

Labenski, Sheri A. (2018) Female defendants in international criminal law and beyond. PhD thesis. SOAS University of London. <http://eprints.soas.ac.uk/30321>

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Female Defendants in International Criminal Law and Beyond

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Thesis submitted for the degree of PhD/MPhil

2017

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Abbreviations

BiH	Bosnia and Herzegovina
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CLS	critical legal studies
CPK	Communist Party of Kampuchea
DDR	disarmament, demobilization, and reintegration
ECCC	Extraordinary Chambers in the Courts of Cambodia
FLS/T	feminist legal studies/theory
FYR	Former Yugoslav Republic
GA	General Assembly
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Courts of Justice
ICL	international criminal law
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	international humanitarian law
IHRL	international human rights law
ILC	International Law Commission
IMF	International Monetary Fund
IMT	International Military Tribunal
NAIL	new approaches to international law
NATO	North Atlantic Treaty Organization

NMT	Nuremberg Military Tribunal
OSCE	Organization for Security and Co-operation in Europe
RES	resolution
SC	Security Council
SCSL	Special Courts for Sierra Leone
TWAIL	third world approaches to international law
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNPROFOR	United Nations Protection Force
US	United States
WAIC	women accused of international crimes

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The Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 75 UNTS 85, adopted in 1949.

The Geneva Convention Relative to the Treatment of Prisoners of War 5 UNTS 135, adopted in 1929, revision in 1949.

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United States of America

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ICTY

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ICTR

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Prosecutor v Musema (Trial Chamber Judgement and Sentence) ICTR-96-13-T (27 January 2000).

Prosecutor v Nahimana et al (Appeals Chamber Judgement) ICTR-99-52-A (28 November 2007).

Prosecutor v Nyiramasuhuko and Ntahobali (Amended Indictment) ICTR-97-21-1 (1 March 2001)

Prosecutor v Nyiramasuhuko et al (Judgement and Sentence) ICTR-98-42-T (24 June 2011).

Prosecutor v Nyiramasuhuko (Appeals Chamber Summary Judgement) ICTR-98-42-A (14 December 2015).

Prosecutor v Semanza (Trial Chamber Judgement and Sentence) ICTR-97-20-T (15 May 2003).

Prosecutor v Semanza (Appeals Chamber Judgement) ICTR-97-20-A (20 May 2005).

ECCC

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ICJ

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Abstract

Gender justice is an important component of contemporary international criminal law. Feminist scholars and practitioners have been instrumental in advancing gender law reform within international criminal law and a key outcome has been the prosecution of conflict related sexual violence, in particular through the work of the Ad Hoc Tribunals for Rwanda and the Former Yugoslavia, as well as analysis of the Extraordinary Chambers in the Courts of Cambodia. This thesis argues that, despite these important gains with respect to gender justice in international criminal law, there has been inadequate attention to women as potential perpetrators, defendants, and suspects of international crimes. In addressing the absence of female defendants from prosecution under international criminal law, I argue that expectations with regard to gender are reproduced in international criminal law without sufficient understanding of the diversity of gender as a power relation reproduced intersectionally with other power relations. Following Engle's work on the hypervisibility of women as victims of sexual violence, the thesis analyses female defendants in legal and cultural contexts to examine female violence in armed conflict, beyond gendered meanings. Furthermore, through drawing on feminist approaches from MacKinnon to Kapur, to examine constructions of gender, sexuality, race and class, within law, the thesis challenges narrow assumptions with respect to gender in armed conflict that collapse into stereotypes of raced victimhood and sexual vulnerability.

Gender is understood, not as a form of identity, but as a power arrangement that is implicated in racial, ethnic, classist, and socio-economic understandings of conflict and of culture. Thus, enhanced understanding of the complexity of gender in armed conflict is advocated through the study of female defendants. The thesis highlights representations of women accused of international crimes in the ICTY, ICTR, and the ECCC, and identifies tensions between international and domestic dialogues as a result. The study of the ICTY demonstrates the friction between the pursuit of gender justice and the limited gendered narratives women are represented through in depictions of the conflict in the Former Yugoslavia. Similarly, in the ICTR the thesis demonstrates a racialised preoccupation with violence that further reproduces gender, minus its complex relation with race stereotypes. In the study of the ECCC the absence of female defendants is analysed via tensions between local and international perceptions of political leadership, law, and gender. This is not a study of the stories of individual female defendants; rather the research explores how understandings of gender, international law, and armed conflict shift when female defendants are positioned as the focus of analysis.

Chapter One

Encountering the Female Defendant in International Criminal Law

“Nothing about being socially constituted as women restrains us from simply becoming violent ourselves.”

Judith Butler¹

In 1991, amid ongoing hostilities, the armed conflict in the Yugoslavian territories began to engulf the region in violence. The impetuses included a reimagining of national identities, through the rise of new political leadership, in addition to a severe economic crisis. Both factors played an important role in creating an environment that encouraged armed conflict, which in turn renewed past hostilities.² The armed conflict included high levels of torture and sexual violence as well as the deaths of an estimated 250,000 lives between the years of 1991-1995.³

In 1995, in an effort to escape the armed conflict in Bosnia-Herzegovina, Rasema Handanovic travelled to Austria. In 1996, Handanovic immigrated to the United States, after having been granted refugee status. In 1998, Handanovic married Ismet Yetisen and later gave birth to a son. Upon becoming a naturalised US citizen in 2002, she settled in Oregon with her parents. When Handanovic and Yetsen divorced in 2002, Handanovic became a single mother taking sole custody of their child. In 2009, Handanovic sought counselling for post-traumatic stress disorder, which was said to have been the result of the violence she experienced during the armed conflict in the Former Yugoslav Republic, including an instance where she was the victim of a sexual assault. Over the period when Handanovic was settling and making a new life for herself and her family in the US, the War Crimes Chamber of Court of Bosnia-

¹ Butler, *Precarious Life: The Power of Mourning and Violence* (2006) 42.

² See Orford, 'Locating the International: Military and Monetary Interventions after the Cold War' (1997) 451.

³ While these specific dates are listed, it is acknowledged that the hostilities and loss of life extended beyond these years. It is also clear that the reasons behind the conflict are far from simplistic, and will be detailed further in Chapter 4.

Herzegovina was established to investigate instances of genocide, crimes against humanity, and war crimes.⁴

In 2010, the War Crimes Chamber issued an arrest warrant for Handanovic.⁵ The arrest warrant alleged Handanovic had committed war crimes while she was a part of the Zulfikar Special Purposes Detachment during an attack in Trusina, in 1993. Handanovic was alleged to have executed three civilians, as well as three soldiers who had surrendered to her unit. The US authorities arrested Handanovic in 2011.⁶ This was reported as a surprise to her friends and family.⁷

Handanovic was eventually extradited to Bosnia-Herzegovina where she entered into a plea agreement with the Prosecutor of the Bosnia-Herzegovina Court, agreeing to testify against her former fellow soldiers, Mensur Memic, Dzevad Salcin, Senad Hakalovic, Nedzad Hodzic, Nihad Bojadzic and Zulfikar Alispago.⁸ After pleading guilty in 2012 and reading a statement of remorse to the victims' families in court, Handanovic was sentenced to five and a half years in prison.⁹ Handanovic was the first woman found guilty of war crimes in the Bosnia-Herzegovina Court. Stories of violence against women, particularly sexual violence in the Former Yugoslav Republic (FYR) conflict, are well represented internationally. Handanovic's story disrupts victim narratives because she is found guilty as a perpetrator. Importantly, her story also alerts us to the layers of law from international courts, often identified through the work of the ICTY, to domestic courts, such as the less well known War Crimes Chamber of Court of Bosnia-Herzegovina.

This thesis examines the representation of female defendants in feminist scholarship and under international criminal law, from the International Criminal Tribunal for the

⁴ Terry, 'Beaverton women due in Bosnian court Wednesday to face war crimes accusations' (Oregon Live, 27 December 2011); Jung, 'Family and friends weep as magistrate refuses to release Beaverton women accused of Bosnian war crimes' (Oregon Live, 16 April 2011); 'OSCE mission issues report on war crimes trials in Bosnia and Herzegovina courts' (OSCE Newsroom, 23 March 2005).

⁵ In the Matter of the Extradition of Rasema Handanovic, United States District Court, D. Oregon, Portland Division, 829 F.Supp.2d 979 D. Or. (2011).

⁶ *ibid.*

⁷ Jung, 'Family and friends weep as magistrate refuses to release Beaverton women accused of Bosnian war crimes' (Oregon Live, 16 April 2011).

⁸ 'Rasema Handanovic's plea bargain agreed' (Balkan Insight, 13 March 2012).

⁹ 'Five and a half years for Rasema Handanovic' (Balkan Insight, 30 April 2012).

former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), and the Extraordinary Chambers in the Courts of Cambodia (ECCC). The ICTY and ICTR, founded in 1993 and 1994 respectively by a United Nations Security Council Resolution, were the first international courts established to try war crimes since the Nuremberg and Tokyo Tribunals, after World War II.¹⁰ The ICTY and ICTR tried violations of the laws or customs of war, crimes against humanity, genocide and grave breaches of the 1949 Geneva conventions. The ECCC, established in 2003 by a joint agreement between the United Nations and the Cambodian Government, tries crimes found in international law as well as Cambodian law.¹¹ This thesis recognises that domestic criminal law processes have also prosecuted women involved in the armed conflicts of the Yugoslavian Territories, Rwanda, and Cambodia.¹² The importance and influence of both national and international criminal justice processes in conjunction with Western feminist intervention and international media focus will be explored throughout this thesis.

1. Research Questions

This thesis inquiries into how gender is represented under international criminal law. My primary research question is: why are women, who participate or are accused of participating in criminal acts during armed conflict, an under-recognised area of women's experience in armed conflict? Branching from this central research question, the thesis engages the following questions: Do understandings of gender, law, and violence shift if female defendants are centred within analysis? How do popular representations of gender infiltrate international courts and tribunals, including representations of female defendants in the media? Given the likely continued importance of complementarity in the future development of international criminal law, how can the discussion of female defendants aid in greater understanding of the benefits of local justice processes?

¹⁰ Statute of the International Criminal Tribunal for the Former Yugoslavia, adopted by Security Council Resolution 827, U.N. Doc. S/RES/827 (1993); Statute of the International Tribunal for Rwanda, adopted by Security Council Resolution 955, U.N. Doc. S/RES/955 (1994).

¹¹ Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, as amended, Reach Kram No. NS/RKM/1004/006 (2004).

¹² The domestic legal processes will be detailed further in each of their respective chapters.

1.1 Do understandings of gender, law, and violence shift if female defendants are centred within analysis?

Under international criminal law no distinction is made between women and men and each can be held, under the law, culpable for international crimes.¹³ Female defendants just as male defendants have the potential to be tried under international criminal law.¹⁴ Nevertheless, this is not evident in the jurisprudence of international criminal courts and tribunals given that Biljana Plavšić, was the only woman tried by the ICTY,¹⁵ and Pauline Nyiramasuhuko, was the only woman brought before the ICTR.¹⁶ The ECCC has indicted two women, Ieng Thirith and Im Cheam. However, Thirith was deemed unfit for trial due to a medical condition and Cheam's case was dismissed in February 2017.¹⁷ Additional limited jurisprudence has emerged from the Special Court of Sierra Leone with cases against Margaret Fomba Brima, Neneh Binta Bah Jallow, Anifa Kamara, and Esther Kamara, as well as in the International Criminal Court via the indictment of Simone Gbagbo.¹⁸ Having so few women brought before international courts and tribunals gives the impression that very few women have participated as aggressors during these conflicts. Overall, the ICTY indicted 161 persons, the ICTR indicted 93 individuals, and the ECCC accused 9 persons. Despite the lack of female defendants in the ICTY, ICTR and ECCC, as compared with the total number of accused persons, women have been documented to have been involved in every aspect of the hostilities in the Former Yugoslavia, Rwanda, and Cambodia.¹⁹ Unlike international courts and tribunals, increased evidence of female defendants appears throughout domestic prosecutions of

¹³ UNGA, 'Rome Statute of the International Criminal Court' A/CONF.183/9 (1998) (Last Amended 2010).

¹⁴ This statement refers to the 'gender neutral' language in the definitions of crimes in the statutes of the International Courts and Tribunals.

¹⁵ Prosecutor v Plavšić (Initial Indictment) IT-00-39 & 40/1 (3 April 2000) [hereinafter Plavšić Case].

¹⁶ Prosecutor v Nyiramasuhuko and Ntahobali (Amended Indictment) ICTR-97-21-1 (2001); Prosecutor v Nyiramasuhuko et al (Judgement and Sentence) ICTR-98-42-T (2011) [hereinafter Nyiramasuhuko Case].

¹⁷ Prosecutor v Ieng Thirith (Decision on Reassessment of Accused Ieng Thirith's Fitness to Stand Trial Following Supreme Court Chamber Decision of 13 December 2011) 002/19-09-2007/ECCC/TC (2012) [hereinafter Ieng Case]; Im Cheam (Closing Order Disposition) 004/D308/ECCC/OCIJ (2017).

¹⁸ Prosecutor v Gbagbo (Indictment) ICC-02/11-01/12 (2012).

¹⁹ Coulter, 'Female Fighters in the Sierra Leone War: Challenging the Assumptions' (2008) 55; Coulter notes that 10-30 percent of all fighters in the Sierra Leone War were women; see Hogg, 'I never poured blood': Women accused of genocide in Rwanda' (L.L.M. thesis, McGill University) on file with McGill University (2001).

international crimes, where women have been accused of murder, torture, abuse, and sexual violence.²⁰

1.2 How do popular representations of gender infiltrate international courts and tribunals, including representations of female defendants in the media?

Reports of women perpetrating crimes against humanity, war crimes, and genocide are also in media reports on the FYR, Rwanda, and Cambodia.²¹ In addition, women have been documented as taking up positions of leadership which has granted them the ability to use their status to affect great harm across each of these conflicts.²²

While this thesis does not focus on individual women who were involved in perpetrating crimes the armed conflicts, as a way to dissect their character or unearth reasons for their participation, it is interested instead in understanding the effect their presence has on conversations around identities such as gender, race, class, ethnicity, and socio-economic status.

Implicated in this analysis is the role of leadership (in crime), which is required in order to be tried before an international court or tribunal. A common counterargument against studying female defendants in international law is that women were not in the position of leadership and thus cannot be brought before international criminal courts. This counterargument to this position is discussed later in this chapter. However, what this idea also implies is the possibility that those actors involved in post-conflict justice processes (i.e. Western feminist, legal practitioners, and media outlets) do not “see” women as potential defendants and therefore do not “see” female leadership.

²⁰ Other cases include: Richburg, ‘Rwandan nuns jailed in genocide’ (Washington Post, 9 June 2001); Martinez, ‘Kentucky woman indicted for Bosnian war crimes’ (CBS News, 18 March 2001); ‘Dutch Yvonne Basebya jailed for Rwanda crimes’ (BBC News, 1 March 2013); Cerkez, ‘US Extradites War crimes suspect to Bosnia’ (NBC News, 27 December 2011); Seguegila, ‘Women lied about role in Rwanda genocide, U.S. jury says’ (CNN News, 22 February 2013); ‘Bosnia arrests ‘Female Monster’- wife of warlord ‘Serb Adolf’ (Mirror UK, 22 December 2011); Oliver, ‘The US single mother who was actually a war criminal: killer becomes first woman to be convicted of Bosnian war crimes’ (Daily Mail, 1 May 2012); ‘Catholic nun jailed for 30 years for her part in Rwandan genocide’ (USA Today, 10 November 2006); ‘Rwanda jails journalist Valerie Bemeriki for genocide’ (BBC News, 14 December 2009); Becker, ‘Chieu Ponnary, 83, first wife of Pol Pot, Cambodian despot’ (The New York Times, 3 July 2003); Crane, ‘Female cadres of the Khmer Rouge (Phnom Penh Post, 1 August 2015); ‘Ieng Thirith: ‘First Lady’ of Cambodia’s Khmer Rouge dies while facing charges of genocide, crimes against humanity’ (ABC News Australia, 22 August 2015).

²¹ *ibid.*

²² This refers to the cases of Plavšić, Nyiramasuhuko, Gbagbo, and Thirith, as women in leadership roles.

When recounting the start of the Rwandan genocide, many refer to the plane crash and assassination of President Habyarimana on 6 April 1994, however only few recall that Prime Minister Uwilingiyimana was assassinated 7 April 1994.²³ Uwilingiyimana was the nation's first female prime minister, and is an example of the presence of female leadership that existed prior to the armed conflict. The position of women in post-conflict Rwanda has been celebrated by the United Nations for being first in the world for women's participation in Parliament and seventh in the world for women in ministerial positions, as of January 2017.²⁴ However, Hogg states that before the conflict, women were working in the government as well as heads of households, and thusly should not be defined along traditional assumptions of women's subjugation.²⁵ Other women, who were not in particular positions of power before the armed conflict, still significantly contributed to the violence of these armed conflicts, further solidifying women's participation.²⁶

The research that underpins this thesis makes clear that women actively participate in the commission of violence in all wars. However, under international criminal law, female defendants are far from prevalent in court jurisprudence which implies that the few who do make their way into a courtroom are exceptional examples.²⁷ With the limited number of female defendants, international criminal law conveys that females who perpetrate violence are outside of the normal conduct women employ during conflict.²⁸ This produces an incomplete depiction of women's roles in armed conflict within international criminal jurisprudence. Furthermore, female defendants, who have been brought before the courts and tribunals, have often found that their identity

²³ The example here is not to make a judgment on the Prime Minister's actions in office, but rather to highlight the existence of female leadership that predates the genocide.

²⁴ 'Women in Politics 2017 Map' (UN Women Website) available at: <http://www.unwomen.org/en/digital-library/publications/2017/4/women-in-politics-2017-map>.

²⁵ Hogg, "Women's participation in the Rwandan genocide: mothers or monsters?" (2010) 73, 75.

