of rape charged as war crimes or a crime against humanity seems even more absurd in light of the fact that this is not a necessary element when charged as different crimes including enslavement or torture.

#### *Forced Pregnancy in ICL*

The only crime which can be exclusively committed against women within the crimes enumerated in the Rome Statute is that of forced pregnancy (forced abortion is not expressly stipulated in the statute). Given the analysis to follow in later chapters, the section below introduces the protections provided by international law for pregnant women and the crime of forced pregnancy. This analysis highlights that the definition as it stands fails to understand the essence of the violation as against a woman's reproductive autonomy and instead, creates a burden on the prosecution to prove an intention to alter the ethnic composition of a group or commit another grave breach of international law. The provision thus focuses on the accused's *mens rea* rather than the violation of the woman's rights. Further, it raises questions about States parties' commitment to prosecuting forced pregnancy given the compromised wording of the definition.

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<sup>233</sup> *Prosecutor v. Kunarac*, para 464.

<sup>234</sup> Goldstone, 'Prosecuting Rape as a War Crime' (n.64) 284.

By way of background, under international humanitarian law, pregnant women have received special protection dating back to the times of the Lieber Code in situations of conflict.<sup>235</sup> The European Court of Human Rights (ECHR) has recognised that these protections pre-date the Second World War and are well established in customary international law.<sup>236</sup> The Geneva Conventions similarly recognise the special vulnerability of pregnant women in its various provisions.<sup>237</sup> The UN Committees and regional bodies have confirmed that the torture or cruel, inhumane or degrading treatment of a pregnant woman is an aggravating factor of the ill-treatment.<sup>238</sup> In the case of *Miguel Castro Castro*, the Inter-American Court recognised that torture and mistreatment had a differential impact on the pregnant women in the prison and underlined the additional difficulties these women faced in their attempts to escape the massacre.<sup>239</sup>

The Inter-American Court has reinforced this jurisprudence in the case of *Gelman v Uruguay*.<sup>240</sup> Citing Argentine jurisprudence, the Court found that the “pregnant women detained in this context of counterinsurgency were left alive until they had given birth, to then abduct their children, while, in many cases, the children were handed over to families of military and police officers, after their parents were disappeared or executed.”<sup>241</sup> The Court then considered the violations of human rights taking into account the state of pregnancy during the torture and subsequent disappearance. The Court highlighted the disappeared mother’s differential treatment due to the state of pregnancy, stating:

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<sup>235</sup> Instructions for the Government of Armies of the United States in the Field, General Order No 100, articles 19 and 37.

<sup>236</sup> *Kononov v. Latvia*, (Application no. 36376/04). 17 May 2010, paras 56-66.

<sup>237</sup> The Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, (Protocol I), 8 June 1977 provides protection for pregnant women in Chapter II in Articles 70 (1) and 76.2. Under Article 8(a) of the 1977 Additional Protocol I, the terms “wounded” and “sick” also cover maternity cases and expectant mothers. This means that pregnant women have protection under Common Article 3 of the Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949. Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949 also contains a number of provisions which relate to pregnant women. Articles 16, 17, Article 50(5), Article 89 (5) and Article 132(2) contain provisions relating to the evacuation, medical assistance, and provision of clothing relating to pregnant women, while Articles 18(1), 21, 22(1), 23(1), 91(2) and 127(3) contain specific mention of medical assistance and transportation of pregnant women.

<sup>238</sup> *Miguel Castro Castro v. Peru*, para 300-306.

<sup>239</sup> *Ibid.* “The pregnant women who lived through the attack experienced an additional psychological suffering, since besides having seen their own physical integrity injured, they had feelings of anguish, despair, and fear for the lives of their children.” para 292.

<sup>240</sup> *Juan Gelman et al. v. Uruguay*, Inter-Am. Ct. H.R. Judgment of February 24, 2011.

<sup>241</sup> *Ibid.*, para 60-61, footnotes 55-60.

The facts of the case reveal a particular conception of women that threatens freedoms entailed in maternity, that which forms an essential part of the free development of the female personhood. The foregoing is even more serious if one considers, as indicated, that her case took place in a context of disappearances of pregnant women and illegal abductions of children in the framework of Operation Condor.<sup>242</sup>

The Inter-American Court found that the treatment of María Claudia García could be classified as one of the most serious and reprehensible forms of violence against women.<sup>243</sup>

While forced pregnancy was recognised and mentioned in the Vienna Declaration and Programme for Action and at the Fourth World Conference on Women and the Beijing Declaration and Platform for Action,<sup>244</sup> in the field of international criminal law, it was not until the Rome Statute establishing the International Criminal Court that it became officially enshrined in a statutory instrument.<sup>245</sup> The inclusion of forced pregnancy in the Rome Statute was a direct consequence of the Bosnian conflict, where it was alleged that Serbs impregnated Croat and Muslim women and forced them to bear children as part of a systematic plan.<sup>246</sup> ICTY decisions such as *Kunarac* highlight how some men raped women with the express knowledge and intention that she could and would become pregnant as a result of the rapes. The court in the *Foca* case found that on at least one occasion the defendant Kunarac had mocked women while he raped them “...by laughing at her while she was raped by the other soldiers, and finally by saying that she would carry Serb babies

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<sup>242</sup> Ibid para 97.

<sup>243</sup> Ibid para 98.

<sup>244</sup> Vienna Declaration and Programme for Action para 38 “In particular, the World Conference on Human Rights stresses the importance of working towards the elimination of violence against women in public and private life, the elimination of all forms of sexual harassment, exploitation and trafficking in women, the elimination of gender bias in the administration of justice and the eradication of any conflicts which may arise between the rights of women and the harmful effects of certain traditional or customary practices, cultural prejudices and religious extremism. The World Conference on Human Rights calls upon the General Assembly to adopt the draft declaration on violence against women and urges States to combat violence against women in accordance with its provisions. Violations of the human rights of women in situations of armed conflict are violations of the fundamental principles of international human rights and humanitarian law. All violations of this kind, including in particular murder, systematic rape, sexual slavery, and forced pregnancy, require a particularly effective response.” “Other acts of violence against women include violation of the human rights of women in situations of armed conflict, in particular murder, systematic rape, sexual slavery and forced pregnancy.” Beijing Declaration, para 115.

<sup>245</sup> Articles 5(1), 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(v).

<sup>246</sup> Bedont and Hall-Martinez, 'Ending Impunity for Gender Crimes under the International Criminal Court' (n.106) 73.



and that she would not know the father.”<sup>247</sup> Despite this evidence before the Tribunal, no one has been charged with forced pregnancy at the ICTY and the judges have not intervened to ensure its inclusion under other charges.

In fact, forced pregnancy has never been charged or prosecuted in any international court, despite the pregnancies resulting from the rapes in Bosnia, Rwanda, and Sierra Leone. Further, scholars have challenged the current ICC definition of the crime. Under the elements of the Rome Statute, forced pregnancy is made out when the “perpetrator confined one or more women forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.” Under this definition the *actus reus* of the crime is one of unlawful confinement, of a woman “forcibly made pregnant”, with Kirsten Boon suggesting that this definition captures rape and means other than rape (for example withholding contraception or artificial insemination).<sup>248</sup> While the factual circumstances in *Kunarac* (where the defendant explicitly stated while raping one of the women who testified that she would have Serb babies) would satisfy the elements in the Rome Statute, the narrow confines of this definition have been criticised.<sup>249</sup>

Although forced pregnancy was included in the ICC Statute after lobbying from women’s groups, the definition has since been criticised for including references to the ethnic composition of the groups in conflict. Alyson Drake has noted that in Beijing and Vienna, forced pregnancy was seen as a violation against women’s rights rather than a crime relating to ethnic conflict.<sup>250</sup> A similar view has been expressed by Barbara Bedont and Katherine Hall Martinez who have started that “...the crime of forced pregnancy was meant to criminalize the acts of making and keeping a woman pregnant.”<sup>251</sup> The way in which the compromise was reached in Rome has resulted in a definition which fails to capture forced

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<sup>247</sup> *Prosecutor v. Kunarac*, para 583. This is also discussed in the chapter *As If I Am Not There*. Evidence was also discussed in *Application of Convention on Prevention and Punishment of Crime of Genocide*, para. 364 (citing *Prosecutor v. Karadzic*, IT-95-5/18-I (July 11, 1996).

<sup>248</sup> Kristen Boon, 'Rape and Forced Pregnancy under the ICC Statute: Human Dignity, Autonomy, and Consent' (2000) 32 Columbia Human Rights Law Review 625.

<sup>249</sup> Evidence of this was also found in by the Commission of Experts for Yugoslavia, See U.N. Secretary-General, Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), U.N. Doc. S/1994/674 (May 27, 1994), para 248.

<sup>250</sup> Alyson Drake, 'Aimed at Protecting Ethnic Groups or Women-A Look at Forced Pregnancy under the Rome Statute' (2011) 18 William & Mary Journal of Women & Law 595, 605.

<sup>251</sup> Bedont and Hall-Martinez, 'Ending Impunity for Gender Crimes under the International Criminal Court' (n.106) 73.

pregnancy as a crime committed against a woman's bodily autonomy.<sup>252</sup> Why should there be an intention to affect the ethnic composition of a population? How can this intention be proved? By stipulating the need to prove an intention to affect ethnic composition the law is reinforcing the deeply gendered view that the ethnic composition of an identity is tied to the paternal. The definition thus seems overly legalistic and narrow. As Alyson Drake has argued "...the multiple levels of intent seem to suggest that the crime of forced pregnancy is targeted more at preventing the perpetration of ethnic crimes than at preventing crimes aimed at violating women."<sup>253</sup> This observation falls within a broader critique of ICL by feminist scholars of the failure to prosecute criminal acts within ethnic groups.<sup>254</sup>

The definition of forced pregnancy has also been criticised for the lack of clarity on the basis that it fails to stipulate whether the prosecution will also need to prove the rape or acts that led to the woman becoming forcibly pregnant as part of the forced pregnancy charge. Some scholars have suggested that where the rape is carried out by another, the rights of the alleged rapist may be violated if this is recorded at trial.<sup>255</sup> However, as we will see later in the film analysis chapters, in the case of multiple assailants and rapes, the perpetrator may not be known and there is no reason why the rape needs to be proved first as an element of the crime. This would simply be yet another hurdle for the prosecution to cross and this crime could be charged cumulatively.

Thus while the inclusion of forced pregnancy in the Rome Statute is a welcome development, real questions remain as to whether the compromised wording of the provision will negatively affect or even prevent charges on this count from being brought before the ICC. The crime of forced pregnancy thus exemplifies the ongoing struggle to include crimes against women in prosecutions at the international level. While women in Bosnia live with the consequences of this crime, the lack of jurisprudence on this charge points to law's inability to capture and represent these experiences. Further, even where the crime is included in the Statute, its current manifestation demonstrates the dangers of compromised wording and on-going State opposition to women's reproductive autonomy.

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<sup>252</sup> Article 7 (1) (g); Article 7(2)(f). "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy.

<sup>253</sup> Drake, 'Aimed at Protecting Ethnic Groups or Women-A Look at Forced Pregnancy under the Rome Statute' (n.250) 596.

<sup>254</sup> Buss, 'The Curious Visibility of Wartime Rape: Gender and Ethnicity in International Criminal Law' (n.7).

<sup>255</sup> Milan Markovic, 'Vessels of Reproduction: Forced Pregnancy and the ICC' (2007) 16 Michigan State International Law Review 439.

### Less Visible Obstacles

Beyond criticisms of the definitions of the crimes, feminist legal scholars have argued that gender crimes continue to be marginalised in the proceedings for a host of different reasons.<sup>256</sup> Referring to the *ad hoc* tribunals Clare McGlynn and Vanessa Munro have stated in their introduction to *Rethinking Rape Law*, that “...the legacy left by these tribunals is one replete with failures in the charging and prosecution of sexual violence claims.”<sup>257</sup> More subtly, Doris Buss has stated that the legacy of the ICTR and its record on sexual violence prosecutions is “mixed, uneven” and, “for many, disappointing”.<sup>258</sup> Feminist scholars of international criminal law have drawn attention to the fact that although these crimes are now set out in statutes and have been prosecuted in landmark cases, in practice many obstacles remain. This section provides a number of illustrative examples of these difficulties, which together paint a picture of a mixed legacy rather than a triumph of prosecuting these crimes at the international level.

The challenges of investigating sexual violence begin at the pre-investigation and investigation stages.<sup>259</sup> The Office of the Prosecutor (OTP) at the International Criminal Court (ICC) has identified a number of factors which have prevented the adequate investigation of these crimes including: under or non-reporting due to societal, cultural or religious factors; stigma for victims; limited domestic investigations, and the associated lack of readily available evidence; lack of forensic or other documentary evidence, owing, *inter alia*, to the passage of time; and inadequate or limited support services at national level.<sup>260</sup> While the OTP places the emphasis here on the lack of local efforts, it might be added that the prosecution teams at the international criminal tribunals are equally guilty of failing to effectively investigate and then prosecute gender crimes. This is especially the case where gathering evidence of gender crimes has been the responsibility of the prosecution teams. Even where investigations are carried out and evidence has been collected, prosecution teams have failed to charge gender crimes for a number of reasons.<sup>261</sup>

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<sup>256</sup> Sellers, 'Gender Strategy is Not Luxury for International Courts' (n.118).

<sup>257</sup> McGlynn and Munro, *Rethinking Rape Law: International and Comparative Perspectives* (n.213) 7.

<sup>258</sup> Doris Buss 'Learning our Lessons? The Rwanda Tribunal Record on Prosecuting Rape' in *ibid* 61.

<sup>259</sup> This was an issue at the ICTY where the Commission of Expert's mandate was cut short meaning that their investigation into sexual violence in Bosnia was curtailed. Scharf, *Balkan Justice: The Story Behind the First International War Crimes Trial since Nuremberg*. (n.63).

<sup>260</sup> ICC Policy Paper (n.112) paras 5 and 50.

<sup>261</sup> On the failure to indict Al-Bashir for gender crimes see John Hagan, Richard Brooks and Todd Haugh, 'Reasonable Grounds Evidence Involving Sexual Violence in Darfur' (2010) 35 *Law & Social Inquiry* 881.

Alongside pre-investigation and investigation difficulties, a prominent reason for the silencing of women's narratives in the trials has been the failure to charge gender crimes, even where credible evidence has been held in prosecution hands. At the ICTY, the issue of prosecutorial discretion and gender crimes came to international attention when the former Chief Prosecutor Carla del Ponte decided to omit charges of rape and sexual violence from the indictment in the *Lukic* case.<sup>262</sup> Following Del Ponte's decision not to prosecute the defendants for rape and sexual violence on the basis of expediency, a change in personnel resulted in a request by the prosecution to amend the indictment. This was done on the grounds that:

The material supporting these amendments shows that the acts of sexual violence were such an entrenched and integrated part of the crimes for which the Accused had been charged, that this evidence will inevitably emerge during the course of the trial through the witnesses who will be called.<sup>263</sup>

The prosecution's motion goes on to argue that if the indictment is not amended then the trial chamber "...may consider as irrelevant the evidence that they were raped and limit their testimony to their simple viewing of the Accused at the time and place in which they were raped." It further submits that a failure to prosecute these charges would "result in a miscarriage of justice" and references the *Akayesu* case as authority for the ability of the Tribunal to add new charges. In terms of doctrine, Rule 50 of the Rules of Evidence and Procedure (RPE) provides the Tribunal with a wide discretion to permit amendments to indictments, even in the late stages of pre-trial proceedings or when the trial has begun.<sup>264</sup> The prosecution also cited *Milutinovic*, *Haradinaj* pre-trial Chamber and *Dragomir Milsoevic* decisions as all granting leave for amendments to indictments.<sup>265</sup> Moreover, Rule 50(B)

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<sup>262</sup> *Prosecutor v. Lukic*, IT-98-21/1-PT, (July 29, 2009). On her experiences as a prosecutor see Carla Del Ponte and Chuck Sudetic, *Madame Prosecutor: Confrontations with Humanity's Worst Criminals and the Culture of Impunity* (Other Press, LLC 2011).

<sup>263</sup> *Prosecutor v. Lukic*, Decision on prosecution motion seeking leave to amend second indictment. (July 8 2008) para 65.

<sup>264</sup> *Prosecutor v. Popovic et al.*, IT-05-88-PT & IT-05-88/1-PT, Decision on further amendment and challenges to the indictment, (July 13, 2006) para 8.

<sup>265</sup> *Prosecutor v. Milutinovic et al.*, IT-05-87-PT, "Decision on motion to amend the indictment", (May 11, 2006), para 13; *Prosecutor v. Haradinaj et al.*, IT-04-84-PT, "Decision on motion to amend the amended indictment" 12 January 2007. Although the prosecution cites *Dragomir Milsoevic* as authority it provides no citation for this and it may be going to a different point of amending the witness lists. *Prosecutor v. Dragomir Milsoevic*, IT-98-29/1.

and 50(C) explicitly provide for the addition of new charges.<sup>266</sup> Although this must be balanced against any prejudice it would cause to the accused in preparing his defence, especially with regards to Article 21 of the Statute which provides that the accused should be tried without undue delay.<sup>267</sup> The prosecution's motion submits that since leave to amend was sought prior to the start of the trial, and also before a start date had been set, there was no actual delay to the proceedings. Further, the motion stated that it could deal with the gender crimes charges at the end of its case in chief to provide the defence teams with more time to prepare their response.

Despite the wide discretion open to the Tribunal, the trial chamber denied the motion to add the new charges (and to add a new mode of liability) on the grounds of expediency since it "...would adversely affect the Accused's right under Article 21 of the Statute to be tried without undue delay."<sup>268</sup> The chamber stressed that the prosecution, under its previous management structure, had been aware of the evidence of sexual violence and had decided not to amend the indictment. Although, as a matter of principle, this decision did not prevent the prosecution from seeking leave to amend at a subsequent point, the chamber found that the prosecution had failed to act with the required diligence and had omitted to provide adequate notice to the accused. The motion concludes with the judges stating that "...the Chamber is constrained to point out that the standard to be applied in assessing whether to grant requested amendments is not whether not doing so would result in a miscarriage of justice; rather, it is whether the amendment results in unfair prejudice to the accused."<sup>269</sup> The bench thus clearly placed greater weight on expediency and the accused's rights than the right of the victims to have the perpetrators prosecuted for the crimes.

The failure to charge gender crimes has been exacerbated by the refusal of judges of different courts to include these crimes. The *Lukic* case is not alone with scholars drawing attention to similar problems at different international courts. Thus a similar example is evident in the *Prosecutor v. Samuel Hinga Norman, Moinina Fofona and Allieu Kondewa*,

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<sup>266</sup> If the amended indictment includes new charges and the accused has already appeared before a Trial Chamber in accordance with Rule 62, a further appearance shall be held as soon as practicable to enable the accused to enter a plea on the new charges.

<sup>267</sup> Article 21 (c) ICTY Statute.

<sup>268</sup> *Prosecutor v. Lukic*. Decision on Prosecution Motion Seeking Leave to Amend Second Indictment. (July 8 2008), para 62.

<sup>269</sup> *Ibid* para 63.

more commonly referred to as the *CDF* case in the Special Court of Sierra Leone.<sup>270</sup> In this instance, the pre-trial chamber decided to reject the motion to include gender crimes in the indictment, following the prosecutor's failure to include charges of rape and sexual slavery. While the prosecution in this case argued that the testimony of rape and sexual violence was essential "in order to tell the story in a coherent fashion" the Court found that admitting evidence of the rape of a pregnant woman, which had resulted in a miscarriage, would lead the proceedings into "forbidden evidentiary territory."<sup>271</sup> Staggs Kelsall and Stepakoff argue that this decision meant that witness TF2-187 could discuss other women's loss of pregnancies, since they had the foetus cut from their bodies with a knife, but not her own miscarriage which was induced by a brutal rape.

Moreover, it rejected the prosecution's motion to appeal this decision. In 2005, the majority of the Court went further when it opined that all evidence of sexual violence was inadmissible and could therefore not be tendered as evidence of other counts.<sup>272</sup> Michelle Staggs Kelsall and Shanee Stepakoff have argued that despite the Court's wide discretionary powers, in its admissibility decision "...timeliness is emphasised and is seemingly the judges' overriding consideration."<sup>273</sup> In his dissenting opinion, Justice Boutet chastises the arbitrary line drawn by the majority decision on the grounds that:

Evidence of acts of sexual violence are not different than evidence of any other violence for the purposes of constituting offences under Counts 3 and 4 of the Indictment and are not inherently prejudicial or inadmissible... by virtue of their nature of characterisation as 'sexual'.<sup>274</sup>

Patricia V. Sellers has argued that as a result of the strict application of the evidential rules the credibility of the female witnesses was negatively affected as:

...once you lead a bifurcated witness's evidence, her credibility is generally troubled. She really wants to say something additional, something else that cannot

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<sup>270</sup> *Prosecutor v. Moinina Fofana, Allieu Kondewa* (the *CDF* case), SCSL-04-14-T, Decision on Prosecution Request for Leave to Amend the Indictment, (May 20, 2004).

<sup>271</sup> Michelle Staggs Kelsall and Shanee Stepakoff, "'When We Wanted to Talk about Rape': Silencing Sexual Violence at the Special Court for Sierra Leone' (2007) 1 International Journal of Transitional Justice 365.

<sup>272</sup> The *CDF* case. Decision on the Prosecution's Motion for a Ruling on the Admissibility of Evidence 24 May 2005 (issued on 23 June 2005).

<sup>273</sup> Michelle Staggs Kelsall and Shanee Stepakoff, "'When We Wanted to Talk about Rape': Silencing Sexual Violence at the Special Court for Sierra Leone' (n.271) 360.

<sup>274</sup> *The CDF case*, Judge Boutet's Dissenting Opinion para 33.

be admitted. Her mouth twitters and she looks nervous. She might look like she is less than truthful.<sup>275</sup>

For some, the *CDF* case is a shocking example of how a majority of judges separated the notion of sexual violence, rape, and sexual slavery from their own understandings of violence more generally. While attacks carried out with a knife, or violence in the form of beatings were held as admissible, the women were not able to speak about rapes and the effects these abuses had on their bodies and lives.

Similarly the ICTR has been criticised for its handling of sexual violence charges in a number of cases.<sup>276</sup> For example in the *Kajelijeli* case, although the trial chamber unanimously found the factual existence of sexual violence it acquitted the accused of these counts on the basis that the female witness was not credible. The prosecution then failed to file a notice of appeal within the required time period. The appeals chamber subsequently dismissed the rape charges with Judge Ramaroson dissenting.<sup>277</sup> The acquittal in *Kajelijeli* forms part of what Niamh Hayes' has described as a "disconcerting tendency" at the ICTR to acquit on charges related to sexual violence but convict on other charges.<sup>278</sup> This tendency has also been noted where sexual violence charges are dropped in return for a guilty plea.<sup>279</sup> As a result, at least 20 defendants have pleaded guilty at the ICTY in return for concessions from the prosecution.<sup>280</sup> According to Niamh Hayes, at the ICTR, the

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<sup>275</sup> Sellers, 'Gender Strategy is Not Luxury for International Courts' (n.118) 317.

<sup>276</sup> *Prosecutor v. Juvénal Kajelijeli*, ICTR-98-44A-T, ICTR, 1 December 2003. Appeals Chamber Decision on Prosecution Urgent Motion (Jan 23, 2004).

<sup>277</sup> *Prosecutor v. Kajelijeli*, ICTR 98-44-A-A, Dissenting Opinion of Judge Ramaroson "I do not agree with the Majority's rationale for dismissing the charge of rape, and its decision strikes me as lacking both in fact and in law" para 2.

<sup>278</sup> Hayes, Niamh, 'Sisyphus Wept: Prosecuting Sexual Violence at the International Criminal Court' in Niamh Hayes, Yvonne McDermott and William A Schabas, *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Ashgate Publishing Ltd. 2013) 1. *Prosecutor v. Bisengimana* ICTR-00-60 (13 April 2006); *Prosecutor v. Nzabirinda* (Sentencing Judgment) ICTR-2001-77 (23 February 2007); *Prosecutor v. Rugambarara* (Sentencing Judgment) ICTR-00-59 (16 November 2007); *Prosecutor v. Serushago* (Sentencing Judgment) ICTR-98-39-S (5 February 1999).

<sup>279</sup> Although the ICTY was initially opposed to the practice of plea bargains, unknown to most civil law systems, this position changed in response to the increasing case load, financial pressure and time constraints on running full trials. In the event, the Tribunal has adopted two rules in order to regulate the issue of guilty pleas and plea bargains. Rule 62 bis and Rule 62 ter A. Michael P Scharf, 'Trading Justice for Efficiency Plea-Bargaining and International Tribunals' (2004) 2 *Journal of International Criminal Justice* 1070; Alan Tieger and Milbert Shin, 'Plea Agreements in the ICTY Purpose, Effects and Propriety' (2005) 3 *Journal of International Criminal Justice* 666.

<sup>280</sup> Janine Natalya Clark, 'Plea bargaining at the ICTY: Guilty Pleas and Reconciliation' (2009) 20 *European Journal of International Law* 415; Ralph Henham and Mark Drumbl, *Plea Bargaining at the International Criminal Tribunal for the former Yugoslavia* (Springer 2005). Sexual offences were dropped or not charged in return for a plea bargain in *Prosecutor v. Todorovic*, IT-95-9/1, July 31, 2001: paras 37-40.

availability of plea bargains has resulted in particularly gendered consequences, with the rape charges being dropped.<sup>281</sup> Significantly, the ICTR's own best practices manual acknowledges that more should have been done, especially at the senior management level, to prosecute gender crimes effectively.<sup>282</sup> The film *Storm* discussed later also raises questions about how these deals are negotiated and whom they ultimately benefit.

Given the experiences and lessons from the various international and hybrid tribunals one would be forgiven for thinking that the ICC would have built on the best practices and lessons learnt from the other tribunals.<sup>283</sup> However, in the first case decided by the ICC, Judge Elizabeth Odio Benito makes it clear in her dissenting opinion that the prosecution could have indicted Lubanga for gender crimes as separate charges.<sup>284</sup> She also draws attention to how the majority excluded sexual violence from the legal concept of the "use to participate actively in the hostilities" when a different interpretation could have included these acts within the scope of the concept.<sup>285</sup> The judge concluded that the invisibility of sexual violence in the charges is "discriminatory".<sup>286</sup> Further, the subsequent acquittal of Germain Katanga on the sexual violence charges has created increasing frustration with the Court given that the ICC is yet to secure a conviction for gender crimes. Despite assertions made by the former Gender Advisor Catherine Mackinnon that "short of Mars, the ICC is as good as it gets" the rhetoric has not translated into practice.<sup>287</sup>

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<sup>281</sup> Hayes, Niamh, 'Sisyphus Wept: Prosecuting Sexual Violence at the International Criminal Court' (n.278).

<sup>282</sup> ICTR Report. The Prosecution of Sexual Violence. Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict Regions: Lessons Learned from the Office of the Prosecutor for the International Criminal Tribunal for Rwanda. January 30, 2014, <http://www.unict.org/portals/0/English/Legal/Prosecutor/ProsecutionofSexualViolence.pdf> last accessed 1 March 2015.

<sup>283</sup> The ICC has come under severe criticism for its prosecutorial decisions more generally with Stephen Kay QC describing the Prosecution's approach in Kenyatta as displaying a "catalogue of errors and failures." Stephen Kay QC "The Prosecution of Uhuru Kenyatta at the International Criminal Court" 20 January 2015. <http://www.internationallawbureau.com/wp-content/uploads/2015/01/report.pdf> last accessed 1 March 2015. *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-983.

<sup>284</sup> Ibid. para. 20.

<sup>285</sup> *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06.

<sup>286</sup> Ibid. para 21.

<sup>287</sup> *Prosecutor v. Germain Katanga*, ICC-01/04-01/07. The Trial Chamber II found German Katanga guilty, as an accessory, within the meaning of article 25(3)(d) of the Rome Statute of one count of crime against humanity (murder) and four counts of war crimes (murder, attacking a civilian population, destruction of property and pillaging). He was sentenced to 12 years imprisonment. Catharine Mackinnon, 'The International Criminal Court and Gender Crimes.' Consultative Conference on International Criminal Justice, September 9-11, 2009. United Nations Headquarters. Last accessed 12 March 2015. [http://www.internationalcriminaljustice.net/experience\\_the\\_conference.php](http://www.internationalcriminaljustice.net/experience_the_conference.php)



The examples above illustrate that beyond the “landmark” cases set out in the first chapter, the international courts have struggled to mainstream gender crimes in the charges. While rape in wartime has become visible in numerous scholarly works and in the rhetoric of the international tribunals and courts’ outreach and PR machinery, the story of prosecuting gender crimes is far from a linear progress narrative. Further, the sections above illustrate the formalism and technicality of the law in this area, with important divergences appearing in the practice and jurisprudence of the different international courts and tribunals. While these technicalities form part of the maturation of international criminal justice, the legalism also seems to suggest a departure from the original creativity of the tribunal and courts tasked with adjudicating mass violations of human rights and atrocities. The *Lukic* case and the emphasis on timeliness further underlines the notion that while some trial procedures are afforded years and months in terms of deadlines, others are cut off and marginalised. The less visible obstacles are thus obfuscated behind this legalism and formalism, only to be explored later by the fluidity of the cinematic narratives.

### **Essentialising Women’s Experiences of Conflict**

Gender crimes should not be limited, to what I call the “R word”: rape.<sup>288</sup>

Patricia V. Sellers

Another critique to emerge in the field of international criminal justice has been concern over the “essentialization of women’s experiences of injury” during periods of mass atrocity.<sup>289</sup> These critiques are related to the “reductionist” approach of the tribunals and the limited focus on the crime of rape within the range of gender crimes. Despite the existence of these crimes with their different components and consequences, the focus of criminal prosecutions remains on rape.<sup>290</sup> As Doris Buss notes the:

Singular focus on rape as a weapon of war, as well as the hardening of the gendered dichotomy of perpetrators and victims, has elevated a particular kind of

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<sup>288</sup> Sellers, 'Gender Strategy is Not Luxury for International Courts' (n.118) 314.

<sup>289</sup> Fionnuala Ní Aoláin, 'Exploring a Feminist Theory of Harm in the Context of Conflicted and Post-Conflict Societies' (2009) 35 *Queen's Law Journal* 219.

<sup>290</sup> Fionnuala Ní Aoláin, 'Political Violence and Gender During Times of Transition' (2006) 15 *Columbia Journal of Gender and Law* 829; Nicola Henry, 'The Fixation on Wartime Rape Feminist Critique and International Criminal Law' (2014) 23 *Social & Legal Studies* 93; Chiseche Salome Mibenge, *Sex and International Tribunals: The Erasure of Gender from the War Narrative* (University of Pennsylvania Press 2013).

rape (as a weapon of war) and rape victim (women, usually from the African continent) to an almost hyper-visible level.<sup>291</sup>

For Buss this “hypervisibility” of rape has resulted in some kinds of victims becoming “...over-represented, crowding out a more complex picture of victims, perpetrators, and the lived reality of violence in both conflict and post-conflict societies.”<sup>292</sup> Janet Halley and Karen Engle have made similar arguments on the over-representation of rape in the judgments of the ICTY. Critical feminist scholars of international law have claimed that the “...international criminalization of rape – as a grave breach, a war crime, and a crime against humanity – is neither as pathbreaking nor as progressive as the doctrinal recognition might suggest.”<sup>293</sup> Others such as Kristen Campbell have similarly argued that cases such as the *Prosecutor v. Kunarac* which have prosecuted men for crimes perpetrated solely against women, “...reinforces the gendered framings of conflict, in which men are active agents of conflict and women are passive civilians subject to sexual violence.”<sup>294</sup> Campbell thus finds that while:

Accountability for sexual violence in the Yugoslavian conflict is now seen as a ‘core achievement’ of the ICTY... A close examination of these prosecutions reveals the complex way in which these rules and practices of international post-conflict justice are themselves gendered, and can serve to reinforce gendered hierarchies.<sup>295</sup>

These critiques can be linked to wider concerns expressed by international lawyers on cultural imperialism in the field of international criminal law.<sup>296</sup> As Chinkin, Charlesworth and Wright have noted in their *Reflections from another Century*: “...a major concern of those promoting women’s international human rights: avoid essentializing women and

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<sup>291</sup> Buss, 'The Curious Visibility of Wartime Rape: Gender and Ethnicity in International Criminal Law' (n.7) 15; Cynthia H Enloe, *Maneuvers: The International Politics of Militarizing Women's Lives* (Univ of California Press 2000) 108.

<sup>292</sup> Buss, 'The Curious Visibility of Wartime Rape: Gender and Ethnicity in International Criminal Law' (n.7).

<sup>293</sup> Engle, 'Feminism and its (dis) contents: Criminalizing Wartime Rape in Bosnia and Herzegovina'. (n.5) 780.

<sup>294</sup> Campbell, 'The Gender of Transitional Justice: Law, Sexual Violence and the International Criminal Tribunal for the Former Yugoslavia' (n.68) 427.

<sup>295</sup> Ibid 412.

<sup>296</sup> Tim Kelsall, *Culture under Cross-examination: International justice and the Special Court for Sierra Leone* (Cambridge University Press 2009); Charles C Jalloh, Dapo Akande and Max Du Plessis, 'Assessing the African Union Concerns about Article 16 of the Rome Statute of the International Criminal Court' (2011) 4 *African Journal of Legal Studies* 5; Charles Chernor Jalloh, 'Regionalizing International Criminal Law?' (2009) 9 *International Criminal Law Review* 445.

recognizing the diversity in the situation and priorities of women around the world.”<sup>297</sup> In the context of ICL, Third World Feminist scholars have challenged the meta-narrative of a victimized Woman and have highlighted the links between this discourse and ICL’s colonial heritage.<sup>298</sup> Western feminism has been criticized for painting a picture of an oppressed *other*, feeding into the neo-imperialism of international law.<sup>299</sup> International criminal prosecutions are thus criticised for “...positioning some victims as authentic victim subject, silencing other less conventional narratives and obscuring the role that colonialism, capitalism and sexism play in the perpetration of these crimes.”<sup>300</sup>

As a consequence, some scholars of international criminal law have sought to highlight that women also play key political roles during conflict, including their roles as perpetrators of the horrors on trial.<sup>301</sup> In the context of the ICTY one woman has been prosecuted and convicted for international crimes. Biljana Plavsic, one of the three highest-ranking officials in the Republika Srpska was sentenced to eleven years imprisonment after pleading guilty to persecution as a crime against humanity, with another seven counts being subsequently dropped.<sup>302</sup> According to the Drakulic in her book on the ICTY:

The fact that a woman could be responsible for some of the most appalling atrocities committed in Bosnia during the war must be hard to swallow for anyone who believes – even vaguely – that if women ruled, the world would be a better place. When this woman ruled Bosnia, it was pure hell.<sup>303</sup>

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<sup>297</sup> Hilary Charlesworth, Christine Chinkin and Shelley Wright, ‘Feminist Approaches to International Law: Reflections from Another Century’, in Doris Buss and Ambreena Manji, *International law: Modern Feminist Approaches* (Hart 2005) 27-28.

<sup>298</sup> Gayatri Chakravorty Spivak, ‘Can the Subaltern Speak?’ (2003) 14 *Die Philosophin* 42; Ratna Kapur, ‘The Tragedy of Victimization Rhetoric: Resurrecting the Native ‘Subject in International/Post-Colonial Feminist Legal Politics’ (2008) 15 *Harvard Human Rights Journal* 2.

<sup>299</sup> Anne Orford, ‘Feminism, Imperialism and the Mission of International Law’ (2002) 71 *Nordic Journal of International Law* 275; Ruth Buchanan and Sundhya Pahuja, ‘Collaboration, Cosmopolitanism and Complicity’ (2002) 71 *Nordic Journal of International Law* 297.

<sup>300</sup> Henry, ‘The Fixation on Wartime Rape Feminist Critique and International Criminal Law’ (n.290) 99. Mibenge, *Sex and International Tribunals: The Erasure of Gender from the War Narrative* (n.290).

<sup>301</sup> Diane Marie Amann has stated in the context of women prosecuted by the subsequent Nazi trials “IntLawGrrls’ve understandably been loathe to claim these women as our own. But they exist, as photos of ‘SS women’ in yesterday’s *New York Times* reminded. Those who stood trial for war crimes have an undeniable, if unfortunate, international prominence, and at times their story too must be told.” ‘Woman at Nuremberg: Defendants.’ Intlawgrrls Blog. Sept 20, 2007. <http://www.intlawgrrls.com/2007/09/women-at-nuremberg-defendants.html> last accessed 14 March 2015. For a film example, see also *Night of Truth* (2004) Fanta Regina Nacro.

<sup>302</sup> *Prosecutor v. Biljana Plavsic*, IT-00-39 & 40/1, (February 27, 2003).

<sup>303</sup> Slavenka Drakulic, *They Would Never Hurt a Fly: War criminals on Trial in The Hague* (Abacus 2011) 158.

Through the indictment and prosecution of Plavsic, and her own later admission of criminal responsibility, the Tribunal has shown that women were not only victims of the war, but also perpetrators of crimes reaching the threshold of crimes against humanity.

International courts have also convicted a woman for sexual offences. In 2011 the ICTR convicted Pauline Nyiramasuhuko, the former Minister of Family and Women's Development, for *inter alia*, rape as a crime against humanity.<sup>304</sup> Further, in November 2012, the ICC unsealed an arrest warrant for Simone Gbagbo, the wife of Laurent Gbagbo, former President of the Cote d'Ivoire.<sup>305</sup> The indictment of female perpetrators by international courts has been welcomed by scholars who believe that:

Charging a woman with international crimes sparks questions about gender that we seldom ask when the subject of the proceedings is a man. It illuminates long-held assumptions embedded in law and in society about who the "normal" suspects/accused in international crimes are. It undermines the usual view of men as the agents and women as the victims of crime. It challenges the dichotomy that sets up men, masculinity and violence on one side and women, femininity and passivity on the other. It upsets the archetype of women as vulnerable, 'rapeable', and incapable of wielding power.<sup>306</sup>

William Burke-White has gone as far as to say that the *Gbagbo* arrest warrant signals that international courts are slowly moving "beyond gender in prosecuting sexual violence." He asserts that perhaps "...a post-gender model of international criminal justice may be emerging in which women and men are held accountable for crimes—sexual or otherwise—without gender itself being the focus."<sup>307</sup> However, the idea that ICL is moving *beyond gender* simply on the basis that some women are being held accountable for war crimes sits uncomfortably with the practice of various tribunals and courts as set out above. Further, as feminist scholars have noted in the domestic context "...the formal

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<sup>304</sup> See *Prosecutor v. Pauline Nyiramasuhuko et al.*, ICTR-98-42-AR73, (June 24, 2011). See also Mark A Drumbl, 'She Makes Me Ashamed to Be a Woman: The Genocide Conviction of Pauline Nyiramasuhuko, 2011' (2012) 34 Michigan Journal of International Law 559.

<sup>305</sup> *Prosecutor v. Simone Gbagbo*, ICC-02/11-01/12.

<sup>306</sup> Rosemary Grey and Louise Chappell 'Simone Gbagbo & the International Criminal Court: The Unsettling Spectre of the Female War Criminal' Intlawgrls blog. Monday, 26 November 2012. Last accessed 15 March 2015. <http://www.intlawgrls.com/2012/11/simone-gbagbo-international-criminal.html#more>

<sup>307</sup> William Burke-White "A Wife Accused of War Crimes: The Unprecedented case of Simone Gbagbo." The Atlantic. December 3 2012. Available at <http://www.theatlantic.com/sexes/archive/2012/12/a-wife-accused-of-war-crimes-the-unprecedented-case-of-simone-gbagbo/265828/> last accessed 19 September 2014.

reciprocal capacity to rape and be raped” does not represent gender equality and parity in ICL.<sup>308</sup> Instead, some feminist legal scholars have interrogated the trial proceedings, arguing that the adversarial criminal trial process is also complicit in silencing women’s experiences and narratives in the courtroom.

### **Sexism as a Way of Seeing: Myths and Stereotypes**

Beyond the prosecution’s discretion and failure to indict and charge certain crimes, legal scholars have argued that the result of the application of the rules of evidence may be that there are certain stories which do not enter through the door of the courtroom. Similarly, their operation may result in certain stories being silenced within the proceedings. This argument has been made by some feminist scholars who have sought to interrogate how stories of rape and sexual violence are filtered in and out of the trial process. According to Rosemary Hunter, in the domestic context “Feminist critiques of the rules of evidence have noted their tendency to confine, distort or simply to silence women’s stories.”<sup>309</sup> This finding has been repeated in the context of international trials with Marie Benedicte Dembour and Emily Haslam arguing that “war crimes trials effectively silence, rather than hear, victims.”<sup>310</sup> A claim which some feminist scholars believe, is exacerbated in cases involving gender crimes with Dubravka Zarkov arguing that the “...ICTY provides a discursive context for the increased visibility of gender violence, but in the context of legal proceedings, women’s testimonies are often reduced to descriptions of body parts and actions of the perpetrator.”<sup>311</sup>

Before setting out some of the ICL scholarship on this issue, this section introduces some of the domestic literature on the prosecution of rape and sexual violence in domestic criminal trials. Feminist legal scholars have long argued that evidential and procedural rules affect the ability of women to tell their stories in the courtroom.<sup>312</sup> Scholars have illustrated how procedural and evidential rules operate in gendered ways to silence women’s accounts and experiences of sexual violence in criminal prosecutions. In making these arguments,

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<sup>308</sup> Ngaire Naffine, 'Possession: Erotic Love in the Law of Rape' (1994) 57 *The Modern Law Review* 10, 24-25.

<sup>309</sup> Rosemary Hunter “Evidentiary Harassment: The Use of the Rules of Evidence in an Informal Tribunal” in Childs, Mary, and Louise Ellison. *Feminist Perspectives on Evidence*. (Routledge-Cavendish, 2000) 105.

<sup>310</sup> Marie-Bénédicte Dembour and Emily Haslam. “Silencing Hearings? Victim-Witnesses at War Crimes Trials.” *European Journal of International Law* 15, no. 1 (2004) 151, 151.

<sup>311</sup> Žarkov, *The Body of War: Media, Ethnicity, and Gender in the break-up of Yugoslavia* (n.2) 151.

<sup>312</sup> Kim Lane Scheppele, 'Just the Facts, Ma'am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth' (1992) 37 *New York Law School Law Review* 123; Rosemary Hunter and Kathy Mack 'Exclusion and Silence: Procedure and Evidence' in Ngaire Naffine and Rosemary J Owens, *Sexing the Subject of Law* (Lawbook Company 1997) 171-92.

feminist scholars have looked at the gender of law in general terms and also at specific rules governing rape trials. By doing so, feminist legal scholars have exposed the asymmetrical way in which the law positions men and women, or other “abnormally” sexed and racialised bodies in the courtroom.<sup>313</sup> The specific examples below are illustrative of the gendered nature of the adversarial court process.

Feminist scholars of criminal law from diverse jurisdictions have drawn attention to the effects of bias, myths and stereotyping in the courtroom process. Exposing apparently “neutral” laws as gendered in their application and interpretation, they have sought to challenge some of the stereotypes and myths which have affected criminal prosecutions relating to sexual and gender-based violence.<sup>314</sup> One of the most notorious myths expounded by Lord Chief Justice Matthew Hale is that rape “is an accusation easily to be made and hard to be proved.”<sup>315</sup> Helena Kennedy QC has narrated how complainants of sexual violence were disbelieved or considered by some judges to be “asking for it”.<sup>316</sup> These myths often set out to destroy the reputation of the woman in a rape trial by insinuating that she has “loose” morals or that she is a liar. In many jurisdictions around the world these myths remain pervasive today in prosecutions relating to sexual violence.<sup>317</sup>

It has also been argued that these myths have saturated the criminal process, with feminist legal scholars arguing for procedural and evidential law reform. For example, in common law countries, it is standard practice in rape trials that defence teams seek to introduce evidence of a complainant’s past sexual history into the trial.<sup>318</sup> A defendant might wish to

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<sup>313</sup> Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (n.18); Sherene Razack, *Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms* (University of Toronto Press 1998).

<sup>314</sup> For a recent exploration of this issue see: Joanne Conaghan and Yvette Russell, 'Rape Myths, Law, and Feminist Research: 'Myths About Myths'' (2014) 22 *Feminist Legal Studies* 25.

<sup>315</sup> "Rape is an accusation easily to be made and hard to be proved and harder to be defended by the party accused though never so innocent." I. Hale, *Pleas of the Crown*, 1778. Carol Bohmer and Audrey Blumberg, 'Twice Traumatized: The Rape Victim and the Court' (1975) 58 *Judicature* 391; Baroness McGlynn "Regina v A (No 2) [2001] UKHL 25 in Hunter, McGlynn and Rackley, *Feminist Judgments: From Theory to Practice* (n.28) 211; McGlynn and Munro, *Rethinking Rape Law: International and Comparative Perspectives* (n. 213) 1.

<sup>316</sup> Helena Kennedy, *Eve Was Framed: Women and Criminal Justice* (London: Vintage Press 2005) 117.

<sup>317</sup> *R. v. Ewanchuk* [1999] 1 S.C.R. 330 para 95.

<sup>318</sup> Michelle J Anderson, 'From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law' (2002) 70 *George Washington Law Review* 51; Robert Rodes Jr, 'On Law and Chastity' (2000) 76 *Notre Dame Law Review* 643; Jennifer Temkin, 'Evidence in Sexual Assault Cases: The Scottish Proposal and Alternatives' (1984) 47 *The Modern Law Review* 625; Aileen McColgan, 'Common Law and the Relevance of Sexual History Evidence' (1996) *Oxford Journal of Legal Studies*

tell the court about the past history between himself and the complainant, or introduce evidence more generally about the complainant's lifestyle or sexual activities to insinuate propensity to consent to sexual activity. Feminist lawyers and research reports have found that sexual history evidence is used overwhelmingly as "...an attempt to discredit the victim's character in the eyes of the jury."<sup>319</sup> Evidence of a past relationship between the accused and the complainant is introduced in order to infer consent. These observations have resulted in the promulgation of so-called "rape shield" laws which prevent the introduction of evidence regarding a complaint's past sexual history, as is the case in international criminal courts and tribunals. However, although the trials at the ICTY, ICTR and ICC have no jury, this rule was still deemed necessary in order to prevent these types of defence strategies and techniques being used in the proceedings.

