

Symbolic Exits from Trauma? War Crimes Tribunals, Sexual Violence and Juridical Performances of Healing

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Abstract

The growing tendency to view international war crimes tribunals not only as institutions that mete out justice, but also as vehicles for healing victims of wartime violence marks a notable shift in International Humanitarian Law (IHL). This “therapeutic turn” in IHL finds clear expression with the advent of the International Criminal Tribunals for the former Yugoslavia (1993) and the International Tribunal for Rwanda (1994). Both tribunals kicked off what has been referred to as the “tribunal era,”¹ which ushered in an unprecedented emphasis on victims of atrocity. This inquiry critically engages the tribunals’ adjudication of sexual violence as a war crime in the context of the therapeutic turn.

Using trauma theorist Shoshana Felman’s conception of historical trials as a lens, I seek to shed light on the ways the tribunals may in fact impede or preclude the sort of catharsis her account presupposes. I have chosen two case studies to illustrate some of the unforeseen costs of extending the promise of legal healing: First, I contend that the very discourse that promises to heal female victims of sexual violence can effectively reduce those very women to their status as victims. Second, I argue that “other” victims of wartime sexual violence (here: males), are frequently misrecognized or rendered invisible in this paradigm of legal healing. My analyses of these cases explore how therapeutic-juridical interventions can undermine their avowed aims, while concealing the power relations that they rely upon and perpetuate.

Key Words

Justice, trauma, testimony, trials, gender, sexual violence, catharsis, symbolization, narrative.

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¹ Scheffer (2012), 4.

Introduction

Dilated Juridical Remedy

Shoshana Felman conceives of trials and traumas as inextricably linked, wherein “historic” trials (such as the post Second World War Nuremberg trials, and the more recent trials of the *ad hoc* Yugoslavian and Rwandan War Crimes Tribunals) function as new paradigms of justice that go far beyond meting out punishment; they also perform what she characterizes as “symbolic exit[s] from the injuries of traumatic history.”² Noting that the twentieth century was one of collective and individual traumas, historic trials, and an explosion of trauma theories, Felman characterizes the courtroom as a theater of justice—as the stage upon which the public can witness dramatic transformations of the private traumas of what I will call victim-witnesses, into public narratives. These narratives, she maintains, help to exhume, symbolize, and contain the ghostly traumas of past atrocities.³

Seen in this light, *judicial remedy* is dilated to include not only the more conventional ingredients of punishment of legal wrongs, but also comprises psychological and social remedies for the wounds left in the wake of campaigns of violence. The new protagonist of this juridical drama is the victim-witness—not the Defendant or the crime/s committed against “the social order,” as has been the convention in Western legal systems for centuries.⁴ Here, the victim-witness’s mnemonic performance, or verbally animated reenactment of her experience (through testimony) breathes life into the past scene of trauma, thereby providing the material and affective conditions required for individual and collective healing.

In this schema, public articulations of traumatic truths, if received sympathetically, can purportedly pave the way to liberation from the isolation and torment caused by buried, painful memories. Felman describes the conditions for this conversion as follows:

The [historic] trial articulates its legal meaning through... the unconscious body of the witness, history within the courtroom speaks beyond the limits of speech. It is because the body of the witness is the ultimate site of memory of individual and collective trauma—because trauma makes the body matter, and because the body testifying to the trauma *matters in the courtroom* in new

² Felman (2002), 1.

³ *Ibid.*, 1-10.

⁴ For more on the gradual turn in Western European and North American law from crime as a social offence—as an affront to a given social order or state, and its values and interests—to crime as an affront to an individual or collective victim, see Elias (1986). Much has been written on the Western-centrism or Eurocentrism of international humanitarian and human rights law. See, for example: Mutua (2002); Pickering and Lambert (2004); Charlesworth & Chinkin (2000). The tribunals serve as key vehicles for the reproduction and extension of these traditions and norms.

ways—that these trials have become not only memorable discursive scenes, but dramatically physical theaters of justice.⁵

Felman's cathartic account of trials serves as one instantiation of a much broader trend—one that calls for greater critical analysis. Elsewhere I refer to this burgeoning phenomenon as the therapeutic turn in international humanitarian law (hereafter: IHL).⁶ Over the last half-century, the field of jurisprudence has witnessed the emergence of a hybridized discursive terrain on which the juridical and the therapeutic merge. The international criminal tribunals have become sites of the intensification and dramatization of this development.

The therapeutic turn in international humanitarian law pivots on the interlinked premises that “revealing is healing”⁷ and that the status and needs of victims are an integral part of meting out justice.⁸ Central to this model is the proposition that narrating one's experience of victimization—be it in a courtroom, truth and reconciliation commission (TRC), documentary film, or memoir—is presumed to help set one free from psychic pain and from histories of oppression and violence. Lines of descent and affinity can be drawn between this set of presuppositions in fields such as restorative justice, therapeutic jurisprudence, and the strain of trauma studies Felman aligns herself with.

Here I would like to consider Felman's depiction of the trial with respect to the *ad hoc* tribunals of Yugoslavia and Rwanda's adjudication of sexual violence in two landmark cases, using the following questions to guide my inquiry: Which bodies and subjects “matter” in this discursive domain and what are the conditions of their materialization?⁹ With what effects do the

⁵ Felman (2002), 9.

⁶ Anders (2012).

⁷This was the motto of the South African Truth and Reconciliation Commission, and captures a constitutive element of the therapeutic turn, especially in the context of transitional justice measures. In this context, narrating the “truth” of one's experience of victimization (or perpetration) is figured as the path to personal and communal healing. Healing in this frame is seen as the condition of possibility for reconciliation. The ascendance of transitional justice and therapeutic jurisprudence, and the truth and the reconciliation commissions these overlapping enterprises have engendered, has thus involved what Njabulo Ndebele deems the “triumph of narrative” (Ndebele (1998), 19). This narrative element is akin to Felman's account of testimony as the chief method for attaining individual and collective healing. For more on this see: Anders (2012), Chapter 3; and Cole (2009), x.

⁸ For more on the rise of therapeutic jurisprudence, see: Ignatieff (1999), Osiel (1995), Hamber (1995), Alvarez (1998), Wexler & Winick (1996), Henry (2005). The International Network of Therapeutic Jurisprudence (INTJ) describes the field as follows: “[it] concentrates on the law's impact on emotional life and psychological well-being. It is a perspective that regards the law (rules of law, legal procedures, and roles of legal actors) itself as a social force that often produces therapeutic or anti-therapeutic consequences. It does not suggest that therapeutic concerns are more important than other consequences or factors, but it does suggest that the law's role as a potential therapeutic agent should be recognized and systematically studied.” (INTJ website: <https://law2.arizona.edu/depts/upr-intj/>).

⁹ Here I am referring to Felman's quote above, but also borrowing from Judith Butler's theorization of the ways bodies and gendered subjects “materialize” or come to matter through discursive processes. For Butler, the materiality of sex is constructed through the “ritualized repetition of norms” and is an effect of dynamic power relations (Butler (1993), x).

tribunals produce the terms of symbolic legibility and the very subjects they set out to heal? And finally, in what ways are the operative norms of progress and healing gendered in these juridical theatrics, and how might they clear the way for, or obstruct exits from, traumatic injury?