²⁶ Hogg (n 19) 67-71.

²⁷ Hogg (n 19) 51 and 62; In the Rwandan context, a list was published after the conflict citing those who were involved in the genocide separating them into punishable categories by Rwandan law. Category 1 being the worst offenders, as of March 2001 included 2,898 people, 51 of those were women. The list includes a section which separates 'intellectuals', as those who held positions of power, eight women were included in this section which represented the most powerful women for the period that the genocide occurred. The Rwandan government acknowledged the positions of females in leadership roles, yet the ICTR has only brought one woman before the Tribunal.

²⁸ See Sjoberg and Gentry, *Beyond Mothers, Monsters, Whores: Women's Violence in Global Politics* (2015).

as a woman is highlighted. In Nyiramasuhuko's case, her identity as a mother, was emphasised by the fact that she was tried with her son, Arsène Shalom Ntahobali, and accused of facilitating and encouraging her son to commit crimes.²⁹

During the trial at the ICTR, Ntahobali, was accused of rape. Witness TA, when recounting her experiences, was asked to identify her assailant.³⁰ Witness TA identified him as "Shalom, the son of Pauline Nyiramasuhuko".³¹ Media outlets also highlighted Nyiramasuhuko's role as a mother³² and ICTR prison guards reportedly referred to Nyiramasuhuko as 'Mama' inside the Tribunal.³³ Nyiramasuhuko's role as a mother is portrayed as a defining part of her participation in the genocide. Associating Nyiramasuhuko with motherhood makes the fact that she is on trial for international crimes appear all the more shocking and further emphasises that her actions are not typically associated with female experiences in armed conflict. Instead of questioning Nyiramasuhuko and Ntahobali's political ideology, the long term goals they hoped to achieve by participating in the genocide, or rather how Nyiramasuhuko's role as a Minister afforded her great power, descriptions and debates remain focused on Nyiramasuhuko as a 'failed mother'. The continued stereotyping of Nyiramasuhuko's actions as a mother who 'encouraged her son to kill', simultaneously prevented discussions around Nyiramasuhuko as a leader and analysis of the intersection of her class, ethnicity, and gender, which would have allowed greater understanding of the Rwandan genocide.

1.3 How can the discussion of female defendants aid in greater understanding of the benefit of local justice processes?

As international criminal law continues to develop, the role of complementarity will become an essential component when determining the position of post-conflict international legal justice processes. In this thesis, the work of local courts in trying women who participated in the armed conflict, is highlighted to show that justice

²⁹ Nyiramasuhuko Case (n 16) para 2633, 2651, 2657, 2683-2702.

³⁰ *ibid* para 2633.

³¹ *ibid*.

³² Sasan Shoamanesh, 'Nyiramasuhuko: The Mother Who Awarded Rape for Murder' (The Huffington Post, 9 August 2011).

³³ Bouwknecht, 'ICTR Record Breaking Case Comes to a Close' (Radio Netherlands Worldwide, 24 June 2011).

projects need to extend beyond the international and into domestic spaces. Looking at domestic spaces allows the exploration of varying understandings of gender, race, class, ethnicity, and socio-economic status that exist between the international and national, which influence legal actors and proceedings. Engaging in domestic legal structures, within this research, underscores that the post-conflict justice process does not end with international courts and tribunals.

In the following section of this chapter, I introduce the aims of this work, namely, the relationship between Western feminist intervention and international criminal law which underscores the way international law engages with the female defendant. In section three, I discuss the larger objectives of the thesis. The methodology of the thesis will be discussed in section four. Section five highlights common counterarguments against the study or research worthiness of female perpetrators, defendants, and suspects. Section six details the structure of the thesis, indicating the main focus of each chapter. Finally, section seven discusses the audience of the thesis and the importance of my central argument to the pillars of international criminal law and feminism.

2. Aims

My aim in this thesis is to position female defendants at the centre of this research, in order to understand the ways in which international criminal law, and Western feminist interventions, alongside international media coverage of armed conflicts, shape and give meaning to the international perception of women involved in armed conflict. In commencing this thesis, I explore how focus on female defendants shifts assumptions with respect to female victimhood in armed conflict. As the actions of international actors after armed conflict indicate, the assumption that women are victims is perpetually reinforced. Therefore, the international justice system has limited understanding of the roles female defendants have in armed conflict. By studying the way international criminal law, Western feminist interventions, and media representations influence the perceptions of an armed conflict, it becomes possible to question the presumptions around the way race, class, ethnicity, and gender identities influence the mainstream conflict narrative. Throughout this thesis, I argue that ultimately international criminal law in its current manifestation has reproduced gendered tropes regarding women's agency in armed conflict which also

limits the capacity for justice. In analysing the representation and narratives on female defendants, the influences of law and feminism on women's lives is enhanced so as to dispel the idea that men are the primary actors both during and after armed conflict.

3. Objectives

Present within the judgements handed down by international tribunals and courts, international criminal trials have the ability to tell the history of leadership and responsibility in an armed conflict and therefore embed a conflict narrative constructed by the courts themselves.³⁴ An aspect of female leadership shown throughout the thesis is that women's leadership in conflict is often overlooked before and during armed conflict. When examining the cases from the conflicts in the Former Yugoslav Republic, Rwanda, and Cambodia, the factual findings present within the judgements from the ICTY, ICTR, and ECCC only minimally account for the presence of women's involvement in the hostilities of war. The experiences of women who participate in the armed conflict are perceived to be incidental to the larger history of the armed conflict and are not recognised as a subject necessary to understand context of the armed conflict. Yet, after the armed conflict in Rwanda, women's participation in government, despite its current authoritarian shape, is often celebrated. However, female leadership preceding and during the genocide is rarely appreciated, including female leaders, officials, and military actors who committed international crimes.

When women are not written into the history of armed conflict through the work of the tribunals and courts, then the concept that men perpetrate violence and women are the victims of violence remains tied to the international criminal legal structure. Again, in Rwanda, this allows a construction of the contemporary governance of the state as different from before the genocide because of the presence of women currently in parliament. The history of women's political leadership is thus only partial, ignorant in its understudy and representation of local gender norms and appealing model of post-conflict justice that incorporates an extremely simplistic

³⁴ See Buss, 'Expert Witnesses and International War Crimes Trials: Making Sense of Large-Scale Violence in Rwanda' in Zarkov and Glasius (Eds.) *Narratives of Justice In and Out of the Courtroom Former Yugoslavia and Beyond* (2014).

account of gender. In particular, international courts and tribunals uphold a binary of victim and violator which the lack of female defendants serves to underscore.

One of the key objectives of this thesis is to dislodge the assumption that women are only victims in armed conflict and to explore how both law and gender might be understood differently if female defendants were brought into focus. Kapur identifies that the international women's rights movement as strengthening a female victimisation rhetoric through the focus on violence against women.³⁵ Kapur argues that international human rights campaigns on violence against women have reinforced a negative view on women's experiences of sex and sexuality.³⁶ Kapur notes that the discussion of 'metanarratives' on women as victims has often equated all women with the same experience of sexual violence and objectification.³⁷ Kapur has criticised MacKinnon's work for essentialising women and gender, through assuming gender is the basis of women's oppression and that women must "prioritise issues of sexuality and sexual violence".³⁸ I return to this critique in Chapter Four, in order to combat the dominant narratives of women's experiences in armed conflict that assumes women must always be the victim and vulnerable.

Engle has also recognised the influence of feminists in post-conflict spaces. She notes, feminists who worked in various institutions and NGOs, around the ICTY and ICTR, often appeared to assume all women were "powerless victims, incapable of defending themselves or speaking out to defend others, but also of taking sides or participating in war".³⁹ Engle's book review of Hemingway's *For Whom the Bell Tolls* provides a platform for discussing alternative perspectives of women's experience in armed conflict, beyond assumptions around women's victimhood. In the review, Engle highlights the lack of recognition of women's participation in armed conflict, which in some cases includes women who commit crimes.⁴⁰ Engle also importantly notes that men can be "agents of kindness" during armed conflict and are not implicitly

³⁵ Kapur, 'The Tragedy of Victimisation Rhetoric Resurrecting the Native Subject in International/Post-Colonial Feminist Legal Politics' (2002) 2.

³⁶ *ibid* 37.

³⁷ *ibid* 10.

³⁸ *ibid* 9.

³⁹ Engle, 'Feminism and Its (Dis)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina' (2005) 780.

⁴⁰ Engle, 'Judging Sex in War' (2008) 952-953.

violent.⁴¹ Engle's book review moves through fictional and non-fictional conflict narratives and their usefulness in dislodging assumptions around gender, armed conflict, and sexual violence, which inevitably become a part of legal systems post-conflict. While other academic texts specifically engage with female perpetrators, defendants, and suspects in more detail, Engle's review has become the main source of inspiration early on in this thesis, as her work highlights the need for nuance in armed conflict narratives around female participation. While the thesis builds on the ideas of Engle, it similarly desires to dislodge the gendered assumptions around women's experiences in armed conflict.

Throughout the thesis, I use the focus on female defendants as a tool to interrogate the understanding of gender in international courts and tribunals. Analysing gender essentialism enables this work to undertake a discussion that challenges the assumption that the female gender is equated with being a victim of sexual violence and objectification. Evidence of female defendants in international criminal law displays a small form of subversion to stereotyped notions of how women are imagined to experience armed conflict.⁴² The thesis questions how women experience conflict beyond victim narratives, accepting the discomfort of recognising and "seeing" women's violence, including the most extreme violence that constitutes international crimes. The thesis also analyses the limited understanding of gender produced via feminist accounts that prioritises conflict related sexual violence, often to the exclusion of women's diverse experiences of armed conflict.⁴³ If more examples of females who commit crimes were recognised in international law, then gender stereotypes around female victimhood might be rendered with greater complexity,⁴⁴ as would women's experiences of armed conflict. Those who consider sexuality to be the source of women's oppression must recognise that some females can be aggressors too, some of whom have used their position to exploit other females' sexuality and that many actors (regardless of gender) might be both

⁴¹ *ibid* 955.

⁴² 'Interview with Judith Butler' (Think Big, 19 February 2001).

⁴³ See True, 'The Political Economy of Violence Against Women: A Feminist International Relations Perspective' (2010).

⁴⁴ Bouris, *Complex Political Victims* (2007) 28-29. When referring to the need to see the complexity of women's experiences, I utilise the perspective Bouris takes when stating that the victim in 'modern political conflicts' is an underdeveloped area of study. Likewise, Bouris questions the identity of 'the victim' which appears to be a 'given' when assessing individual's roles in armed conflict.

victim/survivor and defendant during armed conflict.⁴⁵ The objective is twofold: one, to capture some of the diversity of women's experiences in conflict and two, to develop a nuanced feminist analysis of international criminal law beyond sexual violence in armed conflict.

4. Methodology

This thesis focuses analysis on three types of materials: first, court judgments, indictments, and reporting from both international and national cases pursuing international prosecutions; second on media reports from both international and national news agencies; and third, feminist engagement with international courts and tribunals. In particular, US and other Western feminisms have prioritised both academic and legal transformation through attention to conflict related sexual violence. The thesis undertakes a doctrinal analysis of a range of narratives that inform and represent the development of international criminal since the early 1990s. I also look at examples of women who were not brought before international courts, but were suspected of committing crimes related to those particular conflicts.⁴⁶

Similarly, Linton's work focuses on Women Accused of International Crimes (WAIC),⁴⁷ however this thesis only peripherally engages with WAIC. Linton's work focuses on a transdisciplinary study, whereas the thesis stays within the frame of international criminal law. The purpose of this research is to understand the way the courts, both international and domestic, handle cases of female defendants of international crimes, in order to discern if there is a gender, racial, or class basis present when law engages with female's who commit crimes.

This section will discuss critical legal studies, moving to feminist methods, as well as the need to look at gender, beyond the lens of victim feminism. The thesis also analyses the way the media, both international and local, describes and represents female defendants, as this provides a perspective from outside the courts. The media is often the only source of information regarding female perpetrators, defendants, and

⁴⁵ Nyiramasuhuko Case (n 16).

⁴⁶ 'Other Cases' (n 20).

⁴⁷ Linton, 'Women Accused of International Crimes: A Trans-Disciplinary Inquiry and Methodology' (2016).

suspects who were not brought before international courts and tribunals. These accounts are useful in understanding the way gender and race have been highlighted in the media's coverage. For example, Azra Bašić, who was arrested in Kentucky, US in 2011, was a Croatian national who was a former member of the Croatian army.⁴⁸ After the conflict in Yugoslavia, Bašić immigrated to the US and settled in Kentucky, supporting herself by working in a sandwich factory while also taking jobs bathing elderly nursing home patients.⁴⁹ The US authorities accused Bašić of committing war crimes at three different camps in Bosnia.⁵⁰ The US media also reported that those who knew her were shocked at these allegations, they called her 'lovely' and could not reconcile her actions in Bosnia with her care for the elderly in Kentucky.⁵¹ Bašić was also known as "the mistress of life and death", which was noted in international media reports.⁵²

This brief example highlights the way the media is able to reproduce gender binaries and stereotypes, as her care for the elderly is juxtaposed with her militant criminal background, and her gender is highlighted against her acts of violence. The media included statements from neighbours who expressed their shock, highlighted that she cared for the elderly, and used the word 'lovely' in reports to associate Bašić with her assumed femininity.⁵³ It is as if the media is suggesting that a person cannot be both caring and violent. This is just one way where the media uses gendered perceptions to call attention to the gender of female defendants. Other examples from cases not brought before international courts and tribunals are used in my research to draw out the way the global media networks contribute to the production of narratives around female defendants, which reflect simplistic gender tropes that then inform dominant legal narratives. This example also highlights the importance of complementarity and

⁴⁸ Barrouquere and Schreiner, 'Lovely' Ky. Woman Accused of Horrific War Crimes' (NBC News, 18 March 2011).

⁴⁹ *ibid.*

⁵⁰ *ibid.*

⁵¹ *ibid.*

⁵² Burgess, 'Mistress of life and death' gets 14 years for Balkan war crimes' (The National, December 2017).

⁵³ *ibid.*

subsequently develops the discipline, as Bašić was later convicted in The Court of Bosnia and Herzegovina.⁵⁴

In the ICTR, Pauline Nyiramasuhuko was tried with her son, which drew attention to her role as a mother.⁵⁵ Nyiramasuhuko was portrayed in the international media as a monster, as well as a mother.⁵⁶ It was noted by one media outlet that Nyiramasuhuko was referred to as ‘mama’ inside the tribunal itself.⁵⁷ Other news organisations cited the fact that she was a mother as something that seemingly made her crimes worse because she had given birth to a child.⁵⁸ These descriptions are extremely telling in the way actions are interpreted where gender is involved. Her gender was seen as paramount to the accounts of her behaviour. Nyiramasuhuko’s relationship with her son, a man, retains primacy in the stories of her crimes, rather than her own agency. Her motherhood becomes a preoccupation of news agencies, as Nyiramasuhuko’s behaviour is outside of what is considered to be proper parenting. Sjoberg and Gentry state: “When we lose the mothers to the dark side, all is lost”.⁵⁹ This highlights the implicit assumptions around women’s allowable behaviour in armed conflict and their impact on the society at large. While Nyiramasuhuko’s cases is analysed further in Chapter Five, it is with this information from various cases on female defendants and other examples of female accused that I begin to develop a fuller account of the ways in which the female defendant is interpreted and understood in both law and media representations of legal processes and outcomes. The thesis examines references to gender, race, and class, examples of language that singles out female defendants as opposed to male, and identifies patterns in the way female defendants have been addressed and identified. My methodology seeks to work against the reductive approach to gender that has resided in conflict related sexual violence work. I will explore and refine this analysis in Chapters Four, Five, and Six.

⁵⁴ Prosecutor of Bosnia and Herzegovina v Azra Bašić (Judgement) S1 1 K 018557 17 Kri (27 December 2017).

⁵⁵ Sperling, ‘Mother of Atrocities: Pauline Nyiramasuhuko’s role in the Rwandan genocide’ (2005) 649.

⁵⁶ Moshenberg, ‘The Rwandan glass ceiling’ (Africa is a Country, 29 June 2011).

⁵⁷ Bouwknecht, ‘ICTR record breaking case comes to a close’ (Radio Netherlands Worldwide, 24 June 2011).

⁵⁸ Sasan Shoamanesh, ‘Nyiramasuhuko: the mother who awarded rape for murder’ (The Huffington Post, 9 August 2011).

⁵⁹ Sjoberg and Gentry (n 28) 78.

This thesis, being a doctrinal analysis, understands law as a discourse that interacts with other normative structures. Shepherd discusses the analysis of discourse as “systems of meaning-production” as well as having the ability to represent, structure, and understand certain things is useful in order to think about the broader structures implicated in this work.⁶⁰ Shepherd’s work moves through different discourses on gender, violence, and armed conflict. Drawing on Shepherd’s discourse model calls into question the very structures of the international system.⁶¹ The legal system is already comprised of multiple conceptions of women and gender. For example, women are primarily victims, as garnered from the WPS agenda, women are ‘evil monsters’ when they do engage in criminal acts,⁶² or women are the resilient peacemakers who need to be ‘let into the fold’ with regard to post-conflict justice.⁶³

Shepherd also draws out the institutionalised conceptions of women and how this prevents women, who fall outside these pre-set ideals, from being acknowledged.⁶⁴ Shepherd’s work is useful for a study of international criminal law because it articulates the notion of an ‘idealised’ version of women, which I argue is found within international criminal law. This ideal purports that men hold power while women are void of agency.⁶⁵ Working through cases and examples of female defendants, Shepherd’s approach is useful in order to identify the rhetoric of female victimisation in which international criminal law, the international legal system, gender, race, class, violence, and armed conflict intersect and produce a discourse on female defendants, confining them to narrow definitions with a lack of autonomy, such as the production of Nyiramasuhuko as a mother rather than an agent. Women’s assumed lack of power and agency⁶⁶ will also be explored in relation to female defendants.