Alongside rules governing whether or not past sexual history is admitted into the trial, the issue of corroboration has been hotly debated both at the national and international level. Historically, many common law countries had rules requiring corroboration evidence in sexual violence cases, or corroboration warnings.<sup>320</sup> The need for corroboration is based on stereotyped and false assumptions that rape is a claim easily made and that women are, quite frankly, liars. It is premised on the assumption that women have something to gain from claiming that they were raped. Although many common law systems have since abolished the absolute requirement for corroboration warnings, some countries still necessitate corroboration evidence.<sup>321</sup>

As set out in the last chapter, the domestic literature and experience on these issues led to intense lobbying to ensure that past sexual history was excluded from the trial process and that corroboration evidence is not mandatory at the international level. Despite these rules, empirical evidence and scholarship at the domestic level suggests that stereotyping

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275; Neil Kibble, 'The Relevance and Admissibility of Prior Sexual History with the Defendant in Sexual Offence Cases' (2001) 32 *Cambrian Law Review* 27; D Birch, 'Rethinking Sexual History Evidence: Proposals for Fairer Trials' (2002) *Criminal Law Review* 531.

<sup>319</sup> *Speaking Up for Justice*, Report of the Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System (Home Office, June 1998). See especially paras 9.56-9.72 of the report. This is also a consequence of the general aim of lawyers in the adversarial trial to discredit witnesses. See Paul Rock, 'Witnesses and Space in a Crown Court' (1991) 31 *British Journal of Criminology* 266.

<sup>320</sup> *R v. Henry* (1969) 53 Cr App R 150.

<sup>321</sup> While in England and Wales, although corroboration in the form of circumstantial or scientific evidence is not a requirement, a judge still has discretion over whether to give a special warning in respect of some witnesses. The direction, known commonly as a *Makanjuola* direction, warns the jury of the danger of acting on uncorroborated evidence in relation to certain witnesses, including complainants in cases of sexual offences, children, patients in secure hospitals and accomplices for the prosecution. *R v. Makanjuola* [1995] 145 NLJ 959.

remains a key difference regarding the way the victim is constructed as “deserving” or not in the rape trial.<sup>322</sup> Further, female witnesses are silenced by general procedures, such as the questioning techniques and the format of the adversarial trial which allows lawyers to rely on these stereotypes. Feminist legal scholars have thus scrutinised the role of the overall process, including the views and biases of members of the judiciary.

The importance of tackling judicial stereotyping in rape cases is illustrated in a case brought before the CEDAW (Convention on the Elimination of All Forms of Discrimination against Women) Committee. In *Vertido v Philippines* the CEDAW Committee was asked to consider whether the acquittal of a defendant in a rape case in the Philippines violated the complainant’s rights. The complainant stated in her communication that the acquittal “...was grounded in gender-based myths and misconceptions about rape and rape victims” and argued that it resulted in a failure by the judiciary to “ensure that women are protected against discrimination by public authorities.” In finding violations of Article 2 (f) and 5(a) of the CEDAW Convention the Committee stated that “...the judiciary must take caution not to create inflexible standards of what women or girls should be... or have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim.”<sup>323</sup> The Committee found that the domestic decision was based on stereotypical assumptions about rape victims and that the negative credibility finding was predicated on these stereotypes. While this decision has been lauded as an important development in the canon of the Committee’s jurisprudence on violence against women, the decision has been criticised by some who argue that the ruling interferes with judicial independence and principles such as impartiality.<sup>324</sup>

Legal scholars have also pointed to the ways in which gender stereotyping has affected the dynamics of war crimes trials. Kirsten Campbell has argued that the ICTY’s decision to admit the medical records of Witness A in the *Furundzija* case was gendered in that it

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<sup>322</sup> David Brereton, 'How Different are Rape Trials? A Comparison of the Cross-examination of Complainants in Rape and Assault trials' (1997) 37 British Journal of Criminology 242.

<sup>323</sup> *Vertido v. The Philippines* (Communication No 18/2008), 1 September 2010, CEDAW/C/46/18/2008; *RPB v The Philippines* (Communication No 34/2011), 12 March 2014, CEDAW/C/57/D/34/2011. In addition see *V.K. v. Bulgaria* (Communication No. 20/2008), CEDAW/C/49/D/20/2008, 17 August 2011; *RKB v. Turkey* (Communication No. 28/2010), CEDAW/C/51/D/28/2010, 13 April 2012. On stereotyping and CEDAW more generally see Rikki Holtmaat, 'Article 5' in Marsha A Freeman, Christine Chinkin and Beate Rudolf, *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford University Press 2012).

<sup>324</sup> On a review of the decision see: Simone Cusack and Alexandra SH Timmer, 'Gender Stereotyping in Rape Cases: The CEDAW Committee’s Decision in *Vertido v The Philippines*' (2011) 11:2 Human Rights Law Review 329.



imposed a higher standard of credibility on the witness. In this case, the defence requested the Tribunal to re-open the case and admit evidence of Post-Traumatic Stress Disorder (PTSD) on the grounds that it affected the reliability of the witnesses' memory. Feminist international lawyers and academics submitted an *amicus curiae* brief in this case arguing that the medical records might have been admitted due to the "unwitting" discriminatory notions that the judges had regarding the reliability of rape victims.<sup>325</sup> Campbell argues that "In the *Furundzija* case, then, prosecutorial processes, procedural and evidential rules, and judicial interpretation of those rules form gendered legal memory."<sup>326</sup> She argues that underlying the defence motion is the myth that a complainant of rape is inherently untrustworthy.

Alongside stereotyping, feminist legal scholars have argued that the practice of witness examination in the adversarial trial format re-victimises complainants of sexual violence and silences their experiences. Legal scholars looking at law and narrative have drawn attention to how the adversarial trial constructs stories through the admission of different forms of evidence.<sup>327</sup> Witnesses are examined and cross-examined by lawyers in ways which can be hostile and invasive with some stories and experiences being filtered outside the courtroom. Alison Young has argued that the space of the courtroom justifies or acts as a "...cloak protecting lawyers from responsibility for the pain they perpetrate and perpetuate in court."<sup>328</sup> This pain is caused not only through techniques of cross-examination but through the insinuation strategies of defence lawyers. Young illustrates that it is through the victim's own narrative that the defence counsel insinuates consent. The privileging of the right to question, over the right to answer, results in the defence counsel demolishing the victim's narrative and replacing it with a counter-narrative which effectively silences the witness.

In the context of the *Foca* case at the ICTY, Julie Mertus has argued that the practice of hostile, invasive and mechanical questioning resulted in an essentialisation of women who testified. According to Mertus, the "...witnesses in the *Foca* case who tried to deviate from the structure of legal witnessing were cut off and then steered into the preferred

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<sup>325</sup> Kirsten Campbell, 'Legal Memories: Sexual Assault, Memory, and International Humanitarian Law' (2014) 40 *Signs* 159. Kelly Askin, 'Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status' (1999) *American Journal of International Law* 97.

<sup>326</sup> *Ibid* 160.

<sup>327</sup> Peter Brooks and Paul Gewirtz, *Law's Stories: Narrative and Rhetoric in the Law* (Yale University Press 1996).

<sup>328</sup> Alison Young, 'The Waste Land of the Law, The Wordless Song of the Rape Victim' (1998) 22 *Melbourne University Law Review* 442, 456.

direction.”<sup>329</sup> The focus on the elements of the crime of rape meant that “...the woman was not relevant as her own agent, but only as her actions demonstrated something about the perpetrator.”<sup>330</sup> This argument is later repeated when she states that “...the narrative constructed at the *Foca* trial focused myopically on the actions of perpetrators and reinforced an essentialist image of Woman Victim.”<sup>331</sup> Mertus draws attention to the role of the prosecution and defense counsels in perpetuating this silencing.

Significantly, Nicola Henry has argued that the criminal prosecutions of wartime rape are inadequate and unable to capture women’s actual experiences of conflict because of the inherent limitations of the law. She argues that legal language cannot capture women’s experiences in their emotional and physical complexity.<sup>332</sup> She states that while “...law gives the impression of having dealt with the crimes of wartime rape” it does not tell the larger stories “about the causes and consequences of armed conflict, ethnic cleansing and massive human rights violations.”<sup>333</sup> This is because international criminal trials are “political” and “violent” in the sense that they are highly gendered spaces, which “...replicate the same sort of gendered biases found within the adversarial tradition of modern liberal democracies.”<sup>334</sup> She explains further that:

Women’s experiences continue to be systematically sidelined not only in official narratives of war, but also during war crimes trials and within other mnemonic forms. There has no doubt been a discernible shift in attitudes towards wartime rape, particularly since the 1990s, but due to the inherent limitations of the law, as well as the gendered nature of these institutional mechanisms, international courts ultimately fail to adequately capture the extent, nature and emotional impact of these crimes; nor do they help to explain the social, political, historical and ultimately gendered context of war and its aftermath.<sup>335</sup>

In the next section of this chapter, I explore these “inherent limitations of the law” further drawing on how different feminist legal theorists have exposed the gender of prosecutions relating to sexual and gender-based violence.

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<sup>329</sup> Julie Mertus, 'Shouting from the Bottom of the Well The Impact of International Trials for Wartime Rape on Women's Agency' (2004) 6 *International Feminist Journal of Politics* 110, 116.

<sup>330</sup> *Ibid* 115.

<sup>331</sup> *Ibid* 118.

<sup>332</sup> Henry, *War and Rape: Law, Memory, and Justice* (n.120) 108.

<sup>333</sup> *Ibid* 127.

<sup>334</sup> *Ibid*.

<sup>335</sup> *Ibid*.

### Inherent Limitations of the Law

For some feminists such as Catharine MacKinnon and Margaret Baldwin, some women are constructed by the law as “unrapable”.<sup>336</sup> However, unlike MacKinnon who has expounded law reform and prosecution at national and international levels as a means to end structural inequality, other feminist legal scholars have called into question the power of the law to bring about these changes.<sup>337</sup> Rather than focusing on specific rules which govern the trial and the criminal process, some feminist scholars have argued that the criminal law (and international criminal law) is inherently limited in terms of the construction of sexual offences and gender crimes. Therefore criticising evidential rules and procedure, is insufficient since changing these practices:

... will not affect, in any substantial way, the conduct and experience of rape trials. This is so because inured within legal discourse is a far more formidable conviction that a woman is both sexual and indifferent, functioning more as a signal to others than as an autonomous agent.<sup>338</sup>

Alison Young argues that women are a projection, “...her bodily surface is a text to be interpreted by the one who images her as textual.”<sup>339</sup> Through her examination of different trial transcripts on the issue of clothing and alcohol consumption, she argues that “...the images of the clothed-yet-undressed woman or the drinking-and-thus-fucking woman are representations of the limits of the law.”<sup>340</sup> She concludes that law is deaf to the accusations of rape, replacing a female complainant’s tongue with “the pathos of wordless song, inarticulate sound, non-language, the pain of alterity.”<sup>341</sup> In other words the law equates the female “subject with her body: the person as body.”<sup>342</sup>

Alison’s Young’s article recalls the work of Carol Smart who famously stated that women’s testimony of violation in the courtroom “becomes a pornographic vignette” since the “...woman in the dock is there in the flesh to feel her humiliation. The judge, the lawyers, the jury, and the public can gaze on her body and re-enact her violation in their

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<sup>336</sup> Catharine MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1989) 175. Margaret A Baldwin, 'Split at the Root: Prostitution and Feminist Discourses of Law Reform' (1992) 5 *Yale Journal of Law & Feminism* 47.

<sup>337</sup> “...in accepting law’s terms in order to challenge law, feminism always concedes too much.” Carol Smart, *Feminism and the Power of Law* (Routledge 1989) 5

<sup>338</sup> Young, 'The Waste Land of the Law, The Wordless Song of the Rape Victim' (n.328) 445.

<sup>339</sup> *Ibid* 450.

<sup>340</sup> *Ibid*. 455.

<sup>341</sup> *Ibid*. 465.

<sup>342</sup> Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (n. 18) 114. Judith Butler, *Precarious Life: The Powers of Mourning and Violence* (Verso 2006).

imagination.”<sup>343</sup> In the context of war crimes trials Nicola Henry has argued that the courtroom is “a voyeuristic space that is intrinsically connected to the pleasure of consuming the pain of the ‘other’.”<sup>344</sup> Similarly, Chiseche Mibenge also argues that the “sexing up” of crimes against humanity risks erotising the discourse rather than challenging gender relations.<sup>345</sup>

The issue of the construction and representation of women in a rape trial is one which has been considered in film studies. The decision of whether or not to portray sexual violence on screen, and whether this reinforces discursive rape has been a issue of debate between feminists. Tanya Horeck has argued in her work on rape, spectacle and courtroom drama that “...we may be participating in a rape by ‘just looking’, be it in Big Dan’s tavern or in the comfort of our living rooms, is the underlying anxiety – and ultimately, perhaps, the appeal – of the rape trial as contemporary American spectacle.”<sup>346</sup> Horeck’s work traces the links between the first fully televised trial in American history and the subsequent Hollywood film, *the Accused* (1988), which re-enacted the gang rape of a woman on a pin-ball machine while the men in the bar cheered as if spectators to a sports event. Catharine Mackinnon has controversially argued in the context of her work on pornography that: “In terms of what the men are doing sexually, an audience watching a real gang rape in a movie is no different from an audience watching a gang rape that is re-enacting a gang rape from a movie, or an audience watching any real gang rape.”<sup>347</sup>

Feminist scholars in different disciplines have thus argued that the ways in which women are seen in the courtroom (and on the screen) affect the ability of the criminal trials to fully capture women’s experiences of sexual violence. Nicola Lacey has thus argued that:

Rape victims giving evidence in court are effectively silenced, caught between the equally inept discourses of the body as property, framed by legal doctrine but incapable of accommodating their experience, and the feminine identity as body,

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<sup>343</sup> Smart, *Feminism and the Power of Law* (n. 337) 38.

<sup>344</sup> Henry, *War and Rape: Law, Memory, and Justice* (n.120) 101.

<sup>345</sup> Chiseche Mibenge, 'Investigating Outcomes of a Limited Gender Analysis of Enslavement in Post-conflict Justice Processes' (2010) 5 *Journal of Peacebuilding & Development* 34, 38.

<sup>346</sup> Tanya Horeck, *Public Rape: Representing Violation in Fiction and Film* (Routledge 2003) 90; Dominique Russell, *Rape in Art Cinema* (Bloomsbury Publishing USA 2010); Sarah Projansky, *Watching Rape: Film and Television in Postfeminist Culture* (NYU Press 2001); Alison Young, *The Scene of Violence* (Routledge-Cavendish 2010).

<sup>347</sup> Catharine MacKinnon, *Only Words* (Harvard University Press 1993) 20.

which pre-judges their experience by equating it with stereotyped and denigrating views of female sexuality.<sup>348</sup>

This recognition of law's inability to incorporate the affective and corporeal discourses has led scholars to ask whether criminal law should be reconstructed at the domestic level.<sup>349</sup> These domestic insights are equally relevant to the silencing at the international level and demonstrate why "best practice" procedural rules alone will not allow women to be heard in the current doctrinal frameworks.

## Conclusion

In the last two chapters, I have set out the development and practice of gender crimes in various international courts and tribunals. In many ways, the international tribunals have used imaginative interpretations in order to prosecute those individually criminally responsible for atrocious acts including ethnic cleansing, genocide and mass murders. The rapes, sexual slavery, forced pregnancy and other acts form part of these systematic campaigns which have caused severe pain and suffering to thousands of individuals. Relying on customary international law, tribunal judges have interpreted the statutes to develop modes of liability such as JCE III which allowed for these crimes to be included within the ambit of the plans. Further, they have given life to the provisions in the statutes, developing the law on sexual slavery and other gender crimes.

However, while the rules have been interpreted and invoked liberally in some cases, in other circumstances the practice points to rigidity and formalism. Alongside these formal instances denying women their chance to tell their stories in the courtroom, the decision to replicate the adversarial criminal trial, with its many gendered problems, has been criticised by some feminist legal scholars. For many, this critique is underpinned by the belief, that international courts play an important role for those wishing to testify to their experiences and receive recognition for their suffering. Thus while the promulgation of an ICC policy paper is a welcome development, it remains to be seen whether feminist critique and interaction with the institutions will lead to a reality which matches the rhetoric.

A role for feminist scholarship could therefore be reconstructive, or as an imaginative project to think about the other ways in which we might better include these voices in the courtroom. Looking to cinema could therefore be another manner of "imagining the

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<sup>348</sup> Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (n.18) 116.

<sup>349</sup> Nicola Lacey, Celia Wells, and Oliver Quick, *Reconstructing Criminal Law: Text and Materials* (Cambridge University Press 2010).

real”.<sup>350</sup> This imaginative project has led some to explore film as an important site of “production, interpretation, consumption, and circulation of legal meaning in popular culture.”<sup>351</sup> Cinema presents us with alternative realities about the law and also about how women’s stories are captured, understood and judged in cinematic terms. Before turning to fictional filmic accounts which depict the ICTY or have normative links to sexual violence in Bosnia, in the next chapter I further explore the interaction and relationship between war crimes trials and the medium of film.

The next chapter contextualises the practice of documentary production by the courts and tribunals and provides some of the theoretical underpinnings which might shape our understandings about the interaction between law and film. It does so in order to highlight that the moving image plays a key role in war crimes trials. It helps to explain why the Tribunals have decided to make documentaries and also, why international lawyers have begun to take film seriously as an advocacy and scholarly medium. In terms of the thesis methodology, it also illustrates why film is privileged over other mediums such as photographs, art or comic books. The Tribunals and courts have turned to film in order to improve the visibility of their work. However, as I will argue, these films and the moving images of the trials are used and employed to reinforce the success rhetoric of the tribunals and thus provide audiences with a partial visibility. This is particularly the case with regard to the prosecution of gender crimes with the release of the documentary *Sexual Violence and the Triumph of Justice*. However, as I will argue in later chapters of this thesis, shifting the focus to fictional films allows us to see and hear complementary and subversive narratives, which paint a more nuanced picture of the legacy of the Tribunal.

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<sup>350</sup> Kim Lane Scheppele, 'Manners of Imagining the Real' (1994) 19 Law & Social Inquiry 995, 1022.

<sup>351</sup> Sarat, *Imagining Legality: Where Law Meets Popular Culture* (University of Alabama Press 2011) 3.

## Chapter 4 Images and War Crimes Trials: Methodologies and Methods

### Introduction

In the broad field of international law there is increasing recognition that film, media and visual mediums interact and interrelate with law in important ways. As Daniel Joyce has put it “International lawyers are coming to recognize the role and significance of global media, especially in the sphere of human rights.”<sup>352</sup> Moving images are frequently employed prior to the commission of atrocities as forms of propaganda, dehumanising “the Other” in preparation for future atrocity.<sup>353</sup> During conflict, war reporters transmit images of war crimes onto our screens. These images along with those captured by civilians are later used as evidence leading to investigations and indictments. At the trial stage, courtrooms full of television screens play footage of atrocities and proceedings are streamed to virtual audiences. Eventually, the conflict and the trials themselves become transformed into documentary or feature films with varying degrees of accuracy.

Alongside the legal functions of film as forms of evidence, war crimes trials are increasingly engaging with visual media for a variety of purposes including outreach and legacy building. This is of course readily understandable in the age of digital technology, live streaming and entertainment. Illiterate viewers can more easily comprehend a film than the hundreds of pages of judgments and sentencing judgments. Non-lawyers can also more readily benefit from a snap shot of the most important jurisprudential developments. The documentaries produced by the international courts also provide an insider’s view into the prosecutions, often following investigators and prosecutors into the field and showing global audiences where the crimes occurred and in which conditions the court’s personnel have to work. More generally, films are an easy and pleasurable way of getting to grips with the courts and tribunals work in different geographical locations with Wouter Werner arguing that “...documentaries have turned into a powerful set of practices through which the court is imagined and narrated, ICC documentaries have become an important way to educate broader audiences about the role and activities of the court.”<sup>354</sup>

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<sup>352</sup> Daniel Joyce, 'Human Rights and the Mediatization of International Law' (2010) 23 *Leiden Journal of International Law* 507, 517.

<sup>353</sup> More generally on propaganda see: Predrag Dojcinovic, *Propaganda, War Crimes Trials and International Law: From Speakers' Corner to War Crimes* (Routledge 2013).

<sup>354</sup> Werner, 'We Cannot Allow Ourselves to Imagine What It All Means: Documentary Practices and the International Criminal Court' (n. 88) 322.

The chapter illustrates that the relationship between film and war crimes is deep and complex. As Joyce explains “Increasingly, what the media does is to translate international law for global audiences, and this is changing the character of the discipline.”<sup>355</sup> Documentary practices, celebrity humanitarianism and calling celebrity witnesses in trial proceedings can all be seen as techniques which respond to the need for media attention and awareness of the courts’ and tribunal’s work. However, while these techniques may help to “spread the shadow of the court” they have not been employed in imaginative ways and have instead been used as part of the outreach and PR machinery of the international institution. This understanding helps to explain why the ICTY might have declared a “triumph of justice” and further illustrates that we need to look elsewhere in order to find narratives which call this progressive narrative into question.

Finally, in this chapter I explore the methodological claims that can be made about the significance of looking at gender crimes through the prism of film. It is also argued that like other visual media such as paintings, cartoons or the novel, film can reveal much about the stories which are left untold in legal proceedings or legal scholarship.<sup>356</sup> The final section of the chapter sets out the methods used to analyse the fictional films. By setting out these interactions and methodological reasons, this chapter aims to show why film is an important source of visibility and how this research contributes to the field through a shift to the fictional filmic medium. While the proliferation of moving images produced by Tribunals and Courts could have been analysed for their narrative content, my argument is that these practices should alert us to what is not being shown on the screen, especially since women’s experiences and narratives in their own terms, seem to have been excluded from the frame.

This chapter is structured as follows: the first part provides an overview of the literature from different fields on conflict, media and the moving image. The second part then turns to the legal functions of film in war crimes trials from Nuremberg to the modern international criminal proceedings. The third part sets out the methodological choices such as film selection criteria and introduction of the film choices. Finally, the chapter outlines the methods used to analyse the three fictional feature films which form the focus of the latter half of this thesis.

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<sup>355</sup> Daniel Joyce, 'Human Rights and the Mediatization of International Law' (n.352).

<sup>356</sup> Linda Mulcahy, 'Watching Women: What Illustrations of Courtroom Scenes Tell Us about Women and the Public Sphere in the Nineteenth Century' (2015) 42 *Journal of Law and Society* 53.



### Conflict, Media and Video Advocacy

Visual mediums such as film can be employed by war crimes trials to fulfill legal functions such as providing contextual or corroboration evidence. Film, however, is not simply a handmaiden to the law. Instead, it plays an important role in information provision and can be part of an advocacy campaign to bring attention to human rights abuses around the world. Further, the filming of the proceedings and the streaming of the trials affects the strategies adopted by counsel. Video advocacy thus operates prior to, alongside and following war crimes proceedings, providing global audiences (with access to televisions and Internet) with complementary or alternative narratives about world events. Further, philosophers have argued that it might even be employed as part of the materiality of warfare.<sup>357</sup> This section sketches out some of these broad interactions.

War crimes trials are often preceded by images of conflict and atrocity which can be the impetus behind global outcries for justice and legal accountability.<sup>358</sup> In context of the Vietnam war, commentators have argued that public perceptions in the United States were changed following the publication of the now iconic photograph of a South Vietnamese girl, Kim Phuc, running down the road, naked and screaming after she was sprayed with napalm.<sup>359</sup> Post-Vietnam, the development of real time media coverage and the effect this has on public opinion has been termed the “CNN effect” following the US intervention in Somalia in the 1990s.<sup>360</sup> The development of camera technology means that films can capture the commission of alleged crimes against humanity or war crimes as evidenced by the leaking of photographs of the torture and sexual abuse of detainees at the hands of US soldiers in Abu Ghraib prison.<sup>361</sup> Films can also capture testimonies by survivors and perpetrators, which may lead to prosecutions, for example the indictment of Hilde Michnia in 2015 in Germany following the screening of the RTE documentary *Close to Evil*.<sup>362</sup>

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<sup>357</sup> Judith Butler, *Frames of War* (New York 2009).

<sup>358</sup> On war and photography see Caroline Brothers, *War and Photography: A Cultural History* (Psychology Press 1997); Haim Bresheeth, 'Projecting Trauma: War Photography and the Public Sphere' (2006) 20 *Third Text* 57.

<sup>359</sup> Denise Chong, *The Girl in the Picture: The Story of Kim Phuc, the Photograph, and the Vietnam War* (Penguin 2001); Stanley Cohen, *States of Denial: Knowing about Atrocities and Suffering* (John Wiley & Sons 2013) 174.

<sup>360</sup> Piers Robinson, *The CNN Effect: The Myth of News, Foreign Policy and Intervention* (Routledge 2005).

<sup>361</sup> Stephen F Eisenman, *The Abu Ghraib Effect* (Reaktion Books 2007); Judith Butler, 'Sexual Politics, Torture, and Secular time' (2008) 59 *The British Journal of Sociology* 1.

<sup>362</sup> Ben Knight. “93-year-old German woman suspected of being Belsen SS guard” Feb 2, 2015. <http://www.theguardian.com/law/2015/feb/02/93-year-old-german-woman-suspect-belsen-ss-guard>

The democratisation and ubiquity of the camera means that citizens play an ever-increasing role in information provision as war reporting becomes “embedded” in every day practice. Images of atrocities are capable of being uploaded online by just about anyone with sufficient Internet access. So-called citizen journalists record events on mobile technology and digital cameras providing immediate footage of war and conflict, unedited by mass media networks or regulated by governments. Consequently, the camera has become a powerful tool in the hands not only of the political elite who have traditionally controlled these resources, but also of the NGO sector, collaborative groups and individuals who use film to spread their message and act as watchdogs through recording the actions of different actors in conflict.<sup>363</sup>

The strategic use of the moving image for political mobilisation purposes by NGOs and others has come to be termed “video advocacy”. As former attorney and filmmaker Gillian Caldwell explains, the term refers to “...the process of integrating video into an advocacy effort to achieve heightened visibility or impact in your campaign. ‘Advocacy’ is the process of working for a particular position, result or solution.”<sup>364</sup> Film is considered a particularly useful medium of advocacy since it allows filmmakers to “elicit powerful emotional impact, connecting viewers to powerful stories” and reach diverse and illiterate audiences.<sup>365</sup> According to Human Rights Watch, which runs a number of film festivals, film “...brings to life human rights abuses through storytelling in a way that challenges each individual to empathize and demand justice for all people.”<sup>366</sup> Non-governmental organisations such as WITNESS have produced step-by-step guides to making activist films encouraging people to “ensure that silent voices are heard and important reforms are made.”<sup>367</sup> In some circumstances, short advocacy films such as *Kony 2012*, have gone viral calling on individuals to pressure governments into action and to arrest Joseph Kony in order for him to be prosecuted at the Hague.<sup>368</sup>

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<sup>363</sup> Joyce, 'Human Rights and the Mediatization of International Law' (n.352).

<sup>364</sup> Sam Gregory and Péter Gábor, *Video for Change: A Guide for Advocacy and Activism* (Pluto Press London 2005) 3.

<sup>365</sup> Ibid 2.

<sup>366</sup> Human Rights Watch Film Festival Website <http://ff.hrw.org/about> last accessed 15 March, 2015.

<sup>367</sup> The film currently has over 100 million views on Youtube <https://www.youtube.com/watch?v=Y4MnpzG5Sgc> last accessed 1 March 2015.

<sup>368</sup> Sam Gregory, 'Kony 2012 Through a Prism of Video Advocacy Practices and Trends' (2012) 4 *Journal of Human Rights Practice* 463. Despite this viral campaign, however, Kony still remains at large.

In other cases, individuals create images and films, which result in conflict or civil unrest.<sup>369</sup> The outrage over the amateur video *The Innocence of Muslims* (2012) supports the observation made by political scientists that images play an ever-increasing role in conflict settings with some scholars claiming that film – documentary or fictional - can end or even begin a war.<sup>370</sup> Add to this the theory that the media is not just a watchdog or the mouthpiece of the establishment but that “...military and media networks have converged to the point where they are virtually indistinguishable: that media constitute the spaces in which wars are fought and are the main ways through which populations (or audiences) experience war.”<sup>371</sup> The point being made here is that the media are deeply implicated in how conflicts are fought domestically and internationally.<sup>372</sup> Tim Allen and Jean Seaton have boldly suggested that a “modern definition of war might well be that of a conflict named as such by the media.”<sup>373</sup>

While media reporting has an extremely important and powerful role in information dissemination and audience reaction, the direct cause and effect theory of the impact of images has come under greater scrutiny with theorists positing the many different ways in which film and images can impact global audiences. The belief that images, the media or video advocacy can mobilise public opinion into action is hotly contested with some arguing instead that media coverage desensitises those who watch the images.<sup>374</sup> Thus

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<sup>369</sup> Peter Bradshaw. “Innocence of Muslims: A dark demonstration of the power of film” Guardian Film Blog 17 September 2012. Available at <http://www.guardian.co.uk/film/filmblog/2012/sep/17/innocence-of-muslims-demonstration-film>. accessed 19 September 2014.

<sup>370</sup> Ken Betsalel and Mark Gibney, 'Can A Film End A War?' (2008) 30 Human Rights Quarterly 522; Daniel Lieberfeld, 'Teaching about War through Film and Literature' (2007) 40 Political Science & Politics 571.

<sup>371</sup> Daya Kishan Thussu and Des Freedman, *War and the Media: Reporting Conflict 24/7* (Sage 2003) 7.

<sup>372</sup> Tim Allen and Jean Seaton, *The Media of Conflict: War Reporting and Representations of Ethnic Violence* (Zed books 1999).

<sup>373</sup> Jean Seaton 'Understanding Not Empathy' in Thussu and Freedman, *War and the Media: Reporting Conflict 24/7* (n.371) 45. A similar idea is expressed by Stanley Cohen when he says that “Coverage is so selective that the media in effect create a disaster when they recognize it.” Cohen, *States of Denial: Knowing about Atrocities and Suffering* (n.359) 169.

<sup>374</sup> This is commonly referred to as “compassion fatigue” which has been defined by Keith Tester as “...becoming so used to the spectacle of dreadful events, misery or suffering that we stop noticing them. We are bored when we see one more tortured corpse on the television screen and we are left unmoved... Compassion fatigue means being left exhausted and tired by those reports and ceasing to think that anything can be done to help.” Keith Tester, *Compassion, Morality and the Media* (Open University Press Buckingham 2001) 13. See also Luc Boltanski, *Distant Suffering: Morality, Media and Politics* (Cambridge University Press 1999). A different view is expressed by Ariella Azoulay in her call for “universal spectators” in Ariella Azoulay, Rela Mazali and Ruvik Danieli, *The Civil Contract of Photography* (Zone books New York 2008).

Susan Moeller has argued that “most media consumers eventually get to the point where they turn the page.”<sup>375</sup> Moeller explains that the continuous stream of images of atrocity in the news media “...causes the public to lose interest, and the media’s perception that their audience has lost interest causes them to downscale their coverage” with the consequence that the story no longer gets reported.<sup>376</sup>

The responses to distant suffering may vary depending on how the images are framed and composed by the news narrative.<sup>377</sup> As Stanley Cohen explained “...knowledge about atrocities in distant places is more easily rendered invisible: ‘I just switch off the TV news when they show those corpses in Rwanda’.”<sup>378</sup> Information overload, sensory saturation, being tired of the truth, normalisation, desensitisation, psychic numbing, and ironic spectatorship are just some of the reactions which we have to images of suffering on our television screens with Cohen arguing that “...the transubstantiation of one thing (images of brutality) into another (respect for human rights) can hardly be taken for granted, any more than the iconography of the starving African child can still stand for social injustice.”<sup>379</sup> Similarly, Tristan Anne Borer has suggested that the effect of images of suffering and atrocity may result in complacency, hopelessness, or worse pleasure in “an almost pornographic way”. He explains that perhaps:

...showing images of atrocities may hurt rather than help the victims of violence, turning the viewers into voyeurs of exoticized and objectified victims in an almost pornographic way. In other words, despite the repeated presentation of it as a simple causal relationship (exposure to images and stories of violence leads to action to prevent it), in reality the relationship between media portrayals of atrocities and individual responses to the portraits is anything but simple.<sup>380</sup>

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<sup>375</sup> Susan D Moeller, *Compassion Fatigue: How the Media Sell Disease, Famine, War and Death* (Psychology Press 1999) 9.

<sup>376</sup> Ibid 12.

<sup>377</sup> Cohen, *States of Denial: Knowing about Atrocities and Suffering* (n.359) 176.

<sup>378</sup> Ibid (n.359) 5.

<sup>379</sup> Ibid 187. See also Lilie Chouliaraki, *The Spectatorship of Suffering* (Pine Forge Press 2006); Lilie Chouliaraki, *The Ironic Spectator: Solidarity in the Age of Post-Humanitarianism* (John Wiley & Sons 2013).

<sup>380</sup> Tristan Anne Borer, *Media, Mobilization, and Human Rights: Mediating Suffering* (Zed Books 2012) 4. On the “pornography of pain” see Karen Halttunen, ‘Humanitarianism and the Pornography of Pain in Anglo-American Culture’ (1995) *The American Historical Review* 303.

It is within this context of war as “infotainment”,<sup>381</sup> compassion fatigue and perhaps indifference that human rights advocates have had to come up with strategies to jolt people into action over atrocities being perpetrated at home and in faraway places. Borer argues that three strategies are employed with this objective: shock media, social media and the use of celebrity advocates.<sup>382</sup> The international criminal tribunals have also resorted to social media and in some cases, celebrity status in order to bring attention to war crimes trials. Through social media, local engagement programmes and internet technology the tribunals and courts have sought to promote themselves in their bid to ensure local and global awareness of the trials.<sup>383</sup> Before examining some of these modern techniques in relation to war crimes trials, the next section briefly sets out how war crimes trials have interacted with film and the visual medium since the first prosecutions at Nuremberg.

### **The Legal Functions of Film**

As early as 1914, W. Stephen Bush, writing on World War I stated: “The only real and incorruptible neutral in this war is not the type but the film... It is utterly without bias and records and reports but does not color and distort.”<sup>384</sup> Images are thus considered to provide audiences with documentary evidence of crime, conflict and atrocity. While the idea that film provides an incorruptible and neutral form of evidence has been challenged on grounds of objectivity, authenticity and framing,<sup>385</sup> film and photographic evidence continue to play important roles in legal proceedings.<sup>386</sup> In the context of international criminal justice, it has been argued that tribunals and courts need film in order to convince

<sup>381</sup> According to Daya Kishan Thussu, “...the key features of war as infotainment: the obsession with high-tech reporting, using a video-game format to present combat operations, with complex graphics and satellite imagery, providing a largely virtual, even bloodless, coverage of war.” Thussu and Freedman, *War and the Media: Reporting Conflict* 24/7 (n.371) 117.

<sup>382</sup> Borer, *Media, Mobilization, and Human Rights: Mediating Suffering* (n.380) 24.

<sup>383</sup> According to John Hocking, the ICTY Registrar “Venturing into the social media sphere proved to be a revolutionary step for the Tribunal: never before had a court been able to communicate so directly and instantaneously with the public in words and in pictures, thereby creating a strong sense of participation amongst audiences”. ICTY Annual Outreach Report. ICTY Registry. March 2012. [http://www.icty.org/x/file/Outreach/annual\\_reports/annual\\_report\\_2012\\_en.pdf](http://www.icty.org/x/file/Outreach/annual_reports/annual_report_2012_en.pdf)

<sup>384</sup> Stephen W Bush, 'War Films ' (1914) *Moving Picture World* 1617.

<sup>385</sup> John Tagg, *The Burden of Representation: Essays on Photographies and Histories*, vol 80 (U of Minnesota Press 1988) 60-102; John Tagg, *The Disciplinary Frame: Photographic Truths and the Capture of Meaning* (U of Minnesota Press 2009); Susan Sontag, *On Photography* (Macmillan 1977) 5; Susan Sontag, *Regarding the Pain of Others* (Macmillan 2004); Roland Barthes, *Camera Lucida: Reflections on Photography* (Macmillan 1981).

<sup>386</sup> Jennifer Mnookin 'The Image of Truth: Photographic Evidence and the Power of Analogy' (1998) 10 *Yale Journal of Law and Humanities* 1; Jessica Sibley 'Filmmaking in the Precinct House and the Genre of Documentary Film' (2005) 29 *Columbia Journal of Law and Arts* 107; Jessica Sibley 'Judges as Film Critics: New Approaches to Filmic Evidence' (2004) 37 *University of Michigan Journal of Law Reform* 493.

courts of the “ineffable”. As Peter Goodrich and others argue, the visual is of key evidential import for war crimes trials which rely on the flagrant depiction and visibility of the acts on trial.<sup>387</sup> In other words, seeing the crimes and their aftermath on screen is necessary in order to convince the judges and others that these crimes have been committed.

Photographs and moving images have been admitted as forms of evidence since the first war crimes trial at Nuremberg. The Prosecution’s use of a documentary film as evidence was an unprecedented step in international law.<sup>388</sup> During the proceedings, the prosecution submitted a number of film reels, with one documentary film in particular captivating the attention of the court. Robert Jackson, the Chief Prosecutor, introduced the film *Nazi Concentration Camps* to help those present understand the meaning of the term “concentration camp”.<sup>389</sup> According to Lawrence Douglas, the screening of a documentary film, “in a juridical setting was unprecedented.”<sup>390</sup> Douglas writes that the film acted as an “independent witness” during the trial with the prosecution intent on “securing the most reliable and complete representations of unspeakable atrocities.”<sup>391</sup>

Beyond photography and films as evidence, Martha Minow has considered the importance of capturing scenes of the Nuremberg Tribunal on film. She has argued that the partial filming of the proceedings in Nuremberg helped to reinforce the ideals of the Rule of Law and legal responses to atrocity:

The World War II war crimes trials represent the possibility of legal responses, rather than responses grounded in sheer power politics or military aggression. The

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<sup>387</sup> Christian Delage and Peter Goodrich, *The Scene of the Mass Crime: History, Film, and International Tribunals* (Routledge 2013).

<sup>388</sup> Christian Delage, 'The Place of the Filmed Witness: From Nuremberg to the Khmer Rouge Trial' (2009) 31 *Cardozo Law Review* 1087, 1091.

<sup>389</sup> Lawrence Douglas, 'Film as Witness: Screening Nazi Concentration Camps Before the Nuremberg Tribunal' (1995) *Yale Law Journal* 449, 450.

<sup>390</sup> *Ibid.* 451.

<sup>391</sup> Outside legal scholarship, the *Nazi Concentration Camps* documentary has received critical attention from Holocaust historians and film critics. The documentary has been heralded as marking an important step in the development of modern cinematography. Antoine de Baecque, historian and film critic, has stated: “Modern cinema was born out of those images, which have been ceaselessly at work in it, resurfacing in other forms, the to-camera look, the freeze-frame, documentary in fiction, the flashback, montage, contemplation, malaise, those specifically cinematographic figures that testify to the obsessive presence of the concentrationary palimpsest.” De Baecque along with others such as Claude Wacjman assert that the violence of the Holocaust “...radically transformed cinematic images and our relationship to them.” Libby Saxton, *Haunted Images: Film, Ethics, Testimony and the Holocaust* (Wallflower Pr 2008) 4.

images of defendants, preserved on film, display not only the horrors of their acts but the methodological, careful processes of litigation.<sup>392</sup>

By filming the defendants on trial, the Nuremberg Trial was performing what is now termed “outreach” and “legacy”, teaching global audiences about the merits of international legal responses to atrocity. Christian Delage believes that audiences were prepared for this international and legalistic response to the Nazi atrocities through filmic education prior to the commencement of the prosecutions of the Nazis. He has argued that fictional film played an important role in preparing audiences in the United States where Hollywood studios were commissioned to make films about an international tribunal to prosecute the Nazis.<sup>393</sup>

Whilst the images of the concentration camp and other film reels played a prominent role in the Nuremberg proceedings, the same cannot be said for the Tokyo Tribunal where only one film was screened during the whole proceedings.<sup>394</sup> Helen Lennon has described this as “a puzzling contrast” to the visual evidence presented at Nuremberg.<sup>395</sup> According to Lennon, the prosecution at Tokyo declined to use available footage.<sup>396</sup> She argues that the presence of only one film during the proceedings at the Tokyo Tribunal “...signals an unsettling omission of non-fiction film images that were readily available to the prosecution, raising the question of what was *not* adjudicated at the military tribunals.”<sup>397</sup> This argument has been made by scholars from various schools of thought who have sought to highlight the selectivity of crimes prosecuted at Tokyo.<sup>398</sup>

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<sup>392</sup> Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass violence* (Beacon Press 1998) 27. See also the Harvard Archive on the Nuremberg Trials <http://nuremberg.law.harvard.edu/> last accessed 15 March 2015.

<sup>393</sup> Delage, 'Creating an International Court: A Movie Project' (n.43).

<sup>394</sup> According to the National Archives, exhibit 148 of the IMTFE was a film entitled, “Japan in time of Emergency”, a Japanese propaganda film which emphasised national strength and spirituality. Apart from this exhibit, there is little evidence to suggest that motion pictures played a prominent role in the prosecution of Japanese war criminals during the IMTFE or in the thousands of subsequent trials which took place in Asia and beyond.

<sup>395</sup> Helen Lennon, 'A Witness to Atrocity: Film as Evidence in International War Crimes Tribunals' in Toby Haggith, Joanna Newman: *Holocaust and the Moving Image Representations in Film and Television Since 1993* (London, New York : Wallflower 2005), 68.

<sup>396</sup> I first became aware of this footage watching the films: *Iris Chang: the Rape of Nanking* (2007) and *Nanking* (2007).

<sup>397</sup> Lennon, 'A Witness to Atrocity: Film as Evidence in International War Crimes Tribunals' (n.395).

<sup>398</sup> Tanaka Toshiyuki, Timothy LH McCormack and Gerry J Simpson, *Beyond Victor's Justice?: The Tokyo War Crimes Trial Revisited* (Martinus Nijhoff Publishers 2011); Elizabeth S Kopelman, 'Ideology and international law: The Dissent of the Indian justice at the Tokyo War Crimes Trial' (1990) 23 New York University Journal of International Law & Politics 373.

Undoubtedly, the developments in cinematic and digital technology have resulted in a shift in legal practices since the setting of the first prosecutions at the International Military Tribunals. The *Eichmann* trial was the first prosecution of international crimes to be filmed in its entirety.<sup>399</sup> In Argentina, the former Chief Prosecutor of the ICC, Luis Moreno Ocampo, has argued that the filming and televising of the trial of the Military Junta in the mid-1980s did much to turn public opinion against the former dictator, Videla.<sup>400</sup> The importance of filming war crimes trials has been acknowledged by a number of legal scholars who have argued that these images contribute to the “didactic purposes” of prosecuting those responsible for international crimes.<sup>401</sup> To this end the international courts organise and preserve visual archives of the trials. Unlike the *Eichmann* trial, the films of the ICTY proceedings are carefully stored, organised and archived. The importance of audio-visual archives has been acknowledged in the ICTY Background Paper.<sup>402</sup> The archives have the double aim of teaching the public about the work of the Tribunal and also to provide survivors and others with access to “memory” and cultural heritage. According to Despina Syrri, the ICTY archives constitute “...an important legal and cultural heritage that belongs to the world community, as well as to the state and the citizens involved.”<sup>403</sup>

The visual archive of the court proceedings provides a wealthy resource for future research into the trial and for filmmakers who wish to make documentary films. Having a visual archive however, has led some, like filmmaker Christophe Gargot to question what it is that we do *not* see when we watch the thousands of hours of footage of the trials.<sup>404</sup> Gargot thus alerts us to the importance of what remains outside of the camera frame and the image controlled and projected by the Tribunals. Before exploring this idea further in the subsequent chapters, the section below draws out some of the ways in which the tribunals and courts employ and use film for visibility purposes.

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<sup>399</sup> Douglas ‘Trial as Documentary: Images of Eichmann’ in Moran and others, *Law’s Moving Image* (Cavendish Publishing 2004). See also Griselda Pollock and Max Silvermann, *Concentrationary Memories: Totalitarian Resistance and Cultural Memories* (IB Tauris 2013); Deborah Whitehall, ‘People in Glass Houses: Lessons for International Law from Margarethe von Trotta’s Hannah Arendt’ (2014) 2 London Review of International Law 329.

<sup>400</sup> See the documentary: *On the Front Line: The Making of the OTP* (2012). Federal Court on Criminal and Correctional Matters No 1, Secretariat 2, San Isidro, Argentina, Claim No. 1284/85, captioned “Videla, Jorge Rafael et al. s/ alleged infraction of Arts. 146, 293 and 139, inc. 2nd.

<sup>401</sup> Douglas, ‘The Didactic Trial: Filtering History and Memory into the Courtroom’ (n.44).

<sup>402</sup> Assessing the Legacy of the ICTY – Background Paper. 23-24 February 2010, the Hague. Available online at <http://www.icty.org/sid/10292> accessed 19 September 2014.

<sup>403</sup> Despina Syrri, ‘On Dealing with the Past, Transitional Justice and Archives’ (2008) *Balkanica* 221.

<sup>404</sup> *D’Arusha a Arusha* (2008): Screening and Discussion. 27 June 2013. Gasworks, London.



### **Moving Images and War Crimes Trials: Modern interactions**

The interaction between war crimes trials and film today could be approached and explored from a range of perspectives. For example, a critical international legal scholar might highlight how international tribunals have been keen to realise the potential of film in their communications and marketing strategies. These marketing techniques are employed as a means to obtain and solicit funding from private and state actors and also as a means to legitimise the existence of international courts and tribunals.<sup>405</sup>

From a theoretical perspective, war crimes trials and motion pictures can be linked through their production of spectacles. Since the 1930s, it has been argued that the camera and film have altered our “ways of seeing”.<sup>406</sup> It has even been argued that television and film have created “spectacle societies” accustomed to consuming and being rendered docile by visual imagery and entertainment.<sup>407</sup> In legal studies, the trial and criminal punishment have also been theorised as forms of “spectacles.” The law operates through a visual trial of custom, ritual, costume and practice. War crimes trials have long been considered by critics to be show trials or didactic performances.<sup>408</sup> It has been claimed that prosecutions of those most responsible for international crimes have functions beyond findings of guilt or innocence, of retribution and deterrence, encompassing the making of a historical record, truth-telling, memorialising, closure and the conservation of memory.<sup>409</sup> According to critical legal scholars of international criminal justice, these purposes lie “at the very heart of the proceedings.”<sup>410</sup>

Whether considered as a savvy communications strategy, part of the spectacle of war crimes trials or as recordings for archives, it is clear that the tribunals and courts pay great attention to how they are portrayed in the visual medium. The ICTY thus uses and controls

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<sup>405</sup> Sara Kendall, 'Commodifying Global Justice Economies of Accountability at the International Criminal Court' (2015) *Journal of International Criminal Justice* 1.