Without dismissing the advancements made when it comes to the adjudication of sexual violence as a war crime *in toto*, and without denying the possibility of some sort of cathartic experience for victims altogether, I seek to advance a two-pronged argument: First: I contend that, despite increased efforts to make visible and attend to the widespread use of sexual violence as a tool of war, the closer we look, the more we begin to comprehend the ways in which certain gendered tropes mobilized in trials can silence the victims they bring into their fold, and can occasion their own forms of symbolic violence.¹⁰ And by extension: as inspiring and hopeful as a Felman-esque trial may be, the close readings performed here are meant to shed light on the ways that tribunals may impede or preclude the sort of catharsis Felman outlines.¹¹

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It is no accident that IHL's therapeutic turn came into its own in an age when—in Michael Barnett's words—"compassion is seen as a virtue [...] so much that it has become a status symbol, and individuals, organizations and states compete to be recognized for their generosity."¹² He sees this development as distinctly Western and bound up with enduring investments in the post-enlightenment "man of feeling."¹³ Tethering healing to the act of narrating one's story of suffering—and having it be heard by a compassionate audience (a contemporary dilation of the Freudian talking cure)—is a patent expression of this trend. Barnett asserts that compassion's privileged status has given rise to a new

¹⁰ Michel Foucault's critique of law—which I draw on here—takes distance from a common assumption made by many tribunal advocates and aforementioned advocacy groups; that is, the assumption that law's neutrality is both achievable and paramount to its ability to deliver justice. In this model, the law is defined in opposition to power and violence and marks a point of rupture wherein the disorder of the past is replaced by the ordering function of juridical institutions. Yet with Foucault's analytics of legal power, a perception of the law as a neutral, curative mechanism immune to domination and regulation of body-subjects becomes untenable (Foucault (1984), 85).

¹¹ Although she pays heed to what she calls law's "oppressive" sides, and to the problem of trauma's unrepresentability, Felman nevertheless gives considerable weight to the power of legal testimony to represent and repair "private but also collective historical injustices" and at times renders the trial in this sense as immune to its own forms of violence (Felman & Laub (1992), 20). Moreover, she at times loses sight of the ways victim-witness's testimony in the so-called historical trial—which she claims provides the stage upon which the persecuted and otherwise silenced can express their traumas—is not the only story expressed (Felman (2002), 13). This story competes with other stories and thus is always at risk of being undermined, truncated, and twisted. In other words, the expression and dramatization of trauma that she claims the courtroom enables, and which serves as a pathway to healing, may induce new forms of trauma and obstruct pathways to juridical healing.

¹² Barnett (2011), 220.

¹³ Ibid.

“international humanitarian order....supported by international laws, norms and institutions” that seek to alleviate suffering around the world.¹⁴

In a similar vein, Miriam Ticktin argues that humanitarianism’s institutionalization of compassion (be it in a war crimes courtroom, a TRC, a refugee camp, or an anti-terrorism policy erected in the name of security) reflects a new and expanding configuration of power and form of governance—a “politics of compassion.”¹⁵ These authors highlight the fact that these international efforts are often steeped in Western legal, political, and cultural traditions, but cloaked in the mantel of universalism and neutrality. Barnett, Ticktin and others¹⁶ seek to draw attention to the Eurocentrism and colonial legacies of the very institutions that have emerged as guarantors of “compassionate” legal and political interventions, pointing to the regulatory and paternalistic effects they can occasion. The *ad hoc* tribunal is but one manifestation of this geo-political development, and is thus not immune to the kind of deleterious effects the politics of compassion can precipitate.

Availing myself of Michel Foucault’s account of law as a “multiple and mobile field of force relations” situated squarely within relations of power,¹⁷ I want to highlight the ways that the tribunals can give rise to something quite contrary to their stated missions of gender justice and attention to victims. One might see international law’s highly mesmerizing promises of juridical healing, reconciliation, and justice as proof that humanity has “gradually progress[ed] from combat to combat until it arrive[d] at universal reciprocity, where the rule of law finally replace[d] warfare.”¹⁸ Foucault troubles this narrative of progress, however, when he proposes that, “humanity installs each of its violences in a system of rules and thus proceeds from domination to domination.”¹⁹

In other words, this new humane law does not wholly dispense with violence and domination. On the contrary, it traffics in particular modalities of violence under the banner of rule of law, justice, and peace. Political theorist Wendy Brown avers that, to some extent, this process involves trading “one form of subjection for another.”²⁰ To examine this embryonic juridical mechanism of the *ad hocs* through such a lens illuminates disturbing and tacit effects of its workings; intelligibility as a

¹⁴ Ibid.

¹⁵ Ticktin (2006), 34.

¹⁶ In her book *Juridical Humanity. A Colonial History*, for example, Samera Esmeir (2012) challenges the conceit that modern law serves as “a place in which some forms of resistance against colonialism could unfold”. Instead, she makes the case that this law’s promise of humanization and recognition for colonial subjects is central to the colonial enterprise and its particular configurations of violence. Although Esmeir examines Egyptian colonial history to support her claims, her inquiry speaks to the Eurocentrism of IHL insofar as it highlights the ways contemporary “law endows itself with the power of humanization” and aligns itself with compassion over and against violence (Esmeir (2012), 2).

¹⁷ Foucault (1978), 102.

¹⁸ Foucault (1984), 85.

¹⁹ Ibid.

²⁰ Brown (2004), 455.

victim, or “inclusion” within this discursive domain, does not preclude pathologization, regulation or forms of marginalization.

The international criminal trial becomes a privileged site to deploy and reify gender norms and drape culturally embedded regulative ideals in the mantle of universal human values. These trials also wield a considerable and new form of power over those individuals to which they explicitly or implicitly extend the promise of legal healing.²¹ The power also extends to those who believe such trials can help heal communal traumas in a post-war landscape.

The Ad Hocs — A New Generation of Tribunals for the “Most Victimized” Victims

The United Nations Security Council established the *ad hoc* International Criminal Tribunal for Yugoslavia (ICTY) in 1993 in response to crimes committed throughout the conflict in the former Yugoslavia. It was the first of its kind. In the following year, the International Criminal Tribunal for Rwanda (ICTR) was created in response to the genocide of Tutsi and moderate Hutus in 1994. Both tribunals were established to “prosecute persons for genocide and other serious violations of international humanitarian law” that occurred in the respective territories and within a specified timeframe.²² During the conflicts in Rwanda and the territories of the former Yugoslavia, rape and other forms of sexual violence occurred on a massive scale.²³

The ICTY and ICTR have been championed by numerous feminists and human rights advocates as indisputable markers of progress in the fight to end impunity for perpetrators of sexual violence during war, as milestones for struggles against the oppression of women and girls, and as a step closer to eradicating “gender-blindness” in international law.²⁴ In other

²¹ The extent to which the *ad hocs* subscribe to a more therapeutic jurisprudential approach has been a subject of contention. For example, some practitioners and theorists deny or downplay the courts’ therapeutic leanings, though I have sought to show elsewhere—with the help of interviews with court officials and discourse analyses of trial documents—that the courts’ unprecedented attention to victims and their reliance on the rhetoric of juridical healing have been integral to their operations and image. I have also pointed to the ways in which individuals and communities are often viewed as victims in need of legal healing in this discursive landscape. (Anders (2012), Chapter 4).