⁶⁰ Shepherd, *Gender Violence and Security Discourse as Practice* (2008) 20.

⁶¹ *ibid.*

⁶² ‘Bosnia arrests ‘Female Monster’ wife of warlord ‘Serb Adolf’ (Mirror, 22 December 2011).

⁶³ Shepherd (n 60) 88, 89.

⁶⁴ *ibid* 40-43.

⁶⁵ *ibid* 41.

⁶⁶ This thesis is not undertaking a singular focus on ‘agency’. The use of the term ‘agency’ in the thesis highlights the gender binary that exists between victims and agents. Discussing ‘agency’, therefore, disrupts assumptions of the female victim in armed conflict. See Sjoberg, ‘Agency, Militarized Femininity and Enemy Others: Observations from the War in Iraq’ (2007).

I argue that law's present engagement with females, who commit crimes, has aided international law's current classification of women (as victims) by reinforcing already limiting binaries. This extends on from Sjoberg and Gentry's argument that women's actions are constructed to fit into one of three predefined categories, 'mother', 'monster', or 'whore'.⁶⁷ Sjoberg and Gentry navigate through these three narratives but more importantly draw attention to their existence through examples. These are then not just theories, but an actual discourse that plays out in the public sphere, often simultaneously moving through multiple narratives of mother, monster, and whore. Sjoberg and Gentry are very clear in stating that they do not advocate that women commit more crimes, or blame feminists for intentionally elevating women's supposed morality to the point that women who commit crimes are not recognised. Sjoberg and Gentry rightly state that the violent acts women commit can sit alongside a discourse on women as victims of sexual violence in armed conflict.

My work will also take a theoretical approach which draws on different theories found in gender studies, feminist legal studies, and critical legal studies, to inform and critique the work of international criminal law, and Western feminist interventions. An extended discussion of the theoretical framework is given in Chapter Two and Three. This thesis also acknowledges law's connection to historical, economic, social and political factors allowing for a socio-legal approach. The usefulness of a socio-legal approach for this thesis is in the understanding that an analysis of law is directly linked to the social environment in which law exists. Thus, both the presence and understanding of the female defendant is linked to legal structures and processes as well as the surrounding society. This is why the thesis includes a socio-legal perspective. Throughout the thesis, I highlight the lack of visibility of female defendants in academic work, but do not undertake an explicit description of their crimes. Feminist and gender studies, alongside the methods of critical legal studies, offers a way to engage that is more reflective of the specific situation and allows for a deep structural analysis rather than mere description.⁶⁸

⁶⁷ Sjoberg and Gentry (n 28).

⁶⁸ Chimni, 'An Outline of a Marxist Course on Public International Law' (2004) 1-2; Chimni defines MILS, 'as an ensemble of methods, practices, and understandings in relation to the identification, interpretation, and enforcement of international law'.

The decision not to describe the crimes that women were found guilty of committing or accused of committing was purposeful. The rationale for this decision is based on the tendency, in academic texts, to explicitly detail international crimes that are otherwise irrelevant to the analysis. However, this point is also connected to the thesis focus on analysing the discourse on female defendants and perpetrators, rather than a cataloguing of the crimes and prosecutions of specific female defendants. While the work of analysing specific cases is undertaken, as is the case in Chapters Four and Five with the discussion of Plavšić and Nyiramasuhuko, this work serves to illuminate the surrounding dialogues in relation to both perpetrators rather than a specific account of their actions that lead to prosecution.

Engle discusses the human rights agenda, and suggests that the focus on the exclusion of women and the subsequent need to include women in human rights provisions, highlights a structural bias within the legal discourse.⁶⁹ One of the critiques Engle makes is that when women's rights are discussed as a matter of primacy, it is often assumed that this is enough 'work on women's issues' to satisfy existing inadequacies. Engle argues that this approach ignores the underlying issues and the possibility that disagreements amongst women exist.⁷⁰ This thesis contributes towards a dialogue that does not assume one feminism or approach is inherently more 'feminist' than another. There is not one set of 'common issues' that define women and discussing a topic like female defendants, which may highlight negative actions of women, and is not outside the lens of feminism. While the topic of female defendants may incite disagreements amongst feminists, I argue throughout the thesis that it is still a necessary part of feminist dialogues.⁷¹

The following discussion will first introduce critical legal studies, followed by the work of MacKinnon, in order to establish the understandings of gender shared by radical feminists and the application of these standards to international criminal law. This section will critique MacKinnon's work, which I argue contributes towards a feminist scholarship that frames women's sexuality as the central site of gendered

⁶⁹ Engle, 'International Human Rights and Feminism When Discourses Meet' (1991-1992) 517.

⁷⁰ *ibid.*

⁷¹ Charlesworth, 'Talking to Ourselves? Feminist Scholarship in International Law' in Kouvo and Pearson (Eds.) *Feminist Perspectives on Contemporary International Law* (2011) 23.

harms. Ultimately, the thesis moves towards the work of Engle, Kapur, and Charlesworth in order to combat the exclusive focus on women's sexual vulnerability as the predominant experience of women in armed conflict.

4.1 Critical legal studies as a precursor to feminist methods

In the context of this work, critical legal studies (CLS), is used in order to explore the deficiencies within international law, and informs the epistemology. International critical legal theory identifies that the failures of international law are a part of the system itself, such that the deficits in international law are 'structural' and deeply embedded.⁷² Beckett lists different issues that CLS scholars view as inadequacies within international law, such as "gender biases, racialised exclusions, and differentiations; class, poverty, and exploitation; cultural imperialism; and hidden violence."⁷³ CLS aims to expose these issues and rejects ideas of universality, objectivism, and neutrality.⁷⁴ CLS scholars argue that there is no universal truth or impartiality, as these claims are often representative of a certain group in a specific point in time.⁷⁵ As Carty notes, "in fact the cultural choices of each society are largely attributable to the peculiarities of its history, beliefs etc."⁷⁶

Within CLS, Steinberg and Zasloff have identified language as a producer and reproducer of relationships and binaries, which often close off international law from developing more fully.⁷⁷ Koskenniemi describes the indeterminacy of international law by stating that it "remains indeterminate because it is based on contradictory premises and seeks to regulate a future in regard to which even single actors' preferences remain unsettled."⁷⁸ Koskenniemi asserts that the individuals who work within international law carry conflicting points of view, which is inevitable due to the uncertainty embedded in how international law may need to function in the future. Thus, Koskenniemi states that it is then possible "to defend any course of action," as

⁷² See Koskenniemi, 'The Politics of International Law' (1990).

⁷³ Beckett, 'Critical International Legal Theory' in Carty (Ed) Oxford Bibliographies Online: International Law (2012).

⁷⁴ *ibid.*

⁷⁵ Carty, 'Critical International Law: Recent Trends in the Theory of International Law' (1991) 2.

⁷⁶ *ibid.*

⁷⁷ Steinberg and Zasloff, 'Power and International Law' (2006) 83.

⁷⁸ Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2005) 590.

it is essential for legal rules to adapt to the changing landscape.⁷⁹ While this can be seen as beneficial to international law, it also challenges its efficacy and strength, as it supports the flexibility of laws, which are in theory supposed to be definite.⁸⁰

Koskenniemi states that a consensus in international law refers to the dominance of what is purported to be the ‘neutral’ or universal position.⁸¹ In turn, perceptions of female defendants are influenced by an embedded discourse that represents and reproduces gender in the law. Female defendants, as a focus of study, illuminate how very specific gendered tropes re-emerge in law and are assumed to be universal.

Throughout the thesis, I am particularly interested in how binaries carry embedded gendered assumptions. For example, Kennedy writes on the problems of the victim/violator binary, as law uses language to identify and simultaneously limit those who fall into either category.⁸² The victim is limited to a specific role void of autonomy, while the violator can be seen as nothing other than a person who harms, irrespective of their own particular circumstances. Drawing on CLS methods to analyse female defendants is beneficial, as they have been affected by gender, racial, and class biases in law, as well as language, all of which limit their relationship with the law. Female defendants are constrained by assumptions associated with their gender, coupled with their other identity markers, which often automatically equate women with a victim status in law. To use CLS as a means to critique the construction of female defendants in international law encourages the further examination of the power structures in international criminal law that have prevented decision-makers from viewing women as political leaders, and thus potentially responsible for international crimes – all borne from a preoccupation with women as victims.

4.2 Moving to feminist methods

Radical feminism, in this case highlighted by the work of MacKinnon, is important to understand as it has shaped the understanding of women’s roles in armed conflict and given prominence to issues of conflict related sexual violence, particularly crimes of

⁷⁹ *ibid* 591.

⁸⁰ *ibid* 592.

⁸¹ *ibid* 597.

⁸² Kennedy, ‘Boundaries in the Field of Human Rights: The International Human Rights Movement: Part of the Problem?’ (2002).

sexual violence committed against women. While this work highlights radical feminism and later moves to work such as Engle, Kapur and Charlesworth – all of whom reject the gender essentialism found in radical feminist academic scholarship – there are many other areas of feminist legal theory that do not fall under the purview of the thesis.⁸³

MacKinnon's work on international law has centred on women's experiences in armed conflict. She was a key advocate for the establishment of the ICTY and ICTR, pushing the courts to address the women who were victims of the sexual violence that occurred during both armed conflicts.⁸⁴ MacKinnon also encouraged the courts to include more charges of sexual violence in their prosecutions,⁸⁵ and supported the concept of 'rape as genocide.'⁸⁶ With MacKinnon and other feminists who shared her views, the Ad Hoc Tribunals developed a new focus on women in international criminal law. During this time, feminists used the conflicts in the FYR and Rwanda, as well as female victims, as an entrance point into the conversation on international law, which had long been silent on women, particularly in relation to armed conflict.⁸⁷

MacKinnon's advocacy also incorporated 'the women question,' as she sought to include the experience of female victims in the work of the courts and advocated for more male superiors to be charged with inciting rape.⁸⁸ In her writing, she notes how the ICTR found it difficult to charge men, not with the acts they committed themselves, but the acts which other men committed on their behalf, which was key when accusing one of inciting rape.⁸⁹ MacKinnon further states that the underlying impression given by the prosecutors is that men would not likely commit murder without orders, yet they would likely rape on their own, without the orders of a

⁸³ For a more complete understanding of FLT, see Powell, 'How Women Could Save the World, If Only We Would Let Them: From Gender Essentialism to Inclusive Security' (2017).

⁸⁴ MacKinnon, 'The ICTR's Legacy on Sexual Violence' (2008).

⁸⁵ *ibid.*

⁸⁶ MacKinnon, 'Rape, Genocide, and Women's Human Rights' (1994) 7-10.

⁸⁷ See Chinkin, 'Thoughts on the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)' in Shivdas and Coleman (Eds.) *Without Prejudice: CEDAW and the Determination of Women's Rights in a Legal and Cultural Context* (2010).

⁸⁸ Askin, 'Gender Crimes Jurisprudence in the ICTR' (2005) 1007-1008; MacKinnon (n 84); Catharine MacKinnon, 'Feminism, Marxism, Method, and the State: An Agenda for Theory' (1982); Engle (n 40) 953; Engle (n 39) 785-786.

⁸⁹ MacKinnon, 'Crimes of War, Crimes of Peace' (1993) 64-65; MacKinnon (n 84); MacKinnon (n 88).

superior.⁹⁰ This, she says, falls into the ‘boys-will-be-boys’ narrative and shows that the members of the ICTR do not believe that the rapes were truly the fault of the leaders.⁹¹ MacKinnon also states that there was a willingness to drop rape charges, especially when murder charges were retained, which she stated showed the tribunals’ lack of efforts to prosecute sexual violence.⁹² MacKinnon explains that there seems to be a higher standard of credibility for witnesses to rape than for witnesses to murder, and that all of these instances combined demonstrate a push towards impunity.⁹³

I agree with MacKinnon’s frustrations over the prosecution of rape; however, my concern with MacKinnon’s work is the hypervisibility and exclusive focus on conflict-related sexual violence, which produces a narrow account of women’s experiences in armed conflict concentrating on women’s sexual vulnerability. If rape always makes women victims, then it is more likely that women will be defined by their experience of sexual violence. MacKinnon’s work within the tribunals shows her efforts to examine the law while taking into account the experiences of women. However, it was within her efforts to include more law, which addresses the female victim, that MacKinnon contributed to a victim narrative. This, in turn, emphasised women as victims of sexual violence.⁹⁴ This victim feminism emerged as international criminal law began to grow with the creation of the ICTY and ICTR, and the concern is that other feminist approaches are displaced or suppressed by the dominance of MacKinnon’s approach.

This thesis highlights the importance of alternative feminist approaches to women’s experiences in armed conflict beyond the work of MacKinnon and other radical feminist scholarship coming from the United States and other Western spaces. Notably, Charlesworth states that “feminist methods emphasise conversations and

⁹⁰ MacKinnon (n 84) 105-106.

⁹¹ *ibid.*

⁹² *ibid* 104-105.

⁹³ *ibid.*

⁹⁴ Halley et al, ‘From the International to the Local in Feminist Legal Response to Rape, Prostitution/ Sex Work and Sex Trafficking: Four Studies in Contemporary Governance Feminism’ (2007); Halley et al, ‘Rape at Rome: Feminist Interventions in the Criminalization of Sex Related Violence in Positive International Criminal Law’ (2008); Halley, ‘Rape in Berlin: Reconsidering the Criminalisation of Rape in the International Law of Armed Conflict’ (2008).

dialogue rather than the production of a single, triumphant truth.”⁹⁵ The feminist methods used in this thesis challenge the hypervisibility of conflict related sexual violence, as well as the role of narratives, through the work of Engle.⁹⁶ Kapur’s work develops feminist legal methodology beyond gender essentialism, recognising that multiple identity markers influence women’s experiences.⁹⁷ This thesis also uses feminist methods to question the gendered tropes around women, as Charlesworth does with the question: “are women peaceful?”⁹⁸ Similarly, Ní Aoláin, Haynes, and Cahn acknowledge that their study comprises of a host of feminist methodologies in order to develop their analysis; in order to work through different subject matter, different feminist theories are needed.⁹⁹ Likewise, I utilise different strands of feminism in order to analyse the connection between gender, law, armed conflict and the female defendant.

In order to analyse female defendants as gendered within international criminal law, critical legal studies provides a methodology for analysing the power structures and influences that are predicated upon female defendants. Critical legal studies questions the supposed dominant values of the international legal system,¹⁰⁰ allowing for a discussion of women’s experiences in armed conflict beyond that of victimhood, which has preoccupied mainstream analysis of gender and armed conflict. A discussion of radical feminism lays the foundation for how women’s experiences in armed conflict were understood and interpreted with the development of international criminal law in the 1990s. Both feminist legal theory and critical legal studies provide the space to critique the ways in which law and gender can be understood differently through the analysis of female defendants.

5. Female Defendants in International Criminal Law: Beyond Counting and Towards Justice

There are common counterarguments that surface when female defendants are discussed. This section will address the most prevalent arguments against the study of

⁹⁵ Charlesworth, ‘Feminist Methods in International Law’ (2004) 379.

⁹⁶ Engle (n 40).

⁹⁷ See Kapur, ‘Erotic Justice: Law and the New Politics of Postcolonialism’ (2005).

⁹⁸ See Charlesworth, ‘Are Women Peaceful? Reflection on the Role of Women in Peace Building’ (2008).

⁹⁹ Ní Aoláin, Haynes, and Cahn, *On the Frontlines: Gender, War, and the Post-Conflict Process* (2011) 4.

¹⁰⁰ Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (2004) 328.

female defendants. In my attempt to dispel the arguments against my thesis, I do not intend to trivialise the issues presented or ignore the larger histories that exist within each claim. Instead, I recognise that every thesis topic undertaken will need to be defended, but defending the study of female defendants is not necessarily based upon the strength of argumentation. The counterarguments that surface when female defendants are discussed underscore all of the work in this thesis, and expose fundamental issues around gender, feminism, and international law. This section will highlight each of these counterarguments and in doing so re-establish the need for an analysis of female defendants with feminist accounts of armed conflict and international armed conflict.

5.1 Lack of numbers

One of the key criticisms of the study of female defendants is that there are not enough women who commit international crimes to warrant academic attention. Typically, this argument relies on counting the numbers of women brought before international courts; little attention is paid to the complementary role of domestic courts in prosecuting these crimes. This line of reasoning intimates that a female defendant's actions have not reached the same level of frequency as male defendants. Since men are still statistically more often accused of violence in armed conflict, those who follow this line of thinking reject the need to interrogate women's actions, as their existence is seen as an aberration and exception, thus not warranting significant research.

The problem with this argument is that it wrongly assumes that the number of women documented as taking part in armed conflict is accurate and void of gender bias. This counterargument also wrongly assumes that female defendants would be acknowledged if their actions increased in frequency. However, if the number of women who committed international crimes suddenly increased, then I would argue that the amount of stereotypical reactions to their presence would also increase. This would ultimately result in a lack of understanding around the reasons why women participate in violence and rely on stereotypical explanations to avoid further interrogation. Currently, when women are identified as defendants, Western society responds with shock and condemnation based on the fact that they are women. This

reinforces the view that female defendants are an aberration from the way women normally act.

The actions of females accused need to be explained, as their crimes confront how women are assumed to 'behave'. In order to achieve this, the greater range of women's roles in supporting armed conflict are dismissed. This creates a circular argument that refutes any possibility of women acting voluntarily to support armed conflicts, as well as the fact that their role in armed conflict might not necessarily be a result of their gender, but possibly due to their position in society. However, as Charlesworth has shown, inherent gender essentialism exists within international legal spaces, which confines women to essentialised roles.¹⁰¹ Therefore, a study of gender rather than a study of women proposes an analysis of how gender assumptions and stereotypes are continually reproduced by legal structures. Asking 'the woman question' is not just about identifying spaces where women are absent, but instead, analysing the assumptions made around the question itself. In other words, if it has already been predetermined that 'women are peaceful,' then feminism does not disrupt, but instead reasserts, the gendered status quo.