<sup>406</sup> Walter Benjamin, *The Work of Art in the Age of Mechanical Reproduction* (Penguin UK 2008).

<sup>407</sup> Guy Debord stated that “In societies where modern conditions of production prevail, all of life presents itself as an immense accumulation of *spectacles*. Everything that was directly lived has moved away into representation”. Guy Debord, *Society of the Spectacle* (Detroit: Black and Red 1983).

<sup>408</sup> Hannah Arendt, *Eichmann in Jerusalem* (Penguin 1963); Martti Koskeniemi, 'Between Impunity and Show Trials' (2002) 6 *Max Planck Yearbook of United Nations Law* Online 1; Simpson, *Law, War & Crime: War Crimes, Trials and the Reinvention of International Law* (n.169) 105-132.

<sup>409</sup> On the purposes of international criminal trials see: Mark A Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press 2007) 149.

<sup>410</sup> Douglas, 'The Didactic Trial: Filtering History and Memory into the Courtroom' (n.44); Gerry J Simpson, 'Didactic and dissident histories in war crimes trials' (1996) 60 *Alb L Rev* 801.

the image for its own ends. For example, at the ICTY video and other technologies, such as audio, are used to provide the public with access to the proceedings. Members of the public who cannot travel to the Hague can take a tour of the Tribunal virtually on the Internet from the comfort of their own home.<sup>411</sup> Following a virtual tour, live proceedings can be streamed and watched online (with a 30 minute delay in most cases). The thirty minute delay allows for the footage to be edited in case any confidential information is accidentally recorded and included in the broadcast material. If a live proceeding is missed, parts of the recorded proceedings can be accessed and viewed on Youtube channels, such as the ICTY channel which as of today has well over 1,000 videos uploaded.<sup>412</sup> The rationale behind live-streaming can be found in the former President, Antonio Cassese's statement regarding public access and critical engagement with the trials. He wrote:

In accordance with the well-known maxim, 'Justice must not only be done, but must be seen to be done', it is not enough for the International Tribunal simply to administer international criminal justice impartially and with due regard for the rights of the accused. It must also carry out this activity under the scrutiny of the international community.<sup>413</sup>

At the ICTY, the three courtrooms of the Tribunal are equipped with modern technology, which is used to make proceedings more efficient. Software allows electronic versions of transcripts to be transferred real-time to courtroom participants' computer screens. Media outlets are all invited to access audio-visual feeds on a first come, first served basis and the proceedings (initial appearances, judgments and sentencing) are all streamed online. The proceedings are recorded by an audio-visual director who sits in a soundproof room to the side of the courtroom. According to the ICTY website, these directors are registry staff and are "neutral" to the proceedings.<sup>414</sup> The director controls the six cameras in each courtroom and collates the images from the six cameras into one image which is broadcast to the outside world. The audio-visual directors are responsible for ensuring witness protection where appropriate, pixelating images or distorting voices. Similarly at the ICTR

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<sup>411</sup> The Outreach programme alone has facilitated the visits of over 8,000 international visitors, with an additional 500 visitors coming from the former Yugoslavia.

<sup>412</sup> The ICTY Youtube site can be accessed via this link <http://www.youtube.com/user/ICTYtv> accessed 19 September 2014.

<sup>413</sup> Antonio Cassese, 'Foreword by the former President of the International Criminal Tribunal for the former Yugoslavia' (1997) 37 *International Review of the Red Cross* 601, 602.

<sup>414</sup> ICTY Registry. Courtroom Technology. Available at: <http://www.icty.org/sid/167> accessed 19 September 2014.

based in Arusha, Tanzania, “state of the art” recording equipment allows the Tribunal to broadcast the proceedings on television. The equipment donated by the French Government became operational on the 15 November 1999 during the trial of Ignace Bagilshema.<sup>415</sup>

The ICC also has a virtual gallery through which the courtroom, the detention facility and different sections of the court can be visited online.<sup>416</sup> Alongside the development of internet-based technology, the Court has affirmed its commitment to improving and expanding audio-visual productions including downloadable broadcast quality video and audio edits of the proceedings and DVD copies.<sup>417</sup> As a part of its outreach strategy the ICC has affirmed that “...video screenings of the judicial proceedings relevant for the country are of particular importance as people cannot attend the trials in person. Through video screening a sense of how the trials actually unfold in the Hague can be conveyed to the affected communities.”<sup>418</sup>

The live streaming of the proceedings serves as a reminder that the trial is a highly visual process. Domestic criminal trials such as those of OJ Simpson, Michael Jackson and Oscar Pistorius have been televised live to audiences around the world. On the one hand, televising the trials opens up the courts to public accountability and allows the general public to see the legal proceedings in action. It could also be argued that it sends a strong message about legal consequences of criminal actions (or lack thereof) and the restoration of the Rule of Law. On the other hand, it has been argued that the presence of the camera disrupts the trial and turns it into a “mega-spectacle”. Douglas Kellner has stated in the context of the OJ Simpson case that:

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<sup>415</sup> ICTR Press Release. Barayagwiza Withdraws Request Seeking Partial Stay of Appeals Order. ICTR/INFO9-2-212en. Arusha, 18 November 1999. For information on the Special Court of Sierra Leone see: Order to Permit Filming in the Courtroom. *Prosecutor v. Moinina Fofana, Allieu Kondewa*, SCSL-04-14-T and SCSL-04-15-T (4 October 2004). Human Rights Watch. Bringing Justice: the Special Court for Sierra Leone. VIII. Accessibility and Legacy. September 8, 2004. Available at <http://www.hrw.org/reports/2004/09/07/bringing-justice-special-court-sierra-leone> last accessed 19 September 2014. Suzannah Linton, ‘Cambodia, East Timor and Sierra Leone: Experiments in International Justice’ (2001) 12 Criminal Law Forum 185. All episodes of the series “Duch on Trial” can be seen online at <http://krtmonitor.org/> last accessed: 19 September 2014.

<sup>416</sup> ICC Virtual Tour. Available at [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/virtual%20tour/Pages/virtual%20tour.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/virtual%20tour/Pages/virtual%20tour.aspx) last accessed 19 September 2014.

<sup>417</sup> Assembly of States Parties. Report of the Court on the public information strategy 2011-2013. 22 November 2010. ICC-ASP/9/29.

<sup>418</sup> Assembly of States Parties. Strategic Plan for Outreach of the International Criminal Court. 29 September 2006. ICC-ASP/5/12 para 2.5, 3 and 51.

The camera creates a mediatisation of the courtroom that does not merely mirror an event objectively, but alters what is happening. Televising an event live is always subject to media commentary that frames the issues and defines what is important and what “really” happened. Thus, the media frames and interpretations help constitute the “reality” of the situation. In addition, the presence of the televisual apparatus seduces both sides into playing to the camera, and thus inevitably transforms the dynamics of the trial.<sup>419</sup>

This transformation in the trial dynamics due to the presence of the camera was evident in the *Milosevic* trial before the ICTY. Reporting on the case in 2002, Catherine Samary stated in *le Monde Diplomatique*:

Milosevic opted to use this public arena to present his own defence, declaring that “the people and public opinion should be his judges.” In Belgrade, there was intense interest in the opening of the trial. The proceedings were broadcast live on three channels, viewers kept a daily tally of the points scored by the defendant and his popularity began to recover.<sup>420</sup>

Milosevic used the media coverage to play footage of the damage caused by the NATO bombings. In the documentary *Milosevic on Trial* (2007) which is based on over 2,000 hours of courtroom footage and on interviews with lawyers and other insiders, the defence lawyer outlines that Milosevic’s strategy was not to defend himself but to attack, a tactic which Martii Koskeniemi has described as hardly surprising.<sup>421</sup> In the documentary, the defence lawyer states with reference to the Tribunal that “it is a kind of stage, we want him to be heard all around the world.”<sup>422</sup> The presence of the cameras and the guarantee of a global audience thus clearly affected Milosevic’s legal strategy and the trial process. Milosevic cross-examined witnesses himself and asked questions which threatened to reveal their protected identities. As Gerry Simpson has observed, the adversarial nature of the trial means that “...war crimes trials, then, may be show trials but they are shows for the defence too.”<sup>423</sup> Alternative and dissident stories are not only told through the

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<sup>419</sup> Douglas Kellner, *Media Spectacle* (Psychology Press 2003) 106.

<sup>420</sup> Samary, Catherine. “The Case against the Hague Court: Milosevic in the Dock” *Le Monde Diplomatique*, April 2002. Available at: <http://mondediplo.com/2002/04/07hague> accessed September 10, 2014.

<sup>421</sup> Koskeniemi, 'Between Impunity and Show Trials' (n.408) 1.

<sup>422</sup> *Milosevic on Trial* (2007).

<sup>423</sup> Simpson, *Law, War & Crime: War Crimes, Trials and the Reinvention of International Law* (n.169) 6.

courtroom proceedings but streamed to captivated audiences in cafes in Belgrade and elsewhere.

The effect of the camera in the courtroom is also evident in the practice of calling celebrity witnesses to the courts. In the *Charles Taylor* case, Naomi Campbell and Mia Farrow were just two witnesses out of “a star-studded cast of witnesses summoned to testify about blood diamonds” before the SCSL.<sup>424</sup> The contradictory evidence of Mia Farrow on the diamond donation provided news outlets with sensational drama, which war crimes trials often do not provide.<sup>425</sup> Naomi Campbell’s appearance on the Oprah Winfrey show, the dinner involving numerous celebrities and politicians and ensuing media circus, led Courtney Griffiths, Taylor’s defence lawyers to argue:

There was an even greater distraction, although it attracted the greatest publicity, and that is the appearance of Naomi Campbell, her agent, and also Mia Farrow. Why that evidence was called I’m still at a loss because the question is: How does a gift of diamonds to a beautiful woman, diamonds being of course a girl’s best friend, in South Africa, link Charles Taylor to the purchase of arms which, on one floated theory, arrived in Magburaka at some later stage in 1997? I don’t see it. In our submission, the calling of Naomi Campbell was a complete disaster for the Prosecution.<sup>426</sup>

The Office of the Prosecutor (OTP) of the ICC has also followed suit by releasing a photograph of the actor and UN Special Envoy to the United Nations Higher Commissioner for Refugees, Angelina Jolie, front row at the reading of the *Lubanga* judgment.<sup>427</sup> The photograph below is taken from the OTP press release on the day of the *Lubanga*

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<sup>424</sup> Owen Bowcott. ‘Charles Taylor and the ‘dirty looking stones’ given to Naomi Campbell’ 26 April 2012 <http://www.guardian.co.uk/world/2012/apr/26/charles-taylor-trial-naomi-campbell> accessed 19 September 2014. Campbell appeared on the 5 August 2010. Mia Farrow on the 9 August 2010.

<sup>425</sup> The video of Naomi Campbell’s testimony is widely available online. For example see: Bruno Waterfield ‘Charles Taylor: how Naomi Campbell “blood diamond” evidence was critical.’ 26 April 2012. <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/liberia/9227165/Charles-Taylor-how-Naomi-Campbell-blood-diamond-evidence-was-critical.html> last accessed: 19 September 2014.

<sup>426</sup> *Prosecutor v. Charles Taylor*. SCSL-03-01-T. 9 March 2011, Trial Transcript, page 69.

<sup>427</sup> Angelina Jolie’s role as a celebrity activist and humanitarian has been explored elsewhere. Borer, *Media, Mobilization, and Human Rights: Mediating Suffering* (n.380) 190. Her initiative along with William Hague on combating sexual violence led to a world summit with mass media attention on the issue of sexual violence in conflict.

judgment.<sup>428</sup> According to the press release the photograph marked her fourth visit to the ICC and third appearance at the *Lubanga* trial proceedings. Angelina Jolie also appears in the documentary *The Court*, a film about the ICC from point of view of the OTP.<sup>429</sup> Unlike Naomi Campbell who testified following a subpoena, Angelina Jolie's attendance at the ICC marks her own agenda and commitment to raising awareness about sexual violence in conflict and the plight of refugees in what has been termed by some as "celebrity humanitarianism".<sup>430</sup>



Angelina Jolie-Pitt attends ICC hearing to witness the *Lubanga* decision.<sup>431</sup>

Douglas Kellner and others such as Andrew Cooper and Joseph Turcotte have argued that involving celebrities can be an effective means of bringing media and public attention to a cause due to their mix of star power, attraction and attachment.<sup>432</sup> Kellner has explained the use and involvement of celebrities as follows:

...when daily cable news, presidential campaigns, and major media events are presented in the form of media spectacle it is likely that media attention and often spectacle produced by celebrity activism will publicize their issues, and make such

<sup>428</sup> Press Release OTP: Angelina Jolie attends ICC hearing to witness Lubanga Decision. ICC-OTP-20120314-PR777. 14 March 2012. Available at [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200106/press%20releases/Pages/pr777.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200106/press%20releases/Pages/pr777.aspx) last accessed 19 September 2014.

<sup>429</sup> *The Court* (2013).

<sup>430</sup> Lilie Chouliaraki, 'The Theatricality of Humanitarianism: A Critique of Celebrity Advocacy' (2012) 9 Communication and Critical/Cultural Studies 1.

<sup>431</sup> © ICC-CPI.

<sup>432</sup> Borer, *Media, Mobilization, and Human Rights: Mediating Suffering* (n.380) 188.

celebrity diplomats more public and perhaps effective advocates for their causes than normal diplomats.<sup>433</sup>

While “celebrity diplomats” such as Angelina Jolie have helped to bring some media attention to the proceedings at the ICC, for the most part live streaming of the trials remains a very formalistic and legalistic process, which may be difficult for viewers to digest. First, there is the practicality of watching the many hundreds or even thousands of hours of trial footage. Secondly, and related to the length of the proceedings, much of the trial is concerned with procedural aspects such as disclosure and other evidentiary matters. Even when one does watch the proceedings, large chunks of the proceedings occur “*in camera*” without sound or image. The trial can alternate between the courtroom proceedings and a black screen for many hours.

As Slavenka Drakulic notes from her time observing the prosecutions at the ICTY, contrary to the depiction of legal trials as prime time events the proceedings do not make for dramatic or entertaining viewing. Drakulic, who spent a year at the ICTY has noted in her chapter entitled “*Justice is boring*”:

A trial – any trial and not just this one – is painstakingly slow and boring. But this is exactly as it should be. A trial is not a show for the audience. It does not need to be interesting or entertaining. It is a serious thing: justice is in question, human lives are at stake, and there is nothing spectacular in proving someone’s guilt or innocence.<sup>434</sup>

The setting, the evidential and procedural rules, the length of the proceedings and other alienating legalities, ensure that the live proceedings do not provide much entertainment to lay audiences except on rare occasions.

### **The Turn to Film by the Courts and Tribunals**

In the ten years of his office, the ICC prosecutor Luis Moreno Ocampo emphasised on a number of occasions the interplay between cinema, justice and global change.<sup>435</sup> He used

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<sup>433</sup> Douglas Kellner, ‘Celebrity Diplomacy, Spectacle and Barack Obama’ (2010) 1 *Celebrity Studies* 121, 121.

<sup>434</sup> Drakulic, *They Would Never Hurt a Fly: War Criminals on Trial in The Hague* (n.303) 18. Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (Yale University Press 2005) 18.

<sup>435</sup> Moving the World: An Evening with Luis Moreno-Ocampo. November 6, 2011 USC School of Cinematic Arts. “A conversation with Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, who will discuss the interplay between cinema, justice and global change in a rare open forum with Ted Braun, Writer-Director of Darfur Now and Associate Professor at USC’s School of

cinema and star power as a means of gaining media attention and of ensuring his own legacy as the first world prosecutor. The former prosecutor's enthusiasm for cinema led to the collaboration (or at least facilitation) by the Office of the Prosecutor (OTP) of a number of film productions.<sup>436</sup> Moreno Ocampo has long been a believer in the power of visual media to advance the cause of justice drawing on his experience as a prosecutor during the Trial of the Juntas in Argentina in the mid-1980s. He explains that the trials helped to shift popular opinion on Videla and on the atrocities committed during the period of State Terrorism and repression in Argentina.<sup>437</sup>

Moreno Ocampo has expressed that the media coverage of the ICC and filmic representation helps "spread the shadow of the Court" and collaborated extensively with Cinema for Peace, an organization based in the Netherlands.<sup>438</sup> In 2011, in a speech concerning the situation in Darfur he stated that "...filmmakers can do more, they can spread the truth beyond the Courtroom... movies are connecting us, movies are building a new community, humanity as a community."<sup>439</sup> In this way, the Court has looked on film as a form of video advocacy for the cause of international criminal justice.

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Cinematic Arts. They will explore how the next generation of filmmakers can engage audiences in questions of genocide and crimes against humanity to help prevent these terrible crimes before they start." <http://cinema.usc.edu/events/event.cfm?id=12152> accessed 8 October, 2012.

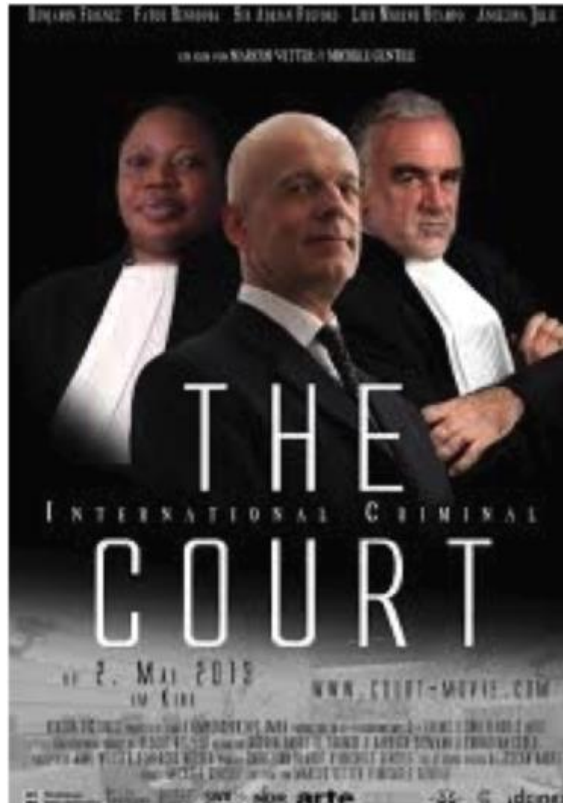
<sup>436</sup> The Public Information Unit (PIU) of the OTP, its own separate entity to the Outreach and Public Information Units of the Registry, participated in a number of documentary films including: *The Reckoning – the Battle for the International Criminal Court* (2009), *The Prosecutor* (2010), *Carte Blanche* (2011), *Darfur Now* (2010) and *The Court* (2013).

<sup>437</sup> *On the Front Line: The Making of the OTP* (2012).

<sup>438</sup> Prior to his appointment as the ICC Chief Prosecutor Moreno Ocampo had this own reality television show where he adjudicated private conflicts between individuals in Argentina. "A finales de los años 90, Moreno Ocampo participó en un programa de televisión llamado "Fórum, la corte del pueblo", una especie de reality show en el que arbitraba sobre conflictos privados." from BBC Mundo. "Perfil de Luis Moreno Ocampo" 14 July 2008. [http://news.bbc.co.uk/1/hi/spanish/international/newsid\\_7505000/7505358.stm](http://news.bbc.co.uk/1/hi/spanish/international/newsid_7505000/7505358.stm)

<sup>439</sup> Cinema for Peace Gala Speech 2011 at <http://www.youtube.com/watch?v=wEEc5gFdBdQ> last accessed 8 October 2012.





*The Court* movie poster. Fatou Bensouda, Adrian Fulford and Luis Moreno Ocampo.<sup>440</sup>

Similarly, the ICTY has produced a number of documentaries with the objective of making its work and achievements accessible to a wide range of audiences including “young people”.<sup>441</sup> The 2013 Outreach report states that in the first few months following the posting of its film *Crimes before the ICTY: Prijedor* the film was viewed on its website over 4,000 times.<sup>442</sup> Petar Finci, director of the ICTY documentaries has stated that: “The goals of the documentary, and the ones which will follow, are to leave proof to future generations as well as to pay tribute to the victims.”<sup>443</sup> The ICTY aims to make documentaries about important jurisprudential developments and also specific geographic regions.

<sup>440</sup> © 2013 Filmperspektive GmbH | Impressum.

<sup>441</sup> For example *Against All Odds: First Ten years of the ICTY* (2002).

<sup>442</sup> Nerma Jelačić. “ICTY Outreach Programme Annual Report 2013.” A publication of the Outreach Programme, Registry ICTY. Netherlands, 2014, 25.

[http://www.icty.org/x/file/Outreach/annual\\_reports/annual\\_report\\_2013\\_en.pdf](http://www.icty.org/x/file/Outreach/annual_reports/annual_report_2013_en.pdf) accessed September 19 2014.

<sup>443</sup> Marina Radenkovic. “Prijedor War Crimes Film Shown in Belgrade” 19 April 2013. Available at: <http://www.balkaninsight.com/en/article/belgrade-hosted-crimes-before-prijedor> accessed September 19, 2014.

The ICTY is the only Tribunal so far to create a film about sexual violence.<sup>444</sup> In the Outreach Annual Report 2012, ICTY President Judge Theodor Meron said that "...the production and presentation of a documentary film about the Tribunal's ground-breaking role in trying crimes of wartime sexual violence, and the translation of this film into Bosnian/Croatian/Serbian, Macedonian, and Albanian, is an important example of the innovative outreach projects undertaken in the former Yugoslavia."<sup>445</sup> Documentary filmmakers have interacted with the Tribunal and the issue of sexual violence from its very inception. The Emmy award winning documentary film, *Calling the Ghosts* (1996) is credited with bringing awareness to the issue of the rapes in Bosnia during the war and in setting up the ICTY.<sup>446</sup> Another prominent documentary film is a PBS production entitled "*I came to testify*" (2011). Narrated by Hollywood actor, Matt Damon, it "...explores the chasm between the seismic legal shift and the post-war justice experienced by most of Bosnia's women war survivors."<sup>447</sup> The documentary contains interviews with the lawyers in the *Kunarac* case and some of the female witnesses who testified during the trial.<sup>448</sup> Importantly the film shows the aftermath of the trial proceedings and the on-going consequences for the witnesses who testified.

So far in this chapter I have outlined the importance of film in contemporary debates about the representation and reception of images of war crimes trials. This serves to justify why film has been chosen as the medium through which to examine gender crimes in the context of ICL. Having selected and justified the choice of this medium in this chapter and in the introduction, a number of other methodological issues remain. In the section below I set out my criteria for film selection before setting out the methods used to analyse the films. As set out in the introduction to this thesis, rather than analyse the live proceedings or the documentary films listed above, this thesis turns to cinematic representations of gender crimes. While documentaries produced by and in collaboration with the Tribunals

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<sup>444</sup> Press Release "Outreach documentary on sexual violence premieres in the Former Yugoslav Republic of Macedonia." The Hague, 22 November 2012. <http://www.icty.org/sid/11150> accessed 1 September 2014. Alongside the 40 minute feature, the film includes a number of extended interviews with Tribunal personnel including, Wendy Lobwein, Judge Gabrielle Kirk Macdonald, Patricia Viseur Sellers and Judge Florence Mumba.

<sup>445</sup> ICTY Outreach Website "Documentaries" <http://www.icty.org/sid/11383> last accessed September 19, 2014.

<sup>446</sup> *Calling the Ghosts* (1996); Wendy Hesford, *Spectacular Rhetorics: Human Rights Visions, Recognitions, Feminisms* (Duke University Press 2011) 115-120.

<sup>447</sup> *I Came to Testify*, episode of *Women, War & Peace* (2011).

<sup>448</sup> Other films about the ICTY include: *The Triumph of Evil* (2001); *Against All Odds* (2003); *The Fugitives* (2004); *Rise and Fall of General Mladic* (2005); *Life and Deeds of Radovan Karadic* (2005); *Beyond Reasonable Doubt* (2005); *Sarajevo Roses* (2012).

and Courts can give us some insights into what we do not see in the live proceedings through talking head interviews or by following personnel in the field (such as investigators in *Carte Blanche* (2012)) the focus in these films remains in the legal narrative. Instead, this thesis is concerned with the wealth of fictional film which has emerged on the issue of gender crimes and seeks to question how these fictional narratives, unconstrained by the law and by the institutional positions, have reflected the jurisprudence or how these narratives disrupt the progress narrative. More specifically, I question whether these fictional films allow us to see women's experiences more clearly than in the narratives constructed by war crimes trials.

### **Choice of Film Selection**

This section introduces some of the critiques of law and film scholarship and methodology, and provides the film selection criteria. The films were selected on the basis of three main criteria: that they represented gender crimes perpetrated during the Bosnian conflict; that the films are "fictional" or artistic representations rather than documentary; and finally, that they can be read chronologically providing audiences with a view of the events on trial, the trial itself and the aftermath. This selection criteria was created in order to narrow the choice to three films. Finally, the criticism of the current approaches, including the critique of the narrow focus on Hollywood films, has been influential in my selection of the final three films. Instead of looking to Hollywood cinema, I decided to focus on European art cinema productions which have attracted less attention in legal scholarship. This meant that I decided not to analyse *Whistleblower* or Angelina Jolie's film *In the Land of Blood and Honey*. The positive choices for the films analysed are set out in full further below.

Although there is an increasing amount of literature on law-in-film and law and film, some scholars have become wary about the lack of rigour and explicitness with which lawyers approach film. First and foremost, legal scholars have noted that lawyers analysing film have not been reflexive about the limitations of their scholarship and the claims which they make.<sup>449</sup> In addition, various authors have commented that scholarship has so far focused almost exclusively on Hollywood cinema and the US legal system leading scholars to comment that the "...parochialism of American law and Hollywood as a national cinema (albeit with a global impact) is largely unmarked in this work."<sup>450</sup> In *Law's Moving Image*, Les Moran and others, have identified two further short-comings regarding methodology in

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<sup>449</sup> Steve Greenfield, Guy Osborn and Peter Robson, *Film and the Law: The Cinema of Justice* (Bloomsbury Publishing 2010) 1.

<sup>450</sup> Moran and others, *Law's Moving Image* (n.399) Xii.

law and film scholarship. First they state that legal scholars are predominantly concerned with narrative and textual analysis. Thus an “...analysis of the particular impact of visualization in general and the audio/visual modes and techniques of cinema in particular have remained beyond the parameters of much of this scholarly engagement with representations of law in film.”<sup>451</sup> Alison Young echoes this sentiment stating that the narrative and empirical sociological reality approaches lose the “...specificity of the medium of film, the cinematographic dimension which distinguishes film from other cultural texts, such as a short story or novel.”<sup>452</sup> Secondly, the authors find that there is hesitancy, if not “complete failure” to engage with related disciplines, including studies of visual culture, film, criminology, cultural and social theory.<sup>453</sup>

The critiques above distil into a failure by some legal scholars to fully set out their methodological choices and to engage with the specificities of the film medium. In other words, some law and film scholars have failed to examine cinematography and cinematic techniques such as lighting, sound, editing, shots etc. In the analysis chapters which follow, I have referred to the cinematic specificities (shots, edits, frames) and have provided screenshots of important scenes. In order to better understand the cinematic techniques used by the filmmakers, I have spent time behind the camera with the generous support of the Arts and Humanities Research Council. In the summer of 2014 I attended a three week intensive film production course in the Anthropology Department at University College London during which time I shot and edited my own short film. The analysis of the films thus draws on this practical experience as well as on the work of a number of different film theorists rather than on one theorist in particular.<sup>454</sup>

I have selected three films for analysis in this thesis. By choosing three films, I decided to carry out a deep analysis rather than an overview of films relating to gender crimes. The selection of the films in this thesis was based on two main avenues of investigation. First, I spent four months at the Legal Advisory Section at the International Criminal Court where I had access to the film library. The film library at the ICC has 174 documentary and feature

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<sup>451</sup> Ibid.

<sup>452</sup> Young, *The Scene of Violence* (n.346) 4.

<sup>453</sup> Moran and others, *Law's Moving Image* (n.399) xii. See also Orit Kamir where she explores why feminist film and legal scholars have not explored each other's work, Kamir, *Framed: Women in Law and Film* (n. 39) 13.

<sup>454</sup> “Indeed, like archaeologists digging down into an ancient site, we have used different tools at different stages of the excavation, borrowing from a range of theories...” Charlesworth and Chinkin, *The Boundaries of International Law: A Feminist Analysis* (n. 12) 18.

length films related to international law. During the four months I was there I watched 74 documentary and feature films and wrote a summary of these films in a blog diary form.<sup>455</sup> This blog is now linked to the ICC library website for staff reference and various entries were published on the intlawgrrls website.<sup>456</sup> The films analysed included documentaries produced by the tribunals, docu-dramas about war crimes trials, fictional accounts relating to conflict and films about women's human rights more generally. Following the four month stay, I have continued to watch documentary and feature films related broadly to international criminal justice (including cinema trips to see Marguarthe von Trotta's 2012 film *Hannah Arendt* depicting the Eichmann trial and a screening and event with the director Joshua Oppenheimer of *The Act of Killing* (2012). A full list of all the films watched is reproduced in Appendix I.

In addition to watching numerous films about gender crimes and war crimes trials, the book *Cinema of Flames: Balkan film, Culture and the Media*, provided me with a detailed filmography about the Balkan conflict and the war up until 1999. Dina Iordanova notes in her work published in 2001 that "The Bosnian war was explored in nearly forty features and over two hundred documentaries made worldwide, thus becoming the event that occupied the minds of the largest number of film-makers since 1989."<sup>457</sup> Later she notes that:

After several years of working on the project, I still cannot say for sure exactly how many films – features and documentaries – were made as a reaction to the break-up of Yugoslavia and the overall crisis in the Balkans during the 1990s. Even after completing an annotated filmography listing over two hundred titles, I have reasons to believe that at least another hundred remain unaccounted for. Every week I come across reports about new films being shown at festivals or that are currently in production.<sup>458</sup>

As this thesis has been written there are undoubtedly new films on the subject which are being produced. Jasmila Zbanic's second film, *For Those Who Can Tell No Tales* (2013) is a

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<sup>455</sup> Reviews and thoughts on the 74 films I watched during this time are available on my blog *Human Rights Film Diary*. <http://humanrightsfilm diary.blogspot.co.uk/>

<sup>456</sup> See the series Look On! <http://www.intlawgrrls.com/search/label/Look%20On>

<sup>457</sup> Dina Iordanova, *Cinema of Flames: Balkan Film, Culture and the Media* (British Film Institute 2001) 10. Another useful resource of the Yale Law School Movie Night website. Last accessed April 15, 2015. <http://library.law.yale.edu/foreign/movie-night>

<sup>458</sup> Ibid, 11.

case in point. Although I attended the UK premiere of the film and the question and answer session with the director in March 2014, without having a copy of the film on DVD it was not possible to carry out a close analysis of the film's narrative or its cinematic specificities. Indeed, at the time of writing, the film is still not available on DVD format.<sup>459</sup>

Given the wide range of films identified, the choice of which to select for an in-depth analysis was a difficult one. The films were eventually selected based on the following criteria. First, the central focus or plotline of the film revolves around gender crimes which can be prosecuted by the ICTY. The reason for the focus on the ICTY as a case study was set out in the introduction to this thesis, where it was explained that compared to other international tribunals, the Bosnian conflict has elicited numerous filmic representations. Further the ICTY has produced a number of landmark cases on the prosecution of gender crimes. Under this criterion, the film needed to have a female protagonist which could testify through words or through her eyes about her experiences in conflict. In this way, a comparative analysis between the legal construction of narrative in criminal proceedings and in the films could be carried out.

Secondly, I have focused on fictional feature films rather than documentary film as this forms part of feminist method of imagination in legal studies, allowing me to explore alternatives and the *as ifs*. The difficulty (and desirability) of drawing the line between fact and fiction, reality and imagination, documentary and narrative in film studies seems to echo some of the legal scholarship on this issue, as set out in the introduction.<sup>460</sup> Some filmmakers argue that documentary films, including genres such as cinema verite and observational documentary provide objective "truths" or facts to audiences. However, this has been challenged by others who argue that documentaries often use reconstruction, and are also creations of fiction through the editing and framing of the events.<sup>461</sup> While

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<sup>459</sup> For an analysis of the film see Simic and Volcic, 'In the Land of Wartime Rape: Bosnia, Cinema and Reparation' (n.36).

<sup>460</sup> See section beginning at page 14.

<sup>461</sup> A famous example is the documentary *Nanook of the North* (1992). A more recent example of use of reconstruction as a technique is visible in *The Act of Killing* (2012). There is no accepted definition of the term "documentary" in film studies. A common definition is John Greirson's designation of documentary as "the creative treatment of actuality". Some film scholars thus assert that the essence of documentary is not information provision or reportage but rather it is an artform. Feminist film maker and post-colonial scholar Trinh T M.-Ha has reflected: "For me documentary may refer to an outside in movement, where images are created by letting the world come to us in every move. And fiction may refer to an Inside out movement in which the images are produced by reaching out to the world from inside. These movements easily overlap in the between realm." <https://vimeo.com/113226850> 23:30 minutes.

these debates are important, in this thesis I move away from the documentary genre which often attempts to prove the facts to audiences.<sup>462</sup> Instead, I turn to “fictional” films about the events.

Some filmmakers have gone so far to argue that it is only through fictionalisation that the “truth” can really be seen. Werner Herzog has claimed: “There are deeper strata of truth in cinema, and there is such a thing as poetic, ecstatic truth. It is mysterious and elusive, and can be reached only through fabrication and imagination and stylization.”<sup>463</sup> Filmmakers have long argued that the fictional medium is an important means of conveying stories in an affective and emotional way. While I have used the term “fictional film” throughout the thesis, it is important to flag that the events portrayed in all of the films are artistic representations of real life events. As Hans Christian Schmid, the German Director, reflected in answer to how much his film script is a fiction:

Do our ideas correspond with reality? Does our script correspond with real life? That said, one cannot explicitly differentiate between fact and fiction in the finished film, since we’ve only tried to produce a kind of condensed reality, one with as few contrived dramaturgical effects as possible.<sup>464</sup>

While the boundaries between fact and fiction may be blurred, the filmmakers have made a positive decision to make fictionalised films rather than documentary film. As Jasmila Zbanic has stated about her film *Grbavica* “I was absolutely sure that it should not be documentary. I didn’t have to prove facts. I was making my own story. Esma is not an example of all these women, she is my character through whom I express my world.”<sup>465</sup> Since the filmmakers do not need to prove the facts they are free and able to express themselves through whichever means and cinematic techniques available to them. This freedom and imagination allows them to tell the same stories we read in the trial judgments in alternative ways and through different means. It also signifies that there is no

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<sup>462</sup> Documentary and narrative cinema may also be distinguished on the techniques used in the films. Documentaries conventionally are comprised of an explanatory voice over commentary, a linear, chronological narrative, ‘talking heads’ interviews, and the use of archive film and photographs.

<sup>463</sup> Werner Herzog. “Lessons of Darkness. Minnesota Declaration: Truth and Fact in Documentary Cinema.” 30, April 1999. Last accessed April 15, 2015. <http://www.walkerart.org/magazine/1999/minnesota-declaration-truth-and-fact-in-docum>

<sup>464</sup> Pressbook Storm [http://www.235film.de/Downloads/STORM\\_Pressbook\\_Berlinale\\_dt+engl.pdf](http://www.235film.de/Downloads/STORM_Pressbook_Berlinale_dt+engl.pdf) last accessed April 15, 2015. The film however is shot with a hand held camera giving it a close-up documentary feel. The decision to use this type of camera and shooting blurs the line even further.

<sup>465</sup> Tatiana Zlig “Jasmila Zbanic in Interview” Aviva. June 29, 2006 [http://www.aviva-berlin.de/aviva/content\\_Women%20+%20Work.php?id=8309](http://www.aviva-berlin.de/aviva/content_Women%20+%20Work.php?id=8309)

one “truth” in the images and that the films convey multiple stories with no one interpretative authority on their meaning.

Thirdly, I chose three films which can be read together in a chronological timeline representing the commission of the crimes, their prosecution and the aftermath. Out of the possible films in this chronology there were two films which dealt with the commission of gender crimes (*As If I’m Not There* or *In the Land of Blood and Honey*) and numerous films dealing with the aftermath (*Grbavica*, *Snejig*, *Children of Sarajevo*, *the Secret Life of Words*). I chose one of the films in each of the categories in order to carry out a close reading.

Following the criteria, seven multilingual films representing different national cinemas were identified. The films are unusual within the study of law and film given the diversity of directors, languages, funding and settings of the films. Only two of the films can be considered as Hollywood films: *Whistleblower* and *In the Land of Blood and Honey* are both imbued with the star power of famous Hollywood actors, in front and behind the camera. All bar one of the movies have been directed by a female director. The films identified were as follows:

- Jasmila Zbanic (Bosnian), *Grbavica: The Land of My Dreams*, 2006
- Isabel Coixet (Catalan), *The Secret Life of Words*, 2007
- Hans-Christian Schmid (German), *Storm*, 2010
- Juanita Wilson (Irish), *As If I Am Not There*, 2010
- Larysa Kondracki (Canadian), *Whistleblower* 2010
- Angelina Jolie (US), *In the Land of Blood and Honey*, 2012
- Jasmila Zbanic (Bosnian), *For Those Who Can Tell no Tales*, 2013

Given the spatial limitations of the research, the sample was narrowed to three films. The film *The Secret Life of Words* by Catalan director Isabel Coixet is set in Northern Ireland and does not focus on gender crimes. It is unclear as to whether the rape and torture occurred in Bosnia or in another region of the Balkans (such as Croatia). The film is mainly about the people who go to work on an oil rig and their isolation rather than the Bosnian conflict. The film *Whistleblower* was also discarded given that the crime of human trafficking falls outside the scope of the ICTY’s jurisdiction. The film raises many issues relating to the impunity of UN peacekeepers, the political economy of human trafficking and the post-



conflict continuum of violence which are touched upon in the thesis. However, the film does not and cannot reflect the jurisprudence of the ICTY with other films better placed in the sample for this analysis. Further, the film focuses on the discrimination faced by the female personnel hired by the UN or by companies performing services to the UN rather than the narratives of the women who had been trafficked.

### **Introducing the films**

#### ***As If I'm Not There***

Juanita Wilson's film focuses on the experiences of Samira (Nastasha Petrovic), a school teacher from Sarajevo, who is captured and held in sexual slavery during the Bosnian conflict. The film depicts her experience of the deportation from a rural village of women to a camp and her forced confinement in a "woman's camp" within the larger camp. Samira is subjected to a number of gender crimes including rape and the crime of forced pregnancy. In this way, the film depicts the lived experience of Samira absent from the trial judgments at the ICTY.

There are striking similarities between the *Foca* case and the storyline of the film by Irish director Juanita Wilson. These similarities are not coincidental; the back of the DVD box of the film states that it is "Based on the Croatian writer Slavenka Drakulic's real life experiences overseeing the proceedings of the International Criminal Tribunal for the Former Yugoslavia at The Hague." The book in turn is an amalgamation of a number of stories of women told during the *Foca* case, which Drakulic watched as part of her on-going journalistic interest into the Tribunal proceedings.<sup>466</sup> Whilst the film is clearly based on the book, there are important differences between the two versions, which will be discussed where relevant.

The mention of the ICTY on the DVD box brings this work within the category of law film. Leslie Moran writes that "...law films based on real events provide a particular instance in which there is a strong demand for, and expectation of, the truth of the image, its accuracy and its authenticity."<sup>467</sup> Although Angelina Jolie's film, *In the Land of Blood and Honey*, also has echoes of the *Foca* case (forced dancing and coercive circumstances) I focus on *As if I Am Not There* due to the fact that it was based on Drakulic's observations of the trial thus giving it a direct link to the *Foca* case. This makes an analysis of how the film reflects

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<sup>466</sup> Slavenka Drakulic, *As If I Am Not There: A Novel about the Balkans*. (Abacus, 2012).

<sup>467</sup> Moran and others, *Law's Moving Image* (n.399) 78.

Tribunal jurisprudence even richer. Further, Jolie's film, including its narrative and local impact, has been considered by a number of authors.<sup>468</sup>

### **Storm**

The chapter on *Storm* turns to look at a film representing the prosecution of gender crimes at the ICTY. It presents the next stage in the chronology moving from the conflict to the prosecution of the crimes. The film's storyline focuses on the experiences of a female prosecutor, Hannah Maynard (Kerry Fox, who starred in Michael Winterbottom's *Welcome to Sarajevo* 1997) and a female witness, Mira. Hannah, a lawyer from New Zealand, is responsible for prosecuting a Serbian commander, General Duric, on trial for crimes against humanity relating to deportations and ethnic cleansing in the area of Kasmaj, Bosnia-Herzegovina. Brought in mid-way through the proceedings, she must battle against the time constraints set by the Tribunal, the poor preparation of the case by the male Deputy Chief Prosecutor and also try and obtain justice for Mira, who comes forward to testify about her experience of the war. Breaking the silence which she has guarded since the war about her experiences, Mira (Anamaria Marinca) agrees to tell the court about the rape camps in the spa town of Vilnia Kosa.<sup>469</sup> This fictional spa resort seems to be based on the spa hotel of Vilnia Vlas where women were held, tortured, raped and murdered in the town of Visegrad.<sup>470</sup>

Despite her competence and dedication to justice, Hannah will ultimately pay the price for her attempts to obtain redress for a female rape victim. By centring on a female prosecutor the film's narrative highlights the gender dynamics in operation at the Tribunal. This perspective is all the more interesting given that the Director worked with a female prosecutor at the ICTY. The script was developed after interviewing the German

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<sup>468</sup> Elissa Helms, 'Rejecting Angelina: Bosnian War Rape Survivors and the Ambiguities of Sex in War' (2014) 73 *Slavic Review* 612; Zala Volcic and Karmen Erjavec, 'Transnational Celebrity Activism in Bosnia and Herzegovina: Local Responses to Angelina Jolie's film *In the Land of Blood and Honey*' (2014) *European Journal of Cultural Studies* 1.

<sup>469</sup> Anamaria Marinca, the actress expressed her initial discomfort with her role in the film saying: "I read the script, a script called *Storm*. I liked it very much. But I didn't think I was the right person to play Mira. Because I'm not a native Bosnian. And I thought that I might betray the other character if – it's not the history of my country, it's not the you know I... of course we have imagination and we have all these amazing testimonies from those terrible years. But it's not the same." Dialogue of Making Storm. Trust Nordisk, 4. <http://files.trustnordisk.com/files/ftpfiles/movies/T132/private/Dialogue%20Org%20Making%20Of%20Storm.pdf> last accessed 2014.

<sup>470</sup> "...the Visegrad area was the site of at least four facilities, including the Hotel Vilina Vlas, where women were reportedly confined and subjected to regular and repeated rape." Rape and Sexual Assault. Annex IX. Final Report of the United Nations Commission of Experts established pursuant to security council resolution 780 (1992). S/1994/674/Add.2 (Vol. V) 28 December 1994. <http://www.phdn.org/archives/www.ess.uwe.ac.uk/comexpert/ANX/IX.htm>

prosecutor, Hildegard Uertz Retzlaff, who along with her initially all female team was instrumental in prosecuting the accused in the *Foca* case. Britta Knoller, the initiator of the project has stated that the prosecutor was “a fascinating figure, very committed to her work, so it was easy to image her as the main character.”<sup>471</sup> This makes the film an interesting counter-narrative to the ICTY’s own documentary on *Sexual Violence and the Triumph of Justice*. I will argue throughout the chapter that the film is a form of outsider jurisprudence which allows us to see certain aspects of the work of the Tribunal which cannot be seen in the judgments or the transcripts of the trials.

### ***Grbavica***

The third and final film chapter focuses on the aftermath of the Bosnian conflict. The film’s narrative revolves around the relationship between Esma (Mirjana Karanovic) and her daughter Sara (Luna Zimic Mijovic) and their struggle to manage in the work place and at school. The film charts Sara’s desire for truth about her father and Esma’s psychological difficulties in coming to terms with the rape(s) and forced pregnancy which she suffered during the war.

Out of the numerous films on the aftermath of the Balkan conflict, in this chapter I carry out an analysis of the feature film *Grbavica* for a number of reasons. First, the film has received widespread media attention and has won prizes including the Gold Bear Award at the Berlin Film Festival. Secondly, it focuses on the consequences of sexual violence and forms a sequel to the storyline in *As If I’m Not There*.<sup>472</sup> Thirdly, the film is available on DVD while *For Those Who Can Tell No Tales* is, as of writing, unavailable online or on DVD. This means that a close and detailed analysis of this second film, which is also concerned with the aftermath 20 years following the war, is not possible. Fourthly, the director has been a vocal advocate of women’s human rights in Bosnia. Jasmila Zbanic studied film and theatre directing in Sarajevo during the war and has made a number of films which focus on the lasting impact of the Bosnian conflict. She has described rape and its consequences as “an obsession” that she has had since 1992 and has described film as an art which has meaning:

It was completely crazy, we were studying films with no equipment and no electricity to watch films, We were completely cold, with seven of us sitting next to

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<sup>471</sup> Case Study Storm – Under One Umbrella? [http://www.efm-berlinale.de/media/pdf\\_word/co-production\\_market/STORM\\_CaseStudy\\_BCPM\\_09.pdf](http://www.efm-berlinale.de/media/pdf_word/co-production_market/STORM_CaseStudy_BCPM_09.pdf) last accessed May 2014.

<sup>472</sup> For an analysis of the two films see Teodora Todorova, ‘Giving Memory a Future’: Confronting the Legacy of Mass Rape in Post-conflict Bosnia-Herzegovina’ (2013) 12 Journal of International Women's Studies 3.

each other like sardines, trying to warm ourselves up and listen to our teachers. But even during these times when the city was surrounded, we still believed that art had meaning. We could still imagine that one day we were going to make movies. That was the good thing about the academy—that you were doing something important and not just waiting to be a victim, to be killed.<sup>473</sup>

Finally, as previously stated, the film is credited with raising awareness of sexual violence in conflict and its consequences. The aim of the chapter is not to quantify the impact of the film but rather to look to the film to see how the narrative differs from that of the law and the judgments at the ICTY. The film's themes of gendered social relations, motherhood, trauma and economic context, reflect key concerns of the filmmaker which often remain outside the scope of law's storytelling. This makes the film an extremely interesting "law film" even though the law or courtroom drama is completely absent in its narrative. In fact, it is this absence that allows us to see outside of the narrow confines of law's lens and look at the broader picture of wartime rape and its aftermath.