²² The Statute of the International Criminal Court for the former Yugoslavia, S.C. Res 827. UN Doc. S/Res/827, May 25, 1993: Article 1; The Statute of the International Criminal Court for Rwanda, S.C. Res 955 UN Doc. S/Res/955, Nov 8, 1994; hereafter ICTY Statute, ICTR Statute: Article 1. Both statutes can be found on the tribunals’ respective websites: <http://www.icty.org/sid/135> and <http://www.unictr.org/Legal/StatuteoftheTribunal/tabid/94/Default.aspx>

²³ See: Human Rights Watch (1996); Moser and Clark (2001); Bassiouni (1996); Vesna Nikolic-Ristanovic (2000); Askin (1997).

²⁴ Over the last three decades, a number of feminists have charged the ostensibly “universal” law of human and humanitarian law with androcentrism, drawing attention to the gap that exists between rights for the “human” of this legal discourse—based on a masculine model—and rights for “women.” These thinkers have charged human rights and humanitarian law with gender blindness, characterized by an implicit gender-bias that fails to recognize and

words, although this legal discourse pivots on the assumption of inclusive universal humanity, many feminists have sought to point out “the fundamentally male cast of the international legal order,”²⁵ and the androcentric conception of the human that grounds it. As such, they point out the ways this rendering of the human constitutes a mode of privileging the norms and rights that adhere to and buoy hegemonic masculinity, while often disavowing and eclipsing particular embodied, material, political, and cultural differences marking and suffusing otherwise gendered subjects (here: females). The most common approach to rectifying these blind spots in humanitarian law has involved calls for more gender-sensitive legal measures, the extension of greater juridical services to female victims, and the overall expansion of the law to make room for previously marginalized groups (in this case, females).

The tribunals took the lead when it came to prosecuting acts of sexual violence as war crimes, crimes against humanity, grave breaches of Common Article Three of the Geneva Conventions, and genocide.²⁶ Many involved with the cause celebrated this new “gender-friendly” approach, as it had helped to secure a central place within the tribunals’ domain for prosecuting crimes committed disproportionately against women and girls in times of war. The tribunals voiced their commitments to gender issues²⁷ and the pervasive use of sexual violence as a tool of war began to be taken seriously.²⁸

Until somewhat recently, rape and related acts of sexual violence have primarily been seen as unfortunate, but permanent facets of armed conflict.²⁹ The remarkable developments of the tribunals, in their efforts to impose criminal responsibilities on leaders and others responsible for carrying out sexual violence, represent a significant shift in international

accommodate women’s specific experiences. See: Charlesworth & Chinkin (2000); Peters & Wolper (1995); Askin (1999); Pilch (2003).

²⁵ Charlesworth (1994-1995), 2.

²⁶ By this I mean that, unlike the Nuremberg and Tokyo trials, the ad hoc tribunals prosecuted rape and sexual violence crimes expressly, consistently, and not solely in conjunction with other crimes. See Askin (2003) for more on the ways in which the aforementioned crimes were rendered in the Nuremberg and Tokyo war crimes tribunals, respectively.

²⁷ One place that the tribunals’ commitment to sexual violence crimes is made evident is in the Rules and Procedure of

Evidence of both the ICTR and ICTY, where victims’ rights and protection were elaborated and codified, especially Rule 69, 34, 40, 69, and 75. For the impact this has on women, see Aafjes (1998) and Ohman (2003).

²⁸ See, for example: Koo (2002); MacKinnon (1998); Askin (1999); Moser & Clark (2001); Lentin (1997); Women, Law & Development International (1998); Charlesworth & Chinkin (2000).

²⁹ For an historical account of the evolution of sexual violence in international law, see: Askin (1997, 1999); Moser & Clark (2001); Bassiouni (1996); Women, Law and Development (1998).

law and should not be taken for granted.^{30 31} That said, I would like to home in on some of the problematic ways that sexual violence has been rendered in two of the ICTY and ICTR trials and consider the prospects for both gender justice and legal healing in the face of these renderings.³²

One place where the therapeutic turn is made most evident is in the case of sexual violence as a war crime. On countless occasions, trial staff and advocates have made explicit reference to sexual violence as the most serious of offences and sexual violence victims as the most vulnerable of all victim groups—as those most desperate for the healing administered by the tribunals.³³ The sexual violence victim operates as the victim *par excellence* of this victim-centered discourse, as evidenced in Madeline Albright's statement to the United Nations Security Council in 1993, when she stressed that “the voices of the groups most victimized [will be] heard by the Tribunal.”³⁴ The category of “the most victimized” applied—for Albright—“in particular to the female victims of systematic rape” from the Yugoslavian war.³⁵ Her speech set the tone for the first *ad hoc* tribunal's tenure, and the ICTR followed suit.

Special Tribunal Victim and Witness Units have been established to protect and provide services for tribunal victim-witnesses of all kinds, but it has been clear from the start that such measures were primarily a response to

³⁰ Cherif Bassiouni notes that “rape has not been prosecuted internationally [because] acts which primarily harm women have not been viewed by men who make policy decisions as violations of those women's human rights. Furthermore, rape and sexual assault are often viewed as private aberrational acts, not proper subjects for international public forum.” (Bassiouni (1996), 557-558).

³¹ With the Nuremberg and Tokyo trials, for example, the problem laid not so much with the existing laws, or with the absence of international laws needed for prosecutions, but rather with enforcing the law's prohibitions, combined with the longstanding marginalization of crimes against women domestically and internationally. The Nuremberg War Crimes Tribunal neglected the issue of widespread sexual violence committed by German soldiers and military leaders during WWII. The Tokyo War Crimes Tribunal paid scant attention to sexual violence carried out on a massive scale by the Japanese military; the crimes were mentioned only in conjunction with other crimes and were thereby eclipsed by what were seen as more serious war crimes. See: Askin (2003).

³² Although one can point to divergences between the two tribunals' histories and records with respect to the adjudication of sexual violence, this article is primarily concerned with a select few of the most prevalent problems pertinent to both institutions.

³³ For example, in an ICTY Bulletin, sexual violence crimes are deemed “the most heinous crimes.” (ICTY Bulletin, No.7, 1998). Patricia Sellers Viseurs, the Legal Officer on Gender Issues for the ICTY, situates sexual violence as the kind of violence that—unlike romanticized violence bound up with notions of heroism, such as defending the homeland—can never be romantic or heroic. Sexual violence serves as a sort of limit case when she avers, “when part of violence incorporates sexual violence, one really has to question the validity of any violence whatsoever, no matter how romantic.” She places sexual violence far apart from other forms of violence on a violence spectrum of sorts, positioning it as more extreme and hideous than other forms of violence. (Sharrat (1999), 5)

³⁴ Statement by Madeleine Albright to the United Nations Security Council on the day U.N. Resolution 808 was adopted (which established the International Criminal Tribunal for the Former Yugoslavia). The statements made prior to its adoption were reproduced in Virginia Morris and Michael Sharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*, vol, 2 (1995), pp. 157-179.