Women who support armed conflict through traditional gender roles, i.e. caring for the wounded, moving supplies, cooking, and so on, are not considered to be directly involved in perpetrating crimes. However, the assumption exists that women who undertake roles 'behind the scenes' in armed conflict are innocent, less culpable, or forced to take part. Successful military or non-military forces require a high level of unseen labour that facilitates the work of those directly involved in perpetrating violence. When men are involved in administrative work during armed conflict, they are seen as either in power, making key decisions, or supporting the conflict by other means. In either case, the men involved in these actions are not assumed to have been coerced to take part. The lack of autonomy that exists in discourse around women engaging in armed conflict rests on the belief that women do not have agency within the conflict or the larger society. This assumes that women who perform 'behind the scenes' tasks do not vehemently support the armed conflict themselves, and are not decision-makers during periods of hostility. While I am not suggesting that women

¹⁰¹ Charlesworth (n 98).

who, for example, cook for paramilitary forces should be classified as female defendants, but the example above is meant to highlight the differences between the perception of men and women's agency in armed conflict.

The number of women who perpetrate crimes in armed conflict is irrelevant, as the focus on numbers ignores the larger issue of access to power in society. This assumes that if women ran governments state violence would be eradicated. However, the existence of female leaders such as Plavšić in the FYR and Nyiramasuhuko in Rwanda demonstrate that women in power can exhibit the same weaknesses as men, which is an area of feminist international legal scholarship that has yet to be sufficiently addressed. To presume that women would need to perpetrate the same number of crimes as men before further interrogation of female defendants is warranted also assumes that there is nothing to be gained from examining all of the various roles women play in armed conflict.

5.2 Harming women who experience sexual violence in armed conflict

Another common perception is that focusing on women who commit international crimes takes attention away from those women who are harmed by conflict-related sexual violence. This argument highlights the struggle women face to gain recognition internationally for the violence they experience in armed conflict; in particular, sexual violence. Likewise, this argument assumes that if there is an acknowledgement that women also perpetrate violence during conflict, including sexual violence, then the work done to combat sexual violence against women will no longer take focus or appear necessary. International law attempts to stop sexual violence against women in armed conflict, but in doing so, it has made women appear hyper-vulnerable, therefore requiring special protection. These two elements rely on each other: 'she' is vulnerable so deserves protection, time, money, resources, and due to the hypervisibility of women as victims of sexual violence, 'she' remains all the more vulnerable.

This counterargument is grounded in the concern that exposing the violence women perpetrate would convince people that women are not worthy of their time or attention, even when they are victims of violence, because they have been exposed to be violent themselves. The argument also suggests that if women are identified as

defendants, this might also lose all women a seat at the negotiation table – although male violence has never lost men a seat at the negotiating table, or a place in the decision-making process. Some would suggest that drawing attention to female defendants is almost celebrating a ‘race to the bottom,’ joyously declaring that women can be just as ‘bad’ as men. However, I am not satisfied with these claims, and I am not content, as a woman, with having a place in international law if I am restricted by which topics I may or may not discuss. It is as if international law has finally opened up to women, allowing them to voice concerns over sexual violence, and because of this, women have accepted the accompanying limitations. This argument also infers judgement upon anyone who decides to examine international criminal, humanitarian law, or armed conflict instead of focusing on women as victims of sexual violence.

Throughout the thesis, I work from the premise that research on female defendants can and should sit alongside research on women as victims. What both topics have in common is the recognition of women’s diverse and gendered experiences in armed conflict. This does not mean that women are only female defendants or victims; they can be both, or neither. What is important to understand from each of these debates is the nuance that exists within armed conflict, and the gendered limitations in international criminal law which ignore these aspects of women’s lives. This thesis is not a celebration of female defendants as an expression of female agency, but an inquiry into how gendered assumptions are produced in legal accounts of female violence.

5.3 Irrelevant to international criminal law

A criticism that focuses primarily on the mechanism of international criminal law purports that if female defendants are an area of study, then they should reside in the area of gender or feminist studies. This argument states that female defendants do not belong in academic work around international criminal law, as international criminal legal analysis is not benefited by a discussion on female defendants.

Mainstream approaches to international criminal law may not identify the relevance of analysing legal responses to female defendants, but that does not mean that feminist approaches do not have resonance within the realm of international criminal law. Feminist approaches to international criminal law have steadily expanded since

the 1990s and the creation of the Ad Hoc Tribunals. International criminal law benefits from the analysis of female defendants for a multitude of reasons. Namely, female defendants identify flaws in the structure of international criminal law, which can lead to its repair. At a moment when international criminal law seems to be losing ground, with more and more states leaving the International Criminal Court, and more critiques waged against the work of the present court as well as past international criminal mechanisms, international criminal law needs to refocus and readjust. I am not arguing that this thesis solves the issues faced by international criminal law at this moment,¹⁰² but what a study on female defendants can achieve is the recognition that the work undertaken through international criminal law's mechanisms has, in many cases, limited the way gender, race, ethnicity, class and sexuality are represented. In this thesis, I explore gender as an embedded bias in law that interlocks with other sites of bias through the analysis of legal representations of female defendants.

5.4 A minor issue

Lastly, there is a criticism that states that the study of female defendants is a minor issue that only exists as an area of extremely specialised study which does not influence the larger tenets of international law or feminist studies. This counterargument also links to my previous point, reiterating that there are other issues more deserving of attention than female defendants. To be clear, this study does not find more of an issue with female defendants' actions than the actions of male defendants. Criminal acts are wrong no matter who perpetrates them, and drawing attention to female defendants does not celebrate their actions. The reason it is necessary to analyse female defendants is partially due to the shock and condemnation people express when confronted with women who commit crimes because they are women, and not because of the appalling nature of the crime itself. There is often the perception that the criminal act is worse when a woman is found to be the perpetrator. This thesis identifies the ways in which the international media, feminists, and international law are reflective of the Western perspective. Upon interrogating the existence of female defendants and their interaction with the international media, feminists, and international law, larger issues around women's existence in society are

¹⁰² See Rogers, 'International Criminal Court' (2018); de Hoon, 'The Future of the International Criminal Court. On Critique, Legalism and Strengthening the ICC's Legitimacy' (2017).

highlighted. What becomes especially apparent is our hesitation to recognise women who do not fit under the category of either victim or peacemaker.

5.5 The future of research on female defendants

The future of research on female defendants remains tenuous.¹⁰³ One of the aspirations of this work has been to illuminate the nuances around the study of female defendants, and the reasons why they remain on the periphery of conflict narratives, if they exist at all. This in turn seeks to highlight the greater extent of women's roles in armed conflict, which should aid in future post-conflict justice. My concern is that female defendants will continue to be excluded from conflict narratives, absent in the histories of future courts or tribunals, and treated as aberrations by international media outlets. If this were to be realised, international criminal law would not benefit, and nor would feminist studies. From a practical standpoint, with the recent rise of women involved in terrorist activities, women will continue to play a predominant role in committing violence, and always have.¹⁰⁴ In order to better prevent such crimes, women must be seen to be a part of potential violence. However, due to the presumed religious affiliation of the women involved in terrorist activities, there is a larger concern that the same mistakes will be repeated as they were in the FYR, Rwanda, and Cambodia. The intersection of gender, race, sexuality, class, ethnicity, religion and colonialism needs to be better understood in order to properly assess the existence of female terrorists.

International criminal law must adapt in order to meet the needs of the diverse situations to which it is required to respond. If international criminal law continues to remain rigid and incapable of moving beyond gender assumptions of women who are accused of perpetrating international crimes, then international law is unable to live up to its potential. It is possible that international criminal law may transform into a

¹⁰³ Smeulers, 'Female Perpetrators: Ordinary or Extra-ordinary Women?' (2015); Linton, 'Women Accused of International Crimes: A Trans-Disciplinary Inquiry and Methodology' (2016); Sjoberg and Gentry (n 28); See Forthcoming Simić and Smeulers, 'People who know her would never believe this': Female War Crime Perpetrators in Bosnia and Herzegovina' in Mouthaan and Jurasz (Eds.), *Gendered Experiences of Armed Conflict: International and Transitional Justice Perspectives* (2018).

¹⁰⁴ Chrisafis, 'Woman charged over failed terror attack on Notre Dame in Paris' (The Guardian, 11 September 2016); Rosenbaum, 'How San Bernardino terrorist went from 'Modern Girl' to 'Calculating Killer' (New York Post, 6 December 2015); Dodd and Khomami, 'Two Bethnal Green schoolgirls 'now married to Isis men' in Syria' (The Guardian, 4 July 2015).

hybrid system that includes international and local legal perspectives, as well as aspects of the Asia Pacific Women's Hearings, which allow for a more transformative relationship for those affected by the violence.¹⁰⁵ Up to this point, there has not been an international forum that has moved beyond gendered assumptions with regard to women accused of international crimes. At the very least, this thesis represents one more perspective that highlights the multiplicity of women's roles in armed conflict. I am hopeful that the work done within this thesis will contribute towards a reimagining of international criminal law's assumptions about the gendered experiences of victims and violators.

6. Structure

Chapter Two will define the following key terms used in this thesis: 'gender,' 'feminism,' 'perpetrator,' 'defendant,' 'suspect' and 'narrative.' The reason for defining my terminology is to clearly detail my approach when utilising these words throughout the thesis. Chapter Two contains a literature review of key scholarship on female perpetrators, defendants and suspects, including the work of Smeulers, Linton, Hogg and Sjoberg and Gentry. This chapter also examines scholarship that informs my theoretical framework, utilising the work of Charlesworth, Kapur, Engle, and Halley.

Chapter Three highlights the development of international criminal law, as well as the relevant elements from the wider subject of international law, which are necessary to discuss in order to understand the position of the female defendant in international criminal law and Western legal interventions. The major developments of international human rights law and international humanitarian law in the second half of the twentieth century are also introduced in this chapter, with special attention to women's rights and the international community's turn to humanitarian concerns, which has resulted in the increased focus on conflict-related sexual violence within international law. Chapter Three also details the liberal and radical feminist agendas within US and Western feminist histories which have focused on conflict-related sexual violence against women. Each of these areas of international legal

¹⁰⁵ This is discussed more fully in Chapter Six.

development are essential to establish prior to undertaking the work in the following chapters.

Chapters Four, Five, and Six of the thesis focus on a specific international criminal intervention, with Chapter Seven synthesising the information gathered in the previous three, in order to understand the connection between local transitional justice projects and domestic courts as spaces of prosecution of international crimes and international law. Chapters Four, Five, and Six take into account Western feminist interventions, international criminal law, and the media – primarily the global media based in the US and the UK. Each chapter builds upon the work of the previous chapter in order to map the evolution of women’s autonomy in international criminal law through the lens of the female defendant. Chapters Four through Six each demonstrate a unique post-conflict situation and the different elements that influence the understanding of female defendants in each context, although it is argued that each situation – while specific – speaks to the wider conceptions held by the international legal community pertaining to women’s experiences in armed conflict.

Chapter Four focuses on the International Criminal Tribunal for Yugoslavia, along with the media campaign that influenced the international response to the crisis in the 1990s, including the UN military intervention and the feminist intervention that focused on addressing sexual violence. The role of Western feminist interventions in influencing the work of the ICTY is discussed and analysed. Each of these elements fit into the construction of women as victims during the armed conflict of the FYR, and therefore contribute to the fiction that women were not perpetrators of violence and crime. This set the framework for developments in international criminal law over the following two decades. The trial of Biljana Plavšić is analysed in Chapter Four to highlight how her case reinforces notions of femininity, while simultaneously citing her crimes as an aberration from women’s usual activities in armed conflict. Local processes will also be taken into account in Chapter Four. The focus on sexual violence jurisprudence by international criminal law and Western feminist intervention created a narrative of women as victims in armed conflict. I argue that the hypervisibility of women as victims in the conflict and the reliance on gender

binaries by the ICTY limits the visibility of female defendants, as women's experiences in the FYR remain tied to sexual vulnerability.¹⁰⁶

Chapter Five analyses the International Criminal Tribunal for Rwanda, again focusing on the global media attention that highlighted the volatility of Africa and also distanced (Western) viewers from the genocide and its aftermath. The ICTR is examined through the case of Pauline Nyiramasuhuko, which details an example of a female perpetrator who was charged for inciting acts of sexual violence, offering a unique perspective on the representation of both masculinity and femininity in international criminal law. The Gacaca Courts will also be discussed in relation to female defendants. I also analyse the assumptions around race in accounts of the Rwandan genocide in order to interrogate the reactions of the international community, including the role of Western feminist interventions that supported the establishment and development of the ICTR, the role of international media and the contours of international criminal law. This analysis underscores the complexity around recognising the female defendant as an autonomous agent before the law and, in particular, the necessity of understanding how perceptions of race and gender function to reproduce specific outcomes within international law.¹⁰⁷

Chapter Six analyses the Extraordinary Chambers in the Courts of Cambodia, which is unique in terms of the number of female defendants brought before the court and mentioned in court documents. Ieng Thirith, Khieu Ponnary, Yun Yat and Im Chaem are all recognised as having been instrumental to the Khmer Rouge regime. However, the problems within the ECCC, as well as the Western conceptions of women and marriage in Cambodia, create an assumption that the women in the Khmer Rouge did not have any 'real' form of agency during the genocide.¹⁰⁸

¹⁰⁶ Zarkov, *The Body of War, Media, Ethnicity, and Gender in the Break-up of Yugoslavia* (2007); Zarkov, 'The Body of the Other Man: Sexual Violence and the Construction of Masculinity, Sexuality and Ethnicity in the Croatian Media', in Moser and Clark (Eds.), *Victims, Perpetrators or Actors? Gender, Armed Conflict and Political Violence* (2001).

¹⁰⁷ Hogg, (n 19) & (n 25); Sperling (n 55); Drumbl, "She Makes Me Ashamed to Be a Woman": The Genocide Conviction of Pauline Nyiramasuhuko 2011' (2013).

¹⁰⁸ Linton (n 47); Jacobsen, 'Misogyny, Malice, and Male Privilege in Cambodia: The Cbpab Srei [c.1800]' (2015); Jacobsen, *Lost Goddesses: The Denial of Female Power in Cambodian History* (2008).

Chapter Seven analyses the binary constructed between the international and the local through law, and international criminal law in particular, in order to gather insight into the way gender and female defendants are constructed given the importance of complementarity in international criminal law. The insights from this thesis in relation to international criminal law are discussed in Chapter Seven, as well the ways in which they can be applied to create an international justice system that enlarges, rather than reproduces, perceptions of gender and gendered experiences, as well the ways that culture, race and class are reproduced within international law. In Chapter Seven I argue that the movement of knowledge between the international and the local with regards to international law and armed conflict needs to be rethought. The future of international criminal law must include the nuances garnered from examining female defendants. These nuances are at once gendered in our perceptions and reactions. Yet ultimately, this thesis highlights the need to recognise that women who commit international crimes are human in their abuse of power, rather than excessive or aberrant in their performance of gender.

In this thesis, I assert that due to international criminal law and Western feminist interventions influenced by both media representations of women's experiences and the armed conflicts themselves, female defendants have not featured as a part of mainstream conflict narratives. The benefits of analysing female defendants within international criminal law become apparent when a gender analysis is applied. Overall, the thesis contributes to an original and innovative analysis of the gendered tropes within international criminal law: not from the assumption of women's sexual vulnerability, but rather an acceptance that women can also play leadership roles in the commission of international crimes.

7. Audience

This project should be read through the main tenets of international criminal law and international law itself, as opposed to simply an addition to the work on law and gender that only speaks to other feminists.¹⁰⁹ The audience for this work is both international legal academics and those who engage with the work of Western feminists in international criminal law. While the relationship between Western

¹⁰⁹ Charlesworth, 'Talking to Ourselves? Feminist Scholarship in International Law' in Kouvo and Pearson (Eds.) *Feminist Perspectives on Contemporary International Law* (2011).

feminism and female perpetrator is an important discussion for feminists who wish to interrogate the influence of the Western feminist agenda in the 1990s to international criminal law and the Women Peace and Security agenda, this relationship is also important for the international legal or international criminal legal scholar. The discussion of female perpetrators, defendants, and suspects highlights the complexity of women's experiences during armed conflict, and the limitations faced when international criminal law engages with these women. A study of female defendants therefore helps us to develop discussions around the role of international criminal law in history-telling and narrative production, which is ultimately circumscribed by its gendered structure. Returning to the Butler quotation with which the chapter opened, seeing women as fully human requires letting go of the image of the peaceful, venerable subject of feminist approaches and acknowledging that women will sometimes act violently in positions of power.

Chapter Two

Positioning Female Defendants

While female defendants are the focus of the thesis, the goal of this research was never to simply recount the stories that lead to women becoming defendants. Structuring the thesis around the instances where women participate or are accused of participating with the violence of armed conflict provides the space for broader gender and legal analysis. Attempting to ascertain the reason why the experiences of female perpetrators, defendants, and suspects are outside of mainstream international criminal law's accounts, therefore involves the examination of the much larger narrative around feminist strategies in international criminal law. The recent work of Halley, Kotiswaran, Rebouche, and Shamir focuses on governance feminism, which they define as, "every form in which feminists and feminist ideas exert a governing will within human affairs".¹ The topic of governance feminism provides a starting point for the work of this chapter, which includes a detailing of the literature and theoretical framework that supports and shapes the thesis.