## Method

The film analysis was carried out after I watched each film ten times over the course of three and a half years. On some occasions, the films were watched for "entertainment" purposes with friends or in my home. I also watched each film once with my supervisors, Christine Chinkin and Linda Mulcahy. Two out of three the films were watched on a computer screen in Professor Mulcahy's office. The third film was watched on a larger screen in the Moot Court Room, located in the LSE law department. Following the viewing, we carried out an extensive discussion of the themes in the film. The chapters were written following these supervision meetings.

Each time I watched the films I looked for different layers in the film's content which would inform my film analysis. First, I focused on the the narrative of the film and the story that it told (the plot). Secondly, I examined how the narrative of the film reflects the jurisprudence of the ICTY and the *Foca* decision in particular. Thirdly, I analysed how the narrative differs from or is critical of the ICTY's practice and operation. In order to carry out this analysis I used an aide memoire (appendix II) which detailed the elements of crimes and themes which might appear in the three films. Fourthly, I watched or "read" the film for its *mise-en-scene* (for example lighting, décor, space), cinematography (focus,

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<sup>473</sup> Gianne Brownell. 'On the Path with Jasmila Zbanic.' July 22, 2011 <http://www.insidefullofcolor.com/on-the-path-with-jasmila-zbanic/> last accessed 14 March 2015.

framing, shots) and sound. In doing so, I made extensive use of the Yale Film Studies website which provides a good introduction to the basic terms and building blocks of film analysis and James Monaco's book *How to read a film*.<sup>474</sup> Finally, I researched online for interviews of the directors about the films. These interviews and their decisions are referred in the chapters.

After watching the films for the narrative and jurisprudence content, I watched the films a number of times on the computer in order to capture film stills (images) from the movie. Throughout the thesis I have included a number of screen shots and still from the films which reflect the key themes identified. The film stills chosen help to illustrate the main arguments that emerge in the chapters. In some cases, they have been chosen to highlight and make visible aspects that are easier to see than to describe. For example, in the next chapter *As If I Am Not There*, I have provided three stills showing different male gazes. The particular stills are indicative of the main arguments but also serve to reinforce that in the films, the action and narrative often progresses without words and through sound and image. By providing the film stills and timings, I also make the research more transparent, and welcome readers to watch the same scenes in the films.

## **Conclusion**

This chapter contributes to the research question in this thesis by demonstrating that the moving image plays a key role in making the work of war crimes trials visible. Therefore, it is understandable that we might look to these resources to see whether women's experiences of conflict and atrocity have been included in this medium. While gender crimes have received prominent attention in the ICTY's documentary production strategy, these films focus on the Tribunal's work and its importance in combatting atrocity. They highlight the achievements and do not critically engage with the issues. Further, they focus on the trials, jurisprudence and procedure, telling the story about legal developments.

It must be noted however that not all documentaries have sought to assert the success of the work of international tribunals in carrying out prosecutions. Critical voices and films have also emerged in the field. For example, one of the former defense attorneys on the *Brima et al.* case, Rebecca Richman Cohen, made the film *War Don Don* (2010) about the

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<sup>474</sup> Yale Film Studies. Film Analysis Website. <http://classes.yale.edu/film-analysis/> last accessed March 30, 2015. James Monaco, *How to Read a Film: Movies, Media, and Beyond* (Oxford University Press 2009).

Special Court of Sierra Leone from a critical perspective.<sup>475</sup> However, in large part, the documentary practices and the images emitted by the courts and tribunals reinforce the importance, mission and ideology for international criminal justice amidst critical interventions which query the justification for these mechanisms.<sup>476</sup> The documentaries, live streaming and filmic engagement can all be understood not only as a means of translation but also a key mechanism for legitimating the courts and tribunals very existence.

Significantly, it would seem in the realm of entertainment, international criminal justice mechanisms and trials provide ample content for documentary films but also legal drama for fictional portrayals. In *Largo Winch II* we see Sharon Stone as a prosecutor for the ICC; the TV series “Crossing Lines” is based on Moreno Ocampo’s role as Chief Prosecutor of the ICC;<sup>477</sup> in *Storm* (analysed later in this thesis) the events unfold around prosecutions at the ICTY; while Raoul Peck’s film *Sometimes in April* depicts the ICTR trial of journalists for their role in genocide. The ICTR has stated that the Tribunal provided “...substantial assistance to Peck while he was filming the movie which includes scenes shot at the ICTR facility in Kigali.”<sup>478</sup> Given these films are the means that many people learn about the law, these films form a crucial part of the legacy of war crimes trials and the discourse more broadly on international criminal justice, its purposes and its promise.

In the following chapters of this thesis, I turn to fictional cinematic accounts in order to argue that these films are complementary narratives which can fill in the gaps left by the law. By highlighting the causes and consequences of wartime gender crimes and by capturing women’s experiences in a more holistic way, the films focus on, rather than sideline, women’s narratives. This is not to say that film does justice better than law. Rather my argument is that film can show us and tell us things that the law will not and cannot make visible and heard. Finally, the films illustrate that telling stories through the fictional medium, and focusing on emotions and empathy is a powerful means of creating narratives which captivate audiences and make them pay attention to these crimes. In this

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<sup>475</sup> Official website: <http://www.wardondonfilm.com/>

<sup>476</sup> Ruti G Teitel, *Humanity’s Law* (Oxford University Press 2011) 84.

<sup>477</sup> Mark Kersten “CSI: The Hague or the ICC just got Jack Bauer-ed” April 17, 2013. <http://justiceinconflict.org/2013/04/17/csi-the-hague-or-the-icc-just-got-jack-bauer-ed/> accessed September 19, 2014.

<sup>478</sup> ICTR Newsletter January 2005. Published by the External Relations and Strategic Planning Section – Immediate Office of the Registrar of UN ICTR. <http://ict-archive09.library.cornell.edu/ENGLISH/newsletter/jan05/jan05.pdf> accessed 1 March 2015.

way, these films play an important role in the “feminist goal of visibility” set out in the introductory chapter.

## Chapter 5 *As if* Jurisprudence: A Representation of Gender Crimes

They are her legs, of course. S tells herself that these are her legs, but she does not actually feel them. As if I am not here, she thinks. As if I am gone.<sup>479</sup>

Slavenka Drakulic

Those words could not leave my mouth.<sup>480</sup>

Witness 50

### Introduction

In the course of the next three chapters, I will argue that fictional accounts play an important role in filling in the gaps left by legal narrative through three deep readings of the films. The fictionalised accounts and the cinematic medium allows us to see and hear things which are absent in the legal judgment and proceedings. The three films clearly show that the cinematic narrative not only fill in lacunas left by war crimes trials (for example on the issue of forced pregnancy) but also offer alternative ways to represent and tell these stories. Visual techniques, cinematography and sound are employed by the film directors to represent the stories from an artistic perspective, providing legal scholars with alternative visions of the legal narratives.

In this chapter I analyse the film *As If I Am Not There*, by Irish director Juanita Wilson for its cinematic jurisprudence. The film is based on a book by the same name, which in turn was based on Slavenka Drakulic's experiences of speaking to women who were held in the camps and also watching the *Foca* trial at the ICTY.<sup>481</sup> This chapter introduces the facts of the *Prosecutor v. Kunarac* (*Foca* case) upon which the film is closely based. It then goes on to evaluate the extent to which the legal findings in this case are reflected in the cinematic narrative. On one level, this section of the chapter carries out a legal analysis of the film *as if* it were a legal document.<sup>482</sup> It considers elements of gender crimes and the ways in

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<sup>479</sup> Drakulic, *As If I Am Not There: A Novel about the Balkans*. (n.466) 67.

<sup>480</sup> *Prosecutor v. Kunarac*, Trial Transcripts, 29 March 2000, page 1246.

<sup>481</sup> Alice Kunzinar "Rape, the Unspeakable War Crime: An Interview with Slavenka Drakulic and Juanita Wilson on the award-winning filmic rendition of *As If I Am Not There*." CineAction, Jan 1, 2012. Last accessed April 15, 2015. <http://www.thefreelibrary.com/Rape,+the+unspeakable+war+crime%3A+an+interview+with+Slavenka+Drakulic...-a0284222740>

<sup>482</sup> Karen Knop, Ralf Michaels and Annelise Riles, 'From Multiculturalism to Technique: Feminism, Culture, and the Conflict of Laws Style' (2012) 64 Stanford Law Review 589; Annelise Riles, 'Is the Law Hopeful?' Cornell Faculty Working Papers, Paper 68; Andrew Lang, 'Governing 'As If': Global



which they have been represented. In law and film terms, it considers the legal realness of the representation and argues that the film reinforces the ICTY's landmark findings on rape as a crime against humanity, rape as torture, and sexual slavery as a crime against humanity. These arguments are made by referring to the judgment and the transcripts of the proceedings.

On another level, the chapter illustrates that film can show us and tell us things that legal narrative does not and cannot. The film's multi-layered narrative is thus both a reinforcement and critique of the prosecution of gender crimes by the ICTY. The film challenges the legal wrangling over the definition of rape and consent through its graphic and implied scenes of sexual violence. Furthermore, the refusal to provide an abortion to Samira following the rapes, the portrayal of the aftermath of the events, including her life as a refugee in Sweden, and the continued consequences of the forced pregnancy challenge the notion of closure. The representation of the aftermath and the gendered social relations before, during and after the war call into question the adequacy of war crimes trials as the primary means of response to violence against women in conflict.

### **The Facts of the *Foca* case**

The *Foca* case resulted in the first convictions by the ICTY for rape as a crime against humanity, enslavement as a crime against humanity and further established that rape was "...used by members of the Bosnian Serb armed forces as an instrument of terror."<sup>483</sup> The convictions of Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, three ethnic Serbs, resulted from events in the wider area of the municipality of *Foca* from early 1992 up until mid-1993. Through armed conflict and a campaign of ethnic cleansing of the Muslim population, Muslims were expelled from the town, killed or detained. Following this, the town of *Foca* was renamed Srbinje which translates as "town of Serbs". The *Kunarac* case focused on the attacks on the civilian Muslim population in the area, specifically on the systematic rape of women in so called "rape camps".

Through live testimony given by 33 prosecution witnesses including 16 women who testified to being raped, the court heard evidence of the repeated rapes of women and girls in the *Foca* area. Witnesses FWS-87; FWS-105; FWS-75; FWS-88; DB; FWS-183; FWS-132; FWS-50; FWS-95; FWS-90; FWS-48; FWS-186; FWS-74; FWS-191; A.S; and FWS-190 all

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Subsidies Regulation and the Benchmark Problem' (2014) LSE Legal Studies Working Paper No 12/2014.

<sup>483</sup> *Kunarac* Trial Chamber Press Release. February 22, 2001. The Hague. JL/I.S/566-e. available at: [http://www.icty.org/x/cases/kunarac/tjug/en/010222\\_Kunarac\\_Kovac\\_Vukovic\\_summary\\_en.pdf](http://www.icty.org/x/cases/kunarac/tjug/en/010222_Kunarac_Kovac_Vukovic_summary_en.pdf)

testified about their rapes and experiences during the proceedings. Some other women were not raped but testified about seeing other women being “taken out”.<sup>484</sup> A mother (FWS-51) and grandmother (FWS-62) were witnesses about the circumstances in which their 16 year old daughter and granddaughter (FWS-50) was taken out and raped. Many of the witnesses were teenage girls at the time of the rapes and enslavement, for example FWS-132 and FWS 87 were 15 years old while FWS-186 and FWS-50 were 16 years old. Others were slightly older at the time, FWS-48 was 35 years old and the eldest witness FWS-183 was born in 1954. Some of the witnesses were related, or were neighbours, or knew the defendants from before the war.

The trial judgment found that men were separated from women with the men often killed on the spot or detained at KP Dom where some of them were used for forced labour while women were transported and kept in local houses and apartments, where they were detained for several months. During their detention some of the women and girls were repeatedly raped and forced to perform other tasks such as cooking and cleaning. Witness 75 recounted how she was raped by ten men before she fainted. Another witness recounted how a woman was raped in full view of the other detainees and her 10 year old son. The women in centres such as the Partizan Sports Hall were kept in unsanitary conditions and with a scare supply of food. Some of the women who testified were raped so many times that they were unable to recall with accuracy the number of times the crimes of sexual violence occurred.

It is for these acts, amongst others, that the three accused were prosecuted and convicted. Dragoljub Kunarac was sentenced to 28 years imprisonment, for rape as a crime against humanity, torture as a crime against humanity, torture and rape as violations of the laws or customs of war, and enslavement as a crime against humanity. The court found that on at least one occasion he had mocked a woman while he raped her by “...telling the other soldiers to wait for their turn while you were raping her, by laughing at her while she was raped by the other soldiers, and finally by saying that she would carry Serb babies and that she would not know the father.”<sup>485</sup>

Radomir Kovac was sentenced to 20 years imprisonment for enslavement as a crime against humanity, rape as a crime against humanity, rape as a violation of the laws or customs of war and outrages upon personal dignity as a violation of the laws or customs of

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<sup>484</sup> *Prosecutor v. Kunarac*, para 36.

<sup>485</sup> *Prosecutor v. Kunarac*, para 583.

war. The trial chamber also found that Kovac was guilty of outrages upon personal dignity. Drawing on the definition set down in the *Aleksovski* case, the trial chamber agreed that this crime is defined as an act that “causes serious humiliation or degradation to the victim” but did not find that it necessitated “...lasting suffering.”<sup>486</sup> The Tribunal found it particularly relevant that the girls were forced to dance naked on a table; “loaned” to other men and were physically beaten and slapped by Kovac. The trial chamber held that the sexual exploitation and sale of witnesses FWS 75 and FWS 87 constituted “a particularly degrading attack on their dignity.”<sup>487</sup>

Finally, Zoran Vukovic was sentenced to 12 years imprisonment for torture as a crime against humanity, rape as a crime against humanity and rape and torture as violations of the laws and customs of war. Vukovic was convicted under counts 33 to 36 for one incident in which he told a mother to go and find her 15 year old daughter so that he could rape her (Witness FWS-50). Vukovic threatened to kill the woman if she did not comply. The 15 year old was taken from Partizan to another house where she was raped by Vukovic. The Court found that the defendant was aware of the witness’ age as he told her that she would have been treated worse had she not been the same age as his own daughter. The trial chamber therefore rejected his defence, in which he claimed that he had sustained an injury and was therefore impotent at the relevant time.<sup>488</sup> Vukovic and Kovac have since been granted early release.

### **Reflecting *Foca*: The Plot**

The plot of Juanita Wilson’s film centres on the experiences of the main character, Samira, a young school teacher from Sarajevo, Bosnia-Herzegovina. Samira is not a frail, emotional or passive woman. In fact, just as Nicola Lacey describes Moll Flanders as a stark contrast to the stereotype of conventional femininity, Samira is also “...a thoroughly autonomous woman, brimming with agency and enterprise.”<sup>489</sup> She leaves her family in Sarajevo and journeys on her own to teach at a small village in the middle of nowhere. Soon after her arrival, the war breaks out and she is transferred to an isolated camp. Through Samira’s eyes we witness the rape, sexual slavery and torture of women at the hands of numerous soldiers and see her exclusive possession by one Captain. Following the release of the women in a prisoner exchange, we next see Samira in Sweden where she has become a

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<sup>486</sup> *Prosecutor v. Kunarac*, para 501.

<sup>487</sup> *Prosecutor v. Kunarac*, para 756.

<sup>488</sup> *Prosecutor v. Kunarac*, para 802.

<sup>489</sup> Nicola Lacey, *Women, Crime, and Character: from Moll Flanders to Tess of the d'Urbervilles* (Oxford University Press 2008) 3.

refugee. Samira is forced to carry a pregnancy resulting from the rapes to term. She is refused an abortion and the film ends with Samira breastfeeding the new born child.

In the section below, I carry out a legal analysis of the film in order to illustrate how closely the film maps onto the *Foca* judgment.<sup>490</sup> The section provides an analysis of how armed conflict is depicted in the film, providing the context for the portrayal of a number of different gender crimes, including sexual slavery. Rather than focus purely on the script, the section draws on the images and sounds of the film. Much of the film works through visual cues, representations and silences rather than through words, necessitating multiple viewings in order to capture the film's nuances.<sup>491</sup> Juanita Wilson has explained that in turning the book into the film she wanted to convey the emotional journal of the protagonist Samira (Natasha Petrovic):

You can read the human face, there's nothing more dramatic than the human face. You can read so much of emotion there if you just allow the actors to do their job. In terms of cinema, there is great power in not telling people everything. You show things rather than tell people what's going on. My producer James Flynn felt the whole film could be silent, and apart from the captain's words there's little dialogue. I remember talking to somebody who had been in a camp and they talked about this language of looks: they couldn't speak but they'd transmit everything just through different looks. In many cases the women were in shock and were not going to be able to express what they were feeling. I found I could still tell the story and tell it much more powerfully without the words.<sup>492</sup>

The film stills and screenshot provided help to illustrate some of these wordless exchanges which occur throughout the film.

### ***The Context: Armed Conflict***

The film opens in a hospital in Sweden and we see Samira and her baby. The rest of the film then functions as a prolonged flashback, portraying Samira's experiences of the war

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<sup>490</sup> The term "reading a film" is used in film studies to illustrate the difference between watching a film (passively/for pleasure) and critically watching or analysing a film. In this thesis, I avoid the term "reading" since the term could be (mis)understood as reducing the film to its dialogue. This choice further reflects the audience of the readership of this research in legal rather than film studies.

<sup>491</sup> Wilson's producer said that he could almost see the movie as a silent film. Brogen Hayes "As If I'm Not There Interview with the director Juanita Wilson." 3 March 2011. <http://www.movies.ie/features/as-if-i-am-not-there-interview-with-the-director-juanita-wilson> accessed 19 September 2014.

<sup>492</sup> Alice Kunzinar "Rape, the Unspeakable War Crime: An Interview with Slavenka Drakulic and Juanita Wilson on the award-winning filmic rendition of As If I Am Not There." (n.481).

through realism. The film comes full circle at the end when we see Samira in Sweden as a refugee. Following the opening scenes of Samira showering in a hospital, the film jumps to Sarajevo where we see Samira laughing and joking with her family. We are introduced wordlessly to her mother and father who kiss their daughter goodbye.

In the opening five minutes of the film, we see Samira leave her family and take a bus into the countryside. At 3:08 minutes, we are provided with a sign and warning of what will occur later in the film. As Samira walks away from her family home, we see two men observing her from the vantage point of the balcony. This hostile gaze is similarly repeated in the village when Samira gets off the bus and later, when three men playing chess watch as Samira attempts to call someone on the public telephone (9:27). The male gaze in these scenes, in juxtaposition to the family scene where she received the loving gaze of her father, signifies not only male desire but also, the conditions of violence and sexual imbalance that operate in this society and the male domination of public space to which we shall return.

Despite this brief visual clue of the gender dynamics to come, the beginning of the film is optimistic. Samira is seen happy with her family and also excited about her decision to leave Sarajevo. We see her on her journey wearing ear phones and listening to upbeat music. Children wave along the dirt road where the bus passes, an old toothless man sleeps innocently on Samira's shoulders' and the beautiful Bosnian countryside rolls by. Samira soon arrives at her destination where she will be the local schoolteacher in a rural village. In the village, we see only men and elderly women alerting us that something is wrong. Samira is left to survey her new quarters as the bus, and her means to get back to the city, drives away (7:30). At school the next day, she introduces herself to the students as a part time teacher, taking over from their usual teacher. A male student informs her promptly that the teacher isn't coming back. We soon get the sense that the children know something that Samira has not yet grasped.

Ten minutes into the film the war has begun for Samira. This war provides the background and context for the gender crimes on screen and brings them within the category of war crimes and crimes against humanity. The film illustrates that the definitions of international and non-international armed conflict are irrelevant in practice to those affected by a war.<sup>493</sup> The end of "peacetime" in the film is marked through the sound of

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<sup>493</sup> Christopher Greenwood, 'International Humanitarian Law and the Tadic Case' (1996) 7 European Journal of International Law 265.

gunshots in the distance. Women and girls are seen leaving her village in the middle of the night, and Samira wakes to see armed soldiers outside of her bedroom window. A young soldier, dressed in military uniform and wielding a gun, soon orders her to take up her things because she is “going on a trip.” Samira attempts to protest, reasoning that she is a teacher from Sarajevo and that she is not from the village. “This is a mistake” she says, a sentiment echoed later in the film by the Captain.<sup>494</sup> Her protests however fall on deaf ears and the armed soldiers round her up with the other villagers.

The sound of gun shots and cries of *brže brže* (this is not translated in the film, but it is Bosnian Serb Croation (BSC) for faster) become steadily muted and replaced by a ringing-noise as Samira enters the hall where the villagers are held (13:27). In this scene the distinction between civilians and the military is clear – the armed men in military camouflage can clearly and visibly be distinguished from the civilians – men and women who are held in their command.<sup>495</sup> The distinction based on gender is also clear as the boys and men are separated from the women.



Screenshot 5: villagers surrounded by soldiers before the men are taken out and shot.

16:05.<sup>496</sup>

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<sup>494</sup> See 57:22 minutes.

<sup>495</sup> The obligation to make a distinction between combatants and civilians in international and non-international conflicts forms a part of customary international law. This obligation is codified in Articles 48, 51(2) and 52(2) of Additional Protocol I of the Geneva Conventions and is also affirmed in case law of international and regional courts. See for example *Prosecutor v. Kupreškić et al.*, IT-95-16, (Jan 14, 2000) paras 441 and 883.

<sup>496</sup> © 2010 Wide Eye Films, Sektor Film and Stellanova Films.

While the villagers stand closely together for comfort, the soldiers occupy as much space as possible, drink beers and brandish their guns. “We have orders to move you out of the village,” a soldier tells them confidently. With his words, the soldier informs the villagers of a command chain of responsibility where he is merely executing an order of ethnic cleansing. At seventeen minutes into the film, we see the men and boys shepherded out of the hall by the soldiers. Less than thirty seconds later, we hear the gunshots. We do not witness the killings, evocative of the Srebrenica massacre of the 8,000 boys and men, but we do witness the women’s reactions to the shooting.<sup>497</sup> Significantly they stand in stunned silence: silenced by fear and grief at what they have just heard. The length of the individual gunshots, a second or two seconds apart for nearly 30 seconds, reinforces the brutality of the crime.

By now the optimism that was present in the first minutes of the film, has been replaced by fear. In a tracking shot following Samira, we now observe the scene from her point of view as the women are forcibly deported from their village.<sup>498</sup> Bundled into buses the women, girls, and some young boys, are taken on a journey. In contrast to the upbeat electronica at the beginning of the film, the non-diegetic music accompanying their journey is slow and melancholic signalling a transition in the scenes of the film.<sup>499</sup> Upon arrival at their destination in the middle of the night, the women are taken into a large warehouse, where they curl up on the floor to sleep. The sound of a slamming door, acts as a code to alert us that they are locked in, and without means to escape. Throughout the next portion of the film, we see how Samira and the other women’s lives are completely controlled by the armed soldiers who organise and regulate their every move. From being taken out to urinate publicly in a field, to washing themselves in a sink, everything is done under the gaze of the male soldiers.

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<sup>497</sup> As Judge Almiro Rodrigues stated convicting Radislav Krstic of genocide: “Srebrenica – a name which conjures up images one would prefer not to see: women, children and old people forced to climb into buses leaving for destinations unknown; men separated from their families, stripped of their belongings, men fleeing, men taken prisoner, men never to be seen again, men who would be found - but not always - dead, corpses piled up in mass graves; corpses with their hands tied or their eyes blindfolded - frequently; dismembered corpses as well; unidentified corpses ... corpses.” Press Release. *Prosecutor v. Krstic*. The Hague, 2 August, 2001. OF/I.S/609e available at [http://www.icty.org/x/cases/krstic/tjug/en/010802\\_Krstic\\_summary\\_en.pdf](http://www.icty.org/x/cases/krstic/tjug/en/010802_Krstic_summary_en.pdf) accessed 1 February 2015.

<sup>498</sup> In the *Krstic* case, the judgment records how during the transport of women and girls out of Potocari to ethnically cleanse Srebrenica some young women “particularly attractive women” were pulled off buses and were never seen again. *Prosecutor v. Krstic*, para 49.

<sup>499</sup> Diegetic sound is sound whose source is visible on the screen or implied to be present by the actions of the film. It is a sound that originates from within the film’s world. The film features the electronic music of Macedonian DJ Kiril Dzajkovski.

This does not mean, however, that the women do not organise themselves in order to resist the constant surveillance. At 24:19, some women stand in front of the others in order to shield them from view while urinating. In another scene, Samira rushes to pull a young girl back towards the women as the soldiers wolf-whistle at the child. The degradation of women and girls through verbal abuse receives scant attention in international law, and yet, this scene and others throughout the film clearly illustrate how women and girls are intimidated and humiliated through these constant words and sounds which are experienced in the film as a form of violence. These sounds are understood as a means to demean and connote women and girls as sexual objects. In yet another scene of female solidarity, an old woman's hand imperceptibly pushes Samira's head down in the warehouse, saving her, at least at the beginning from being "taken out" by the soldiers (27:17). This euphemism for rape used in the *Foca* case refers to the practice of soldiers coming into the hall and picking out the women that are to be abused in this way.<sup>500</sup>

Throughout the film, the director juxtaposes the coercive environment in which the women are placed with various forms of micro resistance. In this way, she problematises the active/passive dichotomy and stereotypes of conventional femininity through the displays of solidarity, courage and agency.

### ***Depicting Gender Crimes on Screen***

If the first thirty minutes of the film tells the story of Samira's journey from Sarajevo to the geographically unidentified women's camp and the deportation and ethnic cleansing of the village,<sup>501</sup> then the next part of the film tells the story of how some women were held in what has become legally identified as sexual slavery during their time at the camps. This part of the film provides a graphic representation of the elements of the gender crimes established by the Tribunal and in particular illustrates how concepts such as ownership, power, and loss of autonomy operated. By doing so it provides context and visualisation of these legal definitions. Instead of separating the events strictly by elements or by crime, the section below carries out this analysis in chronological sequence in order to illustrate how these acts cannot be easily separated and compartmentalised.

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<sup>500</sup> See for example, *Prosecutor v. Kunarac*, para 378 where FWS-51 the mother of FWS-50 describes her daughter being "taken out" many times during their time at the Foca High School.

<sup>501</sup> Under Article 2(g) of the 1993 ICTY Statute, the Tribunal is competent to prosecute unlawful deportation or transfer of civilians as a grave breach of the 1949 Geneva Convention IV; Article 5(d) provides that deportation, when committed against any civilian population, constitutes a crime against humanity.





Screenshot 6. Samira witnesses soldiers taking women into the house for the first time

29:00.<sup>502</sup>

The nurse's words mark the beginning of this chapter, "That last one was just a child" she says at 29:16 minutes referring to the girl in front of the soldier in the still image captured above. The girl depicted in the film is around the age of witness AB in the *Foca* case, a 12 year old girl, held in sexual slavery and who disappeared after she was sold off by Serbian soldiers to others soldiers from Montenegro. We see Samira watching as soldiers pick women out and escort them, via gunpoint to the house. At this point in the film we can only guess what happens in the house, since no words have been said or images screened to confirm our suspicions of sexual violence and enslavement. But we can sense (and see) Samira's terror – echoing what witness 50 stated in the *Foca* case about her fears of the war - "all the things that I was afraid of I experienced on my own skin later on. That's how it turned out."<sup>503</sup>

A minute later, a soldier comes into the warehouse where Samira is sitting with the nurse and her daughter, points his finger and says "you, you". Again we hear stark echoes of Witness 50's testimony in the *Foca* case in the following exchange taken from the examination in chief by Prosecutor Peggy Kuo:

24 Q. Can you describe how they picked out the girls?

<sup>502</sup> © 2010 Wide Eye Films, Sektor Film and Stellanova Films.

<sup>503</sup> *Prosecutor v. Kunarac*, Transcripts, page 1234, March 29, 2000.

A. They would always do this by pointing their finger: You, you, or you. That's how they did it.<sup>504</sup>

Samira's look of terror is met with the soldier's gaze. He looks her up and down and then escorts her to the house. What follows inside the house from the thirty-two minute mark is a brutal gang rape scene. Samira's rape is the only one to be explicitly portrayed on the screen and turns us into a witness of the rape as a war crime, as a crime against humanity and as a form of torture. As the camera cuts back and forth between the faces of the rapists and Samira, we are confronted with the rape front on: as a witness to the events. This is not a scene where depictions of rape and sexual violence are used to titillate, eroticize or entertain audiences.<sup>505</sup> Rather the realistic depiction of the rapes, its length, the focus on Samira's face, contorted in pain clearly illustrate that these acts are a form of torture.

It is from this scene that the title is derived. In the book, the main character recounts that she can no longer feel her legs. It is "as if I'm not there" she says, "as if I'm gone."<sup>506</sup> The scene begins at 32 minutes where Samira is told to strip and is then undressed by a soldier who uses a knife to cut the buttons off her blouse. The same soldier, dressed in military uniform orders Samira to look at him while he is raping her. The two other soldiers watch the rape. Samira resists in the only way that she can, physically overpowered, she refuses to look and averts her gaze from his face.

The film clearly demonstrates that the rapes involve the brutal exercise of power and are a form of torture rather than a manifestation of desire. Significantly, the film highlights that Samira has no control or ability to give consent in the coercive circumstances. As the Tribunal held in the *Foca* case: "Sexual autonomy is violated wherever the person subjected to the act has not freely agreed to it or is otherwise not a voluntary participant."<sup>507</sup> Consent in the film is portrayed as an irrelevant consideration in the midst of the violence and almost total loss of autonomy in the camp.

As the second rapist approaches Samira, we are offered a few seconds of respite from the scene as the camera cuts to a shot of a fly on the wall and the sounds of Samira's pain are muted. The camera pans out to show the soldiers playing football outside of the small

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<sup>504</sup> *Prosecutor v. Kunarac*, Trial Transcripts, page 1255, March 29, 2000.

<sup>505</sup> "The depiction of survivors and of sexual violence has often been eroticized for the purpose of titillating the audience in order to boost ratings." Linda Alcoff and Laura Gray, 'Survivor Discourse: Transgression or Recuperation?' (1993) *Signs* 260-262.

<sup>506</sup> Drakulic, *As If I Am Not There: A Novel about the Balkans*. (n.466) 67.

<sup>507</sup> *Prosecutor v. Kunarac*, para 457.

window of the room in which she is trapped. The juxtaposition of the football and the rapes reinforces the idea that while on the outside – in the public sphere – nothing has changed, Samira's whole world has been significantly altered. It also highlights how the women's treatment in the camp was seen as part of the daily reality of the soldiers' and women's lives.

At 36:44, following over four minutes of the gang rape scene, we see the three men standing behind the desk but cannot see Samira. When we see her, Samira stands dressed at the back of the room watching the events. We soon see that there are two Samira's in the room and that Samira has dissociated from her body. We watch her watching the scene. Her character, standing dressed and free at the back of the room is a reminder of her humanity. The dissociation is also a symptom of her psychological trauma, reminding us of the toll that these rapes are having on her mental health as well as on her body.<sup>508</sup>



Screenshot 7:

Samira watches herself and then approaches to touch her own face. 37:48.<sup>509</sup>

Juanita Wilson has explained the use of the detachment during the rape scene as follows:

I didn't want to show any explicit nudity or be voyeuristic in any way, which is very difficult. So I tried not to show anything that you don't need to see and to portray the experience of rape from her point of view--not just to document the facts. So we stay on her face for most of the scene. We see her trying to block it out by focusing on a little detail, in this case a fly, which is in the book as well. This strategy works for a little while for her but, at a certain point, it gets to be too

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<sup>508</sup> Babette Rothschild, *The Body Remembers: The Psychophysiology of Trauma and Trauma Treatment* (WW Norton & Company 2000) 13.

<sup>509</sup> © 2010 Wide Eye Films, Sektor Film and Stellanova Films.

much and she has an out-of-body experience, which is true to any trauma experience where you feel it's not happening to you but it's happening to somebody else and you can see it happening from a distance.<sup>510</sup>

The apparition, the out-of-body Samira, approaches and touches the Samira on the floor, who has blood coming out of her nose. Again we hear echoes of Witness 50's words when she testified to how the women would return from being "taken out": "They would all be crying when they came back. Some of them would be bleeding from the nose."<sup>511</sup>

While the elements of rape and rape as torture as war crimes and crimes against humanity can clearly be mapped onto this scene, another crime is also represented by the actions on screen.<sup>512</sup> The men's actions following the rape fall within the legal definition of outrages upon human dignity set out in the *Aleksovski* case, as an act that "causes serious humiliation or degradation to the victim" without necessarily resulting in "lasting suffering."<sup>513</sup> Significantly, although there is no evidence in the *Foca* case that the men urinated on the women, accounts of these outrages against human dignity can be found in other reports.<sup>514</sup> Thirty-eight minutes into the film, Samira is informed that she has more entertaining to do. She lies on the ground and the screen goes black. Samira is rendered unconscious as a result of the violence.

### ***Sexual Slavery***

The blackness of the screen marks the transition into the next chapter of the film which depicts the sexual slavery of Samira and some of other women. In the film, the black screen represents Samira's oscillation between consciousness and unconsciousness. It also seems particularly symbolic in this context. First, as it reflects the experience of watching the *Foca* proceedings streamed online or on DVD. In the legal proceedings at the ICTY the black screen and silence denote the privacy and "in camera" nature of the issues, which must take place off camera. There are things that the audience cannot see or cannot

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<sup>510</sup> Alice Kunzinar "Rape, the unspeakable war crime: an interview with Slavenka Drakulic and Juanita Wilson on the award-winning filmic rendition of *As If I Am Not There*." (n.481).

<sup>511</sup> *Prosecutor v. Kunarac*, Trial Transcripts, page 1255, March 29, 2000.

<sup>512</sup> The elements of rape are discussed in Chapter three of this thesis. The elements of torture are as follows "the intentional infliction, by act or omission, of severe pain or suffering, whether physical or mental, for the purpose of obtaining information or a confession or of punishing, intimidating, humiliating or coercing the victim or a third person, or of discriminating on any ground against the victim or a third person. For such an act to constitute torture, one of the parties thereto must be a public official or must, at any rate, act in a non-private capacity, e.g. as a de facto organ of a State or any other authority wielding entity." See *Prosecutor v. Furundzija*, para 162.

<sup>513</sup> *Prosecutor v. Zlatko Aleksovski*, IT-95-14/1-T, (June 25 1999), para 501.

<sup>514</sup> Ivana Nizich, *War Crimes in Bosnia Hercegovina*, Volume 2. Helsinki Human Rights Watch 217.

know. These closed sessions sometimes occur in order to protect witnesses from the gaze of spectators and from being identified. Secondly, the blackness also reminds us that the camera is providing us with a privileged position as a witness to the events through Samira's eyes. Without her sight, we would not be able to see where she is or what her experiences are. In this way, it reminds us that we are being placed in her subject position.

When we next see Samira, her face is physically marked with a deep cut in her lip and a black eye. She lies naked underneath a blanket and her vision is blurry. Through this blurred vision – her point of view – we see girls and women in a room, one of whom is a young child. The sound in the film is now diegetic and non-diegetic. The non-diegetic piano music is slow and played in minor notes. The diegetic noises are the opening and closing of doors; at this noise the women and the girls hide their heads underneath a blanket. At times over the sound of the music's crescendo we hear screams from the women who have been taken out of the room by the soldiers. The other women attempt to sleep against the sounds of these screams.

It is clear from these images, the accompanying sounds and the silences, that the women are locked in the rooms and have no control over their own movements outside of this room. The soldiers who come to take the women are always armed. The women are removed forcibly if they resist. Hands are placed on the women's wrists, leading them to other rooms where they are presumably raped off screen. In these scenes the elements of ownership identified by the Tribunal in *Kunarac* are visible. Following an extensive consideration of the relevant laws and precedents in international human rights law (including the CEDAW Convention's prohibition on human trafficking in Article 6), the trial chamber defined enslavement as a crime against humanity in customary international law as consisting of "the exercise of any or all of the powers attaching to the right of ownership over a person."<sup>515</sup> The trial chamber listed a number of factors which could prove the exercise of the rights of ownership including "...the control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour."<sup>516</sup>

In the film the women have no control over their physical environment, their bodies or with whom to have sexual relations. The soldiers have taken extensive measures to

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<sup>515</sup> *Prosecutor v. Kunarac*, para 539.

<sup>516</sup> *Prosecutor v. Kunarac*, para 543.

prevent and deter escape and subject the women to cruel treatment and abuse.<sup>517</sup> Hungry, dirty and beaten, the women do not have access to food and sanitation facilities. The testimony in the *Foca* case confirms that the women who were “taken out” were “in a terrible state.” Witness 62 testified that “they were all black and blue, beaten up” with some of them tortured and burnt with cigarettes.<sup>518</sup> The film also makes it clear that even if the women were to escape there is nowhere for them to go. The camp is isolated and placed in the middle of nowhere, in the midst of an armed conflict.

At 44 minutes, a young soldier grabs Samira by the wrists and takes her into a room where two other soldiers await. The two soldiers exit and a younger soldier is told to “get on with it”, but he falls asleep by Samira on the bed. This scene clearly illustrates that the rapes of the women were not just instances of men taking advantage of situations for desire or lust; but rather part of a systematic plan in which some soldiers were ordered by others to rape women and girls. Even if this order were not heard and seen on screen, the circumstances presented in the film suggest that the rapes are a foreseeable consequence of having soldiers in charge of the detained females.<sup>519</sup>

In the book, the scene is portrayed differently to that of the film. Although the young soldier does not rape S. she is subsequently brutally raped by another soldier who attempts to burn her with a cigarette. The situation in the film may be reinforcing the Tribunal’s finding that there were instances of “goodness” on the part of some soldiers. It is also the case that there was evidence of “Serb soldiers who refused to rape despite all the pressure from their peers” in the *Foca* trial.<sup>520</sup> However, the scene may have been omitted to spare the audience the discomfort and difficulty of watching another graphic rape scene. The director has stated that “While people say this film is hard to watch, I feel it could’ve been a lot harder. We decided certain events that happened in the book were too upsetting on film and we decided to keep the focus on just one character.”<sup>521</sup>

The next part of the film’s narrative and plot is perhaps the most harrowing. Although the violence takes place off the screen, on the young girl’s return to the room, the viewer becomes aware that the girl child is suffering the same fate as Samira and the other women. Head bowed and silent, the girl enters the room. This implicit message is soon

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<sup>517</sup> *Prosecutor v. Kunarac*, para 543.

<sup>518</sup> *Prosecutor v. Kunarac*, Trial Transcripts, Monday 27 March 2000, page 977.

<sup>519</sup> See Chapter two for the reasoning in the *Blaskic* case (n.161).

<sup>520</sup> *Prosecutor v. Kunarac*, Trial Transcripts, Monday 20 November 2000 page 6271-41.

<sup>521</sup> Alice Kunzinar “Rape, the Unspeakable War Crime: An Interview with Slavenka Drakulic and Juanita Wilson on the award-winning filmic rendition of *As If I Am Not There*.” (n.481).

made explicit in the subsequent minutes of the film. Her return seems to awaken Samira from her injuries and she takes on the role of caring for the girl. She tries to soothe her by brushing her hair and holds the girl in her sleep at night. In contrast to the first scenes where Samira was initially protected by an older woman, it is now Samira, stripped of her own youth, who takes on this protective and mothering role.



Screenshot 8. The girl is returned to the women's room. 42:52.<sup>522</sup>

"Footsteps" one of the women in the room says. The women all turn to see who will come through the door, to see who will be "taken out" to be raped. A handsome soldier with a beret strides into the room and addresses the young child as "monkey face". Don't you recognise me he asks her? The girl's face breaks into a smile, "It's Bojan. A friend of my brother" she says and gets up to leave with the soldier. Two soldiers stand waiting at the door and when she gets there she turns to wave at Samira and at the viewers, a gesture underlying her innocence and status as a child. The other women glance at each other nervously. We are also nervous. We know from the *Foca* case that soldiers often raped their neighbours, friends and people known to them. Those familiar with the case law will also know that children as young as 12 years old were held in the rape camps.

After what seems like an eternity, where we watch the women waiting, the door opens and the soldiers throw the girl into the room. The women (or girls) all rush to her and lift her onto the bed. A woman screams for a nurse while another curses the soldiers, "animals" she says as she rushes to get a wet cloth. At 49:18 Samira and another woman peel off the

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<sup>522</sup> © 2010 Wide Eye Films, Sektor Film and Stellanova Films.

bloodied dress from the girl's back to reveal a large cross, knifed or burnt into her body. No words are spoken. This visual clue is one of the few references to the ethnic component of the conflict. The cross burned and/or knifed into the back of the child in the film provides echoes of the testimony of Witness FWS-50 in the *Foca* case who recounted that an old Montenegrin soldier wielding a knife had threatened "to draw a cross on her back and to baptise her" while he raped her "in a beast like manner."<sup>523</sup>

At 52 minutes Samira touches the girl's face and her hand recoils. The girl is cold, dead. The girl has been raped, held in sexual slavery and tortured to death. An old woman enters and leaves the food. As the soldiers come in to collect the girl's body, Samira wraps a headscarf over the girl's head; another visual cue of the Muslim ethnicity of the girls and women in the room. Again the subtlety of this act means that it is the gender component of the violence which forms of the focus of the film's narrative.



Screenshot 9. Samira offers pain killers to other women in the camp who have been beaten

1:08:53.<sup>524</sup>

### ***Samira and the Captain***

The young girl's death marks a new chapter in the film where Samira refuses to be treated like an "animal" and instead, attempts to assert her agency and femininity. At 54:30, Samira runs into the bathroom and puts make-up on. One of the other women tells her that she looks ridiculous but Samira remains defiant. "This is who I am: a woman" she says, "They are not soldiers, just men." Samira's decision to put on lip stick alienates her from

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<sup>523</sup> *Prosecutor v. Kunarac*, para 243.

<sup>524</sup> © 2010 Wide Eye Films, Sektor Film and Stellanova Films.



the other women. The camera jump cuts from the room to a scene outside. Lined up, in the sunshine, Samira sits apart, head up, looking into the distance in a t-shirt and jeans, emphasising once more her urban status. This scene marks Samira's renewed attempts to assert her control and agency over the situation, within the limited possibilities on offer. Samira becomes visible to the Captain because of her decision to invoke a certain construct of femininity. Samira uses the commodity of lipstick to become visible and in return she becomes the Captain's commodity – for his exclusive use. The following scenes recall the words of Judge Florence Mumba during the sentencing judgment when she stated that the accused Kunarac, "...abused and ravaged Muslim women because of their ethnicity, and from among their number, you picked whomsoever you fancied on a given occasion."<sup>525</sup>

Lipstick on and set apart from the other women, off screen Samira is chosen to meet the Captain. The camera jumps, this time to Samira being pushed through the door by an armed soldier. "Leave us," comes the order before we can see the Captain's face. He asks Samira where she is from, what she does and he tells her that her confinement is a mistake. The notion of mistake takes on a double meaning with the Captain seeming to imply that her confinement is a mistake and that the whole war might also be one too. By reinforcing the notion of mistake, the film seems to create a difference between Samira and the other women in the camp. Samira is educated, beautiful and from the city. The other women remain invisible, "unrepresentable"; their captivity and slavery is not a "mistake." This invisibility is explained in filmic terms by Laura Mulvey who writes on the images of women and sexuality in the films of French new wave director, Jean Luc Godard. Mulvey has argued that make-up gives women a "mask of visibility (which, composed of make-up, clothes and so on, has an indexical relationship to the woman's body)." However, this in turn makes the other women invisible:

This feminine mask is the passport to visibility in a male-dominated world. Her mask of visibility conceals behind it the diverse and complex nature of woman's place in the social and economic order, where sexual difference is a matter of division of labour, differences and divisions which have no image, no form. The

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<sup>525</sup> Full text of the summary of the Judgment of the Trial Chamber II, read out by presiding Judge Florence Mumba at the hearing. Press Release, *Prosecutor v. Kunarac*. the Hague, 22 February 2001. JL/I.S/566-e. <http://www.icty.org/sid/8018> last accessed March 30, 2015.

invisible women in factories, home, schools, hospitals, are formless and unrepresentable.<sup>526</sup>

The relationship with the Captain grants Samira privileges and “luxuries” denied to her since the beginning of the war, such as food, wine and a bath. The domesticity and normality of the scene jars with the ways in which we have seen the women treated for the last hour and a half. Two minutes later as the Captain tries to kiss Samira, this momentary peace is broken, as we are aware that Samira is to be raped again. Before this off screen rape occurs, Samira raises the issue of the men in the camp. “Where are they?” he asks her, “there is no-one here, we are alone.” He maligns her concerns. Yet the Captain has the responsibility under international law to stop the rapes and punish his soldiers as set out in Chapter two of this thesis. As a consequence of her exclusive possession, Samira benefits from the “privilege” of having the Captain’s protection. This means that Samira is no longer raped by the other soldiers. Instead however, the Captain has taken exclusive control of her sexuality and movements.

In the sections above I have mapped out the ways in which the film reinforces the jurisprudence of the *Foca* case and the many ways in which the film reflects the stories which have emerged from the proceedings. The connection between the *Foca* trial and the film are clear, with the trial being a clear reference point for the story told in the film’s narrative. However, the film’s narrative goes further than the *Foca* case and does not stop at the events on trial. Instead, it continues to follow Samira on her journey from the camp where she is freed as part of a prisoner exchange, to Sweden where she lives as a refugee. In the section below, I seek to revisit the narrative in order to look at the ways the film either departs from the story told in the trial or how it uses the visual medium to tell other stories which are not so apparent from a reading of the judgment or trial transcripts. In doing so, I argue that the film reveals stories that could not be voiced in the proceedings.

### **Contesting law’s narrative**

#### ***Consent***

While the film reflects a relationship of exclusive possession of Samira by the Captain, the cinematic narrative challenges the way in which law records these stories. The film calls into question law’s obsession with definitions, in particular the elements of rape, and illustrates the absurdity of the court’s agonising over the issue. In the film, short

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<sup>526</sup> Laura Mulvey ‘Images of Women, Images of Sexuality’ in Laura Mulvey, *Visual and Other Pleasures*, vol 494 (Indiana University Press Bloomington 1989) 57.

conversations between the women make it clear that although the Captain does not physically beat Samira, she is still being raped. One woman asks her “Does he hurt you” to which Samira replies “Not in the way that you mean.” The film makes this point in a mere couple of seconds through Samira’s eye contact with the women.