³⁵ *Ibid.*

the unprecedented number of sexual violence victims from the Yugoslavian and Rwandan conflicts.³⁶ Such protections, along with participation in the trial process, were thought to help female victim-witnesses recover from the traumas they endured. Below I explore some of the possible drawbacks of rendering sexual violence victims the most victimized of victims, insofar as this assumption can, in certain instances, ground understandings of these victims as reducible to their injuries.

Despite the positive developments in the effort to grant sexual violence crimes a place in war crimes tribunals, some feminist activists, scholars and tribunal staff members have reproached the tribunals for a number of reasons: because sexual violence convictions account for only a small fraction of cases in the ICTY and ICTR,³⁷ for inconsistent charging practices in sexual violence cases,³⁸ for low number of female judges involved in the trials,³⁹ for the relatively short sentences for gender-based crimes,⁴⁰ for insufficient gender-sensitivity training for prosecution teams, for “shoddy” investigative work, for a general lack of political will, for failing to grant financial reparations to victims, for treating victims like “cogs in the machine,” for failing to keep victim-witnesses safe,⁴¹ and for alienating witnesses and conflict-affected communities by failing to provide information on court procedures and the progression of cases.⁴² The tribunals’ neglect of its “most victimized” is epitomized by the fact that many victim-witnesses of sexual violence are ultimately told they will not be allowed to testify after traveling long distances.⁴³ Moreover, they must

³⁶ The establishment of a VWS—Victim and Witness Sections—in each of the *ad hoc* tribunals was seen as a means of putting an end to the marginalization of female victims of sexual violence committed in conjunction with war in particular, to better protect witnesses from intimidation and danger, and to avoid or at least mitigate the risk of retraumatization that can result from retelling one’s story/testifying. (See, for example: *Prosecutor vs. Tadić*, “Decision on the Prosecutor’s Motion Requesting Protection for Victims and Witnesses” para. 46). The VWSs were set up in accordance with the respective tribunals’ statutes’ *Rules and Procedures of Evidence* (Rules 69, 75 and 34). Rule 34 states: (A) There shall be set up under the authority of the Registrar a Victims and Witnesses Section consisting of qualified staff to: (i) recommend protective measures for victims and witnesses in accordance with Article 22 of the Statute; and (ii) provide counseling and support for them, *in particular in cases of rape and sexual assault*. (B) Due consideration shall be given, in the appointment of staff, to the employment of qualified women” [emphasis mine]. Part of the VWS’s mandate is to “foster an environment in which testifying can be experienced as a positive, strengthening, and enriching event.” (Rhone (2003), 3).

³⁷ The fact that the number of rape acquittals is twice the number of convictions underscores the severity of the problem. See: Nowrojee (2005), 8.

³⁸ Oosterveld (2005), 125-130.

³⁹ Recent studies indicate that having more women in key positions within the tribunals increases the probability of effectively documenting sexual crimes, as well as the probability that testifying victims will feel more comfortable about the process (Haffajee (2006), 205).

⁴⁰ Charlesworth & Chinkin (2000), 300.

⁴¹ There have been numerous reports of victim-witnesses of sexual violence who have been threatened, intimidated and even physically harmed as a result of their cooperation with the tribunals. See: Nowrojee (2005); Coalition for Women’s Human Rights in Conflict Situations, Rights and Democracy, and International Center for Human Rights and Democracy (2003); Hironelle News Agency (2002).

⁴² Nowrojee (2005), 2-11.

⁴³ In an interview with the head of the Victim and Witnesses Section of the ICTY, Holger Rohne, notes that 11% of victim-witnesses in sexual violence cases who appeared in the Hague did not

often endure emotionally grueling and protracted testimony preparation, and their safety may be compromised upon return to their home countries.

There have been relatively few studies of the effects of tribunal participation for victims of sexual violence, yet several existing studies suggest that many of these women are left dissatisfied and further traumatized after testifying.⁴⁴ Many women from the former Yugoslavia and Rwanda have reported feeling disappointed by the tribunals, and have been more concerned with survival than abstract rulings in a distant courtroom.⁴⁵ Despite these troubling findings, some involved in the tribunals' gender justice and victim's movements fail to adequately question the law's regulative or violent dimensions,⁴⁶ or fully consider the repercussions of continuing to promote the expansion of juridical healing. Drawing on Foucault's claim that confessional discourse meant to liberate can bring with it unanticipated costs, Linda Alcoff and Laura Gray maintain that:

When breaking the silence is taken up as the necessary route to recovery... it becomes a coercive imperative on survivors to confess, to recount our assaults, to give details, to even do so publicly...But it may be that survival itself sometimes necessitates a refusal to recount or even a refusal to disclose and deal with the

end up testifying. These women felt significant frustration when they learned they would not “experience the testimony as a help to bring closure to their victimization” (Rohne (2003), 5).

⁴⁴ Nowrojee (2005), 4.

⁴⁵ As one female rape survivor put it: “If the [Rwandan] tribunal does not change its approach to give value to women, then it's not worth it for us to work with them. Women have so many other things to worry about. Why should we waste our time with the tribunal?” (Ibid., 12).

⁴⁶ The paucity of empirical evidence to substantiate claims that criminal trials have the power to help victims heal from war-related traumas may account for this fact. Or, perhaps the scarcity of such studies reflects the pervasiveness and power of the assumption that justice can in fact heal (i.e. suggesting that we do not need to examine the issue further). Eric Stover (2005) has written on witnesses' experience of testifying before the ICTY, but he does not focus on the experience of sexual violence victim-witnesses *per se*. Although his findings suggest that some witnesses experience the process of giving testimony in a positive manner, he warns against viewing the tribunals as “some kind of panacea for righting past wrongs or as a ‘magic bullet’ for ‘healing’ victims of war-torn societies” (Ibid., 16). Two theorists have focused on particular ICTY sexual violence cases and their capacity to alleviate the suffering and challenges specific to sexual violence victims—Gabi Mischowski and Julie Mertus. In her work, Mischowski reaches no conclusions, yet lists several reasons that many women may choose not to testify and suggests that the tribunal could better serve them with expanded witness-protection measures. (Mischowski (1998), 2). Mertus concludes that the witness stand does not offer victims a safe place to tell their stories, given that they are frequently interrupted and aggressively questioned in cross-examinations, and are subject to highly specific and fact-based prosecutorial questioning. She maintains that, in order for sexual violence victims to regain a sense of agency, the tribunals need to be supplemented with other extra-legal processes and programs (Mertus (2004), 124). A study by Marie-Bénédicte Dembour and Emily Haslam on the effects of testifying on victim-witnesses (of all kinds) argues that war crimes trials in general “effectively silence, rather than hear, victims” (Dembour & Haslam (2004), 151). They do not establish this to be the case in the ICTR or other, similar trials, but—by extension—use the ICTY as the negative example to support their general claim. Although very little research has been done on the value of testifying for victim-witnesses of the ICTY, there have been no systematic examinations of the ICTR with regard to this question of the benefit of participation/testifying for victims—be they sexual violence victims or other kinds of victims.

assault or abuse, given the emotional, financial and physical difficulties that such disclosures can create.⁴⁷

The authors attend here to the risks of “revealing” traumatic experiences, especially publicly, and highlight the coercive potential of the paradigm of healing in question. One is inclined to temper endorsements and celebrations of the tribunals’ remedies for sexual violence when realizing that participation with the tribunals frequently results in increased emotional suffering and potential risks to one’s safety. Several ICTR and ICTY cases lay bare the aforementioned deficiencies, disavowals, and the unforeseen effects of legal curatives, some of which I would like to touch upon next.