Discussing governance feminism, in the thesis, offers engagement with the work of "state, state-like, and state-affiliated power",² particularly in its relationship with international criminal law. This is illustrated through the discussions on US and Western feminist interventions into international criminal law in the 1990s. Halley, states that governance feminism has produced many positives, but has also produced 'terrible mistakes', which are important to 'take stock of'.³ This is precisely the work the thesis is undertaking. The thesis utilises governance feminism by looking at feminist achievements in international criminal law and reevaluating their success through the lens of the female defendant. Dominance feminism, found in MacKinnon's scholarship and activism,⁴ has produced important gains that have encouraged the prosecution of conflict related sexual violence. However, in the push to see women as victims of sexual violence the female defendant was left out of focus.

¹ Halley et al., *Governance Feminism: An Introduction* (2018) ix.

² *ibid* x.

³ *ibid*.

⁴ *ibid* 25-39.

At the same time, feminist approaches to armed conflict and international criminal law became narrowed to the exclusion of alternative analysis on gender and intersectionality. The differences in feminist perspectives are evident in the governance.

1. Terms

Gender

Throughout the thesis, my approach to gender finds Scott's work a starting point; she writes that construction of the concept of gender is in no way related to the actual physical body, rather it is social organisations that shape how gender is perceived.⁵ Masculinity and femininity, therefore, demonstrate relations of power and by defining certain aspects of the political or social realm as masculine or feminine create a hierarchy.⁶ Butler discusses gender as something that is different for each individual, which is also constructed through language.⁷ Indeed, for Butler gender comes before sex or sex difference. It is through framing debates with gender in mind that shifts the focus of this project from only a woman's perspective to a perspective that can incorporate the different social implications masculinity and femininity imply.⁸ It is useful to map the way ideas of masculinity and femininity clash when people describe female defendants, as female defendants are charged with crimes in international criminal law that are often attributed to men in armed conflict.

Those who seek to describe female defendants often highlight their behaviour as shocking, not because the behaviour is shocking but, because they are women and it is assumed women do not act in this manner. As a result, female defendant's actions or demeanour are described as unfeminine or masculine, as if they are citing this as an excuse for their crime.⁹ Holland refers to Butler's notion that 'natural' gender behaviours require 'performative acts' to be constantly reproduced; however, the continuity between these 'natural' acts may be disturbed when certain actions fall into

⁵ Scott, 'Gender: A Useful Category of Historical Analysis' (1986) 1068-1070.

⁶ *ibid* 1063.

⁷ Butler, *Gender Trouble: Feminism and the Subversion of Identity* (1990) 7-13.

⁸ *ibid*.

⁹ Drumbl, "She Makes Me Ashamed to Be a Woman": The Genocide Conviction of Pauline Nyiramasuhuko 2011' (2013) 559.

different, ‘unnatural’ categories, much like the female defendant’s actions.¹⁰ The process of identifying actions as subversive also goes against the ‘normal’ gender categories; this is present when female criminals are described as exceptional.¹¹

Charlesworth and Chinkin define gender as capturing “the ascribed, social nature of distinctions between women and men—the excess cultural baggage associated with biological sex”.¹² Gender includes the idea of ‘relationality’ connecting the descriptions of what is masculinity and femininity.¹³ Charlesworth and Chinkin state that, sex, as biological difference focusing on the body, is equally as important as gender to the study of international law, whereby sex and gender differences shape international legal structures.¹⁴ Cohn highlights how understandings of gender are interconnected to ideas of war. Cohn states:

the institutions that are constitutive of the wider economic, political, social, and environmental processes formative of war are themselves structured in ways that both draw on and produce ideas about gender, that rely on gendered individuals in order to function.¹⁵

The way gender is defined and thereby influences legal arrangements is not neutral; rather it is hierarchical and embedded in power structures, which privileges certain individuals and ideas. The ordering of individuals based on gender produces inequalities that can be supported by legal institutions. Gender, however, is not the only site of oppression. Race, class, ethnicity, and socio-economic status all contribute towards the ordering of individuals, which underscores the importance of understanding the intersectionality of gender with other identity markers.¹⁶

In order to explore how law limits the ways women are able to express themselves, it must also be understood that masculinity is a social concept that prevents men from forms of expression that lay outside of the stereotypical tenets of masculinity.

¹⁰ Holland, ‘The Enigmatic Lynndie England: Gendered Explanations for the Crisis at Abu Ghraib’ (2009) 246-248.

¹¹ *ibid* 250.

¹² Charlesworth and Chinkin, *The Boundaries of International Law: A Feminist Analysis* (2000) 3.

¹³ *ibid*.

¹⁴ *ibid*.

¹⁵ Cohn, *Women and Wars: Contested Histories, Uncertain Futures* (2013) 3.

¹⁶ See Crenshaw, ‘Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color’ (1993); Yuval-Davis, ‘Intersectionality and Feminist Politics’ (2006).

Therefore, law is equally as important to explore from this perspective. This approach invokes a different set of debates that move away from an assumption that all men benefit when women are oppressed and toward the idea that men are also affected by gendered power structures in law. This is especially the case when someone does not wish to identify with either category of man or woman. It is also important to acknowledge that women are a socially constructed category that only exists in a binary with the socially constructed category of men.¹⁷ Each in turn invokes the other and a range of assumptions around the performance of femininity and masculinity are produced. Law's ability to reinforce certain aspects of masculinity and femininity as well as limit both genders, while retaining 'gender neutral' language is a discussion that underpins inquiry into an embedded bias in the discourse of international criminal law. In this thesis, consider how international criminal law and the US and Western feminist intervention understand gender and how that understanding might be different when female defendants are the focus of study.

Feminism

I am careful to recognise the large variance, internationally, in the term 'feminism', and I also acknowledge the difference in and amongst Western feminist spaces. When discussing feminism the thesis takes a critical feminist approaches that draws on critical legal scholarship, and a combination of postmodern work, Butler and Scott, and post-colonial methods, Kapur. However, within this thesis, I use 'Western feminism' to identify the intervention of feminists from the West, namely the United States, into international criminal law in the 1990s, around the topic of sexual violence against women in armed conflict. This intervention was a specific radical feminist approach connected to MacKinnon's dominance thesis.¹⁸ I further argue that the topic of female defendants benefits feminism by exposing the nuance of women's experiences in armed conflict. As a result of the analysis around female defendants, stereotypes of women's peacefulness are disrupted, which contribute towards critical legal studies indeterminacy thesis, radical feminism focus on gender and conflict, and post-colonial studies desire to look beyond gender in global manifestations.

¹⁷ While I continually use the term 'woman' throughout the thesis, I recognise the assumption I am making. I utilise this term in order to emphasise gender power dynamics. When I write that an individual is a 'woman' I am doing so based on references already made in international and local spaces, which highlights part of the problem.

¹⁸ MacKinnon, *Towards a Feminist Theory of the State* (1989).

Perpetrators, Defendants, and Suspects

'Female perpetrators' are women who have been found guilty of committing crimes during armed conflict, that are illegal under international or domestic law. The category 'female perpetrator' is narrower than the term 'female defendant', as it infers a successful prosecution of to those women who have been brought before courts or tribunals, in both national and international jurisdictions.

My definition of (and focus on) 'female defendants' encompasses all women who garner attention from the criminal justice system, by being formally accused, and may or may not be found guilty. These women have been indicted for crimes illegal under domestic laws of war or international criminal law.¹⁹ The term 'female suspects', is the broadest category and refers to those who are reasonably believed to have taken part in illegal acts during armed conflict but have not been formally accused in a court of law. A continuum exists encompassing women's experiences, which includes female perpetrators, defendants, and suspects as well as female victims and I argue, in order to understand women's experiences of armed conflict, one must acknowledge the extremes of women's behaviour.

Narrative

The discussion of narrative throughout this thesis takes on Heathcote's approach to 'law as narrative'. Heathcote states, "law as narrative is a reference to the possibility of law as one telling among many rather than presenting law as an objective and universal standard."²⁰ Heathcote highlights the use of narrative in academic work as a way to disrupt law's prominence in societal structures, and as a way of including of

¹⁹ See generally, the First Hague Conference (May 18–July 29, 1899) adopted three conventions and three declarations and the Second Hague Conference (July 15–October 18, 1907) adopted 13 conventions and one declaration; See also The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 75 UNTS 31, adopted in 1864, revised in 1949; The Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 75 UNTS 85, adopted in 1949; The Geneva Convention Relative to the Treatment of Prisoners of War 5 UNTS 135, adopted in 1929, revision in 1949; Geneva Convention Relative to the Protection of Civilian Persons in Time of War 75 UNTS 287, adopted on 12 August 1949; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) 1125 UNTS 3, adopted on 8 June 1977; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) 1125 UNTS 6098, adopted on June 1977.

²⁰ Heathcote, 'Feminist Legal Approaches and International Law on the Use of Force' in *The Law on the Use of Force: A Feminist Analysis* (2011) 15.

experiences outside of mainstream understandings, highlighting the limitations of traditional international legal approaches.²¹ In the thesis 'narrative' is an important element that is utilised in order to identify the instances in which international law and the Western feminist agenda shapes and gives meaning to the way women's lives are understood during and after armed conflict. In the context of this thesis, narrative is also developed through international media coverage of female defendants, which frame societal understandings of women who participate in armed conflict, and it is that limited viewpoint of women's roles that this thesis challenges. Narratives have developed not only around female defendants, but around women as victims in armed conflict, which in turn has limited the visibility of female defendants. In the following section three common narratives about female defendants will be detailed.

2. Literature Review- Exploring Common Narratives

This section will highlight three narratives that permeate the work around women as perpetrators, defendants, and suspects. The three narratives include: the assumption that an explanation is needed when women move outside of traditional female roles, the justification of female defendants' presence within international criminal legal discourse, and the hypervisibility of women as victims of sexual violence. Each of these narratives are evident in Western feminist interventions, international criminal law, as well as in international media representations of female defendants. The importance of highlighting and refuting each of these claims is to address the tropes that limit the acknowledgement of women as defendants in Western feminist and international criminal legal discourse. This is linked to a failure to see women as political leaders/agents and women as equally vulnerable to corrupting effects of power as men. However, before exploring narratives on female defendants, I will first discuss the key literature in the field of female defendants.

In their seminal text, Sjoberg and Gentry, use the terms, 'mothers', 'monsters', and 'whores', which are deeply connected to social constructions of femininity, in order to describe the gendered depictions of women who are violent and to highlight that a violent woman is often imagined as one or the other.²² Sjoberg and Gentry recognise

²¹ *ibid.* Traditional international legal theories include positive law, natural law, and formalism, and instrumentalism.

²² See Sjoberg and Gentry, *Mothers, Monsters, Whores: Women's Violence in Global Politics* (2007).

the gender bias evident in the reactions to female violence and question the ways in which these reactions have shaped legal institutions and global politics. Focusing on the categories of ‘mother’, ‘monster’, and ‘whore’ allow Sjoberg and Gentry the opportunity to draw out the instances where women who commit violent/criminal acts are viewed only through the lens of gender stereotypes, devoid of agency.

Smeuler utilises Sjoberg and Gentry’s work and highlights key issues surrounding the topic of female defendants, cataloguing an array of instances where women have participated in mass atrocity.²³ The gendered stereotypes of armed conflict, the use of sexual violence as a weapon of war, the multitude of different ways women participate in ‘mass violence’,²⁴ the gendered tropes that surface in literature and the media when women are discovered to have taken part in violence and conflict,²⁵ and the cases of Plavšić and Nyiramasuhuko,²⁶ are all discussed by Smeulers.²⁷ This is an important contribution to the area of female defendants and I build upon Smeulers’ work in the thesis. However, Smeulers’ approach and purpose differs to the approach of this thesis. While she draws on armed conflict as well as media representations to identify the bias that exists when female defendants are discussed, Smeulers also explores motives of women who are involved in mass violence.²⁸

The purpose of this thesis is not to explore why women take part in violence, but rather to understand if conceptions of gender, violence, and the law shift when female defendants are the focus of analysis. Building upon this, I question the gendered representations of female defendants found in the media and the narratives produced by media sources, which in turn contribute towards understanding how representations of female defendants influence international criminal trials and legal systems. Another difference between Smeulers’ work and the thesis is my discussion of victim feminism (or governance feminism) and the work of US and Western feminists in the 1990s, both of which I see as instrumental in the topic of female defendants, but is not included in Smeulers analysis.

²³ Smeulers, ‘Female Perpetrators: Ordinary or Extra-ordinary Women?’ (2015).

²⁴ *ibid* 211-227.

²⁵ *ibid* 227-234.

²⁶ *ibid* 235-241.

²⁷ *ibid* 208-211.

²⁸ *ibid* 241-251.

Linton's work is concerned with women accused of international crimes or as she abbreviates the phrase, WAIC.²⁹ Linton seeks to develop WAIC as its own area of research and highlights the need to better understand women's roles in 'atrocities'. Linton's work, like Smeuler's, offers important scholarship on the topic of female defendants and lays the groundwork for some of the key questions in this emerging field, such as the relationship of power and leadership to women's violence.³⁰ Linton's focus, however, is 'trans-disciplinary' and takes care to identify the presence of women in various conflicts,³¹ utilising the benefits of criminology, psychology, scholarship on globalisation, masculinity, femininity, and historical examples of women who commit crimes, to understand the new field of WAIC in greater context than just the acts of violence themselves (although Linton is interested in this as well).

Linton's work moves from a more general discussion on female criminality to women specifically involved in armed conflicts. Linton recognises that the rhetoric on 'women as victims' has influenced understandings of women who are accused of committing international crimes.³² Due to the broad approach in Linton's work, this thesis differs in its narrowness. While Linton does highlight some similar questions around victim rhetoric, gender bias, power, and leadership, she points out herself that the work 'raise more questions than answers',³³ which is due to the fact that Linton is mapping a new field of study. Alternatively, this thesis is not interested in criminology or a discussion of different types of criminal participation, rather I am focused on female defendants in order to better understand gender, armed conflict, and the law.

Drumbl writes on women's roles in genocide and specifically on the case of Nyiramasuhuko, which was characterised by problematic assumptions about women and mothers.³⁴ Drumbl highlighted that the gender neutrality of Nyiramasuhuko's

²⁹ See Linton, 'Women Accused of International Crimes: A Trans-Disciplinary Inquiry and Methodology' (2016).

³⁰ *ibid* 162.

³¹ *ibid* 164-174.

³² *ibid* 200.

³³ *ibid* 159.

³⁴ Drumbl (n 9).

judgment, despite the gendered media coverage and comments in court,³⁵ may have indicated a missed opportunity to interrogate the reality of Nyiramasuhuko's motivation and greater understanding of femininities and masculinities.³⁶ Drumbl encourages a viewpoint that recognises the reality of armed conflict and therefore women who perpetrate crimes, in order to fully encompass multitude of factors that influence those who participate in mass violence. This approach, Drumbl sees as key for 'reconciliation and prevention', a viewpoint this thesis also supports.³⁷ Drumbl's work is expanded upon in this thesis, through the discussions on female defendants in the FYR and Cambodia. This thesis also implicates Western feminism in its interrogation of international legal and media engagement with female defendants.

Sjoberg cites the rhetoric around Boko Haram as an example of idealising gender roles for men and women in conflict, and due to this the presence of female defendants, within that conflict, are impossible to integrate into this narrative.³⁸ Similarly, Coulter discusses the presence of female fighters throughout Africa and how many fail to see these women as anything but victims, further limiting their reintegration into society after the cessation of hostilities.³⁹ Simić and Smeulers detail the existence of women as active defendants of violence in the FYR, and focus on the need to look beyond stereotypes of women as victims.⁴⁰ McLeod identifies the biases that exist in peacebuilding and peacekeeping in relation to gender. McLeod notes that there are normative judgements in the way questions are asked post-conflict, these judgements offer embedded assumptions about armed conflict.⁴¹ Each of these authors detail a different example of women who commit crimes in armed conflict or engage in violent activities and the resistance in recognising their participation in

³⁵ *ibid* 583.

³⁶ *ibid* 581.

³⁷ *ibid* 599.

³⁸ See Sjoberg, 'Women as Wartime Rapists: Beyond Sensation and Stereotyping' (2016); Halley, 'Rape in Berlin: Reconsidering the Criminalisation of Rape in the International Law of Armed Conflict' (2008).

³⁹ See Coulter, *Bush Wives and Girl Soldiers Women's Lives through War and Peace in Sierra Leone* (2006).

⁴⁰ See Forthcoming Simić and Smeulers, "People who know her would never believe this": Female War Crime Defendants in Bosnia and Herzegovina' in Mouthaan and Jurasz (Eds.), *Gendered Experiences of Armed Conflict: International and Transitional Justice Perspectives* (2018).

⁴¹ See McLeod, 'Gender and Peace Settlements from a Quantitative Perspective: A global survey' (2014) Working Papers in Gender and Institutional Change.

these roles. This resistance exists in the context of academic scholarship, the media, and post-conflict justice processes.

In this thesis, I build on the existing scholarship, to develop an extended study of the representation of female defendants in international criminal law and in Western feminist interventions into international criminal law. However, unlike the existing texts my study focuses on legal, media, and feminist representations to provide an analysis of international criminal law, its limits and potential. Where Sjoberg and Gentry tell the stories and describe key examples, and Coulter or MacKenzie focus largely on female combatants, this work seeks to push beyond description toward an embedded analysis of female defendants in the context of international criminal law. Smeulers, Linton, Drumbl's contributions all underscore the importance of engaging with discussions on female perpetrators, defendants, and suspects. However, my work differs in its engagement with the US and Western Feminist interventions into international criminal law.