Screenshot 10. Samira averts her gaze from the Captain. 1:09:50.<sup>527</sup>

In case there was any doubt about the matter, the film represents the moments before an off screen rape in which we see the Captain kiss Samira in bed. We see Samira’s face for a few seconds (in the still above) – her gaze makes it clear that she is not consenting – she does not want to be there. This is still rape. The scene illustrates the absurdity of the *Furundzija* definition of rape which necessitated violence or physical force as an element of the charge. The silent scene above also provides a stark contrast to law’s reliance on the text and words. While the film often operates silently in its representation of rape, including the off-screen sexual violence, the law does not allow this to happen with the women testifying forced to provide mechanical and graphic details as part of law’s “violence of meaning” through which survivors are compelled to speak in certain ways.<sup>528</sup>

The film also calls into question the individualisation of the harms by placing Samira’s treatment within the context of how she has been treated by other soldiers and also how her experiences are linked with those of the other women in the camp. Unlike the rapist and soldiers (referred to in the credits as rapist 1, rapist 2, threatening soldier) the film

<sup>527</sup> © 2010 Wide Eye Films, Sektor Film and Stellanova Films.

<sup>528</sup> Tagg, *The Disciplinary Frame: Photographic Truths and the Capture of Meaning* (n.385) Introduction.

gives each of these women names, even if they are not verbalised in the film's dialogue. Jasmina, Alisa, Halida and Mirsada are held in the room with Samira. The credits and film thus emphasise the concrete realities of each woman's experience. The director tells us that while this is a film about Samira, it could be about Alisa or Halida. Each woman has a different story to tell and she gives them a face and a name. This symbolic act of naming the women in the credits recognises each woman as an individual and affirms that these women "were there". This stands in contrast to the trial where the women have been given numbers instead of names for protective reasons. As Olivera Simic has noted:

In the Balkans, women's stories of violence have been if not silenced then (mis)used by the governments only for achieving political gains and often for no other reason than to advance one ethnic group of women over other. Women victims of war have often been represented as numbers and statistics, faceless and nameless and only occasionally remembered by politicians when they wish to emphasise the crimes of 'the other side'.<sup>529</sup>

The film also reinforces the jurisprudential finding that consent cannot be given in the coercive circumstances of the camp. The film makes it clear, beyond a reasonable doubt, that the Captain is guilty for holding Samira in sexual slavery and also for the crime of rape. He is aware of their power differential and later attempts to exculpate his behavior by reasoning that "We are both doing what we need to do to survive." But these words and his attempt to turn the slavery into a transaction by giving her money in the end are exposed in the film's narrative through the framing of her experiences in the camp. This is not a relationship of equals; it is clearly not a situation in which Samira can consent. Samira's choice is between rape by one Captain and rape by multiple soldiers. The film thus calls into question the reintroduction of consent as an element of the crime of rape, when it is completely irrelevant for the crimes of sexual slavery and torture.

The exclusive possession of some women by soldiers in the *Foca* case was used by the accused as a form of defence, with both Kovac and Kunarac alleging that the sexual relationship was consensual. Kovac, who was found guilty of enslaving FWS-87 claimed that that she had been in love with him.<sup>530</sup> Whilst Kunarac had claimed that he had been seduced and even forced by D.B. to engage in sexual acts. He stated the following: "I had sex against my will... without having a desire for sex" and further clarified following

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<sup>529</sup> Simic, 'But I Want to Speak Out: Making Art from Women's Testimonies' (n.38) 56.

<sup>530</sup> Kuo, 'Prosecuting Crimes of Sexual Violence in an International Tribunal' (n.199) 318.

questioning by Judge Mumba, “I cannot say that I was raped. She did not use any kind of force but she did everything.”<sup>531</sup> The court clearly and categorically rejected these defences and Kunarac was found to have personally raped a number of women and to further have aided and abetted the gang rape of a number of the witnesses on several occasions.<sup>532</sup>

With regards to D.B the Trial Chamber opined that the bench “...regards it as highly improbable that the accused Kunarac could realistically have been “confused” by the behaviour of D.B., given the general context of the existing war-time situation and the specifically delicate situation of Muslim girls detained in Partizan or elsewhere in the Foca region during that time.”<sup>533</sup> The Trial Chamber found it irrelevant as to whether he was aware of the threats made by Gaga on D.B.’s life. The judges were satisfied that “D.B. did not freely consent to any sexual intercourse with Kunarac. She was in captivity and in fear for her life after the threats uttered by ‘Gaga’.” The Trial Chamber also found that Kunarac was aware of the rapes inflicted on D.B. by other soldiers.<sup>534</sup> Similarly, although Kovac tried to suggest that he and Witness 87 were in love, the Trial Chamber rejected this defence. It found that the “...relationship between FWS 87 and Kovac was not one of love as the Defence suggested, but rather one of cruel opportunism on Kovak’s part, of constant abuses and domination over a girl who, at the relevant time, was only about 15 years old.”<sup>535</sup> The Trial Chamber concluded that Kovac exercised *de facto* powers of ownership of the women and disposed of them the same way by selling them.

Like Kovac, if the Captain were indicted, he might assert that Samira was in love with him, or perhaps, like Kunarac he might argue that Samira seduced him by putting on make-up and provocative clothing. These defences rely on the myths and stereotypes through which law constructs both facts and stories in sexual violence cases.<sup>536</sup> Outside the confines of legal narrative the film shows how irrelevant consent is and also allows us to imagine how the events could allow for a twisted defence of consent in the Tribunal. In this way, the film challenges legal narrative construction and how witnesses of sexual

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<sup>531</sup> *Prosecutor v. Kunarac*, para 231.

<sup>532</sup> Kunarac was convicted of personally raping FWS 87, FWS 95, D.B., FWS 183 and FWS-191. He was convicted of aiding and abetting the rape and gang rape of witnesses FWS-75, FWS-50, and FWS-186.

<sup>533</sup> *Prosecutor v. Kunarac*, para 646.

<sup>534</sup> *Prosecutor v. Kunarac*, para 647.

<sup>535</sup> *Prosecutor v. Kunarac*, para 762.

<sup>536</sup> Scheppele, 'Manners of Imagining the Real' (n.350).

violence are treated in the Tribunals. Further it calls into question the way in which justice is currently served for the few who are called to testify.

### ***Intersectionality***

One of the most striking differences between the film and the Tribunal's proceedings and judgments is the way both narratives treat the ethnicity of the actors in the conflict. In the film, there is a lack of identifying visual markers on the soldier's uniforms (I cannot comment on the linguistic content and accents in the film) and instead, it is through visual cues that we become aware of the religious/ethnic dimension of the conflict. First, through Samira's father placing the headscarf around her before she leaves her home in Sarajevo and later, when the women wrap a scarf around the girl child's head before her body is taken out of the room by the soldiers.



Screenshot 11. Samira's father places headscarf on her head. First male gaze 2:34.<sup>537</sup>

In *Foca* the Trial Chamber found that the three accused "...mistreated Muslim girls and women, and only Muslim girls and women, *because* they were Muslims. They therefore fully embraced the ethnicity-based aggression of the Serbs against the Muslim civilians."<sup>538</sup> In the context of the ICTR Doris Buss has criticised the ICTR for its refusal to recognise the sexual violence perpetrated by women which did not fall across the ethnic lines of the conflict. Buss argues that in the Tribunal's work "...the focus on gender in the context of an over-determined assessment of ethnic conflict becomes a means for occluding, rather than

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<sup>537</sup> © 2010 Wide Eye Films, Sektor Film and Stellanova Films.

<sup>538</sup> *Prosecutor v. Kunarac*, para 592.

opening up the complex dimensions of violence against women.”<sup>539</sup> Whilst Wilson’s film portrays the conflict as one which has ethnic dimensions, in contrast to the *Foca* judgment or the *Gacumbutsi* case, it is gender which forms the primary focus of the film.

Drawing on the male gaze and women’s position in the continuum of everyday violence, Wilson’s narrative aims to be more universal in its scope and does not confine itself to the targeting of Muslim women, “because they were Muslims.” Instead, it is Samira and the other women’s gender which forms the focus of the film. There are cues from the very beginning that gendered social relations play a fundamental role in the film’s narrative. In the opening scenes as Samira leaves Sarajevo we see two men stare down at her from a balcony. Through their male active gaze we understand their construction of Samira in terms of what Laura Mulvey describes as the “traditional exhibitionist role” where “...women are simultaneously looked at and displayed, with their appearance coded for strong visual and erotic impact so that they can be said to connote *to-be-looked-at-ness*.”<sup>540</sup> This connotation of women as to be looked at and displayed has especially harrowing manifestations in the *Foca* case where some of the witnesses explained how they were forced to dance naked for the pleasure of the soldiers.<sup>541</sup>



Screenshot 12. The second male gaze. 3:08.<sup>542</sup>

<sup>539</sup> Buss, 'The Curious Visibility of Wartime Rape: Gender and Ethnicity in International Criminal Law' (n.7) 5.

<sup>540</sup> Laura Mulvey, 'Narrative cinema and Visual Pleasure' (1975) 16.3 Autumn Screen 6, 9.

<sup>541</sup> *Prosecutor v. Kunarac*, para 767.

<sup>542</sup> © 2010 Wide Eye Films, Sektor Film and Stellanova Films.

In the camp, this *to-be-looked-at-ness* is depicted through the symbolism of the red dress in the midst of the bleak landscape. For the director, the dress must have been too much to resist both in terms of its visual impact and its symbolism: red the colour of the blood running into the plug hole in the opening scenes of the film; the colour of Samira's nosebleed and then the red dress.<sup>543</sup> In the image below we see Samira in her red dress being marched to the Captain's house. An armed soldier stands behind her and the soldiers standing around wolf whistle as she walks by. The armed soldiers are a reminder, lest we forget, that her every movement is controlled by the soldiers.



Screenshot 13. Samira in a red dress 58:38.<sup>544</sup>

Outside the confines of the camp and during the prisoner exchange, Samira still receives a gaze from a male soldier. The gaze of a male soldier following the women with his eyes and his gun reiterates the point made from the beginning of the film, that women are objectified and sexualised, inside and outside the confines of the camp. In doing so, Wilson implicitly engages with a critique of international criminal law, which seeks to draw attention to some of the underlying, and on-going causes of the violence, rather than the atomised focus on individualised responsibility. The persistence of the male gaze throughout the film's narrative may be seen as a part of Wilson's structural critique of the field of international criminal law where "...morally culpable behaviour is often understood

<sup>543</sup> Samira packs the red dress but never wears it in the novel. On the symbolism of the colour red see Trinh T. Minh-ha. *When the Moon Waxes Red: Representation, Gender and Cultural Politics* (Routledge 1992).

<sup>544</sup> © 2010 Wide Eye Films, Sektor Film and Stellanova Films.



as psychological or individualised rather than collective or social.”<sup>545</sup> Further by giving the women in the film names and faces, this film and the others analysed differ from the stories told and recognised by the courts and the governments.



Screenshot 14. Soldier follows Samira with his eyes and gun. 1:24: 56.<sup>546</sup>

A brief analysis of the male gaze in the film thus alerts spectators to gender relations in society prior to, during and in the aftermath of war. The film hints through the use of the gaze that “...pre-existing structural inequality ... may be at the root causes of the violence the women experience before, during and after the conflict.”<sup>547</sup> The heckling, sexualisation and violation of the women is linked implicitly to everyday domination and verbal assault which women and girls face in times of peace. The theme of on-going sexual violence and this continuum is explored further in the next two chapters.

### ***Abortion and forced pregnancy***

While the narratives of the women in the trial are focused on the events which relate directly to the crimes, Wilson decides to continue the narrative and recount the aftermath of the war. In doing so she departs from the book in two major ways: first, she decides to use a sentimental scene of women running down a hill to their freedom rather than following the book’s story in which the women are abandoned in a village and left to fend for themselves until other buses come. In the book a woman gives birth prematurely from

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<sup>545</sup> Simpson, *Law, War & Crime: War Crimes, Trials and the Reinvention of International Law* (n.169) 2.

<sup>546</sup> © 2010 Wide Eye Films, Sektor Film and Stellanova Films.

<sup>547</sup> Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo. Reparations for Women subjected to Violence, A/HRC/14/22, 23 April 2010, para. 31.

the rapes and the mother of the birthmother (the grandmother) murders the baby. The film also does not depict the process of obtaining refugee status and the time “S” as she is known in the book, spends in a refugee camp. Instead, the film jumps to Sweden.

Switching to English language in an antiseptic doctor’s office, Samira states, “Just get rid of it.” A man sitting behind a desk tells her that this is not possible and that it is “too late.” The reason why the doctor replies this way is not clear but it is implied that there is a time limit on the availability of terminations in Sweden. Samira replies “It is too late for who?” questioning both his decision and the limits placed on her reproductive autonomy by the law. The national legal system in this case, privileges the life of the unborn over Samira’s agency over her own body, denying her the choice and ability to terminate the pregnancy resulting from the rapes. This line is the last we hear Samira speak in the film. The law effectively silences her protests and she is forced to carry the foetus to term.

The fact that women became pregnant from the rapes is documented in the testimony of witness 62 in the *Foca* case.

5 Q. I have to refer you back to the statement you gave, page 6 of that statement, paragraph 3. The sentence begins: "I know that many of the women became pregnant. I heard that in Montenegro some of them had abortions. I don't know where all the women went to." You say you know.

11 A. I know that.

12 Q. How do you know?

13 A. Well, I heard it talked about, that when -- and when they went to Montenegro they had to go to the doctor and have themselves examined.

16 Q. But you don't know; you know that from the stories that were told?

18 A. Yes. They went off whenever they went off, to Turkey or wherever. I don't know. I never heard of them or saw them after that.<sup>548</sup>

However, since the women who testified only spoke about this issue in relation to other women, the pregnancies and abortions did not form part of the judgment.<sup>549</sup> The judgment

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<sup>548</sup> *Prosecutor v. Kunarac*, Trial Transcripts, Monday 27 March 2000, page 1044.

<sup>549</sup> For example, the forced pregnancies could have been prosecuted as a grave breach of the Geneva Conventions for “wilfully causing great suffering or serious injury to body or health” Article 2 (c) or as a crime against humanity under Article 5(i) other inhumane acts.

also refers to the testimony of Witness FWS-191 who had been raped and enslaved by Kunarac. However, one Serbian soldier hid her from Kunarac and later became her husband. The judgment recounts that she refused to be exchanged on the basis that she was pregnant and that “...she had also heard that she would be forced to have an abortion were she to leave for Sarajevo.”<sup>550</sup> The failure to include the crime of forced pregnancy in the ICTY and the lack of witness testimony from women who were forced to carry pregnancies following the rapes has created a silence in the official legal judgments of the Tribunal. Significantly, the film brings this experience to the fore and helps fill in the gap left by this legal silence.

The refusal to provide Samira with the abortion is a violation of international human rights law and emerging standards in international law. The Committee against Torture, the UN Human Rights Committee and the European Court of Human Rights have made it clear that to deny an abortion to a woman or girl who has become pregnant as a result of rape is torture.<sup>551</sup> Just as attempts at unsafe abortions following an unwanted pregnancy from rape can result in severe medical complications, in the case of unwanted pregnancies from rape in conflict, the refusal to grant an abortion may amount to torture and breach the countries’ obligations under these international instruments.<sup>552</sup> In the context of Women, Peace and Security, Security Council Resolution 2122 (2013) provides that Member States and United Nations entities seeking to ensure humanitarian aid and funding “...must recognise the importance of including provision for the full range of medical, legal, psychosocial and livelihood services to women affected by armed conflict and post-conflict situations, and noting the need for access to the full range of sexual and reproductive health services, including regarding pregnancies resulting from rape, without discrimination.”<sup>553</sup> This last statement is a major breakthrough given the controversy and opposition which surrounds abortion politics at the national and international levels.

The result of the refusal to provide Samira with the abortion is graphically illustrated in the film through a birth scene. The violence of the scene and the camera’s focus on Samira’s anguished face, contorted with pain and screaming is reminiscent of the rape scene earlier in the film. The film uncomfortably links the rape and the birth reminding viewers that

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<sup>550</sup> *Prosecutor v. Kunarac*, para 270.

<sup>551</sup> Committee Against Torture Concluding Observations on Nicaragua, CAT/C/NIC/CO/1, 10 June 2009; *KL v Peru*, *Communication*, No. 1153/2003, Views of 22 November 2005, Human Rights Committee and *S & P v Poland* (Application no. 57375/08) 30 October 2012.

<sup>552</sup> Manjoo and McRaith, 'Gender-based Violence and Justice in Conflict and Post-Conflict Areas' (n.15) 16.

<sup>553</sup> Security Council Resolution 2122, S/RES/2122 (2013).

although forced pregnancy was never prosecuted at the ICTY and in this case would not meet the elements of the crime at the ICC (where the focus is on confinement and altering the ethnic composition of the group), the result has been the same.<sup>554</sup> Samira has been forced into carrying the foetus and giving birth.

In the final scenes of the film, we see Samira silently contemplate the fate of the baby. At one point she approaches the baby with a pair of scissors and cuts off the name tag on the baby's wrist. By cutting off the baby's name tag, Samira attempts to sever the links between herself and the baby, and to create confusion over the baby's identity. However, the baby is placed back at her bedside. Although it seems that Samira had resolved to leave the baby at the hospital, placing the photos of her family beside his head, she changes her mind. In the last shots of the film, a sobbing Samira notices that she is lactating. Throughout the film Samira has been denied control over her own sexual and reproductive autonomy, the last scene of the film, reinforces this lack of bodily control, with the milk flowing from her breasts. She picks up the child and breastfeeds him. Samira sits on the hospital bed, crying. She is now a mother.

### ***Aftermath***

Another important way in which the film differs from the trial is through its refusal to provide closure to the spectator. In the film, we are able to witness the aftermath to the rapes (an aftermath discussed in later chapters in the context of the film *Grbavica*) as Samira grows visibly pregnant. Further, this refusal to grant closure or finality is emphasised by the silence which comes to permeate the end of the film.

The film challenges the idea that "war is over" through the pregnancy and also through a scene in which images of the atrocities committed in Bosnia come onto a television screen which Samira is watching as she flicks between channels.

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<sup>554</sup> See Chapter three for a longer discussion on the crime of forced pregnancy and its elements.



Screenshot 15. Samira watches the news about Bosnia on television. 1:30:06.<sup>555</sup>

After a couple of seconds of watching the news about Bosnia, in Swedish (unsubtitled), Samira zaps to another channel. It would seem that her experience now mirrors that of viewers situated outside of conflict zones who are able to flick on and off the images of atrocity which fill our screens on a daily basis. With this scene, the film's narrative seems to ask the viewer questions about the ethics of watching images of atrocity. The consumption and reception of images of suffering continues to be a contested and difficult subject in the field of ascetics raising questions on if, and how, we are affected by these images.<sup>556</sup> The film thus implicates the viewer with inaction over the violence in Bosnia. Just as Samira changes the channel, it could be argued that the film reinforces the international indifference to these images and also points out that although Samira may have left Bosnia, the war is still raging on. The film also recalls the scene in *Hotel Rwanda* when Paul and Jack discuss the potential impact of images on political indifference to the Rwandan genocide, with Jack stating: "If people see this footage, they'll say "Oh my god! This is horrible!" And then they go on eating their dinners."<sup>557</sup> These films question the power of images to galvanize public outcry and expose the framing of the conflicts for Western audiences who sit comfortably in their homes.

The film also refuses to provide the viewer closure in terms of legal accountability. While the proceedings have clearly influenced the film, the director makes a clear choice not to

<sup>555</sup> © 2010 Wide Eye Films, Sektor Film and Stellanova Films.

<sup>556</sup> See Chapter four for a greater discussion of compassion fatigue (n.374).

<sup>557</sup> Dauge-Roth, *Writing and Filming the Genocide of the Tutsis in Rwanda: Dismembering and Remembering Traumatic History* (n.74) 225.

portray the ICTY. Without the mention of the ICTY on the DVD box, a spectator could be completely unaware of the existence of the Tribunal or the proceedings which formed the inspiration for the film. In fact, the film leaves us with uncertainty over whether the women will ever speak out about their experiences. In a scene just prior to the prisoner exchange we see Samira in the Captain's office advocating for the exchange of the women. Her advocacy is based on the shame of the women and their future silence on what has occurred.

1:18:43	S.	The others – they won't say anything. They're so ashamed.
1:18:51	C.	What about you?
1:18:59	S.	What about me?
1:19:17	C.	You're going to be exchanged. So you can go.
1:19:28	S.	Go home?
1:19:31	C.	That's not an option. For either of us.

The scene also seems to reinforce the notion that the women raped in the conflict would not come forward and speak about their experiences. Samira's own silence about whether she will speak out or not (lasting 18 seconds) also raises uncertainty as to whether Samira will eventually speak about her experiences or attempt to hold the Captain to account for his actions. In this way, the film emphasises some of the obstacles in place which prevent women from testifying about their experiences and further highlights that only a very few of these experiences will be recorded in official legal proceedings.

### Conclusion

Sentencing the accused in the *Foca* case, Judge Mumba stated "...by the totality of these acts you have shown the most glaring disrespect for women's dignity and their fundamental human right to self-determination." An important landmark on gender crimes, the *Foca* case remains a precedent setting judgment which recognises the ability of courts to charge cumulative acts as separate charges and which also fleshes out the elements of crimes such as sexual enslavement.<sup>558</sup> The recognition that cumulative charges

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<sup>558</sup> *Prosecutor v. Kunarac*, para 195-199. On cumulative charges see *Prosecutor v Kunarac* para 557. "Comparing the elements of rape and torture under either Article 3 [violations of the laws or customs of war] or Article 5 [crimes against humanity], a materially distinct element of rape vis-à-vis torture is the sexual penetration element. A materially distinct element of torture vis-à-vis rape is

can be brought for the same acts when they satisfy the elements of different crimes is an important one since it reflects the reality of people's experiences during the conflict. However, as the film illustrates, while the law is obsessed with definitions and elements, in life, a clear line cannot be drawn between the various gender crimes. Sexual slavery, sexual violence, outrages upon human dignity, rape, forced pregnancy, trafficking and torture can all form part of someone's experience of conflict. Further, the film calls into question why the issue of forced pregnancy remains outside of legal jurisprudence.

Based closely on the facts of the trial, *As If I Am Not There*, is in large part a complementary narrative to the *Foca* judgment. It reinforces the judgment's findings and brings to life the horror stories and crimes against humanity detailed in the judgment. As a complementary narrative the film allows us to see the blood which runs between the judgment's legal jargon and hundreds of pages. This cinematic reinforcement is thus welcome. However, the film is also a site of criticism. Rather than allowing us to draw a line after the *Foca* proceedings, the film suggests that there is no such thing as "finality" or closure. Instead, the birth of the baby and Samira's silence call for the audience to reflect on the place of the trial and the treatment of women survivors in the larger context of the aftermath of the conflict.

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the severe infliction of pain or suffering aimed at obtaining information or a confession, punishing, intimidating coercing or discriminating against the victim of a third person."

## Chapter 6 *Storm*: The Gender of Silencing

“If there is a person like the real Hildegard (our Hannah), then she can accomplish certain things. But she also must pay the price for it.”

Hans Christian Schmid  
Director of *Storm*

### Introduction

This chapter turns to look at a film representing the prosecution of gender crimes at the ICTY. It presents the next stage in the chronology moving from the conflict to the prosecution of the crimes. The language and narrative of *Storm* places a lot of emphasis on the procedural aspects of the proceedings at the Tribunal. In some cases, these do not conform to the real life rules of the Tribunal.<sup>559</sup> This chapter however is not concerned so much with the legal realness aspects of the film but rather it seeks to illustrate how the film reveals aspects of the trials which are not readily visible from a reading of the judgment or even the proceeding transcripts. While the public are able to watch the streamed proceedings or attend the trials and see the examination or cross examination of witnesses (where these are not pixelated or held in camera due to protective measures), the public often do not see how witnesses are treated outside the courtroom or how the different sections of the court interact. Further, the film also shows how these “off camera” events and decisions affect the rules of procedure and silence women’s experiences inside and outside of the courtroom.

In the following sections of this chapter I explore two major themes which I argue reveal aspects of the Tribunal which are not readily visible through a reading or even watching of

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<sup>559</sup> For example, when the witness Alen, Mira’s brother, is on the stand giving his testimony about the forced deportations, the prosecutor asks him to identify the commander. At 10.23 she turns to the judges and states with confidence “I would like to state for the record that the witness has clearly identified the accused, Goran Duric as the officer in charge of the Kasmaj deportations”. Legal scholars and lawyers familiar with the rules of the court will be put on notice that this identification procedure has no probative value in the court’s jurisprudence. In fact, defendants have appealed trial chamber decisions on *inter alia* the basis that the judges relied on in court identifications. The accused have challenged in court identifications on the grounds that they are unreliable given the suggestive environment of the court. *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*. IT-03-66, (Nov 30 2005), para 27. This point has also been made in the *Kunarac* case where the trial chamber held that in court identifications are inherently unreliable “because all of the circumstances of a trial necessarily lead such a witness to identify the person on trial.” The point was upheld on appeal in *Kunarac* and later in the *Kamuhanda* Appeals Judgments. *Prosecutor v. Kunarac*, para. 562; *Kunarac et al.* Appeal Judgement (Jun 12, 2002), para. 320; *Prosecutor v. Kamuhanda*, ICTR-99-54-A) Appeal Judgment, (Sept 19, 2005) para 243.



material related to the Tribunal. The first theme looks at the ways in which various procedures affect the prosecution of gender crimes. In particular I look at issues surrounding witness intimidation, witness testimony and other “less visible” obstacles which affect these prosecutions. The film clearly depicts how political and economic considerations affect the prosecution decisions and how women’s experiences are traded in return for guilty pleas. In the film the camera has privileged access to hotel lobbies, art galleries and private rooms where these decisions are made away from the public view. Placed in the position of Hannah, the female prosecutor, the camera is even denied entry and at times, we cannot see behind the closed doors where the real decisions are made.

The second theme explored in the film concerns the gender dynamics operating within the Tribunal. The film’s narrative specifically focuses on the role of women (a woman) in the Tribunal. The director has explained this choice during an interview:

I am interested in the discrepancy of a woman for whom the fulfilment of institutional duties had been highest priority for years and who all of a sudden finds herself being an outsider because of her persistence. Who is confronted with the fact that a system, which she had always believed in and passionately supported, turns against her.<sup>560</sup>

These dynamics thus form a crucial part of the film’s plot and its very conception as a project. As discussed in the methods section of Chapter four, the film script was developed by interviewing Hildegard Uertz Retzlaff, a German prosecution lawyer. Her role in revising the script and commenting on drafts may explain why the plot mirrors many of the criticisms of the trials expounded by feminist scholars of international law. Further the film challenges the idea that feminists are walking the halls of power and instead, suggests that the system remains embedded in sexism and patriarchy.

The chapter is structured as follows. I first set out a short plot summary of the film. I then turn to the procedural technicalities and rules depicted in the film and show how these influence the film’s narrative. Finally, I explore the issue of gender dynamics, first through an exploration of the academic literature and secondly, by applying this literature to the film’s storyline.

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<sup>560</sup> Hans Christian Schimd. Director’s Statement. Film Movement Press Release. <http://www.filmmovement.com/downloads/press/STORM%20PRESS%20KIT%20w%20NYTimes.pdf> accessed March 30, 2015.

### **Storm: The Plot**

The film opens with a car chase and arrest of the accused, Goran Duric, indicted for war crimes at the ICTY. Following these opening scenes, which mark the film as a political thriller, the action re-opens in the Hague. The ICTY building is profiled in a mid-range shot. The building was originally built as the corporate headquarters of the Aegon Insurance Company and has been described as an “imposing, secretive place.”<sup>561</sup> We follow the the main protagonist, the prosecutor Hannah Maynard into the offices where a party is being thrown for the appointment of the new Deputy Prosecutor, Keith Haywood (Stephen Dillane) an English lawyer. At 4:59 minutes into the film Keith informs Hannah that Goran Duric has been arrested for crimes against humanity and what he terms “violations of martial law.” She is told that all the evidence has been collected, the witnesses have been interviewed and that the case is “a piece of cake”. This was formerly Keith’s case but he tells her he no longer has the time to finish the case. He is adamant that they can secure a conviction and put Duric away for 10 years under command responsibility for ethnic cleansing. It soon transpires however that this is not in fact an open and shut case.

The camera jumps to a scene in which we see a man praying. This religious marker undoubtedly refers to the ethno-religious dimension of the conflict. Like *As If I’m Not There*, the film uses markers such as headscarves and prayer to signify the ethnicity of the characters rather than making this issue explicit through words or dialogue. After the man has finished praying, a woman from the Victims and Witnesses Unit (VWU), one of the most poorly funded sections of the Tribunal, comes and collects the man. This witness is the only eye witness in the Prosecution’s case.

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<sup>561</sup> Stover, *The Witnesses: War Crimes and the Promise of Justice in the Hague* (n.192) 34.



Screenshot 16. The Courtroom in Storm, 9:37.<sup>562</sup>

In the first courtroom scene nine minutes into the film we see the witness, Alen Hadjarevic (Kresimir Mikic), give testimony. He identifies the accused as the man responsible for forcing women onto a bus and deporting them from the town of Kasmaj to an unknown location. However the defence object to his testimony on the basis that the bus could not have been stationed in the school. The action moves to an on-site inspection of the school yard in the Republika Srpska through the course of which it becomes clear that the witness is lying. Back in the Hague, following an altercation with the prosecutor, the witness speaks his last words “I believe in this court, it’s the only thing that I have left” (21:24). Although the prosecutor has asked him many times why he believes that Duric is guilty and why he has testified, the witness refuses to provide the prosecutor with an answer and commits suicide. This creates mystery and suspense in the storyline, a puzzle which the prosecutor must solve in the next section of the film.

The action then moves into the next phase of the film where Hannah begins to carry out her own investigation into Alen’s past. Hannah goes to his funeral and questions his fiancée and sister. In answer to her queries the fiancée asks to be left alone given that Alen has just been buried. She informs the prosecutor that she did not even know that Alen had been going to testify at the Hague, something the VWU confirm is common practice with

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<sup>562</sup> © 2010 Soda Pictures Ltd.

some witnesses choosing to keep their testimony a secret from friends and loved ones.<sup>563</sup> The prosecutor, however, is undeterred and turns to Alen's sister Mira (Anamaria Marinca), who has been acting as a translator and begins to question her. This is the first time that we meet Mira, the other main character in the story.

In the course of questioning, Mira tells the prosecutor that she is no longer close to her brother and that she had not seen him in a while. Mira no longer lives in Bosnia, her reasons are simple: "Germany is my home. There is no future here. Sooner or later they will be cutting each other's throats again." (32:50). Hannah leaves Mira to pack their lives and return to Berlin with her husband and son, Simon. With Alen's death, the link with the past is erased, she says. However, we will soon see that erasing her past is impossible and that their conversation has made Mira a target of witness intimidation. This intimidation pushes her into agreeing to testify at the Hague against Duric.

After Hannah has secured Mira's cooperation and agreement to testify, Hannah is informed by Keith that there may be an issue with the Presidency of the Court. Sure enough, the following day at an art gallery, the Presidency informs the prosecution that it is unlikely that Mira will be accepted as a witness since this could potentially lengthen the proceedings by four weeks. The reasons for refusing to grant permission to let the witness testify relate to the issues of expediency and closing down of the Tribunal. Hannah is indignant, "We are still working within the rules of the court, it is totally legitimate to bring in a new witness during the course of the trial" she retorts. Finally, a deal is struck between the judge and the Deputy Prosecutor; Mira can talk about what happened at Kasmaj but not about the rapes in Vilnia Kosa. Justice, in the words of the young German prosecutor Patrick, is exchanged for convenience.

Despite the fact that the Tribunal limits her testimony to the simple viewing of the accused at the time and place in which the deportations took place, Mira still decides to testify. Although this testimony secures Duric's conviction, a plea bargain brokered in secret

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<sup>563</sup> The issue of secrecy and witness protection has been a difficult one for the ICTY. Even when protection measures are put in place all members and participants in the proceedings know the identity of the witness. In the *Tadic* case, some witnesses were granted absolute anonymity. However, following an outcry from the American Bar Association and a vigorous dissent from Judge Stephen, subsequent cases have not followed this approach. Instead, if a party reveals the identity of a protected witness or divulges any information whereby a witness can be identified, the person is liable to prosecution for contempt of the Tribunal and to a sentence of up to seven years' imprisonment and/or a fine of 100000 euros. See also *Prosecutor v. Tadic*, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses (Aug. 10, 1995) (Separate Opinion of Judge Stephen); and for a discussion of this issue, Wald, 'Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal' (n.192) 223. ICTY RPE Rule 77.

between the Deputy Prosecutor, the EU political attaché (Hannah's boyfriend) and the defence counsel allows Duric to walk free after the trial. The deal is struck without Hannah's knowledge on the basis that Duric will testify against some of the "bigger fish" in order to establish superior responsibility.<sup>564</sup> Hannah has now been betrayed by her colleagues and also her partner. Duric is convicted and sentenced but he walks free at the end of the film on the basis of the plea bargain.

### **Legal technicalities and witnesses**

Through the plot and the relationship of the two female protagonists the film brings to the fore a number of procedural and legal issues which have affected the prosecutions of cases involving gender crimes in war crimes trials. Further, the film also calls into question the use of technical and legal rules which witnesses and those most affected by the crimes on trial find difficult to comprehend. Before exploring these rules in relation to Hannah and Mira, this section first illustrates how Alen, the brother, is affected by these rules.

One of the difficulties which Alen faces occurs early in the film outside of the courtroom. On a break from his testimony, Alen, the witness approaches Hannah and tells her that he wanted to go to the mosque to pray and that he wants to have a recording of his testimony. The young woman from the Victims and Witnesses Unit approaches him and tells him that he cannot speak to the prosecutor while he is under oath and on the stand. This "prophylactic measure" according to Judge Patricia Wald "...sometimes makes for increased discomfort of the witness who has had all his prior contacts with the lawyers or investigators for the prosecution or defense and finds himself in a strange city not allowed to contact them."<sup>565</sup> Alen is thus rebuked for his infraction of a legal rule of which he was not aware and is put in his place, at the margins of the trial proceedings.

The film also highlights that witnesses may come with a very different idea of what giving accurate, true or even, false testimony means. According to Judge Wald "...most experts say a witness who did not see, but 'only heard' about something is far less reliable than an eyewitness."<sup>566</sup> The law here works on the presumption that Alen is no longer a useful prosecution witness, since minimum probative weight will be attached to testimony which is hearsay and since he is not an eye witness. The film thus presents the prosecution's

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<sup>564</sup> Mark Osiel, *Making Sense of Mass Atrocity* (Cambridge University Press 2009) 177.

<sup>565</sup> Wald, 'Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal' (n.192) 221.

<sup>566</sup> Ibid. 226.

ethical dilemma and difficulties with witnesses who “contumaciously” refuse or fail to answer questions or who “wilfully give false testimony.”<sup>567</sup>

At 20:33 minutes Alen approaches the prosecutor again, this time in her hotel room, and is informed by Hannah that he could be put in prison for perjury for the testimony that he gave earlier in court that day. Despite his assertions that his evidence is true, the fact that he has not seen the events with his own eyes as claimed makes the witness into a liar, perhaps even meriting criminal punishment for wasting court time. “It doesn’t work like that I’m afraid, you’re dealing with a court of law” Hannah tells him. The witness is close to tears “I only want to get things right, it’s not fair” he says. The reply from the prosecutor is angry and harsh, “piss off” she says as she shows him the door. For the prosecutor, the “lies” have wasted court time and have placed the conviction in jeopardy. “What part of your cock and bull story is true” she shouts. She tells him that it is a court of law, and that it cannot be about blind revenge. The next morning, the witness commits suicide. The director has explained the importance of the scene as follows:

I think over time she has become too callous and tied up in this professional routine. As prosecutor you shouldn’t get too emotionally attached, you have to function and stay objective. That this now happens to her is terrible: a witness commits suicide because she maybe treated him wrongly and in an important moment didn’t realise that he would have needed her attention.<sup>568</sup>

Alen’s experience, which culminates in his suicide, highlights the difficulties which international tribunals and courts face in protecting witnesses while at the same time ensuring the integrity and honesty of evidence. The ICC in particular has been plagued by witnesses refusing to testify following intimidation, fabricated evidence and witness interference with the International Bar Association asserting that protection and support issues feature in all cases before the Court.<sup>569</sup> *Storm* not only brings to the fore the importance of witnesses in the proceedings but also calls into question the lines drawn by the law in relation to honest/fabricated evidence. Further as the director notes it, the film questions the lack of emotional involvement of the lawyers when faced with vulnerable witnesses.

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<sup>567</sup> Rule 91 ICTY RPE. Adopted 11 Feb 1994.

<sup>568</sup> Dialogue of Making Storm. Trust Nordisk (n.469).

<sup>569</sup> IBA “Witnesses before the International Criminal Court” July 2013. Available [file:///H:/ICC%20Witness%20report%20\(July%202013\).pdf](file:///H:/ICC%20Witness%20report%20(July%202013).pdf) last accessed March 30, 2015.

The procedural rules which silence Alen come into play in a number of ways when Mira attempts to testify about her experiences –events which she has seen with her own eyes. After Hannah obtains Mira’s testimony which irrevocably places Duric at the scene and in command of the deportations, she finds out that many other procedures and rules will be invoked to prevent Mira from testifying about the rapes and her experiences following the deportation. These procedures take Hannah from being a committed trial lawyer to an outsider, in disagreement with her boss and “the system”. In the section below I explore some of these obstacles to securing a conviction for the crimes committed against Mira in Vilnia Kosa.

### **Witness Intimidation**

Witness intimidation is a recurring theme which runs throughout the film. It is an important one given the issues of witness intimidation and protection which have affected recent war crimes prosecutions.<sup>570</sup> The film draws on many witness protection issues which the ICTY personnel have faced in its years of operation. As Judge Patricia Wald notes “...intimidation, anonymous phone calls and word-of-mouth threats relayed by third party intermediaries occur with some frequency when the word gets out that someone is coming to testify at the Hague.”<sup>571</sup> These problems are brought to life in the film through the intimidation of Hannah and Mira. As Hannah and Mira leave the apartment block, we see the two women being photographed by a man sitting in a car. Later this man approaches Mira as she puts Alen’s belongings in the car. He grabs her, shoves her against a wall and sexually assaults her for a few seconds before her brother’s fiancée comes over to see what is happening. The film is shot with a hand held camera and this places the viewer in a close and uncomfortable position to the assault. The man warns Mira in an aggressive whisper not to talk to “those pigs” in the Hague and runs off. Hannah does not see the sexual assault and instead goes directly to visit the hotel spa resort in Banja Luca.

At the spa, Hannah asks a female receptionist about the history of the hotel. The woman informs her that she cannot talk about the 1990s. Hannah then pulls out her ICTY identification badge and requests a meeting with someone who will talk to her about the hotel’s history. The scene then jump cuts to an office, where a man, the owner of the hotel, offers Hannah a cigarette. She asks him about the history of the hotel, and in return, he produces black and white photographs of Hannah and Mira taken earlier by the man

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<sup>570</sup> See discussion on *Prosecutor v. Kenyatta* (n.283).

<sup>571</sup> Wald, 'Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal' (n.192) 220.

who assaulted Mira. He tells Hannah to get out of his office. As Hannah unlocks her car, rocks are thrown at the rear car window, shattering the glass. She drives away determined to return with a search warrant. The prosecutor and witness have now both been warned and threatened.

These warnings grow in number throughout the film. In an anxiety inducing scene which eventually convinces Mira to speak to Hannah, her son Simon goes missing from school and returns with presents given to him by a man: a PS2 gameboy and a packet of “mentona”. Mira smashes the gameboy in fury when she sees the war game and shooting. Later she explains to Hannah that the Mentona’s were “a reminder of Vilnia Kosa so that our breath wouldn’t stink so much” (54:27). Following the threats, Mira finally agrees to testify at the Hague amid assurances from Hannah that the Tribunal will keep her safe. Eventually when Mira goes to the Hague to testify, the car in which she is travelling is spray painted with the words Vilnia Kosa; her picture and address are printed in a newspaper along with the commentary that she is testifying in the Hague.<sup>572</sup>

The film thus shows the challenges which the prosecution and victims and witness units face and further exposes the reasons for this intimidation. Back at the Hague, a member of the prosecution team gives Hannah a run through the major players in the Republica Sprska. He tells her that the owner of the hotel is one of the five “untouchables” who profited from the war. He informs her that it was naïve and dangerous for her to go to the hotel alone and that she will achieve nothing without the support of Brussels. This development links Hannah’s private life to her work as a prosecutor. Hannah’s boyfriend, the political attaché responsible for negotiating the EU’s relationship with Republika Sprska is called in to negotiate access to the hotel for investigation purposes. During this meeting, the negotiator for Republika Sprska asks her if the witness knows the risk that she is taking by testifying. The negotiator knows more at this stage than Hannah about what Mira has experienced during the war and is protecting men who remain in positions of economic and political power.

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<sup>572</sup> Names of protected witnesses and their evidence have been revealed to newspapers and confidential and protected information made public in a number of cases at the ICTY. *Prosecutor v. Marijadic and Rebic*, IT-95-14-R77.2, (March 10, 2006). Judgment on Contempt Allegations, *Prosecutor v. Beqa Beqaj*, IT-03-66-R77, (May 27, 2005). See also Carla Del Ponte, 'Investigation and Prosecution of Large-scale Crimes at the International Level The Experience of the ICTY' (2006) 4 Journal of International Criminal Justice 539, 546.



The film highlights the difficulties of investigating and prosecuting these crimes where the individuals involved are part of criminal gangs and paramilitary groups. As Cherif Bassouni has noted in the context of rape as a tool of “ethnic cleansing”, the Serb leaders

...enlisted the help of paramilitary organizations, police auxiliaries, and others with a penchant for violence. Because such groups are informally organized and loosely run, their command structure could remain hidden. Their members blend into the population at large and are hard to identify, either in the region or in the refugee communities that they have now formed outside of the former Yugoslavia. As a result, victims live in fear of returning to their homes and encountering their persecutors, and witnesses are understandably reluctant to tell their stories.<sup>573</sup>

Not only do some victims fear returning to their villages,<sup>574</sup> but witnesses have been threatened, intimidated and faced violence in the region and beyond. The links between the war, ongoing violence and impunity is explored further in the next chapter on *Grbavica*.

### **Less Visible Obstacles on Film**

Although Hannah is finally able to get her investigation under way with the support of Brussels, the optimism is short lived as Hannah and Mira soon face “less visible” obstacles in their attempts to prosecute Duric for gender crimes. The first of these obstacles, as outlined in the plot overview, is the Presidency’s decision not to allow new charges to be added on the basis of delay and prejudice to the accused. In addition to opposing the witness on the grounds of delay, the judges are concerned that Mira is going to air allegations which are not part of the initial indictment. The judges and defence lawyers are keen to ensure that Mira’s testimony serves only, rather than primarily, to prove Duric’s mode of liability and chain of command regarding the deportations.

As discussed in Chapter three on the rules of evidence and procedure, the ICTY has previously stated that the purpose of these rules is to “...promote a fair and expeditious trial and Trial Chambers must have the flexibility to achieve this goal.”<sup>575</sup> The film therefore realistically illustrates the discretion of the judges at the ICTY to make decisions on this basis. In the fictional case of Duric, the judges are concerned that he has already been held

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<sup>573</sup> M. Cherif Bassouni and Marcia McCormick. “Sexual Violence: An invisible weapon of war in the former Yugoslavia” Occasional Paper No. 1. International Human Rights Law Institute. DePaul University College of Law, 1996, 5.

<sup>574</sup> See the PBS documentary *I Came to Testify*.

<sup>575</sup> *Prosecutor v. Aleksovski*, Decision on Prosecutor’s Appeal on Admissibility of Evidence, IT-95-14/1-AR73, Appeals Chamber (Feb 16 1999) para 19.

for three years without trial and that the case is dragging on. There is a feeling that the prosecution are playing “piñata” (striking blindly and wildly in their attempts to obtain evidence and a conviction) rather than following a case strategy. On the other hand, the flexibility of the RPE means that the judges could equally reach an opposite conclusion, an option voiced by Hannah in the film to the President of the Court during their meeting at an art gallery.

Given the factual similarities between the case depicted in the film and cases such as *Lukic*, it is interesting to re-consider what happened in that case.<sup>576</sup> In Chapter three I set out how the prosecution had sought to amend the indictment, in that case pre-trial, arguing that evidence of rape would eventually emerge. They sought to add new charges for rape, enslavement and torture, by prosecution witnesses already scheduled to testify. The prosecutor argued in his motion that it would be a miscarriage of justice and unjust to the survivors if they were prevented from testifying about the rapes. The motion warned that the Trial Chamber “...may consider as irrelevant the evidence that they were raped and limit their testimony to their simple viewing of the accused at the time and place in which they were raped.”<sup>577</sup>

In *Lukic*, Trial Chamber III (comprised of Judge Patrick Robinson, Krister Thelin and Pedro David, an all-male bench) rejected the motion to amend the indictment on the grounds of undue delay. In this case the chamber stated that the test was “...not whether not doing so would amount to a miscarriage of justice; rather, it is whether the amendment results in unfair prejudice to the accused.”<sup>578</sup> This strongly echoes the judges’ decision in the film where greater weight is placed on expediency and the rights of Duric, than the rights of the rape survivors to see (criminal) justice done. In *Lukic* the judges effectively punish the prosecution for their failures to indict the accused for the crimes even though they had evidence of sexual violence from the first indictment. This is in line with the ICTR and ICTY’s requirements that the indictment must be the “primary accusatory instrument” and that the prosecution must set out “with the greatest precision” the identity of the victim,

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<sup>576</sup> *Prosecutor v. Lukic*.

<sup>577</sup> *Prosecutor v. Lukic*. Decision on prosecution motion seeking leave to amend second indictment. (July 8 2008). [http://www.icty.org/x/cases/milan\\_lukic\\_sredoje\\_lukic/tdec/en/080708.pdf](http://www.icty.org/x/cases/milan_lukic_sredoje_lukic/tdec/en/080708.pdf) para 13.