Woman as Ideal Victim: The Discursive Operations of Destruction and Disavowal

The sexually violated female body on the witness stand sometimes operates as the quintessential symbol of traumatic shattering in this juridico-therapeutic discursive scene. In the discourse in question, healing regularly involves recovering the psychic, bodily, and narrative “integrity” ostensibly lost via trauma. Such integrity is identified with “closure” and opposed to the shattering or dis-integration typically thought to characterize trauma.⁴⁸ Legal scholar Jose Alvarez maintains, “the model of closure...has provided the single, coherent rubric to justify the international tribunals.”⁴⁹

Closure—and the reintegration of the shattered self that it presumes—surfaces in this discourse as both the condition for, and the proof of, healing in atrocity’s wake. This produces a paradox: While the ostensibly shattered female body-subject is rendered the most in need of healing and “closure,” it/she is also sometimes the least likely to attain it. And if we probe further into the construction of the sexually violated body-subject in certain *ad hoc* trials, we can begin to see the ways in which male victims of wartime sexual violence occupy the space of the disavowed and/or misrecognized sexual violence victim. Their path to possible legal or psychological closure is thus also strewn with obstacles.

The Destroyed Victim

In the watershed *Prosecutor vs. Akayesu* ICTR case in 1998, Jean-Paul Akayesu was charged with rape as genocide—a first for international law. Akayesu was bourgemestre⁵⁰ of the Rwandan commune Taba. He was convicted of numerous counts of genocide, crimes against humanity (which included torture, extermination, rape and murder), and “other inhumane

⁴⁷ Alcoff & Gray (1993), 281.

⁴⁸ Herman (1997), 41.

⁴⁹ Osiel (1995), 19.

⁵⁰ Equivalent to the Mayor.

acts.”⁵¹ Given these successful convictions and the unprecedented attention given to sexual violence in the trial,⁵² this case has been heralded by some gender justice advocates as the most progressive of all the sexual violence cases tried by the two tribunals.⁵³ Moreover, it has been touted as the benchmark by which to measure sexual violence cases tried by the two tribunals.⁵⁴ Yet, closer examination of the gendered assumptions informing the Chamber’s rhetoric suggest that intelligibility as a victim of sexual violence may come with significant costs. Recognition on the part of the court as having been wronged in this way would seem to obstruct rather than facilitate symbolic exits from traumatic histories.

In the ICTR *Akayesu* case, we can observe a troubling account of genocidal rape, insofar as the group/community (that a rape victim is a member of) can ‘trump’ the individual victim’s experience of victimization. The latter also dovetails with the tribunals’ unsettling tendency of figuring rape as something that “destroys” the victim, defining and canceling her whole being.⁵⁵ ICTY Judge Gabrielle Kirk McDonald, for instance, states “rape does not only destroy women, it destroys the family.”⁵⁶

Departing from this stance, Nusreta Sivac, who testified at the ICTY about her experience as a Bosnia-Herzegovinan prisoner and sexual violence victim in the Omarska camp, criticized the tendency to describe a raped woman “as if [she] had no other characteristic, as if that [was her] sole identity.”⁵⁷ In a similar vein, my analysis seeks to draw attention to the ways representations of sexual violence can hurt the very women these courts are attempting to help. Unlike the brute violence the *ad hoc* tribunals are charged with prosecuting, my analytic lens considers more subtle forms of subjugation and regulation that can be thought of here as symbolic violence. Symbolic violence constitutes forms of domination that work by way of actions and speech that have injurious meanings or implications.⁵⁸

I will briefly elaborate my argument here with reference to specific aspects of the *Akayesu* judgment, wherein rape was held to constitute genocide. The Chamber made room in its final judgment to reflect on sexual violence as a weapon of war, and its disastrous effects on women from a particular

⁵¹ *Prosecutor vs. Akayesu*, Judgment. ICTR-96-4-T (ICTR, 2 September 1998), 4.

⁵² That is, once the sexual violence charges were added to the Indictment. Factors contributing to the case’s landmark status include: the detailed legal analysis of issues related to sexual violence as a tool of war, the broad and progressive definitions of sexual violence and rape, and the Court’s recognition of the sensitivity of the issue and the difficulties facing witness/victims.

⁵³ See for example: Haffajee (2006); Obote-Odora (2005).

⁵⁴ Nowrojee (2005), 16.

⁵⁵ This bold statement on the part of the *Akayesu* Chamber is frequently touted by advocates of gender justice. For a Trial Chamber to take the time in its final judgment to reflect on sexual violence as a weapon of war, and its disastrous effects on women from a particular ethnic group, is quite unusual.

⁵⁶ Sharratt (1999), 32.

⁵⁷ Halley (2008), 114.

⁵⁸ This position is based in part on Pierre Bourdieu’s concept of symbolic violence. Bourdieu’s later work situates gender domination as the “the paradigmatic form of symbolic violence.” Bourdieu & Wacquant (1992), 170.

ethnic group—a highly unusual move. Granting this degree of attention to the subject, and charging someone with rape as genocide for the first time, *Akayesu* has earned the status of a “watershed” and “landmark” case by many working in the field of gender justice.⁵⁹ Particularly, the following passage of the judgment stands out in this respect:

The rapes resulted in physical and psychological destruction of the Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to the destruction of the Tutsi group as a whole. The rape of the Tutsi women was systematic and was perpetrated against all Tutsi women and solely against them.⁶⁰

One of the most troubling features of the judgment is the way rape is figured as the full-scale destruction of the raped women (even those that survived the rapes and various forms of abuse and trauma).⁶¹ Rape is thus in some sense equated with murder, insofar as it is tendered as a social and psychological death. The tendency to equate rape with the destruction of the self, and even with death, is surprisingly common in this discourse. In this instance, the language of destruction found in this passage and other parts of the judgment is, at least in part, borrowed from the legal definition of genocide outlined in the ICTR and ICTY statutes: Acts committed “with the specific intent to *destroy*, in whole or part, a particular group.”⁶²

Although the destructive element is central to proving a given act is genocidal, to claim that even surviving rape victims are “destroyed,” reinforces the troubling notion that a raped woman is a ruined woman and no longer has a place in the world of the living. As such, she no longer occupies a legitimate place in the social order. Moreover, this move seals her fate as the incarnation of extreme victimhood and as the wound that cannot be healed. What possibilities exist for “exiting” trauma in this arrangement, where identification with “destruction” is the condition for legal recognition? And what of the survivors who do not experience themselves as “destroyed”? This account makes little room for alternative experiences of victimhood and survival, and insists on a petrified, painful past at the expense of an otherwise future.