Examining the existence of female defendants during armed conflict as well as interrogating the lack of visibility of female defendants in Western feminist dialogues and international criminal law, is a way of working through the social constructions that dictate what defines a woman. Focusing on female defendants also allows international criminal law to be critiqued and some of its inadequacies to be exposed, in particular its need to uphold binaries around gender and agency such as male/female, which directly corresponds to the binary of violator/victim. Moreover, international legal discourse benefits from the study of female defendants as a means to offer new insight into the ways in which international interventions, in the form of international criminal law, act as a mode of regulation. The work of Western feminism, is also affected and constrained by the current rhetoric that limits the representation of women to one of victimhood.⁴²

At the same time, research on female defendants opens up a discussion of Western notions of gender, class, and race deployed by those in power in the international

⁴² See Heathcote and Otto (Eds.), *Rethinking Peacekeeping Gender Equality and Collective Security* (2014).

criminal courts and tribunals. As discussed above the link between the acknowledgement of female defendants and the understanding that women have the ability to perpetrate violence is important to address. The way women who deploy violence are understood within law is not a new area of debate and indeed scholars have discussed the general aversion of the academic and legal communities to depict females as capable of committing violent crimes.⁴³ For example, Engle notes how the ICTY and ICTR has denied women as criminals, political actors, military actors, and capable of being in charge of their own sexuality.⁴⁴ The resistance to seeing women as violent is apparent in the lack of visibility around female defendants and functions as a corollary to the hypervisibility of women as victims in armed conflict. While the ICTR and ICTY do not explicitly deny women's roles in armed conflict, the Tribunals are structured in a manner that more often represents women's experiences of harm. This example shows how the link between the understanding that women are violent is connected to the way specific conflicts have characterised women's roles, leading to the lack of acknowledgment of women's roles in perpetrating crimes. Charlesworth states more broadly that international law only addresses women when they are victims.⁴⁵

This project builds upon previous feminist work in international law that analyses the hypervisibility of the 'women as victims' narrative to stress the necessity of seeing females as potentially violent and understanding women's violence as a predictable component of any armed conflict. In addition, this research will also focus special attention upon the understanding of female defendants in international criminal law; identifying the ways in which the structure of international criminal law is embedded within a gendered binary understanding of victim and defendant, which causes the entire mechanism of international criminal law to provide limited post-conflict justice.

⁴³ See Ehrenreich, 'Feminism's Assumptions Upended' (*LA Times*, 16 May 2007) 171; Melone, 'We've Come a Long, and Wrong, Way' (*Tampa Bay Times*, 7 May 2004); Gronnvoll, 'Gender (In)Visibility at Abu Ghraib' (2007) 373.

⁴⁴ Engle, 'Judging Sex in War' (2008) 954-956.

⁴⁵ Charlesworth, 'International Law: A Discipline of Crisis' (2002) 389.

There have been concerted developments in jurisprudence pertaining to women's involvement in armed conflict within international criminal law since the 1990's.⁴⁶ A great majority of the jurisprudence that deals with women and war does so through the lens of the female victim; with important gains made to recognise the harms women experience during armed conflict. From the creation of Ad Hoc Tribunals and Special Courts, to the signing of the Rome Statute, international criminal law has increasingly addressed sexual violence crimes committed against women in conflict situations.⁴⁷ This has been evident in the ICTY, ICTR, and ECCC among others. Considering the large amounts of women who have suffered and suffer in contemporary armed conflicts,⁴⁸ these advancements in jurisprudence signal, at the very least, the progression of awareness of women's experiences of harm during armed conflict. While women have and continue to be victimised in multiple ways throughout an armed conflicts duration, and while violence is often sexual and gendered in nature, this only highlights certain aspects of women's participation in war. It is the actions of the female defendant that are not currently visible in international criminal legal discourse.

2.1 Women outside of traditional female roles

One of the narratives that affects the way that female defendants are understood imagines women in general as non-violent, inherently peaceful, and on the side of the 'good'.⁴⁹ The work of Sjoberg and Gentry details the characteristics women are often assumed to inhabit and how the realities of women's lives and women's actions, which can include violence, confronts these ideas in a manner that begs for

⁴⁶ 'Crimes of Sexual Violence', (ICTY Website) <<http://www.icty.org/sid/10312>>; *Prosecutor v Gacumbitsi* (Appeals Chamber Judgement) ICTR-2001-64-A (2006); *Prosecutor v Muhimana* (Appeals Chamber Judgement) ICTR-95-1 (2007); *Prosecutor v Nahimana et al* (Appeals Chamber Judgement) ICTR-99-52-A (2007); *Prosecutor v Semanza* (Appeals Chamber Judgement) ICTR-97-20-A (2005); *Prosecutor vs. Brima et al* (Appeals Chamber Judgement) SCSL-2004-16-A (2008); *Prosecutor vs. Sesay et al* (Trial Chamber Judgement) SCSL-04-15-T (2009); *Prosecutor v Taylor* (Trial Chamber Judgement) SCSL-03-01-T (2012); *Prosecutor v Katanga* (Trial Chamber Judgement) ICC-01/04-01/07 (2008).

⁴⁷ Statute of the International Criminal Tribunal for the Former Yugoslavia, adopted by Security Council Resolution 827, U.N. Doc. S/RES/827 (1993); Statute of the International Tribunal for Rwanda, adopted by Security Council Resolution 955, U.N. Doc. S/RES/955 (1994) UNGA, 'Rome Statute of the International Criminal Court' A/CONF.183/9 (1998) (Last Amended 2010).

⁴⁸ The fact that they have suffered is apparent. The reason behind the suffering is not as clear. Many of the societal and cultures norms that discriminate against women can be seen to have encouraged the violence women faced, recognising it is not always the conflict alone.

⁴⁹ Sjoberg and Gentry (n 22).

justification.⁵⁰ When discussing the narratives surrounding ‘mother’, ‘monster’ and ‘whore’ Sjoberg and Gentry state, “these narratives define what violent women are (less than women, less than human, crazy, sexualized, or controlled), but they also define what all women are (peaceful, incapable of violence, and in the personal rather than political sphere).”⁵¹ This is the foremost concern of Sjoberg and Gentry, that the narratives around violent women marginalise all women, not just those women who take part in violent acts.

Charlesworth discusses women and their assumed peacefulness; identifying UN documents that have linked women and peace and highlighting situations where women have been involved in peace processes post-conflict, displaying a more complex picture than the ‘women are peacemakers’ rhetoric would indicate.⁵² What Charlesworth concludes is that women are not necessarily predisposed as peacemakers, and assuming so ignores the other elements of their lives and conflict situations.⁵³ Furthermore, the women and peace association often assumes women definitively suffer the most, which in reality has not been the case in many conflicts.⁵⁴ Charlesworth suggests that the assumption that women always suffer the most relegates women to the vulnerable victims, however in many cases more men die and are held as prisoners as a result of armed conflict, and also suffer sexual violence.⁵⁵ Another issue that has played out in the focus on women as peacemakers is the conflation of the term ‘women’ with the term ‘gender’.⁵⁶ Charlesworth sees this as problematic as it does not account for the power relations in society or the structures that exist which ignores the “performative aspects of gender”.⁵⁷ Charlesworth’s work is especially useful for this thesis as it identifies the ‘women are predisposed to peace’ assumption as invalid, which has often been seen as a way to silence debates on women as defendants. It also highlights the danger in dialogue that limits women’s experiences. The work of Sjoberg and Gentry, and Charlesworth highlight that

⁵⁰ *ibid.*

⁵¹ *ibid* 23.

⁵² Charlesworth, ‘Are Women Peaceful? Reflection on the Role of Women in Peace-Building’ (2008) 351, 352.

⁵³ *ibid* 357.

⁵⁴ *ibid* 358.

⁵⁵ *ibid.*

⁵⁶ *ibid.*

⁵⁷ *ibid* 359.

gendered narratives create gendered assumptions, which become embedded in legal structures. The following two examples draw out the relationship between gender, narrative, and international crimes.

Examples of women committing acts of violence are often reported in the media with links to gender roles; an article on Rasema Handanovic, who was referenced in the preface of this chapter, read, “The US single mother who was actually a war criminal.”⁵⁸ The article's headline simultaneously emphasises her role as a mother, which focuses the story on the mother/war criminal dichotomy instead of her crimes and role in armed conflict, and highlights her ‘single mother’ status which reminds the reader that Handanovic falls outside of the heteronormative relationship model. Thus, Handanovic’s gender and sexuality are already inscribed, as relative to her crimes. More often than not when women are tried before international courts and tribunals their actions are related to their gender in ways men’s actions are not. Sjoberg and Gentry point to gender norms as a way of punishing women for acting outside of expected behaviour.⁵⁹ Female defendants who are brought before either local or international courts are frequently shamed within the media, often based on gender. Men are also shamed in the global media, but not for being a ‘bad’ father; instead they can be shamed for the crimes they are accused of, while simultaneously be lauded as a model soldier or leader.⁶⁰

When Pauline Nyiramasuhuko was on trial in the ICTR, the US and UK media commented on her dress and appearance. This narrative seemingly contradicting the violence she perpetrated.⁶¹ Nyiramasuhuko was cited as looking like a “dear aunt” during trial.⁶² Similarly, the fact that her son was also on trial was often referred to in the press, this reiterated her role as a mother and her ability to steer her son towards committing crimes.⁶³ Her own political agency as a leader was ignored for the most part. Being tried as a woman is another sort of punishment; women who are tried are

⁵⁸ Oliver, ‘The US single mother who was actually a war criminal: killer becomes first woman to be convicted of Bosnian war crimes’ (Daily Mail, 1 May 2012).

⁵⁹ Sjoberg and Gentry (n 22) 15.

⁶⁰ Vries, ‘Abu Ghraib GI: I’m no Bad Apple’ (CBS News, 2 June 2005).

⁶¹ Harman, ‘A Woman on Trial for Rwanda's Massacre’ (*The Christian Science Monitor*, 2003).

⁶² *ibid.*

⁶³ *ibid.*

shamed because they are women and their gender would dictate that they should not have been involved in actions that would lead to criminal proceedings. Reports of male defendants do not include commentary on their crime as a violation of their masculinity or role as a father, if anything war crimes often solidify evidence of their gendered identity.⁶⁴ War and violence has continued to reinforce and often mirror traditional displays of masculinity, which makes it unnecessary to cite emphasis on masculinity. International criminal law is designed to censor and punish excesses of masculinity, without disrupting their rationale behind male violence. Violence committed by men in armed conflict is then expected and allowed. Criminal acts are then masculine by definition, which leads to an assumption that men are the default defendants, and that peace requires a military masculine actor to understand the violence that precedes it. When female defendants often appear in the media tied to their gender, and sensationalised accounts of their crimes in relation to their gender thus takes the focus instead of the legal implications of their acts or the processes of criminal law.

There is a recognised link that the international media has with the ideals in a given society. The global media's inferences also point to an idea that is based within a Western notion of gender. Defining "the West" is not particularly straightforward, but in this case I am referring to a predominately white, Christian mind-set evident within States in the Global North. The way women are described in the global media relies upon stereotypical notions of peace/violence and victim/agents, within Western stereotypes of women and men. In Chapter Four, I demonstrate how the media representation of the armed conflict positively linked the Western viewer to those victims of the conflict in the FYR, creating a sense that the victims 'are just like you', combined with the Western feminists focus on sexual violence in the FYR, resulted in the positioning of women in the FYR as victims of rape. This rhetoric left no space for the understanding that women were also defendants. In Chapter Five, I detail the media's focus on Africa as a whole, as still dominated by brutal tribal chaos, this I state lead to a distancing of Western audiences from the Rwandan conflict, which made the focus on women as defendants more visible in academic texts (as well as in the ICTR), with the first women tried and convicted for rape. The constructed

⁶⁴ Engle (n 44) 956-957.

distance between the outside viewers of the conflict, which includes the media, Western feminists, and legal practitioners in the ICTR, allowed female defendants to become more visible. However, this has not led to a great understanding of women's roles in armed conflict. In the sixth chapter I analyse the ECCC in Cambodia where women were more visible within the work of the court, but due to the other factors around the ECCC justice in Cambodia the hybrid court has ultimately been unsuccessful. Despite this, the time lapse between the conflict and the court may account for the higher awareness of women as defendants. However, this knowledge is not necessarily moving to the international plane. This dissonance between local courts of female defendants and the international courts/tribunals is addressed in Chapter Seven, I analyse the link between the international and local to conclude that the structure of international criminal law, which relegates women to victims and men to defendants, does not allow for women to be agents who perpetrate crimes and by extension ignores female political leadership and power.

This work recognises that there exists nuance in the way female defendants are seen across societies. Scenes of women carrying machine guns engaging in violent combat is not necessarily surprising to those who have grown up with stories of female fighters, for example in contemporary Kurdistan, and therefore women who then commit crimes in these roles may not be cause for shock. This is not because women who are military or political leaders will always commit international crimes. However, the thesis argues that moving away from the hyper-focus on conflict related sexual violence towards viewing women as agents raises questions about dominant narratives in international criminal law. For example, in Kurdistan where female fighters have been a part of the history of women's involvements in armed conflict, female combatants do not feel out of the ordinary.⁶⁵ The idea, is to be mindful of the spaces female defendants are situated in when analysing their actions in relation to international criminal law. One of the distinctions I am making between female defendants and female combatants is the presumption of criminal activity, soldiers carry a different level of privilege, as they are required to follow international humanitarian law and allowed to kill within legal parameters.⁶⁶ Predominately, the

⁶⁵ Dirik, 'Western Fascination with 'Badass' Kurdish Women' (*Al Jazeera Opinion*, 29 October 2014).

⁶⁶ See Kennedy, 'Speech: Modern War and Modern Law' (2007).

work on female combatants centres on preventing women and girls from taking up arms as well as strategies for reintegrating women and girls who do participate in combat back into society.⁶⁷ However, this thesis is not a study of female soldiers.

The focus on disarmament, demobilisation, and reintegration, otherwise known as DDR programs, in relation to the female combatant is less about culpability of those women who choose to participate in the hostilities of armed conflict and more on how to integrate women in a post-conflict climate.⁶⁸ I am not suggesting that DDR programs must include work on punitive measure for female combatants, as this work is not within the purview of this thesis, and I do acknowledge that some perspectives on DDR take a nuanced view of women and their roles in armed conflict and post-conflict.⁶⁹ However, what is useful for this thesis is the difference between the female combatant and the female defendant, with the latter involving a display of agency that is punishable. Acknowledging women as combatants, while a hard-fought process in many cases, appears to be integrated into the work of the UN with much more success than the existence and acceptance of female defendants. This work has been undertaken by UN programs such as UN Women⁷⁰ and the Department of Peacekeeping Operations,⁷¹ which recognise the unique needs of female ex-combatants. One of the solutions to the situation of female combatants, by the Department of Peacekeeping Operations, is to deploy female peacekeepers to a State post-conflict.⁷² The mere deployment of female peacekeepers is presumed in certain contexts to be enough to satisfy the need for a post-conflict gender perspective. Scholars such as Heathcote, Otto, Henry, and True, amongst others, have called into question the work of UN Security Council Resolutions and their ability to positively shape the status of women before, during, and after armed conflict, globally.⁷³

⁶⁷ Specht and Crisis Response and Reconstruction, 'Red Shoes: Experiences of Girl-Combatants in Liberia' (International Labour Organization Report, 2006).

⁶⁸ Mazurana et al, 'Girls in Fighting Forces and Groups: Their Recruitment, Participation, Demobilization, and Reintegration' (2002).

⁶⁹ Democratic Progress Institute, 'DDR and Former Female Combatants' (Report, 2015).

⁷⁰ 'UN Women' (UN Website) <<http://www.unwomen.org/en>>.

⁷¹ 'Department of Peacekeeping Operations' (UN Website) <<http://www.un.org/en/peacekeeping/about/dpko/>>.

⁷² 'Interview: Female Peacekeepers Connect Better with Women and Children- UNISFA Deputy Force Commander' (*UN News Centre*, 31 October 2016).

⁷³ See Henry, 'Peacexploitation? Interrogating Labor Hierarchies and Global Sisterhood among Indian and Uruguayan Female Peacekeepers' (2012); True, 'Mainstreaming Gender in Global Public Policy'

Although the greater discussion around female combatants and peacekeeping is not a part of the work in this thesis. Nevertheless, drawing out the distinctions between female combatants and female defendants, which rests on a difference in culpability, emphasises international law's resistance in engaging with women who have committed crimes.

Despite work that recognises women as combatants, and women as defendants, there still exists a reliance on filtering women's actions through traditional roles. When women act outside of these roles, their gender is highlighted as well as their incompatibility with the qualities of 'normal' women. Sjoberg and Gentry state that narratives created around violent women also define what 'normal' women are, which is 'peaceful and incapable of violence'.⁷⁴ This further exemplifies that the presumed qualities of both violent and non-violent women need to be analysed as they expose the ways narratives around women's behaviour is set within limited gender norms.

2.2 Justifying women in international criminal law

As the counterarguments in Chapter One have indicated, the thesis is not suggesting that women commit more violent acts during armed conflict than men or that the levels of violent crime is equal. However, women do commit international crimes and it is possible that many go unnoticed due to the perception that women remain the victims during armed conflict. This highlights the need to recognise women as political and military leaders who exercise power in ways similar to elite men.

The aim of the thesis is to understand the representation and construction of female defendant's in international criminal law as well as the way gender, race, and class interplay upon female defendant's experience with the law. To that end, the most significant limitation was finding cases and examples of women who have been indicted, charged, or even suspected of committing crimes relating to the situations that surrounded the international courts. International examples of female defendants were easier to locate, albeit fewer in number, as the ICTY, ICTR, ECCC court documents were readily available through their respective websites. National

(2010); Heathcote and Otto (Eds.), *Rethinking Peacekeeping Gender Equality and Collective Security* (2014).

⁷⁴ Sjoberg and Gentry, (n 22) 143.

examples were more difficult to find, while many of the women before the national courts in Bosnia and Herzegovina could be located in court documents, they were often charged alongside men, meaning that the case title did not use their name, which only compounded translation issues when searching through documents. Therefore, unearthing examples of female defendants was more commonly done by searching for international criminal law in national news websites. Once a woman was identified as an alleged war criminal in a national news story, the other people tried in the same case were often listed as well.