<sup>578</sup> *Ibid* para 63.

the place and date of the alleged criminal acts and means by which they were committed.<sup>579</sup>

This is factually a different situation to the one in the film where the prosecution only later became aware of the rapes and sexual violence.<sup>580</sup> However, in the film the judges seem to be punishing the prosecution for their piñata strategy and for their lack of diligence in what seems to be a poorly prepared case. As the SCSL held in the *CDF* case:

58. We are, in the light of this observation, constrained to hold the opinion that if any gender offence or offences existed at all against those accused persons who are the subject matter of this motion, this should have been uncovered through the exercise of the ordinary and normally expected professional diligence on the part of the Prosecution and the investigators, and the accused brought to justice after having, as was the case with the other offences for which they now stand indicted, been informed and in detail, of the nature and cause of the charge against them as mandatorily stipulated in Article 17(4)(a) of the Statute.<sup>581</sup>

Similarly in the fictional case of *Duric*, the investigators clearly did not properly and fully investigate whether gender crimes were perpetrated by the accused.<sup>582</sup> Furthermore, the prosecution only tendered one eye witness as evidence of *Duric*'s responsibility. The ICTY has previously warned the Prosecution about this approach in *Kupreskic*, a case in which

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<sup>579</sup> *Prosecutor v. Kupreskic et al.*, IT-95-16-A, Appeal Judgement, (October 23 2001) para. 114 and para. 89; *Prosecutor v. Karemera*, Decision on Defects in the Form of the Indictment, ICTR Trial Chamber III, ICTR-98-44-R72, 5 August 2005, para 17.

<sup>580</sup> International tribunals have placed emphasis on when the Prosecution became aware of the counts of gender crimes. For example see *Prosecutor v. Moinina Fofana, Allieu Kondewa* (the *CDF* case), SCSL-04-14-T, Decision on Prosecution Request for Leave to Amend the Indictment, (May 20, 2004). "Our duty in situations of this nature, where statutory interests are in conflict or in competition, is to ensure a rigorous respect for the rights of each of the parties in the arena, and to ensure that there is no breach of one's or the other's rights. To attain this objective, answers to a few questions will clarify the situation. The first is whether the evidence the Prosecution is relying on to base the amendment has, as it affirms, just come to its possession." para 56.

<sup>581</sup> *Ibid.* para 58.

<sup>582</sup> The failure to charge gender crimes in the ICC has led the OTP to state that "The Office will strengthen the concrete steps it has taken to enhance the integration of a gender perspective and expertise into all aspects of its operations: during preliminary examinations; in the development of case hypotheses and investigation and prosecution strategies; in the analysis of crime patterns; in the screening, selection, interview, and testimony of witnesses; at the sentencing and reparation stages; and in its submissions on appeal and witness protection including after the conclusion of proceedings." 2014 ICC Policy Paper (n.112) para 21. There is an issue as to whether sexual and gender based violence should always be suspected and included in the preliminary investigation phase or whether, given resources, case strategies, and the focus on "exceptional" or "emblematic" crimes, these crimes can be omitted in order to focus on other crimes in the Statute. David Luban, 'A Theory of Crimes against Humanity' (2004) 29 Yale Journal of International Law 85.

the Appeals Chamber overturned the convictions of three accused on the basis of evidence given by a single witness.<sup>583</sup>

While the Tribunal could have amended the charges under rule 50 to include charges of sexual violence and rape, or could have alternatively allowed Mira to speak about her experiences in the broader context of the deportation charge, the judges adopt a strict approach to the rules reminiscent of cases such as *Lukic* and the *CDF* case heard before the SCSL.<sup>584</sup> The consequence of this is made clear in the film; the prosecution is estopped from asking Mira questions which could lead the Tribunal into forbidden evidentiary territory. Yet this “forbidden territory” is the very reason Alen and Mira both decided to testify in the first place. As Mira says “The only thing that is getting me through this is that tomorrow I can get out everything that I have been carrying around for such a long time.” Thus, while the film may depart from the exact factual circumstances of *Lukic*, it brings these matters and concerns to a broader audience.

While Hannah attempts to negotiate with the Presidency about the limits and contours of her witness’ testimony, Mira sits and writes a list of the other women who were held with her in the rape camp. At the same time, Keith, the political attaché and the defence lawyer meet to reach an agreement. Despite Mira’s expressions of her need to speak, the decision of the Presidency and the plea bargain arrangement made behind closed doors effectively rob Mira of her opportunity to tell the Tribunal about her experiences of the war and include her testimony in this version of the history of the conflict. While according to Keith, the Deputy Prosecutor, everybody is happy with the deal, the deal is clearly a betrayal. It betrays the hundreds of women who were raped and massacred in the fictional site of Vilnia Kosa and the witness who agreed to testify despite the dangerous climate. As Hannah says “we have a woman who needs to be heard. She has to tell her story.” Hannah’s pleas, however, fall on deaf ears as Keith and the Presidency assert their authority over the witness’ ability to speak. Mira becomes invisible in the inner workings of the Tribunal as European and Serbian political considerations trump her needs.

The film reinforces the claim of Judge Wald who has argued that “...there is something lost in the utility of historical trials that are meant to send messages to future war criminal

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<sup>583</sup> *Prosecutor v. Kupreškić et al.* Appeal Judgment para 34.

<sup>584</sup> *Prosecutor v. Moinina Fofana, Allieu Kondewa* (the CDF Accused), SCSL-04-14-T (Oct 9, 2007); Kelsall and Stepakoff, ‘When We Wanted to Talk about Rape’: Silencing Sexual Violence at the Special Court for Sierra Leone’ (n.271); Sellers, ‘Gender Strategy is Not Luxury for International Courts’ (n.118).

when the witnesses stay hidden and are not identified in the judgment.”<sup>585</sup> If the ICTY is conceived as a venue for historical trials, then the refusal to allow Mira to speak effectively writes her experiences and the experiences of other women out of history, much like we have seen with the Tokyo Tribunal’s failure to prosecute those responsible for the plight of the so-called Comfort Women. This message is similarly repeated in Jasmila Zbanic’s film *For Those Who Can Tell No Tales* which also suggests that the failure to include the rapes and deaths of women in the *Lukic* case led to an obfuscation of these crimes. In that film, it is a private act of memorialisation on camera by an Australian performance artist in the spa hotel that finally helps to fill this gap.

### Testimony

Along with portraying the external factors which have a bearing in the trial, the film also gives us the privileged position of witnessing Mira’s interview with the prosecutors. These interviews sometimes carried out months or years before the prosecution at the Hague are private and are only witnessed by those involved. The film represents both the interview by the prosecutors and her testimony in court allowing the audience to see the different ways in which testimony is regulated inside and outside of the courtroom. In this way, it provides an artistic representation of the feminist critique that women’s voices are filtered out of the courtroom.

Although the film is marketed as a political thriller, it is, at least in part, a courtroom drama. Through the setting in the courtroom, we come to see some of the rituals in the court: the oath taken by the witnesses; the calling of the case; the introduction of the counsel to the judges; and the dress of counsel and judges. These rituals establish the authority of the court and provide the setting for the formal testimonies given by the witnesses: the brother and sister. With this in mind Mira’s three minute recorded interview by the prosecution and her testimony in her own words stands in contrast to the experience of Mira and her brother in the courtroom. By showing the testimonies inside and outside the courtroom the viewer can clearly see the ways in which legal procedure regulates and controls speech. Further, the film shows us how the legal proceedings reject emotional speech and silence Mira’s experiences of the rape camp.

Nine minutes into the film we are spectators to the first courtroom scene. Hannah Maynard is on her feet and is examining the witness. Alen speaks in Bosnian-Serbian-

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<sup>585</sup> Wald, 'Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal' (n.192) 224.

Croatian (BSC).<sup>586</sup> He mumbles and finds the words difficult to get out. He is cut off by the defence counsel who tells him to “stick to the facts.” An objection which is upheld by the bench.



Screenshot 17. Defence Counsel objects to witness testimony, 9:13.<sup>587</sup>

The way Alen is controlled by the lawyers illustrates the problems highlighted by Julie Mertus who argues in the context of the *Kunarac* trial, that the prosecutor “...appropriated what the witness said to an existing schema, he was no longer listening to *her*, but rather to his own construction of the Victim.”<sup>588</sup> She goes on to state that the “witnesses in the *Foca* case who tried to deviate from the structure of legal witnessing were cut off and then steered into the preferred direction.”<sup>589</sup> From the very beginning of the film, we see how witnesses are controlled not only by their own counsel but also by the various other actors in the courtroom. As Judge Mumba made it clear to the prosecutor Dirk Ryneveld in the *Foca* case:

We are not likely to listen to a witness who is left in the witness box to tell it all, as it were, because quite a lot of irrelevance has come in, and usually the witnesses,

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<sup>586</sup> The two official languages of the court are English and French. In addition, the accused’s rights are protected by ‘ensuring that all evidence submitted at trial is provided in his language.’ *Prosecutor v. Naletilic and Martinovic*, IT-98-34, Decision on the Defence Motion Concerning Translation of all Documents, (Oct 18 2001). The ICTY also has a unit dedicated within the Tribunal’s Conference and Language Services Section to maintaining consistency in terminology to be used in the different proceedings since words can often be translated in a number of different ways. For more information on language and translation see the ICTY website: <http://www.icty.org/sid/165> last accessed March 30, 2015.

<sup>587</sup> ©2010 Soda Pictures Ltd.

<sup>588</sup> Mertus, ‘Shouting from the Bottom of the Well The Impact of International Trials for Wartime Rape on Women’s Agency’ (n.329) 115.

<sup>589</sup> *Ibid*, 116.

as you know, they don't know what the Trial Chamber is looking for, and counsel does. So we would appreciate it very much to make sure that the witnesses are directed properly and they are brief and to the point, so that we don't take too much time.<sup>590</sup>

Time and expediency mean that a witness cannot simply be asked “what do you want to tell us” but must be strictly controlled in the courtroom. The control of counsel over the proceedings is clearly established from the beginning of the trial, with lawyers performing the leading parts. The witnesses are only able to answer questions and are not allowed to speak of their own accord. The lawyers and the judges decide the contours of what is relevant and what is irrelevant choreographing the trial. The need to constrict witness testimony is also reflected in the evolution of the RPE at the ICTY.<sup>591</sup> Although oral testimony was once preferred, written testimony is increasingly encouraged to facilitate expediency. Witnesses’ accounts are controlled through examination and cross-examination and kept strictly to the confines of “facts” or what Mertus terms “legal witnessings”.

The ways in which Alen’s speech is curbed and silenced by the court stands in stark contrast to Mira’s testimony that she gives to the prosecution lawyers in private. Nearly one hour into the film, we hear Mira’s account of her experiences during the war for the first time. Outside of a brightly lit courtroom where every move she makes is monitored by court personnel and by cameras, Mira can control the settings of her testimony. In a dark room, with a tape recorder on, Mira is asked by the prosecutors to tell her story. Although she is interrupted a few times by both Hannah and the German prosecutor, Patrick Farber (Alexander Fehling) for the most part she is able to speak freely. Even when she is interrupted and asked a question, she does not answer it immediately, instead, weaving the answer into her own account of the events. During the interview, as Mira tells her story the camera provides close up of her eyes, and reverse shot angles, providing close ups of Hannah’s face and eyes. In this way, the scene is constructed as a conversation between Hannah and Mira, with the focus on the relationship between the two women.

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<sup>590</sup> *Prosecutor v. Kunarac*, Trial Transcripts, March 2, 2000, page 254.

<sup>591</sup> Originally the ICTY preferred oral testimony in Rule 90 (A) however, the role of written testimony under Rule 92 bis means that “although live testimony continues to play a defining role in ICTY proceedings, the role of written testimony has steadily grown.” Wald, ‘Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal’ (n.192) 227.

This is in stark contrast to how witnesses can speak in the Hague, with Judge Mumba reminding witnesses that “I know that when you are speaking the same language you forget that you are answering questions for the Court. This is not a conversation between you and him.”<sup>592</sup> In this scene we see that Mira is not only answering questions, she is telling her story and has control over the way in which she is speaking and to whom she is addressing it. We hear and see a natural conversation and there is no suggestion or reason for us to doubt Mira’s narrative.



Screenshot 19. Mira tells Hannah she was raped with her eyes 58: 47.<sup>593</sup>

Mira’s story and testimony in the darkened room reveals the complexity of talking about and testifying to experiences of atrocity. She expresses her own guilt at not helping a woman and her baby when they were killed by soldiers before the deportation, “none of us helped her” she says. Following a few seconds of silence, Mira is prompted by Hannah to continue with her story. “And then what happened” Hannah asks an open question. Mira looks Hannah in the eyes and asks her the rhetorical question: “What happens to women in times of war?” She later adds “whoever couldn’t take it, whoever refused to participate, whoever was sick was taken into the cellar and shot dead. Duric gave the orders.” With this statement the Prosecution have the necessary evidence to argue that Duric’s liability lies beyond a reasonable doubt. They do not need to ask specific and graphic details of the rape or sexual enslavement. They do not ask her mechanical questions about body parts, timings and dates.

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<sup>592</sup> *Prosecutor v. Kunarac*, Trial Transcripts, March 21, 2000, page 536.

<sup>593</sup> ©2010 Soda Pictures Ltd.



The testimony above stands in contrast to the proceedings in the Hague later in the film when Mira takes the stand. Mira's examination in chief by Hannah about the events in Kasmaj provide a direct comparison to the testimony she provided earlier on in the film, when she speaks in her own terms. In the courtroom, we see the fragmented form of story-telling which is managed and controlled by advocates in the trial who use a question and answer format to illicit the story from the witness. In the courtroom, Hannah begins the examination by asking her questions about the day in Kasmaj. We have already heard this story from Mira. But this time, instead of the intimate setting of the dark room, Mira sits alone in the courtroom. Behind her is the public gallery, where amongst others, Keith is sitting and watching. Mira is giving her testimony in open court and the prosecution call her by her name. Since her name has already been leaked to the press it may be that she has decided to forgo all protective measures. In the film, since there are no protective measures in place, the public are in a position to witness her testimony. It may even be streamed online since it is later reported in the news that although Duric is free he will face investigation by the national Bosnian authorities.

Although Hannah had been warned by Keith and by the judges in the courtroom, (and had instructed the witness that the events from Vilić Kosa are off limits), the final scenes of the film mark Hannah's defiance and protest against the gendered powers of the institution. Hannah asks Mira three times if she ever saw the accused, Duric again. The third time, Mira erupts and she begins to scream. She is angry. She speaks to Duric directly rather than to Hannah or the judges and demands to know what he did with the women, where he buried them. The scene echoes the words of Wendy Lobwein, the former director of the VWU when she said of a witness "...we could see her getting angry and strong."<sup>594</sup> The film however moves beyond these echoes and represents this anger and agency through the fictional account.

Courtroom proceedings are commonly orientated to the shutting down of natural narrative and emotion. As Judge Florence Mumba stated in the *Foca* case berating both a female witness and the defence counsel "can we please proceed with the case, rather than emotions."<sup>595</sup> The expression by both the defence counsel and the witness that "this has been too much" for them were met with discursive shutdown – there is no place in the courtroom for those types of sentiments. Significantly, in the fictional case depicted in the film, Mira's reaction is more extreme than those we have witnessed in the ICTY. She leaves

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<sup>594</sup> From the documentary *Sexual violence and the Triumph of Justice*.

<sup>595</sup> *Prosecutor v. Kunarac*, Trial Transcripts, March 21 2000, page 592.

the witness stand and approaches the accused, and consequently she is manhandled by security and escorted out. The emotional outburst in the courtroom provides a stark contrast to the sterility and order of the proceedings. Mira is asserting her agency at this point and rejects the contours and limitations of her role as a witness only able to speak at the behest of the prosecution or defence counsel. She confronts the accused and in doing so, the film provides us with an alternative reality of how witnesses might behave in the courtroom, allowing Mira to play the role of the protagonist for a moment in the proceedings thereby showing her empowerment at confronting Duric. It is the unlikely nature of this outburst which gives the film a dramatic crescendo. The film also illustrates that this protagonism will not be tolerated. In violation of the choreography of the trial, it is Mira's behaviour which is chastised as she is removed from the courtroom setting.

Through this outburst and in earlier scenes, the film's narrative reinforces the idea that the adversarial trial is not a therapeutic forum which liberates people by allowing them to have a voice. This is made explicit through the film's dialogue, with Keith shouting at Hannah that the Tribunal "is not fucking therapy." We see the toll that the proceedings have on the witness' relationship with her family. The young woman from the VWU adds further support to this view stating "we lock that woman away, she is not even allowed to see her husband, and when it's all over she gets a letter from the president of the court, thank you very much for letting us put you through the rigmarole once again... This is so disgusting." The views of the woman from the VWU are in stark contrast to Keith's words "Talk to her, explain it, she'll get over it." Again the film calls into question the lack of emotional involvement of the prosecution lawyers which we saw previously with Alen's treatment.

By showing us the interview in the darkened room, the film also highlights the difference in the ways in which Mira is able to tell her story inside and outside the courtroom. The film provides viewers with a privileged position of seeing the interview by the prosecutors which we would never see through a reading of the transcripts or the judgment. This interview and Mira's story in her own words provide us with an example of what storytelling might look like outside of the courtroom setting. As Julie Mertus argues her in work on the *Foca* trial "In a non-legal setting, a rape survivor would tell a much different story, focusing not on the perpetrator, but on her own feelings and fears, and how the rape has changed her relationship with her family and community. The adversarial setting

makes such potentially therapeutic story-telling impossible.”<sup>596</sup> The film visualises this observation, through the different testimonies and reinforces the notion that courtrooms are inadequate forums to capture affective narratives.

### **The Gendered Nature of the ICTY**

The fictional representation of a prosecution of war crimes at the Hague provides viewers with a privileged viewing position that is only available to an institutional insider. While anyone with internet access can stream the proceedings online, the rationale behind the procedural decisions or the environment in which these are made remain off screen. In fact, as Christophe Gargot has stated, the streaming and filming of the proceedings should make us ask what remains off the screen and out of the public eye. *Storm* helps to fill in this gap and suggests that the decisions made off camera, the unseen, remains as important as what we see on the screen. By taking us behind the scenes into the President’s chambers the audience sees how legal bargains are made and why these deals are struck between the different parties. As the film shows, these decisions which are taken by men in offices outside of the courtroom, in art galleries or hotel lobbies all have a huge bearing on the outcome of the case.



Screenshot 20. Hannah sees the plea bargain deal being struck 1:20:23.<sup>597</sup>

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<sup>596</sup> Mertus, 'Shouting from the Bottom of the Well The Impact of International Trials for Wartime Rape on Women's Agency' (n.329) 115.

<sup>597</sup> ©2010 Soda Pictures Ltd.

In the scene above for example towards the end of the film, we see Keith the prosecutor shake hands with Hannah's boyfriend, the EU political attaché and Duric's defence lawyer. Through a point of view shot, the audience is able to see the scene that Hannah's happens upon. Looking up from the street on her own, she sees her boss and her lover exclude her from the decision making process. Through this scene and others, the film explicitly makes the point that politics has a major role to play in the transition from the war to peacetime. As Cherif Bassouni has noted, from its inception, the ICTY has had to "struggle against political resistance, bureaucratic hurdles, and lack of funding. Above all, they have had to struggle against the self-proclaimed realists who would put a political settlement before justice."<sup>598</sup>

The portrayal of those in economic and political power in films such as *Storm*, *Grbavica* and *For Those Who Can Tell No Tales*, not only point to the clandestine economy and their links to political circles post-conflict but are also deeply gendered in the films. In *Storm* for example all of the political attaches and negotiators are male, echoing the fact that protagonists in negotiations and international mediators also tend to be overwhelmingly male.<sup>599</sup> Whether in the form of EU conditionality (Republika Sprska becoming an EU state) or more local powers (the owner of the hotel in Vilnia Vlas as one of the war profiteers) the theme of economics and politics runs throughout the film in an overwhelmingly male fashion.

In this next section, I want to illustrate that beyond the critique of the "less visible" obstacles present in the international criminal legal system, the film calls into question the gender of the ICTY. Using a female protagonist in law film has been recognised as an effective means to call into question "the hidden gender of international law."<sup>600</sup> As Cynthia Lucia has argued in her work on the female lawyer in film:

By their very presence, women in law throw into relief the condition of women in patriarchal culture, whether in terms of female gender performance or female agency, as both are inflected and regulated by the law and conventional narrative form. The female lawyer's (in)ability to "author" versions of truth when constructing legalistic courtroom narratives inscribes her complicated position as a

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<sup>598</sup> M. Cherif Bassouni and Marcia McCormick. 'Sexual Violence: An invisible weapon of war in the former Yugoslavia' (n.573) 2.

<sup>599</sup> Bell, Christine, and Catherine O'Rourke. "Does Feminism Need a Theory of Transitional Justice? An Introductory Essay." *International Journal of Transitional Justice* 1, no. 1 (2007): 23, 25.

<sup>600</sup> Hilary Charlesworth, 'The Hidden Gender of International Law' (2002) 16 *Temple International and Comparative Law Journal* 93.

woman in law, while simultaneously exposing the sometimes precarious yet historically tenacious position of patriarchal dominance in law and film.<sup>601</sup>

The main character of *Storm* (2009) is the female prosecutor, Hannah Maynard. This is hardly a surprise given that the filmmakers had an interest in the male dominated space of the international criminal tribunal. Hans Christian Schmidt, the director, has stated in an interview:

I believe that the ICT is made up of mainly male prosecutors. Once we had a basic interest in international law -- in the Tribunal -- this became important for us. We saw an article in a German paper about one of the prosecutors, a woman, in the Tribunal, and this intrigued us very much: the way she talked about her work.<sup>602</sup>

After reading the article in *Der Spiegel*, the filmmakers went to the Hague to meet with Hildegard Uertz Retzlaff. At the time, the prosecutor had - in the dramatic words of the director - "abandoned her home and family to conduct the first international lawsuit in which rape was acknowledged as a war crime."<sup>603</sup> Uertz Retzlaff was asked to read the drafts of the script and met with the filmmakers on five or six occasions to comment on the plot and legal technicalities. Although the script was developed by consulting an institutional insider, the filmmaker was expressly interested in the outsider narratives, in this case the experiences of female prosecutors in a male dominated institution. The film is one of a number of movies which have emerged about UN institutions and entities which criticise their manner of operation.<sup>604</sup> Before exploring how the film positions Hannah as an outsider, the section below outlines some of the ways in which the legal literature has tackled the issue of female representation in the Tribunals. The critique in *Storm* is all the more poignant given that the Tribunal has sought to emphasise its success on the issue of gender parity in its documentary *Sexual Violence and the Triumph of Justice*.

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<sup>601</sup> Cynthia Lucia, *Framing Female Lawyers: Women on Trial in Film* (University of Texas Press 2010) 24.

<sup>602</sup> Interview: Storm's Hans-Christian Schmid & the International Criminal Tribunal. Nov 4, 2009. Last accessed March 30, 2015. <http://trustmovies.blogspot.co.uk/2009/11/interview-storms-hans-christian-schmid.html>

<sup>603</sup> Ibid.

<sup>604</sup> See for example *Whistleblower* (2010) and *No Man's Land* (2001).

### *Female lawyers and representation*

Feminist legal scholars have long discussed issues of diversity, equal opportunity and representation of female lawyers and members of the judiciary.<sup>605</sup> Developed from the background of cultural feminism, some scholars and judges have argued that women bring a different perspective to decision making and lawyering.<sup>606</sup> For others, the inclusion of women is just one factor which enriches a traditionally, male, white and elite bench. As Ruth Bader Ginsburg has stated “...it is also true that women, like persons of different racial groups and ethnic origins, contribute to what the late Fifth Circuit Judge Alvin Rubin described as ‘a distinctive medley of views influenced by differences in biology, cultural impact, and life experience’.”<sup>607</sup> Without seeking to essentialise women through a monolithic approach to adjudication or of gender, feminist scholars and judges have continued to study and advocate for more women in the highest rungs of the profession.<sup>608</sup>

In the context of international law, Christine Chinkin and Hilary Charlesworth have argued that the “presence of women in international tribunals can make a difference.”<sup>609</sup> Whilst highlighting the role that women have played as participants in the *ad hoc* Tribunals, they draw attention to the danger that the inclusion of women will be perceived as appropriate for a tribunal dealing with, offences against women without extending the same importance to women’s participation in other international institutions. In her research on women judges, Nienke Grossman argued in 2011 for great numbers of female judges in order to increase the legitimacy of international law. She provides the following figures:

For the most part, women participate in meagre numbers on the world’s most important international courts. In its sixty-five year history, only three permanent women judges have ever served on the International Court of Justice. Two of them

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<sup>605</sup> For example see Kate Malleson, 'Justifying Gender Equality on the Bench: Why Difference Won't Do' (2003) 11 Feminist Legal Studies 1; Erika Rackley, 'Representations of the (Woman) Judge: Hercules, the Little Mermaid, and the Vain and Naked Emperor' (2002) 22 Legal Studies 602; Erika Rackley, *Women, Judging and the Judiciary: From Difference to Diversity* (Routledge 2012); Rosemary Hunter, 'Justice Marcia Neave: Case Study of a Feminist Judge' in Ulrike Schultz and Gisela Shaw (ed), *Gender and Judging* (Hart Publishing 2013); Judith Resnik, 'On the Bias: Feminist Reconsiderations of the Aspirations for our Judges' (1987) 61 South California Law Review 1877.

<sup>606</sup> Carol Gilligan, *In a Different Voice* (Harvard University Press 1982); Carrie Menkel-Meadow, 'Portia in a Different Voice: Speculations on a Women's Lawyering Process' (1985) 1 Berkeley Women's Law Journal 39.

<sup>607</sup> Ruth Bader Ginsburg, 'Remarks on Women's Progress at the Bar and on the Bench' (2003) 89 Cornell Law Review 801.

<sup>608</sup> Ibid Brenda Hale, 'Equality and the Judiciary: Why should we want more Women Judges?' (2001) Public Law 489.

<sup>609</sup> Charlesworth and Chinkin, *The Boundaries of International Law: A Feminist Analysis* (n. 12) 321.

sit on the bench today. The European Court of Justice had only 15% permanent female judges in May 2010. Women were appointed to World Trade Organization panels only 17% of the time in 2009, although women constituted 43% of the appellate body in mid-2010, up from only 19% historically. At the same time, women accounted for 29% of the judges on the Inter-American Court of Human Rights, and only one woman had ever served as an ad hoc judge. No women sit on the International Tribunal for the Law of the Sea. The International Criminal Court is the only court, of eleven surveyed in my article, in which women outnumbered men on the bench.<sup>610</sup>

As of writing in 2015, the ICC continues to be the only court with more female judges than male judges from the most recent vote (9/16). While some courts have improved, with three female judges currently on the International Court of Justice, and Judge Elsa Kelly appointed to the International Tribunal for the Law of the Sea, the representation in the Inter-American Court of Human Rights has diminished from 29 percent female judges to no female judges currently sitting in the Court. These figures illustrate that “...Halley’s examples of the feminist takeover of ‘the human rights establishment’ or the international criminal tribunals, for example, seem exaggerated in light of the evidence.”<sup>611</sup> As Hilary Charlesworth notes “...feminist concerns have been translated in a very limited way as simply a head count of women; even so, numerical equality always seems out of women’s reach. And some central institutions, such as the World Trade Organisation, have never taken on the vocabulary of women or gender.”<sup>612</sup> In terms of judiciary appointments, it seems that equality remains a feminist policy goal yet to be achieved.

Beyond the judiciary, legal scholars have recently sought to make visible the different roles of women in the Nuremberg and Tokyo trials in revisionist accounts. Dianne Marie Amann has sought to challenge the memoirs of jurists and other historical accounts which seldom mention women’s participation at Nuremberg as misrepresenting the facts. Through archival research, she argues that “women did play key roles at Nuremberg, even at the

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<sup>610</sup> Nienke Grossman, ‘Do Women Judges Matter?’ March 23, 2011 <http://www.intlawgrl.com/2011/03/do-women-judges-matter.html> last accessed 15 March, 2015. See also Nienke Grossman, ‘Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts’ (2011) 12 *Chicago Journal of International Law* 647.

<sup>611</sup> Charlesworth, *Talking to Ourselves: Feminist Scholarship in International Law* (n.72) 23.

<sup>612</sup> *Ibid.*

first trial.”<sup>613</sup> Similarly, Kelly Dawn Askin has remarked on the role of women at the Tokyo Tribunal that “One arresting difference between the two trials was the inclusion of three women as assistant prosecution counsel at Tokyo” and speculates in the footnotes “...while it is unknown whether these women were responsible for including rape charges within the indictments, perhaps their presence and participation made a difference.”<sup>614</sup>

Undoubtedly female personnel are considerably more visible in international courts today than in Nuremberg and Tokyo. Fatou Bensouda is currently the Chief Prosecutor of the ICC and the ICTY has had a number of female chief prosecutors including Louise Arbour and Carla del Ponte. Further, the office of the prosecutors in the *ad hoc* Tribunals and the ICC appoint gender advisors who have up until this point been women.<sup>615</sup> The ICC stands as an anomaly within the international legal institutions as its Statute mandates the appointment of female judges. Article 36 (8) stipulates that the States Parties take into account the need for fair representation of female and male judges; equitable geographical representation; representation of the principal legal systems of the world and legal expertise on violence against women or children or other specific areas of concern. The SCSL also boasts a comparatively high number of female judges as 4 out of 11 justices are women. However, in the *ad hoc* Tribunals few female judges have been elected. As former ICTY Judge Patricia Wald reflected in 2009:

While I was on the ICTY, we had 2 to 14 women; there are now none save for the ICTR woman judge appointed to the joint appellate chamber. There have never been more than 3 at a time. In late 2001 as I was leaving, only 1 woman had been nominated for the new group of judges coming in, and it took an explosion of outrage by NGOs and the European press to galvanize the nomination of more women as *ad litem* judges to help fill the gap.<sup>616</sup>

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<sup>613</sup> Dianne Marie Amann ‘Portraits of Women at Nuremberg’ 34 available at <http://www.roberthjackson.org/files/portraits-of-women-at-nuremberg.pdf> last accessed May 2014.

<sup>614</sup> Askin, *War Crimes against Women: Prosecution in International War Crimes Tribunals* (n.121) 166, Footnote 556.

<sup>615</sup> Former gender advisors include Patricia Viseur Sellers to the ICTY and ICTR, Catharine Mackinnon and Brigid Inger to the International Criminal Court.

<sup>616</sup> Judge Patricia M. Wald. ‘What Do Women Want from International Law?’ 5 October, 2009 <http://www.intlawgrls.com/2009/10/what-do-women-want-from-international.html> last accessed May 2014.



Judge Wald notes how in all of the five major gender crimes precedents made by the *ad hoc* Tribunals, at least 1 woman sat on the bench. Further, she singles out the role played by Judge Pillay in the *Akayesu* trial, when she asked the prosecutor mid-trial to consider bringing a separate gender crime charge.<sup>617</sup> Judge Pillay has explained her shock from questioning a witness about the events on trial when it transpired that investigators had not asked her questions about the rape of her six year old daughter.<sup>618</sup> Similarly, as mentioned in the chapter on gender crimes, Judge Elizabeth Odio-Benito played a key role in the ICTY, berating prosecutors for their failure to bring charges of rape and sexual violence and has subsequently played a vital role in raising gender issues at the ICC.

The importance of female personnel as judges and as staff members of the office of prosecution teams is further echoed in Sara Sharratt's book on witnesses at the ICTY. She argues that there is evidence of a difference in approach to gender crimes between female and male personnel at the Tribunal with one senior female judge stating that she had to "tutor" her male colleagues about the harm of rape.<sup>619</sup> Patricia Viseur Sellers has also voiced her experiences of the gender dynamics in operation at the Tribunal:

The ICTY traditionally has been a rewarding place to work, however, resistance to thoroughly normalizing the investigation and prosecution of sexual violence created a perceptible backlash. At times Prosecutor Goldstone verbally addressed the smouldering sexism to diminish its persistence. At times, throughout the years, when an anti-gender bias swelled, gender advocacy was deigned almost a personal problem of certain women and a few committed men.<sup>620</sup>

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<sup>617</sup> "The Chamber understands that the amendment of the Indictment resulted from the spontaneous testimony of sexual violence by Witness J and Witness H during the course of this trial and the subsequent investigation of the Prosecution, rather than from public pressure. Nevertheless, the Chamber takes note of the interest shown in this issue by non-governmental organizations, which it considers as indicative of public concern over the historical exclusion of rape and other forms of sexual violence from the investigation and prosecution of war crimes. The investigation and presentation of evidence relating to sexual violence is in the interest of justice." *Prosecutor v. Akayesu*, para 417.

<sup>618</sup> On Judge Pillay's role see Diane Marie Amann and D Oxman, 'Prosecutor v. Akayesu. Case ICTR-96-4-T. International Criminal Tribunal for Rwanda, September 2, 1998' (1999) 93 *American Journal of International Law* 195, 196. Charlesworth and Chinkin, *The Boundaries of International Law: A Feminist Analysis* (n.12) 321.

<sup>619</sup> Sharratt, *Gender, Shame and Sexual Violence: The Voices of Witnesses and Court Members at War Crimes Tribunals* (n.196) Chapter five.

<sup>620</sup> Sellers, 'Gender Strategy is Not Luxury for International Courts' (n.118) 312.

The tensions which Patricia Viseur Sellers speaks about have been discussed elsewhere by female prosecutors at the ICTY, including Hildegard Uertz Retzlaff who was one of the founding members of the *Foca* trial team and the prosecutor who provided the inspiration for the film *Storm*. In this work on the case, John Hagan asserts that the “...gender divisions of the roles on the Foca team threatened to pull it apart.”<sup>621</sup> According to Hagan, while the prosecution team in the Foca case was initially comprised of a woman only team – Hildegard Uertz-Retzlaff, Tejshree Thapa, Peggy Kuo, Patricia Sellers and to a more limited extent, Nancy Paterson – before the commencement of the trial in 2000 - Dirk Ryneveld was, in his own words, “parachuted in” to take charge of the trial.

Ryneveld has commented on the awkwardness of the situation stating “it’s very difficult to give instructions with confidence, in a situation where you may have the top rank... but you realize you’re the least informed.” Alongside Ryneveld, Daryl Mundis also joined the *Foca* team shortly before the case went to trial. According to Hagan, the tensions between the *Foca* team were only ameliorated through negotiations which entrenched a division in labour within the courtroom. Hagan states that Hildegard Uertz was “uncompromising” insisting that she and Peggy Kuo handle the witness testimony of the female rape victims. She is quoted as saying “We didn’t want a man. We were a woman team. Of course, we had some male investigators. But we found it all a disturbance.”<sup>622</sup> The female prosecutor justified her insistence on the grounds of confidentiality and trust, which the female team had won from the witnesses in the run up to the trial.

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<sup>621</sup> Hagan, *Justice in the Balkans: Prosecuting War Crimes in the Hague Tribunal* (n.198) 202.

<sup>622</sup> Ibid 186.



Screenshot 21. Hildegard Uertz Retzlaff 26.20.<sup>623</sup>

At the beginning of the defense phase of the *Kunarac* trial, Hildegard Uertz Retzlaff was promoted to the position of senior trial attorney. The promotion has been described as “timely” since it allowed Dirk Ryneveld to take care of the new *Sikirica* case and since it “...was now apparent that Uertz Retzlaff and Kuo were more than capable of handling remaining responsibilities in the *Foca* case.”<sup>624</sup> Uertz Retzlaff would subsequently proceed as lead counsel in the “brother” case of *Kronjelac* along with Kuo and Thapa forming a tight working team. In *Kronjelac*, the accused was found guilty of a number of crimes against humanity and war crimes for his role as a commander of the Serb run Kazneni-Popravni Dom (KP Dom) detention camp in *Foca* where the men were held. The Trial Chamber and Appeals Chamber confirmed that the living conditions and the beatings amounted to crimes against humanity and violations of the laws or customs of war.<sup>625</sup> The case has been termed the brother case to the *Kunarac* case since it deals with the crimes perpetrated against men in *Foca*.

The gender dynamics of the team was an important part of the pioneering jurisprudence in the *Foca* case. Peggy Kuo has explained that even within the OTP some of her colleagues did not believe that there was a need to define slavery or to highlight the indicia such as forcing the women to do household chores. She states:

<sup>623</sup> *Sexual Violence and the Triumph of Justice* © UN ICTY.

<sup>624</sup> Hagan, *Justice in the Balkans: Prosecuting War Crimes in the Hague Tribunal* (n.198) 192.

<sup>625</sup> *Prosecutor v. Kronjelac*, IT-97-25. Judgment, (Sept. 17, 2003).

We had some colleagues saying, “So now doing dishes is slavery?” That misses the point. Doing dishes was not important, but what it showed about ownership and humiliation inflicted upon the women was that they were forced to do things against their will and forced to serve the same people who were abusing them.<sup>626</sup>

The Trial Chamber confirmed the prosecution’s argument by finding that the women and girls were forced to do everything that they were ordered to do, including the cooking and household chores. As Kuo argues above, it is not the doing of the dishes that is harmful in and of itself, but the gendered nature of the slavery which the prosecutors wanted to have recognised. This recognition is an important development in international criminal justice as it illustrates the different ways in which slavery manifests in different contexts and affirms that the circumstances need not be identical to slavery during the Holocaust. As Peggy Kuo and Patricia Viseur Seller’s statements illustrate, gender relations at the Tribunal have clearly had an impact on the relationship between trial attorneys working on the same case. In the section below, I set out how this background has undoubtedly influenced the development of the script in *Storm*.

#### *The Gender of Silencing in Storm*

From the very beginning of the film there are hints that the gendered relations of the Tribunal form a major part of the storyline in the film. The gendering of institutional power is marked by Hannah’s relationship with two people: her boss, the deputy prosecutor, and her boyfriend, the EU political attaché. Hannah, we are told, applied for the job as the Deputy Prosecutor and did not get it, even though she has the same years of experience as her new boss, Keith. It is clear that Hannah is annoyed that she did not get the job. The relationship is fractious throughout the film ending with the plea bargain deal which ultimately denies justice to Mira. Keith, alongside the President of the court who we meet at the art gallery represents, or is an incarnation of, patriarchy. As Lucia, argues:

... almost all female lawyer films feature patriarchal figures who possess the potency – the genuine power – to initiate the female lawyer into the structure of the law, to deny her access, or to regulate her behavior as she performs within or outside the courtroom. These men, the films suggest, rightfully “own” the power of language and the law.<sup>627</sup>

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<sup>626</sup> Kuo, 'Prosecuting Crimes of Sexual Violence in an International Tribunal' (n.199) 313.

<sup>627</sup> Lucia, *Framing Female Lawyers: Women on Trial in Film* (n.601) 19.

Rather than representing Keith as the rightful owner of power, the film calls this into question. It seeks to argue that the concern with expediency and the rights of the accused render these men blind to gender justice. Further, it illustrates what Hilary Charlesworth has termed the hidden gender of the law by suggesting that there are structural barriers of culture and tradition at play which effectively curb a woman's ability to participate effectively in the public sphere, in this case at the ICTY.<sup>628</sup> By focusing on two women – Hannah and Mira - the film highlights these women's experiences and exclusion from the formal structures of the law.

One way the film makes this point is by illustrating the dichotomy which law creates between logic (rationality) and emotion (affectivity). This is illustrated in the way in which Hannah treats Alen, the witness, who commits suicide and is also present in a number of other scenes, particularly in her interactions with Keith. Throughout the film, the relationship between Keith and Hannah is volatile. Keith disagrees with Hannah's strategy to look into Alen's past and to find out why he has killed himself. This sentiment is echoed by other Tribunal personnel who suggest that Hannah is simply on a mission to assuage her own guilt at the suicide rather than doing her job. There are a number of suggestions in the film that emotions have no place to play in the office of the law. As Keith tells her at one point, "pull yourself together." There is no use for spilt tears in the prosecutor's office or as Hilary Charlesworth explains "The use of subjective, emotional or 'disordered' discourse is coded as feminine, and thus devalues the statement or the argument."<sup>629</sup> Hannah's emotions are thus seen as feminine weakness constructing her as an outsider in the inner workings of the Tribunal.

Following the damage control meeting with personnel from the Presidency after the suicide of the witness, the Deputy Prosecutor and Hannah have a heated argument. The dialogue below illustrates the tensions between the two prosecution personnel:

Hannah: 25: 31 You handed me a poorly prepared case and now you're expecting me to get you out of this shit.

Deputy: 25:33 I'm not blaming you.

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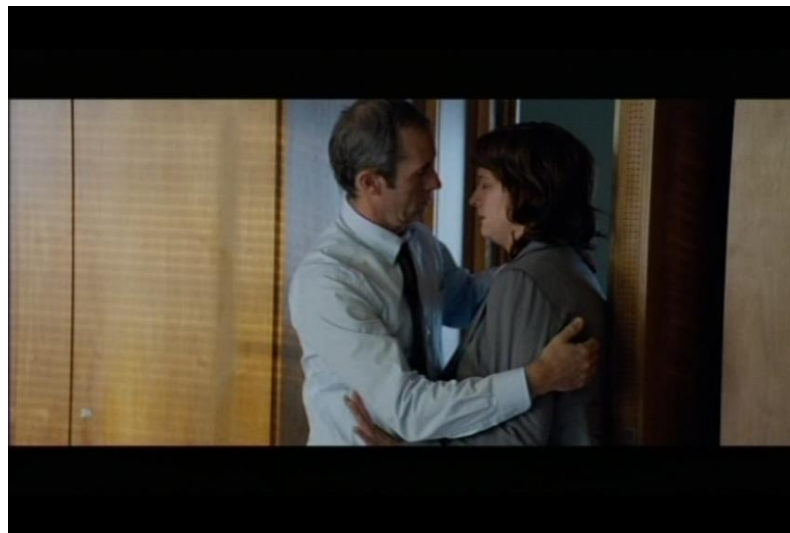
<sup>628</sup> Charlesworth, 'The Hidden Gender of International Law' (n.600) 99.

<sup>629</sup> Ibid 97.

Hannah: 25: 38 What we need is a different approach. We need to look into Alen's past. He didn't kill himself just because a stunt went wrong. We need to work out what went wrong.

Deputy: 25:43 We have one week before the trial resumes. We stopped researching the case the minute our witness turned up. What we do now is go back to exactly where we left off. We read the documents, we sift the evidence, we bring new facts to light.

Hannah's voice and statements here can be seen as an emotional and feminine reaction to the suicide, something that could also be said of her approach to the case. On the other hand, Keith presents the rational and logical figure, representing the dominant discourses of positivistic approach to the law.



Screenshot 22. Keith tells Hannah to "pull yourself together" 23:17.<sup>630</sup>

Through this dialogue a number of things can be gleaned. First, that Keith got the job even though it seems that his work was shoddy and poorly prepared. Secondly, even though he has handed Hannah a poorly prepared case he is unwilling to listen to her suggestions for a new or different approach to the case. Thirdly, the "different approach" idea by Hannah reinforces the gendered divide between the two prosecutors. On one hand we hear echoes of cultural feminists who argue that women may approach things or see things in a different manner.<sup>631</sup> On the other, the different approach may simply be making the point

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<sup>630</sup> ©2010 Soda Pictures Ltd.

<sup>631</sup> Gilligan, *In a Different Voice* (n.606).

that a woman will consider different things that a man may not due to their lived experience. As Justice Ginsburg pointed out about the *Safford Unified School District v Redding* case involving the constitutionality of a strip search of a 13 year old girl “It’s a very sensitive age for a girl.”... “I didn’t think that my colleagues, some of them, quite understood”.<sup>632</sup>

It is this different approach taken by Hannah which places her at odds with the patriarchal structures in operation at the Tribunal. Her decision to go to speak to Alen’s fiancée and to visit the health spa results in threats of violence. These threats not only convey the idea that she is on the right track but also signal the threat that she “...poses to the legal system and to the men who are most identified with that system” as she threatens to expose the shoddy work of the Deputy Chief Prosecutor.<sup>633</sup>

In some ways *Storm* can be viewed as a classic female lawyer film, where Hannah pays the price for taking a different approach thus disrupting the stabilised male power structure. Her relationship with the political attaché and the end of the relationship echoes Cynthia Lucia’s finding that:

The films train their focus not on such complex issues as class but on the female lawyer and her transgressions, primarily in her having abandoned the private for the public sphere, where she finds personal pain, in exchange for dubious fulfilment. Represented as professionally inadequate and personally unfulfilled – frequently unhappy, unmarried, and without children – the female lawyer is further seen as a potentially destabilizing force.<sup>634</sup>

Hannah refused to stay and relax in the hotel lobby with her boyfriend and he later punishes her by betraying her with the plea bargain deal. However, the film also militates against this painting of Hannah, by showing her as a competent lawyer who is commended for her courage in the end by the press. It is Hannah who ends the relationship with her boyfriend and there is no suggestion that she is unfulfilled in terms of her private life (although as Lucia notes, in stereotypical genre fashion, Hannah is unmarried and without children). However, rather than judging Hannah for her lifestyle, the film invites us to

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<sup>632</sup> Grossman, 'Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts' (n.610) 659.

<sup>633</sup> Lucia, *Framing Female Lawyers: Women on Trial in Film* (n.601) 17.

<sup>634</sup> Ibid 22.

judge her partner, who betrays her in conjunction with the other men, in what is clearly an “old boys” network manner of doing things.

In terms of cinematic jurisprudence the film’s critique extends beyond the liberal feminist call for representation of women in positions of power – a mere head count. Briefly in the courtroom scene we see three judges, one of which is a female judge. Although the female judge is seen on screen she is mute and we never hear her speak. It is her male colleague who presides over the proceedings and controls them. Although Hannah has the powerful role of being a lead prosecution counsel, the film suggests that the procedures and rules of evidence affect the prosecution in a gendered way and that they silence not only the voices of female witnesses but also the female prosecutors who attempt to obtain justice for women. Suddenly the female prosecutor finds herself an outsider, and is ultimately told that she will never see a courtroom from the inside again. While this may be an empty threat, it is Hannah who is deemed culpable for her transgression of the norms set by the Tribunal. The refusal of the women to keep silent disrupts the smooth operation of events and exposes the Court to serious scrutiny as to why rape charges were not prosecuted in the first place.

### **Aftermath**

When Mira is told that she cannot testify about the events in Vilnia Kosa, she shouts at Hannah “What kind of court is this, what the hell is it actually for?” Mira’s question and the failure to amend the charges to prosecute Duric for the rapes or even to let her tell her story recalls the comments made by the former Judge Elizabeth Odio Benito when she chastised the prosecution in the first case of *Prosecutor v. Tadic* stating that “there will be no justice unless women are part of that justice.”<sup>635</sup> The film *Storm* essentially repeats this message. With phrases uttered, such as “dirty work”, “it is unjust”, and “this is not meant to be fucking therapy” the film reinforces the need for an approach to criminal justice that is not purely formalistic or which does not prioritise politics and expediency at the cost of justice for women.