Of course it is necessary to describe the particulars of the case (i.e., the fact of the rapes, the victims, the malicious intent behind the rapes that fulfill the chapeau requirements of the crime, etc.), but reducing the rape victim to her rape risks exacerbating the ideologically laden accounts of female

⁵⁹ Askin (2005); Nowrojee (2005); Haffajee (2006).

⁶⁰ *Prosecutor vs. Akayesu*: para.731-2.

⁶¹ This case, and some of its troubling assumptions about gender, was first brought to my attention by my colleague Alyson Smith in her master’s thesis *Rape in Genocide: A Theoretical Exploration of Policy Implications* (London School of Economics, MSc in Gender Studies, 2001; on file with author)

⁶² Statue of the International Tribunal for Rwanda: Article 2; Statue of the International Tribunal for the former Yugoslavia: Article 4.

purity and impurity framing the crimes in question: For the rapes of one side to have the desired, destructive effect on the “enemy” camp, members of both groups (here Hutu and Tutsi) must share an understanding of purity and impurity, wherein a raped woman is deemed contaminated and destroyed. In a sense, legal figurations of the raped woman as destroyed dangerously echo representations of women in the very discourse blamed for inciting the mass rapes carried out by Hutu militias.⁶³ If social stigmatization in the aftermath of rape constitutes a deep source of suffering for victims, then the Chamber’s rhetoric of destruction can be seen as perpetuating that stigmatization and the suffering it spawns.

What is more, describing the trauma endured by a genocidal rape victim in terms of *her* destruction is only a short metonymic step away once she is rhetorically established as the symbol of the community targeted for destruction. In the passage cited above, the rapes of Tutsi women are, by extension, represented as the “rape” or “destruction” of “all Tutsi women” and the entire “Tutsi group as a whole.” Here we see how the crimes committed against the raped women become easily overshadowed by attention to what the crimes mean for the community to which she “belongs”, or for “Tutsi women” as a group; the individual victims are lost amidst the collectivities invoked here. Elsewhere in the judgment, the Chamber avers that the raped Tutsi women were “subjected to the worst public humiliation, mutilated, and raped several times, often in public” and directly links this to the “destruction” of Tutsi women.

Some scholars, such as feminist legal theorist Kelly Dawn Askin, applaud the Chamber for drawing attention to the fact that Tutsi women “were presented as sexual objects”⁶⁴ when they discussed the link between “sexualized representations of ethnic identity”⁶⁵ and the targeting of Tutsi women. Indeed, at first glance the Chamber’s acknowledgment of women as ethnically marked sexual objects seems to reflect a positive development for the adjudication of sexual assaults as war crimes. However, the Chamber’s double-emphasis on the public dimensions of the crime that ultimately “destroys” comes with considerable disadvantages: The Chamber attempts to legally redress the crimes committed against the community, but the violations to which the individual women were subjected are not treated as discrete crimes worthy of their own legal

⁶³ The ICTR has charged several Hutus with the crime “Incitement to Genocide.” In the so-called “Media” Trial, the Court acknowledged that vitriolic speech acts or publications can be inextricably linked to acts of genocidal violence: Three Hutu extremists were charged in the case with “Incitement to Genocide” based on their radio broadcasts and publications that figured Tutsis as “cockroaches” to be killed off by Hutus. With specific reference to the crimes of genocidal sexual violence, the judges asserted that these hateful and violent forms of speech “articulated a framework” in which the Tutsi woman was portrayed as a “femmes fatale” and were marked as “seductive agents” of the enemy camp, leading directly to the genocidal crimes in question (United Nations International Criminal Tribunal for Rwanda, External Relations and Strategic Planning Section - Immediate Office of the Registrar, *The Registrar’s New Years Message to the Staff*, January 2004: 2. Available at: <http://unictr.unmict.org/sites/unictr.org/files/news/newsletters/jan04.pdf>).

⁶⁴ Askin (2005), 1012.

⁶⁵ *Prosecutor vs. Akayesu*, para. 731–32.

penalties. In the judgment, nameless raped women come to stand in for the material, mortal body vulnerable to destruction, whereas the collective, communal body and the order therein is implicitly gendered male.

To function as symbol is to lose one's specificity as an in-the-flesh individual subject with a particular experience of trauma, a personal process of recovery, and singular expectations of, and claims to, justice. In this sense, the victims in question are indeed recognized by the court, but the multifaceted and shifting meaning of their victimhood is overdetermined by the Chamber's generalizing symbolic move. Recalling Felman's account of the body of the witness, we see how the genocidal rape victim's body operates as the key site upon which the Chamber performs its curative rituals and presents itself as the humane, inclusive, and just redeemer of these devastated and damaged peoples. The legal order carves out its position as the authority that can remedy and restore (at least symbolically) the communal vitality that was lost or depleted. One might even say that this rhetorical performance takes on a sacrificial valence, insofar as the victims of genocidal rape are invoked as the protagonists of the cathartic drama, only to be fixed in the time and place of traumatic "destruction;" that is, the horrific past.

While the raped woman remains anchored in this time-space of trauma, the community that discursively supplants her is presented with another chance at revitalization, recovery, and the possibility of a future. In other words, the latter are symbolically invited to experience the juridical conversion that Felman introduced us to. For the collective, there is the possibility of reintegration and closure. This performative conversion from trauma to closure relies upon another conversion—one that transposes the living, breathing body-subject of the female rape victim into an expedient symbol. The former conversion necessarily represses the latter, less seemingly conversion at its core. Thus we see how juridical remedy dispensed to the victims of genocidal rape in this instance may have veiled but noxious side effects.

The Unrapable, Misrecognized Victim

There is considerable evidence of widespread sexual violence crimes committed against men in the Yugoslavian conflict.⁶⁶ These crimes have been referred to by some as "the hidden war crimes" due to the fact that they are rarely made public and bring with them the so-called "taint" of homosexuality and passive, victimized, "feminized" positions.⁶⁷ Even when coercion is involved, these victims are often associated with homosexuality. Given the pervasiveness of homophobia, these crimes are often misunderstood and marginalized in international law and gender-justice campaigns.

⁶⁶ See Sivakumaran (2005), Oosterhoff, Zwanikken & Ketting (2004), and Hague (1997).

⁶⁷ Sivakumaran (2005), 1274.

Oosterhoff, Ketting and Zwanikken describe wartime sexual assault against men as an “open secret,” due to findings in their research that indicates that these crimes are often carried out in public and in the presence of witnesses, but rarely acknowledged.⁶⁸ The problem of silence and mystification is, in part, attributable to the fact that male survivors are often hesitant to come forward, given the cultural stigmas attached to male rape (even taking into account the variable ways that homophobia manifests in different cultures).⁶⁹ Male victims often fail to understand the abuse they have endured as sexual, insofar as it does not coincide with normative conceptions of victims and perpetrators in sexual assault.