The examples of female defendants in Rwanda was also primarily found through news stories or academic texts on international criminal law. The research that was carried out by Hogg, for example, did not indicate women's names, which made it difficult to identify specific women who were involved in the Rwandan genocide.⁷⁵ Female defendants found to be 'hiding' in the United States made headlines in the smaller communities they lived and therefore were broadcasted throughout local community media, and later in national news. What is interesting about these examples from the US is that the news items often focused on the illegality of the accused's application for citizenship and their gender, highlighting the shock of the people who lived and worked around these women upon hearing they were accused of war crimes.⁷⁶ These news story in the US were not particularly focused on the war crimes, rather on immigration. These alleged female war criminals lied to the government to become a citizen, which shifts the story to a binary of 'us', American citizens, versus 'them', foreigners abusing the system.

Also, in deciphering the cases that are available, there is no way of knowing at this stage the way their gender, race, and class have influenced the treatment of female defendants or the ways in which those who have interacted with her in relation to the court have altered their actions due to her precarity as a female criminal. This thesis does not dismiss the possibility for future work that researches into the study of behaviours and attitudes of court and tribunal officials. Other limitations relate to the

⁷⁵ Hogg, "I never poured blood": Women accused of genocide in Rwanda' (L.L.M. thesis, McGill University) on file with McGill University (2001).

⁷⁶ Jung, 'Family and friends weep as magistrate refuses to release Beaverton women accused of Bosnian war crimes' (Oregon Live, 16 April 2011).

way international criminal law understands female defendants. It is only through the language used by the courts in indictments, judgements, and sentencing, or through the media that this can be inferred and even still there are few examples to draw upon. Female defendants have never been addressed by the UN specifically; therefore, this project was required to dissect ‘gender neutral’ language in international criminal law to infer the way international law views females who perpetrate crimes.

Charlesworth discusses the roles of men and women in crisis situations and states that women are only recognised as being a part of the crisis when they are violated, and when that violation is seen as harming their social group.⁷⁷ Charlesworth writes that men are the main focus and seen to be active agents, while women enter only as an afterthought.⁷⁸ Women are on the other side of the binary, and are predominately focused upon when they are victims of sexual violence. What Charlesworth states is that while men are often seen as defendants they are also simultaneously the “saviour” who solves the crisis, saving women in the process. This only leaves room for women on the margins, included when men deem it appropriate. While this view is especially limiting for women, it captures the view from mainstream conflict narratives.⁷⁹

The main goals of international criminal law are to end impunity of leaders and to punish violations of *jus cogens* norms,⁸⁰ and like domestic laws, operates on a basis of wrong and right and a finality of its judgements. International criminal law follows the general principles of criminal law, as well as reconciling itself as a part of the international system, dealing with the critiques on the lack of enforcement, State consent, and legitimacy.⁸¹ International criminal law incorporates different societies, cultures, and legal systems while predominantly entering into a situation post-conflict, and responding to extreme levels of violence. These characteristics make international criminal law a unique form of criminal law, yet also limit the nuance it can contain in

⁷⁷ Charlesworth (n 45) 389.

⁷⁸ *ibid.*

⁷⁹ Coulter, ‘Female Fighters in the Sierra Leone War: Challenging the Assumptions’ (2008) 55; Coulter notes that 10-30% of all fighters in the Sierra Leone War were women.

⁸⁰ As stated in the statutes of the ICTY, ICTR, ECCC, and in the Rome Statute.

⁸¹ See Buss, ‘Performing Legal Order: Some Feminist Thoughts on International Criminal Law’ (2011); Cryer, ‘International Criminal Law vs State Sovereignty: Another Round?’ (2005); Heller, ‘The Uncertain Legal Status of the Aggression Understandings’ (2012); Amann and Sellers, ‘The United States of America and the International Criminal Cour’ (2002).

its judgements. International criminal law also sustains gender binaries evident in its focus on women as victims of sexual violence, positioning women as the continual victim in armed conflict. Drumbl, when discussing the existence of binaries in international criminal law, argues that there needs to be an understanding of the complexity that exists when people commit atrocities.⁸² Drumbl states, “the persecuted may persecute and persecutors themselves may become (or already be) the persecuted. Truly understanding atrocity requires an embrace of this bedevilling interstitially.”⁸³ In order for international criminal law to dispense justice it needs to acknowledge the multitude of experiences that exist in armed conflict, even if they supposedly complicate the binary of victim and defendant or right and wrong and, perhaps, put dominant gender norms and expectations to the side while such assessments are made.

The international criminal legal system should also recognise its part in history telling while contributing towards repairing a community. In this process of history telling the focus on international criminal law already is implicated in both activities. While the need for reparations for victims has been integrated more fully into the language of the Rome Statute, international criminal law’s history in this area has been far from adequate.⁸⁴ The response to this argument might underscore that international criminal law is not designed to complete all of these goals. International criminal law cannot simultaneously punish leaders, tell an accurate nuanced history, charge people from each side of a conflict, and rebuild the relationships in a given society. However, international criminal law’s role as an international project and through the normative value placed upon it by the international community is a part of shaping the way gender, race, culture, and ethnicity are understood post-conflict: both in the conflict region and internationally.

The background provided in each court case judgement, the media focus, the way prosecutors pick cases and conduct trials, the witnesses that are chosen to tell their story, and the way the public responds to all of these actions situate international

⁸² Drumbl, ‘Victims Who Victimize: Transcending International Criminal Law’s Binaries’ (2016) 26.

⁸³ *ibid.*

⁸⁴ See Evans, ‘Reparations in International Criminal Law’ in *The Right to Reparation in International Law for Victims of Armed Conflict* (2012).

criminal law as an authority when trying to decipher an armed conflict. While international criminal law is only one part of the justice process and work needs to be done post-conflict at a local level; international criminal law must acknowledge that it carries responsibility internationally and therefore, needs to address the issues that occur within its framework. Female defendants offer one way into this discussion. International criminal law can then question how the stories of those outside main conflict narratives be included and what can be learned about the conflict as well as the biases of those who work within the system through examining the construction of race, class, and gender.

This thesis is not a study of all female defendants in armed conflict,⁸⁵ it is not a study on women's violence,⁸⁶ or a study of international humanitarian law and women as war criminals, although each of these topics are discussed at different places in the text. This thesis is, instead, a study of a specific set of instances, namely the armed conflicts in the FYR, Rwanda, and Cambodia, where the existence of female defendants is examined in order to understand how women's sexuality and vulnerability is constructed through the media, Western feminist interventions, and international criminal law. Despite the low numbers of female defendants in international courts and tribunals, significant numbers exist in domestic courts, but it is not clear why a certain 'threshold' of cases would be required to justify academic study.

2.3 Focus on sexual violence

Western feminist interventions into crisis in the ICTY and ICTR, focused on women as victims of sexual violence and a male and female binary was reinforced. This push to identify and punish various forms of sexual violence was an important step, but it also had unintended consequences. Western feminists involved in this dialogue continued a narrative that unintentionally limited the roles women were seen to fulfil. Charlesworth continues her discussion by identifying the sets of contrast that exist within international law. Binaries of "objective/subjective, legal/political,

⁸⁵ See work on female defendants in WWII, Lower, 'Male and Female Holocaust Defendants and the East German Approach to Justice, 1949-1963 (2012).

⁸⁶ See Alison, 'Cogs in the Wheel? Women in the Liberation Tigers of Tamil Eelam' (2007); Dearden, 'Isis are afraid of girls': Kurdish female fighters believe they have an unexpected advantage fighting in Syria' (*Independent*, 2015).

logic/emotion, order/anarchy, mind/body, culture/nature, action/passivity, public/private, protector/protected” are listed as distinctions having both male and female characteristics.⁸⁷ Charlesworth argues that international law primarily values the first (male) characteristic.⁸⁸ By constructing binaries and connecting them with a particular gender they are then limited and little to no movement is allowed between. Through the focus on sexual violence in the ICTY the binaries between man and woman, defendant and victim were entrenched as an element of international criminal law. Without highlighting the different roles of women in the conflict examples of female defendants like Plavšić and Nyiramasuhuko are seen as anecdotal and/or exceptional; rather than always a potential consequence of political power and the breakdown of social conventions during armed conflict.

Victim feminism tends to assume that women’s experience in armed conflict is one of sexual violence. Another problem with the rhetoric of victim feminism and highlighting the sexual violence in the conflict, besides that it ignores the other roles women possess, it also identifies rape as unique to a particular armed conflict. Engle states that when women were trying to ascertain stories of rape after the conflict in the FYR, they employed the assumption that all women were victims of rape.⁸⁹ Western feminists in and around the ICTY tended to portray Bosnian Muslim women, as victims and continued to deny women’s participation.⁹⁰ Engle also highlights that journalists and feminists were frequently frustrated with women’s silence as they tried to elicit stories of sexual violence, which made it impossible to view Bosnian Muslim women as anything other than rape victims.⁹¹ Engle also writes that Serbian men were then seen as the ‘typical’ sexual defendant.⁹² Feminists further suggested that if a woman took up arms after she was subjected to sexual violence, then she must have only done so due to the rape she sustained.⁹³ Engle rejects these assumptions and

⁸⁷ Charlesworth (n 45) 389, 390.

⁸⁸ *ibid.*

⁸⁹ Engle, ‘Feminism and Its (Dis)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina’ (2005) 803.

⁹⁰ *ibid.*

⁹¹ *ibid* 790.

⁹² *ibid* 785, 786.

⁹³ *ibid* 790; Further discussion found in Chapter Three.

encourages the recognition of the reality of women's experiences in armed conflict. I return to this discussion again in Chapter Four.

Women involved in the armed conflict as combatants were often seen as reactionary by Western feminists, limiting the possibility that women can employ the ideals of either side of a conflict and become motivated to take up arms. Sexual violence in the conflict is seen as an attack on women as a group because they are women, and while that can be seen in certain instances, it also misses the way sexual violence can be used against both women and men because of their ethnicity or class.⁹⁴ Studying cases of female defendants and incidents of female violence is not to suggest that they are somehow equal to or similar to the crimes men commit, in every instance. It is important to interrogate these women's actions in order to better understand violence and the nature of armed conflict. When assumptions are made that rest upon preconceived notions about gender, little can be gained, especially when there is an implication that women always inhabit certain characteristics. Looking closer at female defendants in the following chapters shows the wide array of factors that influence the ways in which they are understood.

The narratives that are deployed effectively limit the acknowledgement of female defendants is a focus on women as victims of sexual violence, to the extent that it becomes the sole measure for women's experiences in armed conflict. International criminal law's reluctance to incorporate female defendants into the mainstream conflict narrative do not rest in a mere lack of statistics, but on the continued enforcement of binaries, such as victim and defendant, which remain supported when women are seen as victims. The position of assuming that women who act as defendants need an explanation for their behaviour underscores the lack of agency women are assumed to hold during armed conflict and their link to political and military leadership.

The reasons why this thesis focuses on the armed conflicts in the FYR, Rwanda, and Cambodia is due to their specific contributions to international criminal law, as it will be discussed in Chapter Two. The Ad Hoc Tribunals, ICTY and ICTR, expanded the

⁹⁴ See Wood, 'Variation in Sexual Violence during War' (2006).

tenets of international criminal law that had remained dominant since the end of World War II, and the Nuremberg and Tokyo Trials. From the jurisprudence of the ICTY and ICTR, international criminal law was developed and evolved through the work of subsequent hybrid courts. However, Ad Hoc Tribunals displayed one type of post-conflict justice, which emanated primarily from the international community, with little engagement in local justice processes. The failures of the Tribunals are also a necessary part of the narrative of international criminal law's development. Through the work of the international community around both tribunals, a preoccupation with women as victims of sexual violence emerged and was a key element in unpacking the existence of the female defendant, another reason why the FYR and Rwanda conflicts were essential to this thesis.

The ECCC being a hybrid court that took into account the need for a greater link between the international and the local, in many ways should have been an answer to the failures of the Ad Hoc Tribunals. Unfortunately, the Cambodia court did not achieve its initial aims or respond to the issues that resulted from the proceedings of the ICTY or ICTR. Another reason for choosing to highlight the work of the ECCC is because of its failures. The ECCC was established decades after the atrocities of the Cambodian genocide took place, and as a result failed to indict the vast majority of leaders responsible, with only four cases before the court. The ECCC also failed to significantly address the sexual violence that occurred during the conflict, suggesting the hypervisibility of sexual violence in the ICTY and ICTR did not extend to the work of the ECCC. This thesis has critiqued the Western feminist intervention for focusing on women as victims of sexual violence which resulted in a narrowing of women's roles in armed conflict. However, I am not suggesting the prosecution of sexual violence be diminished, but that the Western feminist agenda include the range of women's actions in armed conflict within its purview. Therefore, the limited charges relating to sexual violence crimes before the ECCC is most certainly a failure.

Ultimately, the thesis produces an image of women in armed conflict that is not limited to that of victim or peacemaker, but one that acknowledges women are capable of actively engaging in violence, who believes in a party's political ideology, and supports the affiliated party's goals during the armed conflict. This thesis is not a

call for more women to be tried in criminal courts in order to change the perception of women in armed conflict, but it is a call for the criminal justice system not to overlook women's acts in armed conflict due to gender biases that assume women are predominantly victims in conflict. In order to achieve this the international criminal legal system needs to see women as full agents before the law.

Ní Aoláin, Haynes, and Cahn analyse the different ways women participate in armed conflict, but caution against essentialising these roles.⁹⁵ For example, the authors question, "Are women fighters different from women who have not been involved in armed combat but who have experienced its effects? Are we simply assuming that women who are not active combatants are victims, or that women combatants cannot also be victims?"⁹⁶ This is important to remember, throughout the analysis of female defendants in this thesis. Indeed, the thesis critiques the work that has assumed women are victims in armed conflict, but at the same time, this work needs to be mindful not to limit women to the category of defendant in the pursuit of disrupting the gendered binary of victim/violator.

3. Theoretical Framework

3.1 Beyond female defendants as victims of sexual violence

Throughout the thesis, I argue that the lack of engagement with female defendants' actions, by international criminal legal mechanisms, is linked to a denial of women's ability to be violent. This denial of female violence is not necessarily conscious or purposeful, but rather is embedded in a patriarchal understanding of armed conflict, in which men's lives and actions remain dominant. This is evident in the international criminal legal work done around women as victims of sexual violence in armed conflict. To consider women as capable of perpetrating crimes women must also have the ability to perpetrate violence. Women who are violent are rarely a part of the discussion after a conflict.⁹⁷ The reason women's violence need to be seen as violent is exactly because women are violent. This work is a call to accept what already

⁹⁵ Ni Aoláin, Haynes, and Cahn, *On the Frontlines: Gender, War, and the Post-Conflict Process* (2011) 44.

⁹⁶ *ibid.*

⁹⁷ Engle (n 44) 952.

exists: women are sometimes criminals, including during armed conflict. Recognising women's ability to be violent and commit crimes begins a dialogue that interrogates the multitude of gendered ideals women are assumed to hold and the patriarchal perceptions dominant in society.

Throughout this thesis I argue that the structure of international criminal law perpetuates the notion that females are not common defendants, which opens up into a larger debate around the way law deals with complexity. Bouris identifies the need to recognise the complexity in modern armed conflict, those involved in armed conflict, and in the violence perpetrated.⁹⁸ She identifies a 'complex victim', based on the way that individual "engages and is constituted by a particular discourse", and highlights the complexity found within a specific act of victimisation.⁹⁹ When the thesis uses the term 'complexity' it is recalling the work of Bouris. While my work does not focus on the victim, it still finds Bouris' work useful in understanding the need to unpack the nuance of individual's roles in armed conflict.¹⁰⁰ The gender binary simplifies understandings of human relations and actions, which render justifications about women's roles in armed conflict that rest on gender stereotypes, and thus avoid the complexity of human decisions.

The relationship that international criminal law has with female defendants links to how law genders and constructs subjects, both implicitly and explicitly. International law as a system, is most concerned with a certain type of (chiefly female or feminised) victim. Some feminist strategies have used international law to organise an international response to female victims in conflict, and it is within the debates around such strategies where notions of race, class, and gender have also played out.¹⁰¹ Due to the perception of women in international law more broadly, women are only seen in international criminal law as either victims or contributors to the tribunals or courts, as lawyers, staff, advocates, or in rare cases judges. I argue that this draws on a

⁹⁸ Bouris, *Complex Political Victims* (2007) 82-91; See Charlesworth, 'Talking to Ourselves? Feminist Scholarship in International Law' in Kouvo and Pearson (Eds.) *Feminist Perspectives on Contemporary International Law* (2011); Charlesworth, 'International Law: A Discipline of Crisis' (2002).

⁹⁹ *ibid* 82.

¹⁰⁰ *ibid* 28-29.

¹⁰¹ Kapur, 'Erotic Justice: Law and the New Politics of Postcolonialism' (2005) 127.

specific radical/liberal feminist model, which is most closely associated with US feminism, evident in the Western feminist intervention into international criminal law in the 1990s. Whereby Western feminists, both radical and liberal, saw the opportunity to bolster national agendas as well as insert a universalised version of femininity into the proceedings of the ICTY and ICTR.¹⁰²

Amongst the flurry of jurisprudence in international criminal law since the 1990s, feminist scholars have pursued international criminal legal judgements that deal with women's experiences as victims in war.¹⁰³ I highlight the development of the victim narrative in Chapter Four and Five.¹⁰⁴ Feminist scholars encouraged the growth of this narrative as an important step into the area of women in international law. MacKinnon was one advocate of international criminal law's work on aiding women who have been victimised; along with her view that law was a form of male power, she advocated for a stricter reading of crimes that dealt with violence against women.¹⁰⁵ Although subject to considerable critique, MacKinnon's work should not be dismissed entirely, but viewed as an initial step towards women's recognition in international law, albeit from a Western radical feminist perspective.¹⁰⁶ The work of Western feminists in the 1990s around the ICTY and ICTR, which has permeated into the debates, language, and agenda's visible today, is also regarded by some scholars as promoting 'victim feminism'.