The end of the film provides us with some hope that Duric might be prosecuted for gender crimes before the Court of Bosnia and Herzegovina. Hannah encourages Mira to keep working on the list of women who she remembers being held in sexual slavery. Like *As If I’m Not There*, the film also refuses to provide viewers with finality, leaving the question of a subsequent trial open for future consideration by national authorities. The film’s

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<sup>635</sup> *Sexual Violence and the Triumph of Justice* 8:40.



suggestion that justice for Mira, in the form of criminal prosecution of Duric, might be served on the national rather than international level raises a number of interesting hypotheticals.

A report published in February 2014 by the OSCE provides a comprehensive overview of national prosecutions for gender crimes in Bosnia Herzegovina. Over the last decade 111 cases involving conflict related sexual violence have been addressed by the criminal justice system resulting in 33 convictions and 12 acquittals in 36 concluded cases. The OSCE report cites some of the positive aspects of the prosecution of gender crimes, including the wide array of acts recognised under this category including sexual slavery and rape of men in conflict. Furthermore the report states that while the definition of rape is a narrow one in Bosnian law requiring force or threat of force:

On a positive note, the 2003 Criminal Code contains the relatively new crime of gender-based persecution as a crime against humanity and in three cases to date the BiH Court pronounced what are, to the OSCE Mission's knowledge, the first verdicts worldwide for this offence.<sup>636</sup>

However, as the OSCE report details, although many cases are opened on the issue of conflict related sexual violence, many of these cases languish at the investigation case due to lack of evidence and resources. Thus we cannot be sure whether Mira would receive closure if the matter was investigated by the national authorities. Additionally, the recent decision of the European Court of Human Rights in *Maktouf* means that the legality of the cases prosecuting those responsible for gender based persecution as a crime against humanity might be in doubt.<sup>637</sup> In this case, the Strasbourg Court found a violation of Article 7 (no retroactive punishment) on the grounds that the two accused had been convicted and sentenced under the 2003 criminal code when they should have been prosecuted under the earlier criminal code.

The film seeks to undermine law's claims that it can provide finality to witnesses, victims and those involved in the proceedings and illustrates that the court is only part, or perhaps even beginning of a process of transitional justice and healing. For Mira, the future remains uncertain as after fifteen years of silence, it is only now that she is beginning to

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<sup>636</sup> Combating Impunity for Conflict Related Sexual Violence in BiH: Progress and Challenges. OSCE February 2014.

<sup>637</sup> *Maktouf and Damjanovic v. Bosnia and Herzegovina* (Application nos 2312/08 and 34179/08) 18 July 2013.

come to terms with the events in her past. As Hannah tells Mira in the closing scenes of the film, this is only the beginning. The film denies spectators the finality which law purports to provide. These issues will be explored in greater detail in the next chapter which looks at the aftermath of conflict related sexual violence in the Balkans.

### Conclusion

The film *Storm* is important because it allows us to see beneath the rhetoric of claims about the ability of international tribunals to address gender crimes and look at areas which are “off camera” to the public. It shows us how important procedural decisions are made behind closed doors, in judges’ chambers and even informally, in hotel lobbies and art galleries. It suggests that politics affects the work of the Tribunal, calling into question fundamental principles such as prosecutorial independence and impartiality. It further calls to mind Catharine Mackinnon’s reflection made in 1997 that:

The ICTY was not designed to be accountable to survivors, but to international bodies, which has meant mainly nation-states, and has remained most sensitive to international politics. This is a problem for women, who are largely excluded from meaningful voice within official international arenas.<sup>638</sup>

The substantive developments at the ICTY in law set out in Chapter two and the appointment of women to the Tribunal, have since led to declarations of success, triumph and hypervisibility. However, *Storm* is a reminder, that obstacles and challenges remain a reality of practice at the Tribunal. In her response to Janet Halley’s work “*Taking a Break from Feminism*” Hilary Charlesworth highlights that:

Despite all the talk of women, gender and gender mainstreaming, women’s lives remain on the periphery of international institutions. Halley seems to have been dazzled by the inclusive language, but she has not looked beneath the surface.<sup>639</sup>

This dazzling takes place through the rhetoric of former Gender Advisors such as Catharine Mackinnon who have declared that gender crimes at the ICC have been central to “...every prosecution so far, in a way that clarifies how the sexual abuse becomes a specific instrumentality in each conflict” and through the use of documentary films which reinforce the progress narrative.<sup>640</sup> However Judge Elizabeth Odio Benito’s dissenting judgment in

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<sup>638</sup> Catharine Mackinnon ‘War Crimes Remedies at the National Level’ in MacKinnon, *Are Women Human?* (n.1) 196.

<sup>639</sup> Charlesworth, *Talking to Ourselves: Feminist Scholarship in International Law* (n.72) 23.

<sup>640</sup> Catharine Mackinnon. ‘The International Criminal Court and Gender Crimes.’ (n.287).

*Lubanga* and the acquittal of Katanga for charges of sexual slavery and conscripting child soldiers suggest a different story at the ICC.

In the same vein, the practice of the ICTY post-*Kunarac* and the narrative of *Storm* highlight the dissonance amongst Tribunal personnel and the challenges to prosecuting gender crimes which have plagued the Tribunal beneath the surface. Through its narrative, the story of *Storm* helps to expose the “fiction” in international criminal justice as identified by Chiseche Mibenge in the context of the ICTR and the SCSL:

The term “gender justice” has come to signify the fiction that (i) gender and feminist theories have been mainstreamed into the legal construction of war crimes and (ii) women victims have been ‘given a voice’ by the Tribunals.<sup>641</sup>

*Storm* can thus be seen as an important insider outsider narrative which aims to show viewers what occurs behind the scenes and what remains to be done.

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<sup>641</sup> Chiseche Salome Mibenge. ‘Sex and International Tribunals: The Erasure of Gender from the War Narrative.’ Intlawgrrls 2 Blog. June 15, 2013. <http://ilg2.org/author/chiseche/> last accessed 15 March, 2015.

## Chapter 7: *Grbavica* and the Aftermath

These silences, the no talking, put such a big pressure on the whole city.<sup>642</sup>

Jasmila Zbanic.

### Introduction

So far the chapters in this thesis have focused on the international criminal legal systems' responses to war time atrocity relating to sexual violence against women. The fact is that these responses are just one mechanism in the broader process of "transitional justice" a term "...used to describe the diverse mechanisms by which a society recently emerged from repressive rule or violent conflict attempts to hold wrong-doers accountable for their actions."<sup>643</sup> Numerous mechanisms have emerged in this context including prosecutions, truth commissions, memorials, artistic works and reparations in different situations around the world. There is a vast literature on transitional justice, with debates taking place in the 1980s and 1990s as to whether prosecutions are complementary or exclusionary to mechanisms such as truth commissions.<sup>644</sup> It would seem now that amnesty laws and measures which seek to prevent prosecutions for individual criminal responsibility are no longer legally permissible under international human rights law, with prosecutions seen as an integral part of the transition to peace.<sup>645</sup>

The aim of this chapter is not to delve into the discourses and literature on the issue of transitional justice, which is vast and outside the scope of this work. Instead, it seeks to contextualise the triumphant tone of the ICTY in the broader picture of the aftermath of the conflict in Bosnia. While chapter five highlighted how film can reflect the jurisprudence of the Tribunal and chapter six set out how film can provide an "outsider jurisprudence" disseminating the critiques of feminist scholarship, this chapter moves to illustrate how

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<sup>642</sup> Lucille Fonteny "Jasmila Zbanic: Bosnian pain can be felt by anyone" May 1, 2014. CafeBabel. Last accessed April 15, 2014. <http://www.cafebabel.co.uk/culture/article/jasmila-zbanic-bosnian-pain-can-be-felt-by-anyone.html>

<sup>643</sup> Kelsall, *Culture under Cross-Examination: International Justice and the Special Court for Sierra Leone* (n.296); Ruti G Teitel, *Transitional Justice* (Oxford University Press 2000).

<sup>644</sup> Naomi Roht-Arriaza and Javier Mariezcurrena, *Transitional Justice in the Twenty-first Century: Beyond Truth versus Justice* (Cambridge Univ Press 2006). Iavor Rangelov, *Nationalism and the Rule of Law: Lessons from the Balkans and Beyond* (n.76).

<sup>645</sup> Ellen Lutz and Kathryn Sikkink, 'Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America, The' (2001) 2 Chicago Journal of International Law 1. *Barrios Altos v. Peru*, Judgment of November 30, 2001, Inter-Am Ct. H.R. (Ser. C) No. 87 (2001); *Luis Alfredo Almonacid Arellano et al. v. Chile*, Case 12.057, Report No. 44/02, Inter-Am. C.H.R., Doc. 5 rev. 1 at 208 (2002); *Araguaia Guerrilla v. Brazil*, Judgment Of November 24, 2010, Inter-Am Ct. H.R (Ser. C) No. 219 (2010); *Hermanos Contreras et al v. El Salvador*, Judgment of August 31, 2011, Inter-Am Ct. H.R (Ser. C) No. 232 (2011).

film can have an impact on the law. This shows just how powerful fictional film narratives are in their representation of events and influence in society. As set out in chapter four, *Grbavica* is credited with changing the compensation scheme in Bosnia in order to include survivors of rape. The film thus raises questions over the legal responses to rape in the region since the film was released in 2006 following legal decisions such as *Furundzija* and *Foca*.<sup>646</sup> Why did it take a film to create the shock and awareness in society? Is the law failing in its didactic purposes? The aim here is not to quantify the impact of the film but rather to illustrate how the film reveals international criminal law's limitations in the aftermath of the conflict.

This chapter focuses on the film *Grbavica* (also known as *Esma's Secret*) by Bosnian female director, Jasmila Zbanic.<sup>647</sup> In the sections below I draw out three key themes in the film's storyline. First, the chapter looks at the legal definitions and elements associated with wartime sexual violence and the crime of forced pregnancy discussed in chapter three of the thesis. While Esma, the mother, is able to articulate her experience in the setting of the women's centre, I argue that the courtroom would not be so willing to recognise her account given the high evidential standards required to prove forced pregnancy. In this way, the film becomes an important site of testimony where no prosecutions have yet to be brought for this crime. The section also highlights how her daughter Sara's rights have been affected, from her birth in the rape camp (a violation of her right to liberty) to her teenage years (affecting her right to identity and truth). Significantly, it shows us the law's limitations in capturing the affective impact of these events and their on-going consequences.

Secondly, I tie the issues of reparations and legal definitions together through an analysis of the gendered social relations in the post-war economy. The policing of gender in society and the different roles ascribed to men and women in the film, reinforce the need for a structural shift in the transitional environment in order for real changes to be made. Otherwise, the film illustrates how sexual violence will continue to be perpetrated with impunity in the "peace time" setting. In this way, the film problematises law's distinction

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<sup>646</sup> *Prosecutor v. Furundzija*.

<sup>647</sup> The film has been discussed from a number of disciplinary perspectives: Milja Radovic, *Transnational Cinema and Ideology: Representing Religion, Identity and Cultural Myths* (Routledge 2014) 128; Elissa Helms, *Innocence and Victimhood: Gender, Nation, and Women's Activism in Postwar Bosnia-Herzegovina* (University of Wisconsin Press 2013). On more information about the Grbavica neighbourhood during the war see: Vesna Nikolić-Ristanović, *Women, Violence and War: Wartime Victimization of Refugees in the Balkans* (Central European University Press 2000).

between conflict and non-conflict settings and the individualisation of harms by focusing on a single perpetrator's action rather than the overall context.

Finally, I set out the film's purpose as part of an advocacy campaign in Bosnia to amend the laws on compensation. I argue that the film is a form of persuasive advocacy highlighting the inadequacies of the national and international legal systems which marginalise women's experiences of conflict. *Grbavica* is thus a good example of how film can fill in the gaps left by the law and further call on the law to respond to these lacunae.

### **The Plot**

*Grbavica* (Esma's Secret) revolves around the relationship between a mother, Esma (Mirjana Karanovic), and her daughter, Sara (Luna Zimic Mijovic), in post-war Sarajevo. Esma is a single mother who struggles to make ends meet and works at night in a sleazy bar (Amerika bar). Sara is a teenager, struggling with her transition from childhood into puberty. She believes that her father played an honourable role in the Bosnian war and died in the conflict. The relationship between mother and daughter is captured mainly in the family home, (the private sphere), a small apartment in the Grbavica neighbourhood of Sarajevo. The plot revolves around a secret which Esma has kept from her daughter. The drama unfolds when Sara asks her mother for money to go on a school trip. Esma does not have the money and therefore, desperately seeks the assistance of her friends, her boss and the psychologist at the women's centre. Sara, however, provides her mother with an alternative means to allow her to go on the school trip, Esma can give her a certificate proving that her father died in the war "a hero" and then she can go on the school trip for free.

The requirement to produce a certificate confirming that Sara's father was a war hero thus unravels the secret that Esma has held from her daughter, that she was born as a result of rape(s), and also highlights the continuing ethnic divide in post-conflict Bosnia. The reason for Esma's desire to keep the paternity a secret from her daughter is clear in the film. In school Sara is taunted by other students who comment to the teacher that Sara has no father and that her father was a "chetnik".<sup>648</sup> The scenes in the school playground and in

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<sup>648</sup> The term "chetnik" has been explained at the ICTY as follows: "The word Chetnik derives from the word ceta, meaning an armed band or detachment. A Chetnik is therefore a member of an armed guerrilla band. Chetnik detachments were irregular army forces which consisted of volunteers and could be used by the regular army as support units whose task was to carry out diversionary actions or to engage in intelligence work behind the frontlines... The Chetnik phenomenon thus refers primarily to a particular mode of armed or military action." Exh.P00164, p.38 (public) in *Prosecutor v. Vojislav Seselj*, IT-03-67-T, (February 5, 2012), Prosecutor's closing brief, para 23.

the class room thus emphasise the importance of identity politics both in terms of gender and national/ethnic identity.

Another reason for Esma's secrecy is her own trauma over her experiences during the war. Throughout the film, we see Esma's reactions to men's bodies and women's sexualised bodies which illustrate the toll that her experiences in conflict have had on her mental health and wellbeing. Esma does not talk about her experiences until the very end of the film; instead, she shuns the opportunities at the women's group to speak. Finally, it is through an act of female solidarity, the female factory workers coming together to raise a collection, that Esma attains the necessary money for the school trip. By this time, however, it is too late as tensions between the mother and daughter have reached a climax. The film's plot culminates in Esma telling her daughter about her rape during the war and how she was conceived as a result. The film ends with Esma testifying to the women's group about her experiences and with Sara going on the school trip with a shaved head.

In the sections that follow I first carry out a reading of the film for its cinematic jurisprudence. I then turn to the film's role as a form of persuasive advocacy in Bosnia and argue that films not only provide complementary or subversive narratives but indict the legal systems on screen.

#### **"The Truth": A legal analysis of Esma's testimony**

Although the film makes little mention of legal mechanisms (apart from the joke at the beginning about Esma's former boss being in jail) it makes two important points which seem to highlight "outsider" narratives, which lie beyond the scope of the judgments of the ICTY. The first of these narratives concerns Sara's "right to truth" as a child born of war to know about her father. The second major theme is Esma's unheard testimony and the issue of forced pregnancy.

As a part of the subject of wartime rape and its consequences, the film deals with Sara's needs as a child born of war to have her human rights respected.<sup>649</sup> Sara's behaviour is often difficult, and from the very beginning of the film, the audience is made aware of the complicated relationship between Esma and Sara. While Esma clearly loves her daughter, buying her trout and telling the fishmonger that it is Sara's favourite fish (and denying herself any due to economic constraints), Esma's trauma means that the two struggle to

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<sup>649</sup> Carpenter, *Born of war: Protecting Children of Sexual Violence Survivors in Conflict Zones* (Kumarian Press 2007) 31.

get along. In one of the first scenes, captured in the still below, we see Esma wake Sara up and chase her around the small apartment. The mother and child fight playfully until Sara pins her mother on the ground and sits astride her mother, in a way that clearly brings back traumatic memories for Esma. Esma tells her daughter to get off and to stop playing. Her daughter continues the game but her mother grows increasingly furious with her. The game stops with Esma shouting at her daughter.



Screenshot 23: Sara pins her mother on the ground, 4:19. <sup>650</sup>

Similar scenes to the one described above occur throughout the film, often taking place in the private sphere of their home. The relationship between the mother and child is often violent: with Esma slapping her child in the face or cutting Sara's nails aggressively. The trigger for these reactions is often Sara's curiosity about her father.

The violence underpinning the relationship between mother and child is starkly depicted in one of the closing scenes of the film entitled "The Truth" where Sara confronts her mother over the lack of certificate for her school trip. The certificate is a plot device used by the director to shine a light on the conflict inside the household and link it to the conflict outside the walls of the house. As Esma returns to the house, Sara spies her mother kissing a man outside the front door. Exhausted from work, Esma walks into the house, removes her shoes and asks Sara why she isn't at school. Sara replies "why didn't you bring the certificate." Esma tells her daughter to "fuck off". Sara replies by repeatedly asking her mother where her father was killed. She uses vulgar and sexist language accusing her mother of not knowing the identity of her father and shouting "You don't even know who

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<sup>650</sup> © coop99/Deblokada/noirfilm/Jadranfilm 2005.



you fucked.” In response Esma slaps her daughter across the face. The camera follows Esma out of the room and into the kitchen. Sara remains in the other room in the off-screen space. A technique often used in cinema to raise suspense. Esma walks back into the living room to confront her daughter, the camera moves from a pan shot to a medium close-up of Esma and the shock on her face.

The camera then turns to the reverse position and we see Sara from Esma’s point of view and the shot is framed at an angle so that the viewer is also looking into a gun Sara has acquired and into Sara’s face. The camera switches between these two positions – Esma and Sara’s point of view – twice, in silence in order to build the suspense. The silence is finally broken with Sara’s demand to know, “Where was he killed?”



Screenshot 24: Sara points the gun at her mother, 1:14:40.<sup>651</sup>

In a scene which recalls Paulina’s decision to use violence (in the form of a gun) to hold her own private legal proceedings in *Death and the Maiden*, Esma is now forced into a situation where she is made to tell her daughter the truth and to testify about her experiences of the war.<sup>652</sup> A truth which the audience is already aware of from Esma’s somatic symptoms of trauma and the physical scars we witnessed on her body just fifteen minutes beforehand.

The scene sets up a dichotomy between the needs of the mother and her child: with the daughter needing to know about her father and the mother simultaneously attempting to shield her daughter from these facts and unable to voice and face them. The alternate

<sup>651</sup> © coop99/Deblokada/noirfilm/Jadranfilm 2005.

<sup>652</sup> Kamir, ‘Death of the Maiden: Challenging Trauma and Feminist Judgment and Justice’ (n.40) 185-217.

point of view shots also reinforce this dichotomy between the opposing needs of Sara and Esma within the close confines of their small flat. Sara, as a minor, cannot turn to the legal system for her right to truth in order to discover what happened to her father during the war.<sup>653</sup> This right to truth is acknowledged in the context of children who have sought information about their parents with the Inter-American Court recognising a “right to identity” in the context of forced disappearances.<sup>654</sup> Sara thus asserts this right, through recourse to violence, forcing her mother to address her questions at gun point. “You’re lying to me. My whole life you’ve been lying to me. I want the truth mama!” (1:15:00).

Esma’s response to the gun and her daughter’s insistence for the truth is unexpected. Esma is furious. She slaps the gun out of her daughter’s hands and begins to scream “you want the truth, you want the truth” while she slaps Sara around the head. Pinning Sara down in the scene recalling the first scenes of play fighting, Esma looks her daughter in the eyes and tells her that she was held in a camp and that she was raped. She tells Sara that she was born in the camp (captured in the still below). “You’re a chetnick bastard” she screams repeatedly while she slaps Sara, who sobs loudly. While Sara had been suspicious of her father’s identity she clearly has not expected this response and cries that her father is a Shaheed. This is not the truth which she wanted.

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<sup>653</sup> Article 32 of the Additional Protocol to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, recognises the right of families to know the fate of their relatives. This has been cited in Resolution 9/11 of the Human Rights Council on the Right to Truth. *Velásquez Rodríguez v. Honduras*, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988); *Myrna Mack Chang v. Guatemala*, Inter-Am.Ct.H.R. (Ser. C) No. 101, 274-75 (2003); *Bámaca Velásquez v. Guatemala*, Inter-Am.Ct.H.R. (Ser. C) No. 91, 77 (2002); *Barrios Altos v. Peru*, Inter-Am.Ct.H.R. (Ser. C) No. 75 (2001); *Gomes-Lund et al. (Guerrilha do Araguaia) v. Brazil*, Inter-Am.Ct.H.R.(2010).

<sup>654</sup> *Juan Gelman et al v. Uruguay* para 122; OAS “Inter-American Program for Universal Civil Registry and ‘Right to Identity,’” resolution AG / RES. 2286 (XXXVII O/07) of June 5, 2007, resolution AG / RES. 2362 (XXXVIII-O/08) of 3 June 2008, and resolution AG / RES. 2602 (XL-O/10) on follow-up program, June 8, 2010. See also Article 8 of the Convention on the Rights of the Child.



Screenshot 25: Esma tells Sara the truth 1:15:24.<sup>655</sup>

Significantly, the scene represents testimony in a very different way to how it is given in legal proceedings. Angry and emotional, Esma's outburst recalls the reaction of Mira in the film *Storm* when she shouts at the accused in the courtroom. The scene jars with the words of Judge Florence Mumba in the *Foca* case where she tells one of the witnesses and the defence counsel to "proceed with the case, rather than emotions."<sup>656</sup> In this film, giving testimony to her daughter rather than the courtroom, Esma frames the events in terms of the relationship between herself and her daughter.

The references to a chetnik bastard by Esma in this scene and by the girls at Sara's school earlier in the film further illustrate the stigma and discrimination that so called "war babies" face in post-conflict contexts. Esma's aunt makes this stigma explicit when she says to Esma "your mother hoped you would be a doctor, get married and have a grandchild. Its better she didn't live to see this one" (31:05). Sabina, Esma's best friend says to Sara "your poor mother. Why has God punished her so." These women question Esma's decision to keep Sara instead of commending her for her courage or empathising with her situation. The film thus reflects the anecdotal evidence which has emerged from the former Yugoslavia which reports that hundreds of children conceived in mass rape campaigns were rejected and stigmatised in society. Charli Carpenter has argued that "[O]ften forced to

<sup>655</sup> © coop99/Deblokada/noirfilm/Jadranfilm 2005.

<sup>656</sup> *Prosecutor v. Kunarac*, Trial Transcripts, 21 March 2000, page 592.

carry these children to term, most are said to have abandoned their babies; those that have kept them face ostracism and severe poverty in post-war Bosnia.”<sup>657</sup>

Other responses to children born of rape include abuse, neglect or even infanticide. This is reflected in the final scenes of the film where Esma opens up to the women’s group for the first time, stating “I wanted to kill her! I pounded my stomach with my fists... to make her fall out of me. I pounded with all my strength. It was no use. My belly grew with her inside.”<sup>658</sup> Esma recounts that even while pregnant she was repeatedly raped in the camp. She states that in the hospital she told the staff that she didn’t want the baby; however, “the next day my milk started flowing. I said: Ok, I’ll feed her but only this once.” Esma through her tears expresses her emotions and feelings as she held and fed Sara for the first time. The film illustrates the complex emotional consequences and trauma of forced pregnancy and the construction of motherhood. Esma’s words may also explain Samira’s silent decision in *As If I Am Not There* to keep the baby, with the film in some way forming a prequel to *Grbavica*.

#### *Forced Pregnancy*

In contrast to courtroom testimony, in which women are forced to give evidence in line with the prosecution’s case strategy to prove the elements of the crime, Esma decides at the end of the film to share her experiences with the women’s group and to the camera in her own words. We become witnesses to her therapeutic testimony, and her decision to open up to the women’s group which she had previously shunned. Her decision to speak seems to confirm the words of the psychologist at the beginning of the film, that talking is an important part of the healing process.<sup>659</sup> In this way, the film reinforces the message in *Storm* that women need to be able to tell their stories and highlights the important work of women’s groups like the one featured in the film.

In these final scenes, the camera angle is positioned just below Esma so that her face is framed and we can also see some of the other women behind her looking down or to the

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<sup>657</sup> Charli Carpenter, "War's Impact on Children Born of Rape and Sexual Exploitation: Physical, Economic and Psychosocial Dimensions." (2007) 2. <http://people.umass.edu/charli/childrenbornofwar/Carpenter-WP.pdf> last accessed 10 October 2014. See also R Charli Carpenter, 'A Fresh Crop of Human Misery': Representations of Bosnian 'War Babies' in the Global Print Media, 1991-2006' (2009) Millennium-Journal of International Studies; Ingvill C Mochmann and Sabine Lee, 'The Human Rights of Children Born of War: Case Analyses of Past and Present Conflicts/Menschenrechte der Kinder des Krieges: Fallstudien vergangener und gegenwärtiger Konflikte' (2010) Historical Social Research/Historische Sozialforschung 268.

<sup>658</sup> 1:20:50 minutes.

<sup>659</sup> Shoshana Felman, *Testimony: Crises of Witnessing in Literature, Psychoanalysis, and History* (Taylor & Francis 1992) 70-71.

side. Only Esma looks into the camera as she tells her story. Positioned in this way, the viewer is placed in a judging position, hearing and seeing the witness testify. By focusing on the emotions in her face, the framing also creates empathy and an affective response from the audience. The film encourages us to feel, and to empathise with Esma's situation.



Screenshot 26: Esma opens up in the women's group. 1:21:35.<sup>660</sup>

The scene recalls Sara Sharratt's observations of legal testimony in the ICTY where the move has been to apply protective measures. According to Sharratt, "Testifying behind closed doors or only about rape and sexual violence supports the discourse that it is the worst thing or the defining event that can happen to women and that rape is shameful."<sup>661</sup> In contrast, in the women's group, Esma controls her own testimony and speaks with emotion to the supportive group. Her speech is contextualised in a setting where words are only part of the story-telling and therapeutic journey with women processing their experiences in different ways (for example, through song, tears or even laughter).

Alongside the difference in atmosphere and storytelling, Esma's words can also be analysed for their legal content. Without graphically depicting the sexual violence in conflict (through a flashback for example), the film tells us that Esma has been raped, held in a camp, forced to carry a pregnancy to term against her will and raped during the

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<sup>660</sup> © coop99/Deblokada/noirfilm/Jadranfilm 2005.

<sup>661</sup> See page 50 of the thesis for a discussion of the protective measures.

pregnancy.<sup>662</sup> The film illustrates that while Sara was conceived from rape and Esma was forcibly impregnated, these facts have not been recognised in the law, as set out in chapter three. Esma's narrative thus reflects an observation of the Women's Caucus for Gender Justice that the "...most recent and publicised example of forced pregnancy occurred in Bosnia and Herzegovina, where soldiers raped women until they became pregnant and then continued to imprison them."<sup>663</sup>

Through Esma's testimony the film raises the limitations of law's narrative capabilities with its need to fit actions into neat definitional boxes. Through its broader contextualisation of the problem the film illustrates that positive law's attempts to recognise forced pregnancy are euphemistic and flawed. Through her words, Esma makes it clear that she did not want to be pregnant and that she was forcibly confined in the camp. However, at no time does she present evidence of the soldiers' intention to make her pregnant in order to alter the ethnic composition of the group. The intention of the soldiers and their *mens rea* is irrelevant to her story. The harm in Esma's case is that she has been confined, raped, made pregnant and raped while pregnant. The fact that Sara might "alter the ethnic composition" of the group is neither here nor there and fails to recognise the harm as the violation of her bodily autonomy and reproductive rights.

### **The Economic Aftermath of the War: Gendered Consequences**

Marietta Messmer has argued in the context of the feminicide in Ciudad Juarez, "Most researchers seem to agree that those few people who have so far been tried and convicted are only scapegoats, and that the real perpetrators have to be sought in the context of organized transnational drug cartels and/or among high-ranking U.S. and Mexican officials."<sup>664</sup> In the context of Bosnia, Zbanic similarly suggests in her films that organised gangs and government agencies continue to play a role in silencing the survivors and those attempting to talk about wartime violence and accountability. Beyond the failure of international criminal justice to recognise forced pregnancy in its judgments thus far, the film places Esma's post-conflict experiences within the context of wider societal struggles

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<sup>662</sup> A graphic depiction of forced pregnancy in a non-conflict setting can be found in the controversial John Waters movie *Pink Flamingos* (1972) where women are raped or artificially inseminated and confined until they give birth to babies who are then taken from them and given to couples who purchase the babies.

<sup>663</sup> Women's Caucus Advocacy in ICC Negotiations. The Crime of Forced Pregnancy. ICC – Rome. 26 June 1998 <http://www.iccwomen.org/wigidraft1/Archives/oldWCGJ/icc/iccpc/rome/forcedpreg.htm> last accessed April 10, 2015.

<sup>664</sup> Marietta Messmer, 'Transfrontera Crimes: Representations of the Juarez Femicides in Recent Fictional and Non Fictional Accounts' (2012) Number 57 American Studies Journal.

and problems. By doing so, the film indicts the international criminal legal system's inability and refusal to tackle with underlying causes of violence against women.

Jasmila Zbanic has spoken out on a number of occasions about the intimate links between those who hold power, the economy and the ongoing silencing of those who wish to speak about war crimes and sexual violence.<sup>665</sup> When asked whether the tensions from the war 20 years ago still remain in society today, the director commented that:

In general, the powers from the war are still integrated into the government. That creates tension. Those powers make millions of euros from transforming public property into private property and they are spreading fear to keep their economic power. It is not about national or religious hatred. It's all about money.<sup>666</sup>

*Grbavica* highlights the economic aftermath of the Bosnian conflict, where a significant clandestine political economy emerged, as the region became a hub for smuggling. This smuggling included the movement of illegal drugs, untaxed consumer goods, arms, human organs and humans for sexual exploitation.<sup>667</sup> It illustrates that while prosecutions have been brought for those responsible for the violence, these symbolic trials have failed to prevent the on-going social, gendered and economic violence.

By way of background, scholars of international relations and conflict have long argued that criminality and black market financial incentives formed part of the causes of the war with a "...degenerate political elite and a new class of mafia types" emerging in the 1980s in Bosnia.<sup>668</sup> Mary Kaldor notes that the worst atrocities (including rape and sexual violence) committed at the early stages of the war were committed by paramilitary groups and that these groups were motivated by financial profits.<sup>669</sup> She argues that "...the mafia economy

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<sup>665</sup> This very issue caused difficulties with the filming of *For Those Who Can Tell No Tales*. According to Zbanic "...the film crew did not tell the people in the town what they were filming. – We knew it would be difficult to shoot this in Visegrad. – We were advised by some not to do that. One of our screenwriters, Zoran had to pretend to be a Serbian director shooting a completely different film." Klix.ba "Kym Vercoe: During the filming in Višegrad we did not dare say Jasmila's name." BosnienBloggen, 27 September 2013. Available at <http://bosnienbloggen.wordpress.com/2013/09/27/kym-vercoe-during-the-filming-in-visegrad-we-did-not-dare-say-jasmilas-name/> Accessed 10 October 2014.

<sup>666</sup> Andreas Wiseman. "Jasmila Zbanic, *For Those Who Can Tell No Tales*" 7 September, 2013. Screen Daily. Available at <http://www.screendaily.com/features/interviews/jasmila-zbanic-for-those-who-can-tell-no-tales/5060158.article> accessed 10 October 2014.

<sup>667</sup> Bosnia Peace Operation: Crime and Corruption Threaten Successful Implementation of the Dayton Peace Agreement (Washington, DC: General Accounting Office, 2000), 13. On corruption and prostitution depicted on film, see the Bosnian dark comedy film *Fuse* (2003).

<sup>668</sup> Mary Kaldor, *New and Old Wars: Organised Violence in a Global Era* (Third edn, Polity 2012) 39.

<sup>669</sup> Ibid 56.

was built into the conduct of warfare, creating a self-sustaining logic to the war both to maintain lucrative sources of income and to protect criminals from the legal processes which might come into effect in peacetime.”<sup>670</sup> Post-conflict, Peter Andreas has argued, these activities remain part of the legacy of the war where “...criminal actors played a critical role in sustaining the material basis for the military conflicts in the region.”<sup>671</sup> Further he argues that “...black market entrepreneurs are among the chief beneficiaries of the region’s recent conflicts, having emerged from them as a nouveau riche criminalized elite, and continuing to utilize political connections and smuggling channels built up during wartime.”<sup>672</sup>

#### *Impunity and Sexual Violence: A Legacy of War*

The economic context and consequences of the war are clear from the opening scenes of the film as we see Esma go into ‘Bar Amerika’ and ask for work. The boss, Aran, asks Esma for her experience. Esma replies that she worked at another bar for two years before it closed. Aran laughs and makes a joke about the owner being locked up, in what is the only explicit mention of criminal accountability in the film. In fact, the film suggests in numerous scenes that criminality remains widespread in post-war Sarajevo. The links between the clandestine economy and Esma’s workplace are made clear in the film in a scene which occurs half an hour into the film. At 34:00 minutes we see two men who work at the Amerika bar driving along a road. A man drives alongside them signals the men to pull over and it soon becomes clear that this man, Pu Ka, was their commander during the war. Pu Ka asks the men why they are working for Aran at the bar. “While we fought against chetniks he sold coffee for 150 Dem a kilo” (35:03) he says. Instead of working for Aran, he suggests that the men work for him assassinating somebody in return for money and the car. This scene and numerous others in the film suggest the ways in which some people profited hugely from the war and how relationships fostered during the war continue to affect the economics of the country.

Through Esma’s public life and work at Bar Amerika, the film ties together the themes of ongoing violence, militarisation and employment insecurity. In the film, the military uniform worn by the man who assaults Jabolka, an Ukrainian worker in Esma’s workplace, raises questions over the distinction between conflict and post-conflict violence and flags the links between sexual violence, militarisation and economics explored by feminist

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<sup>670</sup> Ibid.

<sup>671</sup> Peter Andreas, 'Criminalized Legacies of War: The Clandestine Political Economy of the Western Balkans' (2004) 51 *Problems of Post-Communism* 3.

<sup>672</sup> Ibid.



scholars of international relations and development.<sup>673</sup> In one of the first scenes in the film we see Jabolka called over by the boss Aran to sit at his table in the busy nightclub. A number of men sit at the table with bottles of alcohol, smoking and watch the turbo-folk group on stage. Jabolka sits on a man's knee and he immediately pretends to burn her breasts with a cigarette causing Esma to run into the storage room to take a tranquilising pill. The man and Jabolka laugh at this "joke". Prior to this scene, we saw Jabolka, topless in the storage room, advising Esma on her first day "take my advice and show your tits – you'll get better tips."



Screenshot 27: Jabolka and Esma in Amerika Bar. 18:13.<sup>674</sup>

However, while Jabolka is seen laughing and joking in the first scenes, in the later scenes, this "joking" takes a more sinister turn resulting in her sexual assault. One hour into the film, we see Jabolka dance in the highly sexualised environment of Aran's bar. Two scantily clad women gyrate and dance on stage next to the male vocalist. The turbo-folk music blaring in the club forms part of the aggressive environment, with Jasmila Zbanic stating that it "[Turbo-folk] came from Serbia, and there are some theories that it was a weapon of war because it's brainwashing music. You really want to get up and dance, and if a gun is

<sup>673</sup> Cynthia Enloe, *Bananas, Beaches and Bases: Making Feminist Sense of International Politics* (Univ of California Press 2014); Enloe, *Maneuvers: The International Politics of Militarizing Women's Lives* (n.291); Cynthia Cockburn, 'Gender Relations as Causal in Militarization and War: A Feminist Standpoint' (2010) 12 *International Feminist Journal of Politics* 139.

<sup>674</sup> © coop99/Deblokada/noirfilm/Jadranfilm 2005.

near you, you would shoot. So I wanted to use it as one more layer of portraying Esma's life."<sup>675</sup>

A man in military uniform, clearly inebriated, moves towards Jabolka and pours his beer over her breasts and begins to lick it off. The sexual assault occurs in the middle of the dance floor and no one does anything to stop it. In this scene we see Jabolka punished for her earlier advice to use a woman's body for economic advantage. Women such as Jabolka are "...exploited both as workers and sex objects, a profitable business."<sup>676</sup> Given the shortage of jobs and opportunities, they find themselves vulnerable to sexual assault in the political economy of post-war Bosnia, with some women particularly vulnerable due to their migrant status, work status and also gender. Feminist scholars and filmmakers have also drawn attention to the links between post-conflict societies, peacekeeping, prostitution and trafficking with the Balkans becoming a place of origin, transit and destination for the human trafficking of women for the purposes of sexual exploitation. Regional courts have also noted that intersecting factors, such as migrant status and sex work, can make women vulnerable to discrimination necessitating particular diligence on part of the state.<sup>677</sup>

The sexual assault that Jabolka suffers can also be seen as a visual representation of the violence which Esma has suffered in her past resulting in the symptoms of Post-Traumatic Stress Disorder. These somatic symptoms affect Esma in her daily life, provoking a bodily response of flight. In this way, the film makes it clear that PTSD is not about memory loss as suggested by the defence in *Furzundzija* but rather the inability of the mind and the body to forget this traumatic experience.<sup>678</sup> The sexual assault is also a precursor to the violent scene which follows. At 65 minutes into the film, the camera jump cuts from Esma crying in the storeroom over Jabolka's assault to the boss' office. Esma asks for an advance of 200 euros in order to pay for Sara's school trip. Aran gives Esma the money but her good fortune is short lived when he realises that she has forgotten to place his gambling bet. Aran rips up the notes and throws them at her, he then grabs her face and pins her against the wall. The failure to place the bet quickly escalates into physical violence against Esma until his henchmen come to her rescue through their use of physical violence.

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<sup>675</sup> Aaron Hillis "Jasmila Zbanic on 'Grbavica: The Land of My Dreams' Feb 12, 2007. Last accessed April 16, 2015. <http://www.ifc.com/fix/2007/02/jasmila-zbanic-on-grbavica-the>

<sup>676</sup> Messmer, 'Transfrontera Crimes: Representations of the Juarez Femicides in Recent Fictional and Non Fictional Accounts' (n.664).

<sup>677</sup> *B.S v. Spain* (Application no. 47159/08) 24 July 2012.

<sup>678</sup> Babette Rothschild, *The Body Remembers: The Psychophysiology of Trauma and Trauma Treatment* (n.508).

The scene again illustrates the lack of protection which workers have in this environment with Jabolka and Esma's assaults coming within five minutes of each other in the bar. The law in the form of employment rights remains completely absent, in a political post-conflict economy. The UN Policy Document for post-conflict employment creation, income generation and re-generation, has highlighted the difficulties the re-integration of ex-combatants can have on both men and women in society.<sup>679</sup> The report also notes the particular gendered consequences of the economic reconstruction and states that the "...men's disaffection not only affects their well-being, it can also increase sexual and domestic violence and other forms of violence against women, especially when women have become wage earners and assert their right to control their income."<sup>680</sup>

Similarly Rashida Manjoo, the UN Special Rapporteur on Violence against Women, its Causes and Consequences has noted "...women remain vulnerable to violence following armed conflict, as research indicates a strong rise in domestic violence, sex trafficking, and forced prostitution in post-conflict areas".<sup>681</sup> She goes on to explain that the "...post-conflict rise in incidents of domestic violence, for example, has led to speculation of a relationship between these forms of GBV and the availability of small arms, an increased tolerance of violence within society, and the head of households having been engaged in military violence during the conflict."<sup>682</sup> The presence of small arms throughout the film, military uniform and ex-military relationships seems to echo this idea of an increased tolerance of violence both against men and women in society.

The idea that any underlying structural causes of violence or their gendered manifestations have been addressed post-conflict is entirely absent from the film. Instead, the new democratic order or "peace time" fails to offer women greater inclusion or gender equality. As Cynthia Cockburn has argued this may be because:

...gender-as-we-know-it is also a consequence of war. Just as armed conflict often produces notions of ethnic and national identity in more distinct and inimical forms, so it produces an emphatic differentiation of masculine and feminine identities. War and gender relations are mutually shaping. Unless purposeful steps are taken to interrupt and change the social shaping of genders, the gender regime

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<sup>679</sup> UN Policy Document for post-conflict employment creation, income generation and re-generation, Geneva, June 2009, 43.

<sup>680</sup> Ibid.

<sup>681</sup> Manjoo and McRaith, 'Gender-based violence and justice in conflict and post-conflict areas' (n.15) 12.

<sup>682</sup> Ibid 13.

that emerges from war is likely in the short run to disturb the peace with continuing violence, and in the long run to maintain militarism and war-readiness.<sup>683</sup>

The continuing violence is evident in the context of Bar Amerika where Esma and Jabolka work. While Esma is no longer at risk of being placed in a camp, Jabolka's sexual assault in front of her employers and the customers by a man in military uniform confirms that the underlying structural causes of violence have not been disturbed. As the Special Rapporteur on Violence against Women, its Causes and Consequences has explained reparations need to go beyond monetary compensation and must address pre-existing patterns and systemic gender discrimination.<sup>684</sup> Reparations must be transformative and "should aspire, to the extent possible, to subvert, instead of reinforce, pre-existing structural inequality that may be at the root causes of the violence the women experience before, during and after the conflict."<sup>685</sup>

#### *The Failure to Disrupt Traditional Gender Roles*

The film's narrative is peppered with numerous examples which illustrate the entrenched gendered roles which men and women have in society. These norms are not only portrayed through relationships between men and women, but also between women. Thus for example, Sara is guilty of using sexist and demeaning language towards the woman who babysits her when her mother is at work. Sara calls her mother's friend "an old maid" referring to the woman's age and unmarried status. As a child/teenager, Sara is already acutely aware of the different roles prescribed to women in society and uses the term as an insult. The film portrays the policing of gender, with Sara remarking on Sabina's social status based on a gendered reading of her single status. But, in turn, we also see Sara's gender being policed in school.

In one of the opening scenes of the film, a physical fight commences in the playground when a boy takes issue with Sara playing football. Sara dresses in a tomboy like fashion and does not conform to the gender stereotypes of femininity. The boy's comments and violent act function as a warning that as Sara changes from a child into a teenager and a woman, it is no longer acceptable to play football, or transgress traditional gender

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<sup>683</sup> Cynthia Cockburn, 'War and Security, Women and Gender: An Overview of the Issues ' (2013) 21 Gender and Development 433, 445.

<sup>684</sup> Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Rashida Manjoo. Reparations for Women subjected to Violence, A/HRC/14/22, 23 April 2010.

<sup>685</sup> Ibid para 31.

boundaries. Football is a “male sport” and a girl playing football leaves herself susceptible to criticism and violence.



Screenshot 28: The fight over football, 5:40.<sup>686</sup>

In this scene, the boy repeatedly pushes Sara before she confronts him and asks him what his problem is. He doesn't reply and merely pushes her again. This soon escalates. When the teacher approaches and asks what the problem is the boy says “why do you play male sports.” Sara retorts “you hit me because I’m a better player.” At this stage, the teacher says nothing to the boy. Instead, he tells the pair to “kiss and make up” enforcing a heterosexist punishment to bring the matter to an end. The teacher only gets angry when Sara refuses to kiss the boy and calls him a “fag”. While the teacher takes exception to the homophobic language used by Sara, he does not address the boy’s sexism. The idea that women or girls should have the same opportunities to participate actively in sports and physical education is not communicated to the students.<sup>687</sup>

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<sup>686</sup> © coop99/Deblokada/noirfilm/Jadranfilm 2005.

<sup>687</sup> CEDAW Article 10 (g) and 13.



Screenshot 29: Sara shaves her head. 1:20:18.<sup>688</sup>

The final scenes of the film also highlight Sara's gender and acts as a reminder of how women have traditionally been policed and punished in the aftermath of conflicts.<sup>689</sup> At one point earlier in the film, Sara asks her mother if she resembles her father in anyway. Esma replies after some hesitation that Sara has her father's hair. We see Sara smile and stroke her hair, pleased that she has something of her father's; a father who she believes is a war hero. In the last frames of the film when Sara learns that her father is not a war hero but that her mother was raped, Sara shaves off all her hair. In this highly symbolic scene, Sara seems to be breaking the ties she has to her unknown father, her mother's rapist, and also invokes the image of women who had their heads shaved for collaborating with the enemy in diverse contexts including France and Northern Ireland.<sup>690</sup> This gendered punishment seems to highlight both her status as a child of war and also her empowerment as she cuts her ties with the past and the constraints of a gender binary which tells women and girls how to dress and how to wear their hair.

<sup>688</sup> © coop99/Deblokada/noirfilm/Jadranfilm 2005.

<sup>689</sup> *Hiroshima Mon Amour* (1959), Alain Renais' classic, based on the screenplay by Marguerite Duras, tells the story of a French woman, punished for having an affair with a German soldier in her hometown of Nevers. The woman, an actress, had her head shaved off by the town's inhabitants as a punishment.

<sup>690</sup> For a discussion of the similarities in the treatment of women in France and N. Ireland see: Hastings Donnan and Fiona Magowan, *The Anthropology of Sex* (Berg 2010); Alison M Moore, 'History, Memory and Trauma in Photography of the Tondues: Visuality of the Vichy Past Through the Silent Image of Women' (2005) 17 *Gender & History* 657; Sharika Thiranagama and Tobias Kelly, *Traitors: Suspicion, Intimacy, and the Ethics of State-building* (University of Pennsylvania Press 2011) 12. Literary depictions include Maria's experience during the Spanish Civil War in Ernest Hemingway, *For Whom The Bell Tolls* (Random House 1994).

As a part of the film's multi-layered narrative, there are two romantic stories which depict relationships between Sara and the boy who originally teased her (pictured above), and Esma and a man who works as a bodyguard at the bar. While violence surrounds these relationships, especially the presence of small arms, the relationships themselves are not violent. Instead, they represent the first love of teenagers growing up in post-conflict society and a more mature relationship between Esma and Pelda (Leon Lucev). It is this second relationship which makes visible the issue of enforced disappearances and the on-going struggle post-war in Bosnia for family members to obtain information about their relatives and loved ones. While the ICTY has held that enforced disappearance may be classified as a crime against humanity under 'other inhumane acts',<sup>691</sup> this issue has been extensively considered under the rubric of international and regional human rights law. In particular, in the case law of the Inter-American Convention on Human Rights, the European Convention on Human Rights and the Human Rights Committee.<sup>692</sup> More specifically, a number of cases have been brought before the European Court of Human Rights and the Human Rights Committee alleging violations of human rights for Bosnia's failure to investigate these disappearances.<sup>693</sup>

Rather than to examine the jurisprudence resulting from these complaints, the point here is that the film makes visible one of the on-going consequences of the war for both men and women. Pelda and Esma form a relationship after he recognises her from an exhumation of a grave where they were both looking for their fathers. This bond results in a friendship which ends when Pelda informs Esma that he is leaving Bosnia. Her response to this news is to ask him who will identify his father once he leaves. The ghosts of the war, the unburied loved ones, remain present and represented in the film. The ability of the film to weave these multiple harms and aftermaths together in 90 minutes stands in stark contrast to the legal stories and remedies on offer.