Several ICTY judgments mention sexual violence acts committed against men.⁷⁰ That said, in the few cases in which these crimes are acknowledged, one sees a tendency to quickly desexualize them and/or fit them into preexisting understandings of sexual violence against women.⁷¹ The fact that there have been no indictments that expressly include male rape or sexual violence charges, and thus no convictions of such crimes, highlights the discrepancy between the ways the court views sexual violence carried out on men and women.

The latter could partially be explained by the stigmas and homophobia cited above. Yet it seems that additional, related factors might be contributing to the problems of blindness, obfuscation, and silence on the part of the ICTY. The court’s operative gender norms at times fail to accommodate the variety of victims and sexual crimes involved insofar as only female subjects register as penetrable and sexually violable. To cite a specific example, Eric Stener Carlson argues that blunt trauma to male genitals (or, BTMG) is a specific form of sexual violence confirmed to have been widespread in the conflict of the former Yugoslavia.⁷² However, this form of assault as a sexual crime has not been granted adequate attention in the ICTY trials or investigations. The absence of permanent physical damage, such as scars or castration, is frequently interpreted as the absence of proof of sexual assault.⁷³

A formidable challenge facing the ICTR and ICTY involves prosecuting gender-based crimes without falling into what legal theorist Janet Halley views as the “sexual subordination” trap, where women are always in the subordinate position and men are always “on top.”⁷⁴ Again, in efforts to

⁶⁸ Oostefhoof, Ketting & Zwanikken (2004), 75.

⁶⁹ Ibid.

⁷⁰ See, for ex: Askin (2003).

⁷¹ For instance, leading researchers on the topic of male-male rape during war, such as Sivakumaran (2005) and Hague (1997), have described the rape of males in the former Yugoslavia as processes of “feminization.” In the same breath, Sivakumaran himself concedes: “the traditional view of the power dynamic, of two strata with men at the top and women at the bottom, is too polarized in its conceptions of masculinity and femininity [and] should be adjusted to reflect more accurately the fact that these [two] concepts are neither uniform nor truly bipolar” (Sivakumaran (2005), 1282). See also: Euan Hague (1997), 50–63.

⁷² Eric Stener Carlson (2005), 16.

⁷³ Ibid, 19-20.

⁷⁴ Halley (2008). She sees this as a feminist structuralist position insofar as it adhears to “the

increase recognition of war crimes committed against women, many commentators have emphasized the importance of bringing a “gender perspective” to the ICTY and ICTR and prosecuting “gender-based” violence. This rhetoric is frequently adopted by tribunal staff, United Nations diplomats and other advocates. The slippage between “gender” and “women” here is so pervasive that it is easy to overlook. More often than not, thinking about how gender plays into sexual violence crimes during conflict is equated with thinking about how being *female* contributes to victimization and how being *male* contributes to a male propensity for aggression. It is unquestionably important to recognize the gendered power relations that inform various war-related sex crimes, yet the cases examined below underscore some significant problems with assuming that the power relations in question necessarily fit the male-perpetrator/female-victim model.

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The ICTY *Prosecutor vs. Delalic, Mucić, Delić and Landžo* case (also referred to as the *Celebici* case, based on the name of the prison camp where the crimes occurred) involved four members of the Bosnian armed forces. Although Delalic was acquitted, Delić, Mucić and Landžo were each convicted of “willfully causing great suffering or serious injury to body or health” (Grave Breach of the Geneva Conventions) and “cruel treatment” (Violations for the Customs of War) for separate acts that were carried out on Bosnian Serb male prisoners.⁷⁵ These included genital mutilation with the use of an electrical wire and forcing two male prisoners (who were brothers) to perform fellatio on each other. None of these crimes were framed as sexual or “gender” crimes, and thus, none of the convictions refer to the sexual or gender dimensions thereof. Ultimately, the legal categories used to describe the crimes elided the potentially taboo (sexualized) facets of the violations. This begs the question of whether the crimes would be perceived as “gender-based” or as sexual violence had the victims been women. And if so, which aspects of the crimes would be attributed to gender and/or sex?

Not only do the circumstances of this case depart from the male-perpetrator/female-victim model, in that the victims were male, but they also encompass multiple victims and perpetrators as well as a “victim-perpetrator” who was forced to sexually violate his brother. In an exceptional moment, the Chamber noted towards the end of the judgment that the forced fellatio “could constitute rape.”⁷⁶ This acknowledgement signals a brief departure from the sexual subordination paradigm, insofar as it distances itself from a more narrow, mechanical interpretation that

view that the subordination of women is coextensive with male/female relations-is their structure. In a fully structuralist feminist view of sexuality, no sexual interaction between a man and a woman is free from the effects of male domination” (Ibid., 91).

⁷⁵ Askin (2003); *Prosecutor vs. Delalic et al.*: para. 26.

⁷⁶ *Prosecutor vs. Mucić et al.*: para 1066. For additional information see Case Information Sheet at: http://www.icty.org/x/cases/mucic/cis/en/cis_mucic_al_en.pdf

situates forcible penetration of the vagina as the *actus reus* of rape.⁷⁷ The crime was not pleaded in this manner, however, and the opportunity to secure a rape conviction was lost.

Given the Prosecution's failure to define the acts as sex crimes, and given the considerable gap between the estimated number of male rapes and actual convictions, we can deduce that rapes and other sexual assaults targeting males are rarely treated as a priority or as "gender-based" crimes.⁷⁸ The criminal nature of the abuse carried out by Mucić, Delić and Landžo (which ultimately led to their victims' deaths)⁷⁹ were rendered visible at the expense of further investigation of their sexual and/or gender components.⁸⁰ Here we see in no uncertain terms the ways that the sexual subordination model is too polarized in its conceptions of masculinity and femininity to accommodate the elements such as those present in the *Celebici* case.

Similarly, in the ICTY's first case, Serb defendant Duško Tadić was cumulatively convicted for the crimes of forcing two Muslim prisoners of the Omarska detention camp to perform oral sex on a third prisoner and then bite off his testicles. That said, the convictions themselves were worded in such a way that the sexual elements were obscured: Tadić was convicted of "cruel treatment" (violation of the laws and customs of war) and "inhumane acts" (crime against humanity).⁸¹ Two years later he was sentenced on appeal for "inhumane treatment and willfully causing great suffering or serious injury to the body or health."⁸² This legal rhetoric reflects the dissimulative tendency to downplay the question of the crimes' sexual components.

It is difficult to predict exactly how more explicit sexual violence convictions might have impacted the *Celbici* or *Tadić* sentences differently. How might articulations of the crimes *as sexual crimes* have affected the victims of these crimes differently? How might such articulations have helped to bring about greater awareness about wartime sexual assault of men? To what extent might more precise sexual violence designations yield to more just outcomes? We can only speculate on the answers to these questions, especially given the few cases brought to trial that include male sexual assault charges, and given the lack of political will or pressure to pursue these questions further. That said, the fact that the Prosecution in both cases did not attempt to define the acts as sexual suggests that sexual violence committed against males is rarely treated as a priority or seen as

⁷⁷ For more on the history and challenges of arriving at a coherent or singular definition of rape in IHL, see Weiner (2013).