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<sup>691</sup> *Prosecutor v Kupreskic*, para 566.

<sup>692</sup> See International Convention for the Prosecution of All Persons from Enforced Disappearance 2006; Inter-American Convention on Forced Disappearance of Persons, 1994; for an examination of the case law see Nikolas Kyriakou 'An Affront to the Conscience of Humanity: Enforced Disappearances in the Case Law of the Inter-American Court of Human Rights' *Inter-American and European Human Rights Journal*, (2014).

<sup>693</sup> For example: *Emina Kozljak and Sinan Kozlaj v. Bosnia and Herzegovina*, HRC Communication No. 1970/2010, Dec. 1 2014; *Duric v. Bosnia and Herzegovina*, HRC Communication No. 1956/2010, July 16, 2014; *Rizanovic v. Bosnia and Herzegovina*, HRC Communication No. 1997/2010, March 21, 2014; *Zilkija Selimovic et al. v. Bosnia v. Herzegovina*, HRC Communication No. 2003/2010, Oct 15, 2014; *Prutina et al. v. Bosnia and Herzegovina*, HRC Communication No. Nos. 1917/2009, 1918/2009, 1925/2009 and 1953/2010, March 28, 2013; *Palić v. Bosnia and Herzegovina* (application no. 4704/04) ECHR Feb 15, 2011.

It further highlights the unsatisfactory situation for individuals who have to deal with a fragmented legal system in which they must turn to different national, regional and international tribunals and bodies to obtain justice and effective remedies for harms from the war. Thus women must travel to the Hague to testify about war crimes and crimes against humanity to secure convictions of perpetrators, submit petitions to national and international bodies to obtain effective investigation and information about their disappeared loved ones and as set out below, testify before a national panel to receive compensation for sexual violence perpetrated during the conflict.

### **The Consequences of Wartime Rape: Persuasive Advocacy**

Beyond cinematic jurisprudence and film's role in exposing the law's inadequacies, the visual medium is a powerful advocacy tool which can be used to alter social rights and in some cases, bring about legal actions or appeals.<sup>694</sup> Its ability to elicit empathy and to create affective responses can thus translate into social action through the opening of spaces of dialogue with members of the public.<sup>695</sup> The film *Grbavica* is credited with being part of the movement which changed the laws in Bosnia and resulted in the recognition of women who were raped as "war victims" or "war invalids".<sup>696</sup> Following the release of the film in 2006, which was watched by more than 100,000 people in Bosnia, the legislature amended the law entitling women to state compensation equal to that of men who had fought in the war. According to some scholars, the film formed part of a strategy by non-governmental organisations and women's rights groups to obtain compensation on an equal footing with men.<sup>697</sup> This strategy aimed to bridge the gap between the recognition of rape as a crime against humanity by the *Kunarac* judgment and lack of fulfilment of Bosnia's obligations as a signatory of SC Resolution 1325 (2000) on Women, Peace and Security.

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<sup>694</sup> *The Thin Blue Line* (1988) is an example of documentary advocacy.

<sup>695</sup> Brandon Harris 'Claudia Llosa, "The Milk of Sorrow" August 25, 2010 in Filmmaker. At <http://www.filmmakermagazine.com/news/2010/08/claudia-llosa-the-milk-of-sorrow/> last accessed April 15, 2015. See also Chauca, Edward M., Rafael Ramirez, and Carolina Sitnisky-Cole. "No pretendo retratar la realidad. Pretendo interpretar un tema para sacar discusiones que tenemos reprimidas": Una entrevista con Claudia Llosa." *Mester* 39, no. 1 (2010) <https://escholarship.org/uc/item/51z578v6>

<sup>696</sup> Martina Fischer, *Peacebuilding and Civil Society in Bosnia-Herzegovina: Ten Years after Dayton* (LIT Verlag Münster 2006) XI.

<sup>697</sup> Helms, *Innocence and Victimhood: Gender, Nation, and Women's Activism in Postwar Bosnia-Herzegovina* (n.647).



*Grbavica* is a good example of what bell hooks has termed "...cinema's capacity to create new awareness, to transform culture right before our very eyes."<sup>698</sup> In March 2006 the campaign, "For the dignity of the survivors" was launched collecting 50,000 signatures calling for the official acknowledgement of equal reparations for men and women. While compensation was first proposed at 50% of which men obtained, the campaigns were ultimately successful in achieving parity.<sup>699</sup> As a part of this campaign, *Grbavica* was purposefully released to coincide with the launch of the campaign.<sup>700</sup> Martina Fischer has argued that *Grbavica* was a taboo breaking film, dealing with the past and with issues which had previously been marginalised since the war where a process of selective memory had taken place.

Financed and produced by a number of actors from European countries (40% Austria, Bosnia/Herzegovina contributed 26%, Germany 23% and the balance came from Croatia), the film was pitched and conceived of as a means to deal with the rape of women in the former Yugoslavia and the collective trauma this had caused. According to the British Film Institute case study on the film "...rape was also a broader metaphor for the trauma or fratricidal European wars and the violation of human dignity they entailed."<sup>701</sup> Within this broader (and de-gendered) metaphor, however, the film explicitly deals with and focuses on the consequences of wartime rape. This focus is reflected in the participation and consultation of a women's group during the filming. Ten members of the Women's Section of the Association of the Concentration Camp Detainees, an NGO which provides support (including computer classes, human rights courses, support packages, medical and psychological support, and massage treatments) to survivors of torture, rape and other sexual violence, participated in the film.<sup>702</sup>

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<sup>698</sup> bell Hooks, *Reel to real: Race, sex, and class at the movies* (Psychology Press 1996) 9.

<sup>699</sup> Fischer, *Peacebuilding and Civil Society in Bosnia-Herzegovina: Ten years after Dayton* (n.696) XI.

<sup>700</sup> Olivera Simić and Zala Volčič (ed), *Transitional Justice and Civil Society in the Balkans* (Transitional Justice, Springer 2013) 97.

<sup>701</sup> UK Film Council. "Grbavica – Three women, war and the healing power of film: case study". Last accessed April 6, 2015. [www.bfi.org.uk/sites/bfi...uk/.../uk-film-council-grbavica-case-study.pdf](http://www.bfi.org.uk/sites/bfi...uk/.../uk-film-council-grbavica-case-study.pdf)

<sup>702</sup> General Allegation to the Special Rapporteur on Violence against Women, its Causes and Consequences: The situation of women victims of rape or other forms of sexual violence during the war in Bosnia and Herzegovina, May 2011' Submitted by TRIAL (Swiss association against impunity); Women's Section of the Association of Concentration Camp Detainees Centre for Legal Assistance to Women; Zenica Association for Rehabilitation of Torture Victims-Centre for Torture Victims (CTV) Foundation of Local Democracy Association of Women-Victims of War Infoteka (Women's Information and Documentation Centre) Medica Zenica Through Heart to Peace Society for Threatened Peoples Sumejja Gerc Viktorija 99 Vive Žene Tuzla.

The pressure following the campaign and the release of the film resulted in an amendment to the Law on Basic Social Protection, Protection of Civilian Victims of War and Families with Children in the Federations of BiH' (law on CVW). This amendment entitles survivors of rape to:

a personal disability allowance or a personal monthly allowance; a supplement for aid and assistance by another person; an allowance for orthopaedic supports; a family disability allowance; financial support for the cost of medical treatment and purchase of orthopaedic supports; the right to professional training (skills and competencies training and professional development); the right to worker employment priority; the right to housing priority; and, the right to psychological assistance and legal aid.<sup>703</sup>

While the recognition of wartime rape was welcomed by the women's groups, some scholars have been critical of the implementation of the law arguing that access is limited. Women must obtain a certificate through the organisation Survivors of Wartime Sexual Violence Association and must tell their stories to a committee in order to attain the certificate.<sup>704</sup> The compulsion to tell and to share the experiences in public mirror approaches adopted in diverse transitional justice mechanisms where perpetrators have been compelled to tell their stories and crimes in return for amnesty. In the Bosnian context however it is the women who are forced to tell the stories, with inconsistency of payment amounts, time delays and re-traumatisation all cited as flaws to the compensation scheme. Further, for some the scheme does not go far enough. While it provides some women with a financial allowance and compensation it is not a form of reparation for the harms they have suffered, with the latter forming symbolic, expressive and financial entitlements rather than welfare payments which can be granted and taken away.<sup>705</sup>

#### *Film's Role in Opening Spaces of Dialogue*

It is beyond the scope of this chapter to look into the concrete mechanisms of transitional justice currently operating in Bosnia Herzegovina. Instead, in this section I want to illustrate how the film's narrative can be seen as a form of persuasive advocacy highlighting the inadequacies of a system which excludes women. These arguments have been made elsewhere, culminating for example, in the Women's Tribunal in Tokyo mentioned in the introduction chapter to this thesis. The Tribunal was set up in order to offer a platform to

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<sup>703</sup> Volčič (ed), *Transitional Justice and Civil Society in the Balkans* (n.700) 98.

<sup>704</sup> Ibid 99.

<sup>705</sup> Simic, 'But I Want to Speak Out: Making Art from Women's Testimonies' (n.38).

prosecute and adjudicate on crimes of sexual slavery perpetrated during the Second World War by Japanese soldiers, which were never addressed by the Tokyo Tribunal. Just as the Women's Tribunal highlights the absence of the "comfort women" from the original judgment, *Grbavica* points to a failure by the international courts to hold those responsible for forced pregnancy to account.

The film draws attention to the observation by feminist scholars that definition of harm has traditionally been gendered in the transitional justice setting, excluding rape or secondary harms which result from rape such as reproductive health. The health impacts of the sexual violence and the care-giving burdens are clearly huge challenges for Esma as she struggles to make ends meet after the war. Through small gestures such as the buying of one trout for the child, we see Esma ration her pay to feed Sara and deprive herself of nutrition and food. Alongside the gender divides in the work environment, the film highlights the gendered nature of the benefits schemes operating on a micro level. Although legal mechanisms are largely absent in the film, Zbanic's narrative clearly makes the point that there are problems with the definition of harm and violence that are recognised and repaired in the post-conflict context.

As outlined in the plot, in school Sara is told that if her father is a "Shaheed" she can go on the trip for free, or if someone in the family was wounded or disabled, there is a discount. However, there is no mention of sexual violence or its consequences. This means that Esma is unable to produce a certificate that would give Sara a discount for the school trip. Although in some contexts rape is included as a harm, organizations and academics have highlighted how secondary harms associated with gender-based violence have not been included in reparation schemes. Unwanted pregnancies, sterility, internal displacement or even HIV or sexually transmitted infections are often left out of transitional justice measures.<sup>706</sup> The film reinforces the statement in Security Council Resolution 2122 that: "more must be done to ensure that transitional justice measures address the full range of violations and abuses of women's human rights, and the differentiated impacts on women and girls of these violations and abuses." A simple event such as a school trip illustrates how the criteria for defining beneficiaries of compensation and discounts impacts on

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<sup>706</sup> Françoise Nduwimana "United Nations Security Council Resolution 1325 (2000) on Women, Peace and Security. Understanding the Implications, Fulfilling the Obligations" Office of the Special Advisor on Gender Issue and Advancement of Women. Department of Economics and Social Affairs, United Nations, New York, 58. Beth van Schaak, 'Engendering Genocide: The Akayesu Case Before the International Criminal Tribunal for Rwanda' (n.214).

people's lives by creating insiders and outsiders (in terms of ethnicity) and is also highly gendered.

Esma's inability to produce the certificate has many knock on effects in the film. It alerts Sara to the secret and raises suspicions in school about her father. Sara becomes aware that she is the only student not on "the list" and demands to see the certificate. For Sara, the certificate becomes something more than a means to obtain a discount or free place on the school trip; it forms part of her identity. For Esma, the lack of certificate means that she has to ask her friends, family members, her boss and the women's group for money. This places Esma in vulnerable, humiliating and desperate situations culminating in violence discussed earlier in the chapter. By weaving together the consequences of war time rape in the everyday setting the film effectively illustrates how a gendered definition of harm leads not only to socio-economic difficulties, but other issues which aggravate Esma's symptoms of Post-Traumatic Stress Disorder (PTSD) as she attempts to raise her daughter.

As a part of the advocacy campaign, the film's narrative makes visible, and brings to life, feminist academic and activist arguments on secondary harms. The audience connects with and sympathises with Esma and her struggle. Instead of the trial where protective measures mean that the witnesses are faceless, speaking with distorted voices and made invisible, Esma, as a fictional character, can be seen to represent the many women who were marginalised during the transition to peace. As Zbanic has stated on the impact of the film:

We then went to parliament and we changed the law for rape victims. Before that, they did not have any status, they were not recognized as war victims. Soldiers, the wounded, children of dead soldiers—they all got money from the state— but raped women, well they did not. And those women were never strong to push it because there is a big feeling of shame, they are not so outspoken. So we used the film as a voice, and within three months the law was changed, so it had a big impact on society. We as citizens have an obligation to react.<sup>707</sup>

In their analysis of Jasmila Zbanic's more recent film *For Those Who Can Tell No Tales*, Olivera Simic and Zala Volcic have argued that "Bosnian cinema has been a domain within which the trauma of war has received significant attention" and given the limitations of criminal prosecutions they suggest that "...film as an art form has the power of reaching

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<sup>707</sup> Gianne Brownell. On the Path with Jasmila Zbanic. July 22nd, 2011. Last accessed April 15, 2015. <http://www.insidefullofcolor.com/on-the-path-with-jasmila-zbanic/>

many more survivors than courts and retributive justice.”<sup>708</sup> For the filmmaker and other activists, film and other cultural products such as art, have an important place in helping women: to make their experiences visible and their voices heard. Zbanic and others also suggest that video advocacy in the form of a fictional feature film can have a normative impact when it forms part of a wider strategy of collaboration with civil society organisations. Film therefore can fill in the gaps and silences created by the law and also open dialogues and speak about these silences.

### Conclusion

While the sharing of the secret and the ending of the film suggest that Sara and Esma have become closer through the revelation, the film highlights the on-going and lasting consequences of wartime rape and the difficulties faced by both Sara and Esma in the post-conflict context in terms of identity, relationships and economics. These observations go beyond law’s narrative capabilities, with the ICTY judgments slicing narratives into binaries of relevance/irrelevance; probative/disprobative; fact/emotion. The ways in which the legal narratives are told also obfuscate the element of human relationships in the stories, with many of the witnesses involved being family members such as the two sisters in the *Kunarac* trial. Zbanic’s story, told in 90 minutes illustrates how the focus on just a handful of relationships can provide a microcosm of the much larger macrocosm of the experiences of some women and children in the conflict. The privileging of scenes relating to manifestations of emotions such as tiredness, traumatic symptoms and tears, raises questions over why the law rejects emotions and provides it no place in the courtroom.

Just as Sara and Esma struggle, twenty years after the end of the Bosnian war, Jasmila Zbanic continues to struggle with the denial and silence about the atrocities committed during the conflict. Her narratives focus on societal responses to sexual violence calling for memorialisation and an opening of dialogues about what occurred to women and to others during this time. *Grbavica*, and Jasmila Zbanic’s most recent film, *For Those Who Can Tell No Tales* are critical films in that they point to a structural context which suggests that the few people who have been tried and convicted are token and wholly inadequate responses to the atrocities committed during the war.

As part of civil society engagement with these issues, female filmmakers such as Zbanic and Aida Bejic have continued to represent and portray issues relating to the gendered consequences of the Balkan conflict. Drawing on a long and strong tradition of cinema and

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<sup>708</sup> Simic and Volcic, ‘In the Land of Wartime Rape: Bosnia, Cinema and Reparation’ (n.36) 396.

human rights in the region, these artists show how the consequences of conflict are varied, affecting women's participation in society, their opportunities in terms of economic emancipation and, their possibilities in a post-conflict, post-socialist, patriarchal society where violence, including sexual violence has been widespread and/or systematic. The filmmakers grapple with the reality of a largely female society, where work opportunities are limited and where many men and boys have died as a result of the conflict. In doing so, they present the viewer with human lives and faces, reminding us that the ICTY's triumph has been a partial and limited one.

## Conclusion

What you have told us here, Witness I, is indeed an extreme type of human conduct. It goes beyond all horror films that have been made so far. But on the other hand, there is a humane story that you have told us here too.

Judge Rodrigues.<sup>709</sup>

Since the prosecutions in the ICTY, measures to prevent sexual violence in conflict (PSVI), to end impunity and provide accountability for these crimes have become part of a global, high profile political agenda. The Global Summit to End Sexual Violence in Conflict held in London in 2014, launched by UK Secretary of State William Hague and the UNHCR Special Envoy Angelina Jolie-Pitt forms part of the wider campaign to draw attention to violence against women in war. Measures such as CEDAW General Recommendation No. 30, and the Security Council's Women, Peace and Security (WPS) agenda affirm the obligation of States to combat violence against women and to protect their rights in conflict and post-conflict contexts.<sup>710</sup> The Security Council has adopted six resolutions on the issue of women and conflict as part of this agenda.<sup>711</sup> Beyond the need to combat sexual violence in conflict, these resolutions address issues such as participation, leadership, women's agency and reproductive health in post-conflict and peace building settings. The adoption of these resolutions and their reinforcement through General Recommendation No. 30 points to a growing consensus on the need to implement measures to ensure gender equality and to include women at all stages of the transition from conflict to peace time. The prosecution of those responsible for gender crimes at the ICTY can thus be understood as sparking a range of political, social and economic measures to tackle sexual violence in conflict.

While the measures above are welcome, real questions remain over international law's ability and willingness to tackle the underlying causes of violence against women in the continuum of so-called peacetime, conflict and post-conflict. The progress narrative

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<sup>709</sup> *Prosecutor v. Krstic*, Trial Transcripts, Friday, 7th April 2000, page 2437.

<http://www.icty.org/x/cases/krstic/trans/en/000407ed.htm>

<sup>710</sup> Committee on the Elimination of Discrimination against Women, General Recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations, 56th Sess., U.N. Doc. CEDAW/C/GC/30 (Sept. 4, 2013).

<sup>711</sup> S.C. Res. 1325, U.N. Doc. S/Res/1325 (31 October 2000), S.C. Res. 1820, U.N. Doc. S/RES/1820 (June 19, 2008), S.C. Res. 1888, U.N. Doc. S/RES/1888 (Sept. 30, 2009); S.C. Res. 1889, U.N. Doc. S/Res/1889 (5 October 2009); S.C. Res. 1960, U.N. Doc. S/RES/1960 (Dec. 16, 2010); S.C. Res. 2106, U.N. Doc. S/RES/2106 (June 24, 2013), S.C. Res. 2122, U.N. Doc. S/Res/2122 (18 October 2013).

presented by the ICTY and by other Tribunals attempts to reassure us that more is being done than ever to combat violence against women. Critical feminist scholars have consequently claimed that rape and sexual violence are now hypervisible and that feminists are walking the halls of power. The positions of the Chief Prosecutor Fatou Bensouda, the Gender Advisors Catherine Mackinnon and Brigid Inger, the appointment of Judge Silvia Fernandez de Gurmendi and Judge Kuniko Ozaki to President and Vice President of the ICC respectively, and the high profile the UN Women, Peace and Security agenda all seem to corroborate the idea that we are now living in times of “feminist governance”.

However, by shifting the lens to those who are usually anonymised and pixelated by legal proceedings, the fictional films analysed in this thesis remind us that these claims of progress and governance are detached from the reality of most women’s lives. Unlike the films produced by the Tribunals which focus on the legal actors and judicial decisions, the fictional films focus on the lives of the women most affected by the crimes. Further, they run counter to the trend to focus on the perpetrator of these crimes in the courtrooms and also in documentary and fictional film.<sup>712</sup> Framing the story in terms of women’s experiences, the films highlight the context and circumstances in which these crimes are committed, illustrating that these acts of violence are not aberrant or unforeseeable, but rather part of the gendered policing and societal oppression of women’s rights.

It may seem strange to argue that the fictional accounts can provide us with a more accurate picture of reality than the documentary film produced by the Tribunal or even the trials themselves. On one hand, this points to the partial rhetoric of the Tribunal which is concerned with shaping its legacy in a positive fashion. On the other, it points to what Suzanna Bouclin terms the “truth value” of films even when these are not “accurate” or “non-fiction”. She states that “...films nonetheless have truth-value and can resemble lived reality sufficiently enough to reveal truths about how the law operates in peoples’ everyday lives.”<sup>713</sup> Departing from documentary accounts, the filmmakers expressly construct the stories with emotions in mind, looking to tell these stories in ways which connect with audiences and create empathy. In this way, the films show that the same story can be told in different mediums, reaching diverse audiences, spreading the shadow of the court’s work and also criticising the treatment of women’s harms by these courts

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<sup>712</sup> See for example *Waltz with Bashir* (2008); *The Act of Killing* (2012) and many other films about Milosevic, and Eichmann. See Annex I for a list.

<sup>713</sup> Suzanne Bouclin “Feminism, Law and Cinema” in Kim Brooks and Carissima Mathen *Women, Law and Equality: A Discussion Guide* (Irwin Law Inc 2010) 120.



and tribunals. The importance of this affective aspect has been acknowledged by scholars of law, film and feminism who have noted that “...films that invite us to ‘feel’ the injustices experienced by women on the screen have transformative potential because they also allow us to feel the ways in which formal law inadequately addresses these injustices in actuality.”<sup>714</sup>

### **Common Themes**

The chapters in this thesis have been organised by individual film analysis rather than thematically, however there are a number of common themes which run throughout the thesis. The failure to provide closure, the failure to include women’s experiences and testimonies during the trial proceedings, failure to combat structural gender relations are just three critiques of international criminal justice which emerge from watching these films. Further the films call into question the ICTY’s claim of a triumph of prosecuting gender crimes and instead portray the political and economic climates which continue to marginalise women’s voices in the national and international legal systems. In all three films, the law is presented as complicit in this silencing. A central tenet of this thesis is that taken as a corpus of cinematic jurisprudence, these films thus reinforce and challenge the jurisprudence and narratives which have emerged about the ICTY.

The most striking theme which runs throughout the cinematic narratives is the false promise of closure. In the context of the *Milosevic* prosecution at the ICTY Gerry Simpson has argued that the emphasis in that trial was “...on producing some sort of closure through trial.”<sup>715</sup> Elsewhere he states that scholars have claimed that “...the dramatic potential, social space and material resources offered by legal proceedings can provide a sort of provisional closure.”<sup>716</sup> The criminal trial purports to provide closure to victims through the issuing of a final verdict of guilt or innocence. If one of international criminal justice’s promises is to provide closure, or at least partial closure, the three films analysed in this thesis – *As if I Am Not There*, *Storm* and *Grbavica* – illustrate how law cannot and does not provide closure to some women affected by atrocities. This is especially stark in the case of women such as Samira in *As If I Am Not There* and Esma in *Grbavica*, who have been made forcibly pregnant through rape, have subsequently been denied access to safe and legal

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<sup>714</sup> Ibid 123. See also Ruth Buchanan and Rebecca Johnson ‘Strange Encounters: Exploring Law and Film in the Affective Register’ in Austin Sarat ed, *Studies in Law, Politics and Society* (Emerald Group Publishing 2009).

<sup>715</sup> Simpson, *Law, War & Crime: War Crimes, Trials and the Reinvention of International Law* (n.169) 74.

<sup>716</sup> Ibid 88.

terminations and have given birth to a child. Closure for these women is not possible as they struggle to live with the children born of war, in the context of poverty and social deprivation. In *Storm* where a criminal trial does take place at the Hague, the film's ending also makes it clear that there is no closure for the main character and witness Mira. The films refuse to respect law's temporal jurisdiction and instead, show the aftermath of the conflict and its ongoing consequences for these women's lives.

Alongside its depiction of the aftermath of gender crimes and the refusal of films to provide the characters (and audience) with closure, the films selected also demonstrate law's limitations in terms of the definitions used to determine the parameters of adjudication and legitimate narrative construction. Thus while lawyers and judges agonise over whether a crime falls within the definition(s) of rape or forced pregnancy, the films afford viewers room to escape from these legal tangles and to focus on the women's experiences of these events. The abstract language of cinema and artistic licence is a stark contrast to law's strict adherence to elements and language. Outside the confines of the courtroom and the need to squeeze these experiences into the elements and definitions of these crimes, the women tell their stories in a manner which would not be possible in the courtroom context. The films raise questions about law's capabilities to include these narratives in the trial proceedings. The films thus provide a powerful contrast and comparative artistic representation of the lived realities of women's lives.

In all three films, the issue of gendered social relations appear in conflict and post-conflict settings. In one way, this illustrates the false dichotomy drawn by the law in terms of determining what constitutes war and peace, conflict and post-conflict, rape as a war crime or as an act of domestic violence. The films thus alert us to the absurdity of having a clear-cut ending of a war marked by the Dayton agreement in a context where violence, sexual and otherwise, remains endemic.<sup>717</sup> The film also draws attention to law's failure to deal with the structural discrimination and circumstances which allows violence against women to continue.

In the case of *Grbavica* and *As If I am Not There*, the films suggest that the Tribunal may be entirely "absent" in the lives of those who have experienced conflict or may be blind to the needs of survivors of sexual violence. While the Tribunal focuses on experiences as discreet episodes to fit in the categories and boxes of the elements of crimes, the films

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<sup>717</sup> Generally on the Bosnian war and the Dayton peace agreement see Kaldor, *New and Old Wars: Organised Violence in a Global Era* (n.668) 32-70.

show how experiences of the war are on-going. By highlighting the aftermath of the conflict and the multiple experiences women have during times of conflict and war, the films illustrate how criminal justice is inadequate when conceived as the sole response to the multiple consequences of war. These on-going consequences may relate to pregnancy, refugee status, security, economic survival, mental health, reproductive health, internal displacement and homelessness to name but a few.

By providing scenes prior to the conflict or by showing the daily lives of women, the films also highlight gender relations, and their policing in society. Young, beautiful, women such as Samira are subject to constant male attention prior to, during and following the conflict. In *Grbavica*, the film's multi-layered narrative illustrates the sexualisation of women in the context of a nightclub and the objectification of women in these settings. Gambling, socio-economic context, turbo-folk music, sport and gendered division of labour are all represented on screen as part of the gender relations operating and oppressing in society.

Further, other films such as *For Those Who Can Tell No Tales*, Jasmila Zbanic's follow up film to *Grbavica*, explicitly deal with the fact that most perpetrators are not punished and remain living side-by-side their victims. Twenty years after the end of the war, even those who were punished have been released and have returned to their towns – greeted as heroes – rather than stigmatised as war criminals. Jasmila Zbanic has explicitly made a statement to this effect. She has stated during an interview that:

According to United Nations data, approximately 20,000 women of all religions were raped in Bosnia in this war. Many of the women I met could not go back to their towns because the rapists were still there. The perpetrators of these crimes were not even minimally punished. Only a few of them, the most well-known, but the reality is that the victims lives side by side with their rapists on a daily basis. People prefer to think that these women don't exist. Until recently, they were not even considered war victims. Only after the film was a campaign started, based on a petition that forced the government to change the law, and now the victims of ethnic rape are finally recognised as war victims.<sup>718</sup>

The absence of the international criminal tribunal and other institutional and non-governmental organisations in the films by Zbanic and other artists in Bosnia such as Aida

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<sup>718</sup> Camilo de Marco "Love and war in Sarajevo. Interview with Jasmila Zbanic" December 5, 2006. CineEuropa. Last accessed April 15, 2015. <http://cineuropa.org/ff.aspx?t=ffocusinterview&l=en&tid=1294&did=69181>

Begic is notable. It is *as if* the institution is not there and instead, Zbanic highlights the crucial and important role of local actors in dealing with the long-term consequences of conflict. As Mary Kaldor has argued:

The wars epitomize a new kind of global/local divide between those members of a global class who can speak English, have access to the Internet and satellite television, who use dollars or euros or credit cards, and who can travel freely, and those who are excluded from the global processes, who live off what they can sell or barter or what they receive in humanitarian aid, whose movement is restricted by roadblocks, visas and the cost of travel, and who are prey to sieges, forced displacement, famines, landmines etc.<sup>719</sup>

The film is a reminder that while international law claims to act on the behalf of a cosmopolitan legal order, the opportunities it provides in terms of employment and capabilities is hugely unequal. Immi Tallgren has noted that students and ICL academics “...have their own jargon and referential environment in which they exchange on the prominent accused of today and of the past by their names, as well as on the prosecutor or judges, as if characters in a shared story where only the victims appear anonymous.”<sup>720</sup> The films remove the smokescreen constructed by the international community and instead, focus on the lived experiences and perspectives of women.

Significantly, the films suggest international criminal law’s complicity with the on-going violence in post-conflict situations. In *Storm*, where the ICTY is visible, we see Hannah warned by a member of the investigation team that the man she went to see in the hotel/spa in Vilnia Kosa is dangerous and part of a group of five men who gained huge profit from the war in the Balkans. Both *Storm* and *For Those Who Can Tell No Tales* explicitly make the point that politics has a major role to play in the transition from the war to peacetime and that the legal institutions are loathe to upset economic and political deals which benefit those who are already gaining from the post-war system. By showing us the political economy of war, these films represent aspects of the conflict and its aftermath which are rarely seen in court. The film chapter on *Grbavica* illustrates how cinema can capture this context and make these aspects of power visible to audiences.

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<sup>719</sup> Kaldor, *New and Old wars: Organised Violence in a Global Era* (n.668) 5.

<sup>720</sup> Immi Tallgren “Who are We in International Criminal Law? On Critics and Membership” in Christine Schwöbel, *Critical Approaches to International Criminal Law: An Introduction* (n.89) 74.

The portrayal of those in economic and political power in films such as *Storm*, *Grbavica* and *For Those Who Can Tell No Tales*, not only point to the clandestine economy and their links to political circles post-conflict but are also deeply gendered in the films. In *Storm* for example all of the political attaches and negotiators are male, echoing the fact that protagonists in negotiations to transitional justice and international mediators also tend to be overwhelmingly male.<sup>721</sup> In *Grbavica*, the owner of the bar and the clientele are male, while the women hold low wage working positions, which require them to behave and perform in a certain sexualised manner.

The themes outlined above point to shared concerns by filmmakers about the experiences of Bosnian women during the conflict and in the aftermath. My thesis is that taken together as a corpus of cinematic jurisprudence the films dramatically, persuasively and emotionally tell the stories of these events in a way unconstrained by the rules which govern legal narrative. In this way, the fictional films provide a cinematic counter-narrative to two dominant discourses which have emerged in the field of feminist international law with regards to the prosecution of gender crimes. First, the films question the triumphalism of the ICTY. Secondly, the films challenge assertions made by critical feminist scholars of international law that gender crimes have become hypervisible and that “feminists are walking the halls of power” in international courts.<sup>722</sup>

In highlighting the common themes explored above I acknowledge that this thesis could have been structured differently. The thesis could have explored the relationship between gender crimes and film in a various geographical locations or by focusing each chapter on a crime in particular. Methodologically, I could have carried out interviews with legal actors and the film directors about their views on the relationship between law and film. These various approaches illustrate the many ways in which I seek to carry this research forwards in the future.

### **Beyond Spreading the Shadow of the Court**

The International criminal courts and tribunals operate in an age of digital technology where war crimes trials occupy part of the public imagination. Gerry Simpson has stated in the context of Nuremberg: “The world is awash with such images. There is an obsession with the Nazis, with genocide and with crimes against humanity in popular culture (on

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<sup>721</sup> Bell, Christine, and Catherine O'Rourke. "Does Feminism Need a Theory of Transitional Justice? An Introductory Essay." (n.8) 25.

<sup>722</sup> Halley, *Split Decisions: How and Why to Take a Break from Feminism* (n.71) 21.

television, in the newspapers).”<sup>723</sup> Simpson’s reflection is increasingly applicable to conflicts in other situations which are referenced or form the focus of filmic and televised narratives. These depictions in turn inform global audiences about conflicts and the international response (or lack thereof) to these events. In his work on the *Eichmann* trial, Lawrence Douglas has argued that legal scholars should recognise the didactic aims and affinities war crimes trials and documentary film.<sup>724</sup> Douglas argues that film, such as those on the Eichmann trial in Israel serve to legitimise the trials through reinforcing of collective memory of mass atrocity.<sup>725</sup> In a different context, Austin Sarat has gone so far as to say that “Today we may be witnessing a movement from law on the books to law in action to law in the image.”<sup>726</sup>

The main conception of film in international criminal justice is the idea that these films “spread the shadow of the court” and help to disseminate the message of legal responses to mass atrocity. Further, the turn to film by the ICTY and ICC can be understood as a desire to communicate their work to global non-legal audiences in ways which are more easily understood. In terms of the “didactic affinities” between the films analysed in this thesis and the Tribunal, the existence of the ICTY and its prosecution of these crimes can be credited with bringing these matters to the attention of the filmmakers who have in turn sought to make these crimes visible in their films.

However, as set out above, I have argued that these films communicate the criticisms of current prosecution strategies at the ICTY and the discomfort with a progress narrative which leaves women at the margins. A key argument of this thesis is that the films can be seen as spreading the work of feminist legal scholars of international criminal justice. Feminist legal scholars have expressed dismay that their work is often relegated to a footnote and that they find themselves in a “ghetto”. Instead, these films bring these critiques front and centre – to film festivals and into people’s homes – providing broader audiences with an illustration of these criticisms and critiques. As Honni Van Rijswijk has noted in her analysis of Sarah Kane’s play *Blasted*, the “...engagement between legal and cultural domains reveals and allegorises problems with legal processes that have been outlined by feminists, and assists in diagnosing legal entanglements, as well as points to

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<sup>723</sup> Gerry J Simpson, *Law, War & Crime: War Crimes, Trials and the Reinvention of International Law* (n.169) 9.

<sup>724</sup> Douglas, L., ‘Trial as Documentary: Images of Eichmann’ in Leslie Moran and others, *Law’s Moving Image* (n.399).

<sup>725</sup> Ibid.

<sup>726</sup> Sarat, *Imagining Legality: Where Law Meets Popular Culture* (n.351) 3.

new ways of thinking about adjudication in this area.”<sup>727</sup> Through shared political goals of “breaking the silence” filmmakers have turned to feminist scholarship in order to make this work visible and more accessible to diverse audiences. Claudia Llosa’s Oscar nominated film *The Milk of Sorrow* (2009) based on Kimberly Theidon’s book *Entre Prójimos: El conflicto armado interno y la política de la reconciliación en el Perú* is just one of the numerous examples of this feminist engagement between the legal and cultural domains.<sup>728</sup>

The examples of filmmakers using film to challenge injustice and discriminatory treatment of women are numerous. Unfortunately, due to spatial limitations, this thesis has only been able to look at three films which form a chronology. As set out in Annex I, there are many films from different geographical locations (and schools of cinema) which represent different aspects of human rights violations that merit their own analysis. These films are often based on real life events, providing artistic representations of reality. Some filmmakers have used humour to portray discriminatory practices and exclusion of women and girls from certain domains. An excellent example is Jafar Panahi’s film *Offside* (2006) based on his own daughter’s experience of defying the ban on female attendance at a football match in Iran. Others portray and document practices of female resistance to aggression and violence in societies which provide minimal protection to women from physical and sexual harassment. In highlighting the sexual harassment suffered by women in Egypt in his film *678* (2008), the director Mohamed Diab has expressly stated that “I made this film to break the silence of women.”<sup>729</sup> In some situations the films are banned from being screened in the country in which they are made, with filmmakers facing legal repercussions for bringing these stories to international attention.

Further, certain experiences, including gender crimes such as human trafficking, seem to be more readily represented on screen rather than in legal judgments emitted from international criminal courts. Take for example the Hollywood film, *The Whistleblower* (2010), directed by Canadian filmmaker, Larysa Kondracki. The human trafficking for sexual exploitation of women in the Balkans for and by UN peacekeepers demonstrates the lacunas which remain in the international legal system. The privileges and immunities

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<sup>727</sup> Rijswijk, ‘Towards a Feminist Aesthetic of Justice: Sarah Kane’s *Blasted* as Theorisation of the Representation of Sexual Violence in International Law’ (n.38) 108.

<sup>728</sup> Kimberly Theidon. *Entre Prójimos: El Conflicto Armado Interno Y La Política De La Reconciliación En El Perú* (Instituto de Estudios Peruanos 2004).

<sup>729</sup> Noha El-Hennawy ‘678: Sexual harassment in a movie’ Egypt Independent, Dec 17, 2010. Last accessed April 15, 2015. <http://www.egyptindependent.com/news/678-sexual-harassment-movie>

extended to members, permanent or affiliated to the United Nations and the jurisdictional limitations of courts and tribunals, including the ICTY, mean that there has been a wholly inadequate legal response to the graphic gender crimes depicted in the film.<sup>730</sup> *Whistleblower* is thus a powerful indictment of the role international actors play post atrocity and provides a damning picture of the UN and its lack of actual commitment to gender equality.<sup>731</sup> Ban Ki Moon, the UN Secretary General subsequently wrote a letter to the director of the film stating "I want to assure you that we shall embrace the challenge your film places before us."<sup>732</sup>

### Final Thoughts

This thesis is a plea for lawyers to take film seriously, not only as a source of legal scholarship but also as a medium which can affect the ways in which international criminal law is viewed and seen by audiences. This powerful medium is being used by international criminal tribunals and courts concerned with, and conscious of, shaping and communicating their own legacy. At the same time, artists, filmmakers and other voices from outside of the law use film in order to provide counter narratives which can reinforce and critique the project of international criminal justice. These narratives also shape the legacy of these war crimes trials and play an important role in making visible the ways in which law not only provides redress but also contributes to and may well obfuscate harms against women in conflict and post-conflict settings.

In this thesis I have argued that films such as *As If I Am Not There* can complement and reinforce the jurisprudence of the international criminal tribunals. These films can be used as a source of legal scholarship, and means of understanding the complicated and long judicial consideration of the charges and elements in trial proceedings. In addition, the film analysed in this thesis also indict international criminal justice for its failures to prosecute and include narratives of forced pregnancy in the official accounts. As well as providing a complementary source, the films can be read as critical accounts of the way in which law

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<sup>730</sup> Convention on the Privileges and Immunities of the United Nations. Adopted by the General Assembly of the UN on 13 Feb 1946.

<sup>731</sup> While the film notes in its final credits that some peacekeepers were sent home, the crimes remain unpunished with the only adjudication in the UN system occurring before the United Nations Dispute Tribunal on the wrongful dismissal of Madeleine Rees. *Rees v Secretary General of the United Nations*, UNDT/2011/156, 6 September 2011. A similarly damning picture of UNPROFOR in the Balkan conflict is depicted in the Oscar winning film *No Man's Land* (2001).

<sup>732</sup> Column Lynch, "UN sex crimes white-blower wrongfully dismissed" September 16, 2011. Foreign Policy. [http://blog.foreignpolicy.com/posts/2011/09/16/un\\_sex\\_crimes\\_whistleblower\\_was\\_wrongfully\\_dismissed](http://blog.foreignpolicy.com/posts/2011/09/16/un_sex_crimes_whistleblower_was_wrongfully_dismissed) accessed 1 November 2014.



tells stories and the silences which it creates. The films can be read (seen) as reinforcing some of the feminist critiques which have emerged in the field of international criminal justice calling for greater visibility of women's experiences and alternative ways of hearing their testimony in the adversarial court process. In this way, the films let us see things the law does not allow us to see. Going behind closed doors in the ICTY and into the private sphere of the women's lives, the films provide a different viewing position and perspective on the stories which the Tribunal has narrated through the trial process.

The cinematic jurisprudence of these films can thus be seen as disseminating the feminist critiques of the prosecutions beyond the ghetto of feminist legal scholarship and unmasking the gender of the law to audiences. As Costas Douzinas has stated on the separation between law and the image:

Modern law is born in his separation from aesthetic considerations. The self in art-as painter or viewer – is free, desiring, with gender and history. The subject of law – as judge or litigant – is constrained, rational, genderless, a *persona* or mask placed on the body. Justice must be blindfolded to avoid the temptation of facing the concrete person and putting individual characteristics before the abstract logic of the institution. Law and art are, and must remain, separate.<sup>733</sup>

Douzinas argues that the law both loves and fears the image and concludes that:

As a creation of law and power, the image is non-natural, false; but as the necessary support of our humanity, it is the only truth we have. In acknowledging the *ars juris*, the aesthetic dimension of law, we open the institution to the ethics of othernessness and the justice of the sense or of *Justitia*, the feminine principle of transcendence that challenges the patriarchy of sublime Law.<sup>734</sup>

The work of scholars such as Costas Douzinas and Antony Chase underpin the argument in this thesis that the moving image removes the blindfold which the law imposes on the figure of Justitia and in doing so highlights the gendered operation of international criminal justice.<sup>735</sup> These narratives in turn will affect the legacy of its Tribunals illustrating why

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<sup>733</sup> Costas Douzinas, 'The Legality of the Image' (2000) Vol 63 Modern Law Review 813, 813.

<sup>734</sup> Ibid 830.

<sup>735</sup> Peter Goodrich 'The Foolosophy of Justice and the Enigma of Law' (2012) Yale Journal of Law and the Humanities 141; Linda Mulcahy 'Imagining Alternative Visions of Justice: An Exploration of the

international criminal courts and tribunals love the image for its power to communicate its outreach goals but should also fear it, for its subversive feminist potential. By showing us what the law refuses to let us see or cannot let us see, these films provide a critical and powerful feminist cinematic jurisprudence on gender crimes.

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## Appendix I

### Film Diary

Date	Film
October 2014	106. Death and the Maiden (1994) 105. Hotel Rwanda (2004) 104. The Hunting Party (2007) 103. Pink Flamingos (1972) 102. Side by Side (2012) 101. No man's land (2001) 100. Children of Sarajevo (2012) 99. Snijeg (2008) 87. Hiroshima Mon Amour (1959) 86. For Those Who Can Tell No Tales (2013)
September 2013	85. Valentina's nightmare (1997) 84. 100 days (2001) 83. Hannah Arendt (2012)
January 2013	82. Pretty village, pretty flame (1996) 81. The Saviour (1998) 80. The Act of killing (2012) 79. My neighbour, my killer (2009) 78. Night and Fog (1955)
October 2012 The blog stops the review at film 74.	77. The Secret Life of Words (2005) 76. War Don Don (201) 75. In the Land of Blood and Honey (2011) 74. Storm (2009) 73. 678 (2010) 72. Machuca (2004) 71. I am cuba (1964) 70. Wolf Children (2012) 69. The Prosecutor (2010) 68. The Night of Truth (2004) 67. Women without Men (2009)
September 2012	66. The Trials of Henry Kissinger (2002) 65. The Fog of War (2003) 64. If the mango tree could speak (1992) 63. Warchild (2008) 62. Under the Bombs (2007) 61. The Courageous Heart of Irena Sendler (2009) 60. The Dictator Hunter (2007) 59. Saddam's Killing Fields (1992) 58. Justice for Sale (2009) 57. God Sleeps in Rwanda (2005)
August 2012	56. The Battle of Algiers (1966) 55. Born into Brothels (2004) 54. Heart of Jenin (2008) 53. April Capitains (2000) 52. The Apple (1998) 51. Notorious (1946) 50. Princesas (2005) 49. 13 Rosas (2007) 48. The Night of the Pencils (1986) 47. In my country (2004)

	46. Alexandra (2007) 45. Divine Intervention (2002) 44. Death in Gaza (2004) 43. West Beyrouth (1998) 42. The Relief of Belsen (2008) 41. War on Democracy (2007) 40. The Circle (2000) 39. The Peacekeepers (2005) 38. Tokyo Trial (2006) 37. Bamako (2006)
July 2012 Some of these films were viewed in June but were written up in the blog in July.	36. Offside (2006) 35. Eichmann's End (2010) 34. John Rabe (2009) 33. Shake Hands with the Devil (2007) 32. Carte Blanche (2011) 31. Nanking (2007) 30. Iris Chang: Rape of Nanking (2007) 29. The Killing Fields (1984) 28. The Debt (2010) 27. Whistleblower (2010) 26. Lilya-4-ever (2002) 25. Srebrenica: Triumph of Evil (2001) 24. When the Mountains Tremble (1983) 23. Stray Dogs (2004) 22. Buddha Collapsed Out of Shame (2007) 21. Breaking the history of silence (2001) 20. Bent (1997) 19. Against all odds: The first ten years of the ICTY (2003) 18. Waltz with Bashir (2008) 17. Grave of the Fireflies (1988) 16. Persepolis (2007) 15. Granito: How to Nail a Dictator (2011) 14. Judgment at Nuremberg (1961) 13. Courting Justice (2010) 12. The Bubble (2006) 11. The Reader (2008) 10. Inherit the Wind (1956) 9 The Milk of Sorrow (2009) 8 The Hurt Locker (2008) 7 The Reckoning (2009) 6 As if I am not there (2010) 5: Turtles can fly ( 2004) 4 Secret Life of Words (2005) 3: Esma's Secret (2006) 2 La Historia Oficial (1986) 1. Welcome to Sarajevo (1997)

## Appendix II

### Aide Memoire

#### Crimes

- Rape
- Sexual violence (mutilation/ forced nudity/ dancing)
- Torture
- Outrages upon personal dignity
- Sexual enslavement (ownership, control etc)
- Deportation
- Ethnic cleansing
- Forced pregnancy

#### Context

- Armed conflict
- Distinction (civilians/armed groups)
- Actors in conflict (insignia)
- Ethnicity
- Gender dynamics between characters
- Resistance/ Agency
- Coercive circumstances

#### Legal technicalities

- Rules of evidence
- Procedural evidence
- Accuracy
- Courtroom dynamics
- Consent
- Representation of female lawyers

#### Film narrative

- Aftermath
- Closure
- Testimony
- Relationships
- Portrayal of femininities and masculinity
- Consequences: economic, social, reproductive
- Sexuality

#### Film specifics

- Shots (point of view, close up, medium for identification)
- Frame
- Music and sounds
- Edits (ex. Jump cuts)
- Silences and speech
- Flashbacks
- Gazes (Laura Mulvey)



- Eye contact
- Colour