⁷⁸ I am not aware of accounts of the sexual abuse of men in conjunction with the genocide in Rwanda in 1994, or of any ICTR cases that address this issue. The absence of such information does not necessarily mean that men were not sexually violated.

⁷⁹ *Prosecutor vs. Mucić et al.*

⁸⁰ *Ibid.*

⁸¹ "Crimes of Sexual Violence: Landmark Cases" available at the ICTY website: <http://www.icty.org/en/features/crimes-sexual-violence/landmark-cases>

⁸² *Ibid.*

a true “gender” crime in ICTY cases. The victims of these crimes may be recognized as victims, but not as the “right” kind of victims for sexual violence convictions. More often than not, sexual assault against males in this legal universe is perceived as an aberration, and, when recognized, is associated with cruel treatment, torture, and physical suffering.

The ICTY itself has heralded these two cases as pathbreaking with respect to sexual violence jurisprudence in the context of war.⁸³ Given the treatment of sexual violence against males in the *Celebici* case, it should come as little surprise that the Chamber adopted a definition of rape as the “coercive vaginal penetration by the penis.”⁸⁴ Delić was found guilty for repeatedly raping two female prisoners.⁸⁵ This formulation fits the sexual subordination model perfectly, and further highlights the discrepancy between the Tribunal’s treatment of male and female victims when it comes to sexual crimes in their various permutations. Recognition of sexual violation is apparently reserved for penetrated female prisoners in this paradigm, obfuscating those sexual crimes involving male victims, and leaving fully intact the sexual subordination model and its attendant biologism. In this model, individuals with vaginas perform the passive role of sexual vulnerability and assaultability, and individuals with penises perform the active role of penetrators and sexual violators.

The Tadić trial stands out in a different respect: The trial Chamber took pains to recognize that “rape and sexual assault often have particularly devastating consequences [and] traditional court practice and procedures have been known to exacerbate the victim’s ordeal during trial.”⁸⁶ Quite remarkably, the Chamber even mentioned that such treatment has often made victims feel as if they had “been raped a second time.”⁸⁷ Despite the unprecedented attention given to the particular ways in which trials involving sexual violence victims are at risk of producing their own forms of (sexualized) violence, the Chamber unfortunately neglected to consider the following possibility: The omission of sexual violence in its rulings pertaining to male genital mutilation might also “exacerbate the victim’s ordeal.”

In spite of the fact that men predominantly commit sexual violence against women in both war and peace, to assume this invariably applies to all cases reifies negative stereotypes of female passivity and masculine aggression, thereby essentializing the categories “women” and “men.” In this model, sex crimes against men are deemed non-sexual, female survivors are upheld as the ideal (sexual) victims, and male victims are rendered aberrant or simply invisible, not to mention unrapable. Such cases

⁸³ Ibid.

⁸⁴ *Prosecutor vs. Mucic et al.*, para 940.

⁸⁵ This was based on the Chamber’s understanding that forcible sexual penetration of the vagina or anus constitutes the actus reus of rape. (*Prosecutor vs. Mucic et al.*, Indictment, IT-96-21-I, 19 March 1996, para 18 & 19).

⁸⁶ Ibid.

⁸⁷ Ibid.

illustrate the need for more nuanced understandings of what gender-based crimes signify in particular situations. What becomes painfully clear is that only a limited set of gendered performances of victimhood and perpetration are fully recognized in precisely the legal domain extolled for its gender fairness, sensitivity and inclusivity. It is almost as if the crimes themselves—in their defiance of the sexual subordination model—precipitate a certain anxious reconfiguration of their elements as a means to ward off threats to hegemonic heteronormativity.

The prospects for juridical healing of the sort Felman describes seem particularly poor in instances wherein the historic trial fails to adequately account for and recognize the sexual violence injuries on trial. For Felman, the historic trial has the potential to function cathartically because it provides the conditions through which the traumatic truths of the victims' suffering can surface in public and historical discourse by way of victim testimony. She posits that these truths become less vulnerable to denial when verbalized and embodied by the victim-witness.

The trial in this sense “stages and enacts the effects of the very trauma that the law is unable to see.”⁸⁸ The *Celebici* and Tadić trials were handled in such a way that, instead of animating the legal scene with otherwise invisible truths, they produced their own set of erasures and obfuscations at the expense of delivering justice to the victims and the specific forms of violence they experienced. In turn, the legal interpretations put forth suspended the possibility for more rigorous analyses of what constitutes the “sexual” or “gendered” dimensions of the crimes in question. Moreover, they stifle debates about the significance of gender identity for wartime sexual violence crimes in terms of the complex ways that gender, ethnic and national identity intersect to produce intelligible victims and perpetrators on the international tribunal stage.

Conclusion

At stake in the cases examined here is what happens to the bodies/subjects that fall inside and outside dominant paradigms of representation, recognition, revelation and remedy in this discursive terrain. Whereas the female victims in the *Akayesu* case can be thought of as over-symbolized or over-exposed in ways that deny their resiliency and specificity, the victims in the *Celebici* and Tadić cases can be conceived of as underexposed in ways that obfuscate the sexual nature of the crimes committed against them. Both overexposure and underexposure in this sense can impede the kind of cathartic truthfulness at the heart of the therapeutic justice movement to which Felman subscribes.

By mapping and scrutinizing particular points on the tribunals' shifting grids of intelligibility with respect to both the adjudication of sexual violence crimes and the therapeutic model of jurisprudence that seeks to stage and assuage victims' suffering, we can perhaps highlight the need for

⁸⁸ Marder (2006), 5.

rigorous and sustained critical analysis of the gendered norms of law interrogated here. At stake is the possibility of mobilizing more apt heuristics for understanding and signifying the crimes in question, as a means to trouble a certain orthodoxy in IHL and the deleterious effects it can engender. Such analyses also allows us to consider what it might mean to balance—in Martha Minnow's words—"too much memory and too much forgetting" in the context of the trial.⁸⁹

One might say that the sexual violence victims discussed in the *Akayesu* case were burdened by the court's tendency to remember the violations committed against them "too much" and even reduce them to those very violations, while simultaneously forgetting to acknowledge their capacity for becoming more than their injuries and more than symbols of communal injury. The male victims of sexual violence in the *Celebici* and *Tadić* cases might be read as victims not only of the crimes they endured, but also of "too much forgetting," insofar as the crimes prosecuted left out specific sexual components that defied the limited understanding of gender identity mobilized by the court. At issue are not only the repercussions of wartime violence on victims, but also the violence of the letter of the law vis-à-vis the deployment of therapeutic and gender norms.

Rather than a symbolic exit from trauma, these cases warn of the potential for an increased risk of traumatic re-entry. Such juridical dramas offer a stage upon which stifling gender and ethnic norms can be reenacted and reinforced via the body of the victim *qua* victim. These theatrics distinguish themselves from other discursive productions; their status as *legally authorized* acts in the name of justice, peace, healing, and universal human rights renders them a socio-symbolic force to be reckoned with.

⁸⁹ Minnow (2002), 16.

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