Kotiswaran and Halley develop the analysis of victim feminism as a specific critique of MacKinnon and developments on prosecuting sexual violence in international criminal law.¹⁰⁷ In this thesis I respond to the critical work of Kapur, which identifies

¹⁰² See discussion in Chapter Three, Section Four.

¹⁰³ Engle (n 89) 785-786.

¹⁰⁴ Kapur (n 101) 120.

¹⁰⁵ See MacKinnon, 'The ICTR's Legacy on Sexual Violence' (2008).

¹⁰⁶ Kapur (n 101) 101-105, 113, and 134; Kapur highlights MacKinnon's focus on the commonality of women's experiences as well as the danger in discussing women's rights claims from a 'women's point of view' effectively inferring women have a unified voice; also see Janet Halley et al, 'From the International to the Local in Feminist Legal Response to Rape, Prostitution/ Sex Work and Sex Trafficking: Four Studies in Contemporary Governance Feminism' (2007) 342; Halley discusses victim feminism as governance feminism and cites the ICTY and ICTR as examples where feminists acted with powerful political leaders to expand women's involvement with the making of law and in its application.

¹⁰⁷ Halley et al (n 106); See Kotiswaran, *Dangerous Sex, Invisible Labor Sex Work and the Law in India* (2011).

the Western feminist as creating ‘victim feminism’ or ‘dominance feminism’.¹⁰⁸ Kapur undertakes a postmodern and post-colonial critique of MacKinnon’s work, stating that the ‘dominance feminism’ promoted by MacKinnon positions women as ‘always already victimised’.¹⁰⁹ Western feminists perceive women in developing countries to be in need of rescuing and lacking in power and agency, and through their attempts to help the women of the Third World, Western feminists have reproduced the colonial mind-set.¹¹⁰

Kapur, as well as Mohanty,¹¹¹ emphasise on disengaging the concept of the Third World female victim from the focus of Western feminists. To develop this approach, I regard the production of gender in international criminal law as intertwined in ideas of gender, race, class, and a post-colonial environment. Halley’s analysis constructs an account of victim feminism across various texts,¹¹² and while she initially argues the solution might be to ‘take a break from feminism’,¹¹³ in later texts she retreats somewhat from this position.¹¹⁴ Kapur’s answer is to centre peripheral subjects. Her focus is women in the Global South (Kotiswaran undertakes similar work in her study of sex work in India).¹¹⁵ This thesis considers female defendants as similarly on the peripheries of feminist accounts.

In addition, an adjunct example of the perception of women’s roles in international law that pervades from the work done by Western feminists in relation to armed conflict is the Women Peace and Security agenda, which I reflect on again in Chapter Seven. This agenda has produced Security Council Resolutions that address the importance of recognising women as key participants in peacebuilding and peacekeeping, counter terrorism strategies, and stressed the need to empower women in political and economic realms. The Women, Peace, and Security agenda has

¹⁰⁸ Kapur, ‘The Tragedy of Victimisation Rhetoric Resurrecting the Native Subject in International/Post-Colonial Feminist Legal Politics’ (2002) 29.

¹⁰⁹ Kapur, ‘Pink Chaddis and SlutWalk Couture: The Postcolonial Politics of Feminism Lite’ (2012) 11.

¹¹⁰ Kapur (n 101) 11-12.

¹¹¹ See Mohanty, ‘Under Western Eyes: Feminist Scholarship and Colonial Discourses’ (1988).

¹¹² Halley et al (n 106); Halley (n 106); Halley et al (n 1).

¹¹³ See Halley, *Split Decisions: How and Why to take a Break from Feminism* (2006).

¹¹⁴ Halley et al (n 106).

¹¹⁵ Kotiswaran (n 107).

focused on women as victims of sexual violence by encouraging the implementation of accountability mechanisms through international and local institutions. However, the existence of women who participate in combat or commit crimes has had limited representation in the Security Council debates or resolutions and women as victims has retained primacy.¹¹⁶ The most recent Resolution, 2242, does mention the need to gather research on what leads to the radicalisation of women, admitting that women too can be involved in extremism and terrorism.¹¹⁷ However, Resolution 2242 also suggests that women's participation in extremism is not entirely voluntary, but rather the result of 'drivers'.¹¹⁸ The United Nations urges member States to undertake research in order to identify factors that specifically encourage the participation of women in extremism. This reiterates the assumption that for women to participate in extremism, terrorism, or indeed violence, there must be a reason that is in some way connected to their gender.

Unlike the gendered assumptions in the Security Council's Women, Peace, and Security framework, organisations, including the United Nations, United States Agency for International Development, and Governance and Social Development Resource Centre, are realising women's reasons for participating in violent extremism are similar to men's reasons.¹¹⁹ In contrast, Sjoberg and Gentry highlight how the field of terrorism studies has tended to see the women who participate in violence as a result of extremist views as a product of women's maternal and nurturing characteristics.¹²⁰ This means that women's 'innate' ability to nurture is seen as so powerful it even extends to participating in terrorism, if only for the need to be needed. Not only does this limit women's ability to be agents in their own lives, but it reaffirms stereotypical characteristics as inevitable. Furthermore, Resolution 2242 along with the entire collection of Women Peace and Security resolutions imply that once women are fully integrated into society, issues of inequality and gendered

¹¹⁶ UN Security Council Resolutions on Women, Peace, and Security include Resolution 1325, 1327, 1366, 1408, 1820, 1888, 1889, 1960, 2106, 2122, 2242, 2272, and 2331.

¹¹⁷ UN Security Council Resolution 2242 (2015).

¹¹⁸ *ibid* para 12.

¹¹⁹ See Giscard d'Estaing, 'Engaging Women in Countering Violent Extremism: Avoiding Instrumentalism and Furthering Agency' (2017); Carter, 'Women and Violent Extremism' (*Report, Governance, Social Development, Humanitarian, Conflict Applied Knowledge Services*, 13 March 2013); USAID, 'People, not Pawns: Women's Participation in Violent Extremism across MENA' (Research Brief, September 2015).

¹²⁰ Sjoberg and Gentry (n 22) 33.

violence will slowly be eradicated. This also carries an assumption that once women enter typically masculinised spaces, such as armed conflict, DDR programs, transitional justice mechanisms, and so on, they will work for ‘good’. This solidifies the representation of women as the victims/agents of change and peace, while men are relegated to defendants/allies. It is these broader understandings of women and their roles that permeate the way women are seen in international criminal law.

The Women, Peace, and Security agenda demonstrates a reliance on binaries of female/victim and male/violator. An analysis of the binary of victim/violator evident in international criminal law as well as Western feminist intervention into international criminal law permeates the work of my thesis. However, this does not dismiss the importance of the integration of women’s issues into international law since the 1990s. It is true that women are often victims in times of conflict and real work should still be done to unpack the reasons behind the gendered violence that occurs in armed conflict. However, issues arise when the term ‘woman’ becomes equated with the term ‘victim’. Currently, international criminal law reinforces the idea that women are predominately victim and are generally acknowledged to be in continual need of protection.¹²¹ International criminal law recognises women as victims and does not also balance this with a sufficient response to women who commit crimes or women as combatants.¹²² This will be demonstrated in this thesis through identifying structural issues in international criminal law, as well as problems within the discourse of women and armed conflict. The structure of international criminal law creates biases that limit the normative understandings of those who work within the court which influence the operational elements of courts and tribunals. The discourse that is perpetuated by the work of international criminal law solidifies women as victims and men as defendants. Influenced by the work of Kapur, Engle, and Halley, I seek to move beyond victim feminism.

3.2 Situating female defendants: representations of gender, race, and class

Armed conflicts are chaotic, boundaries are blurred, and often the binary of victim and violator is not a sufficient way to distinguish all those who were involved in a

¹²¹ Evidence of this is present when shifting through ICTY, ICTR, and ECCC jurisprudence.

¹²² See Coulter (n 79).

conflict.¹²³ To say a woman was a victim during a conflict does not eliminate the possibility they may also have committed criminal offences. I am not suggesting female criminals should be celebrated. I am also not arguing more women should necessarily be brought before international courts, as this would not solve the problems I propose. To this end, the thesis identifies issues with regard to the way women's participation and agency is perceived during armed conflict and in doing so reveals the larger societal problem that relegates women to certain roles, both in and after armed conflict.

Throughout the thesis I also consider the restraints that prevent women who commit crimes at an international level from becoming a part of the international criminal legal discourse, which include the media perception of women who engage in violence or are cited as committing crimes, Western feminist work that focuses on women as consummate victims, and international criminal laws emphasis on binaries. The thesis analyses how law defines women primarily as victims of violence, rather than potential aggressors of violence, and in doing so contributes towards a larger misunderstanding of women's agency. While I do not reach into the sociological or criminological factors that permeate this issue, I do recognise their importance in what could be a broader study somewhere in the future.¹²⁴ This thesis uses international criminal law to focus on female defendants, to demonstrate how the lack of visibility of female defendants in international legal studies and feminist studies is as a problem that is symptomatic of greater issues around the perception of gender.

In order to address the female defendant and understand her significance it is important to first accept the ways in which international law and gender/feminist theory, are woven together, as the conceptual framework that surrounds this project. There is no possibility of engaging with the female defendant by solely looking at international law, gender, race, or class alone, or using only one type of theory. The object of this thesis is to analyse the female defendant's representation in international criminal law and in doing so discover the way gender, race and class exist within legal constructions and dismissals of female violence. Butler's work on gender as a product

¹²³ Kennedy, 'Boundaries in the Field of Human Rights: The International Human Rights Movement: Part of the Problem?' (2002) 105.

¹²⁴ Linton (n 29)

of language and society will be used,¹²⁵ as well as the work of MacKinnon in order to critique her scholarship that has emphasised law's relationship with the female victim.¹²⁶ The necessity in utilising Butler's work in relation to international criminal law is done to reveal the inadequacies in international criminal law's current manifestation and development. Butler's work on gender, while not specifically relating to the field of international criminal law, exposes the limitations in law's structure and thus highlights the need to expand the narrow conceptions of gender as well as the way gender is used by legal structures.

MacKinnon's work details the contribution of the Western feminist intervention into international criminal law with the work of the ICTY and ICTR, while I use Butler's work to question the long term effects of the ICTY and ICTR on the status of women. I regard feminist approaches to law as far from uniform and see the tensions within, for example the work of MacKinnon and Butler, as important feminist dialogues. This project is not concerned with the motives of female defendants, but how the relationship between law and female defendants gives evidence to the way law deals with complexity.¹²⁷ The female defendant becomes a tool to look into the limitations of the contemporary international legal system, and recognise gender biases entrenched in the law.

International criminal law comprises a host of ideals and concepts, it is at once addressing people and composed by people who are of different religions, races, classes, carry different cultural understandings, and who might hold varied views on masculinity and femininity and yet international criminal law continues to project a narrow gender ideology for the most part.¹²⁸ International criminal law is a nexus, similar to the manner female defendants cannot be separated from racial, gendered, or class frameworks, international criminal law too cannot be separated from the frameworks it employs. The approach this thesis takes is a combination of a case analysis with a critique drawn from the feminist and legal academic scholarship,

¹²⁵ Butler (n 7) 7-13.

¹²⁶ MacKinnon (n 105); Catharine MacKinnon, 'Feminism, Marxism, Method, and the State: An Agenda for Theory' (1982).

¹²⁷ Bouris, *Complex Political Victims* (2007) 82-91.

¹²⁸ See Heathcote, 'Feminist Legal Approaches and International Law on the Use of Force' in *The Law on the Use of Force: A Feminist Analysis* (2011).

alongside an analysis of the representation of female defendants in global, particularly Western, media sources.¹²⁹ Critical legal studies are used as a way of addressing law's bias while drawing on the intersectionality of race, class, and gender, and the discussion around victim feminism. The importance of drawing out the way race, class, and gender are interconnected is to recognise how each of these modes of identity shape and give meaning to the way female defendant's actions are understood.

The thesis consciously moves beyond a descriptive account of the acts and stories of individual female defendants. Throughout I analyse the way actions are represented and understood by international criminal law, and Western feminist intervention, both supported by the media. I am also deciphering the way female defendant's actions disrupt or affirm stereotypes around women in armed conflict. The importance of a gender analysis notwithstanding, race and class can also give insights into the perception of female defendants. Crenshaw highlights the need to look beyond gender as a tool of analysis, as many women's lives are also influenced by their identity of race and class.¹³⁰ To this end, the perception of female defendants by international criminal law, Western feminist intervention, and the media also needs to account for the other identity markers that influence all women's lives, including female defendants.

The analysis of feminist debates which surrounded the courts as well as a critique of the human rights agenda, inform a larger viewpoint that reading cases alone could not accomplish. Gender will be deployed as an analytical tool in to order examine the way it is framed in law and to understand the way legal discourse is influenced by gender.¹³¹ I trace female defendants throughout international criminal law by using the judgements and sentencing of the cases brought before international courts as well as examples of female defendants who were not necessarily tried on an international level, but were accused of committing crimes in the surrounding conflict. Within the

¹²⁹ This thesis will focus on the international media which grew from the shift in reporting that occurred in the 1990s by organisations such as CNN and the BBC. The real time broadcasting of events in the FYR, for example, by the BBC and CNN changed the landscape of broadcast news and in turn propelled their global influence.

¹³⁰ Crenshaw (n 16) 1245, 1246

¹³¹ See Davies and Munro, *The Ashgate Research Companion of Feminist Legal Theory* (2013).

context of international law the female defendant is influenced by the concepts of gender, race, and class, as well as the rise of the human rights agenda and frame the way her actions are interpreted.¹³² It is my claim that international criminal law distances itself from the fact that women are capable of committing violent crimes because international criminal law finds it easier to view women as in need of protection than to confront the idea that current gender, race, and class binaries are an insufficient representation of human behaviour. Currently, international criminal law limits every woman's ability to be seen as capable of displaying a wide spectrum of acts, both positive and negative.¹³³ The invisibility of women's violence is important to interrogate as it directly relates to the vulnerability of women's bodies in armed conflict produced by the elevation of the victim subject.

Solely focusing on gender as a tool assumes a singular narrative around women as a whole and ignores the other identities women may have.¹³⁴ To do this is to ignore the intersection of gender with race or class, for instance. MacKinnon's work around the tribunals has largely neglected the intersections of race and class. In the ICTY MacKinnon, and others who worked at the ICTY,¹³⁵ were accused of ignoring the ethnic differences of women.¹³⁶ Engle states that feminists tended to emphasise ethnic differences between Serbs, Croats, and Bosnian Muslims in the ICTY, which furthered divisions in the understanding of the harms women experience, but did little to interrogate the divisions that were bolstered by the armed conflict.¹³⁷ Reinforcing that rape of Bosnian women by Serbian men was genocide, feminists assumed that the women who bore children as a result of the rape would adhere to strict ideas of ethnic identities, meaning their children would be Serbian, instead of the ethnicity of the mother.¹³⁸ Brownmiller writes, that Balkan women were stripped of their ethnic and religious background and assumed to be victims of rape, evidence of another way

¹³² This will be discussed further in Chapter Three.

¹³³ 'Humanness' as a concept, influenced by Arendt and Cannadine's work. The starting point will be around the idea that it is in our differences that we are similar and in our capacity to change. See Arendt, *The Human Condition* (1998) (1958); Cannadine, *The Undivided Past: Humanity Beyond Our Differences* (2013).

¹³⁴ Harris, 'Race and Essentialism in Feminist Legal Theory' (1990) 585.

¹³⁵ Halley (n 106).

¹³⁶ Engle (n 89).

¹³⁷ *ibid* 780.

¹³⁸ *ibid* 807.

ethnicity was shaped in the aftermath of the armed conflict.¹³⁹ Buss stated that the tribunals failed to understand the multiple sites of oppression present around the conflict, which included race, religion, ethnicity, class, as well as gender.¹⁴⁰ Buss noted that women's experience in conflict would be better served by viewing the ways 'gender intersects and shapes' other areas of oppression.¹⁴¹ She further states that feminists encouraged women's visibility in international criminal law through their work with the tribunals; however, this visibility was 'superficial' as it failed to take into account the other areas where oppression existed.¹⁴² The status of women in the FYR before international law is discussed in Chapter Four.

I argue in this thesis that whether or not 'the women question' has been asked, accepting the outcome of this first stage of feminist intervention is not sufficient. Instead this question must be re-asked and complicated by understandings of gender. It is not sufficient to just view gender, race, and class alone, these and other areas of identity need to be seen as influencing one another. The female defendant's relationship with race, class, gender, ethnicity, religion, and the distinctions between these identities. This leads my focus toward international criminal law's relationship to race and class, understanding that they must be developed in conjunction.

This study must come to its analysis recognising that there are multiple ideas of self, women employ,¹⁴³ and to assume that gender is the only or main tool people are being oppressed with, is to ignore men and women who have been discriminated because of race as well as cultural and religious backgrounds.¹⁴⁴ Gender is understood in this study as performative and due to this it is diverse in its representations and meanings across communities. This approach can also incorporate other forms of identities. bell hooks also writes that it is often the case that those who avoid discussing race in their work, do so because they have never had to experience it themselves.¹⁴⁵ Kline warns

¹³⁹ Brownmiller, 'Making Female Bodies the Battlefield' (*Newsweek*, 3 January 1993) 37; See Simić, *Silenced Victims of Wartime Sexual Violence* (2018).

¹⁴⁰ Buss, 'The Curious Visibility of Wartime Rape: Gender and Ethnicity in International Criminal Law' (2007) 22.

¹⁴¹ *ibid.*

¹⁴² *ibid* 5.

¹⁴³ Harris (n 134) 586.

¹⁴⁴ Kapur (n 101) 9, 18.

¹⁴⁵ See bell hooks, *Feminist Theory: From Margin to Center* (1984).

that race's relationship with feminism can at times be extremely limiting and is capable of producing a hierarchy of power between white women and women of colour, or as it features in Chapter Five with women on the African continent.¹⁴⁶ It is from this understanding that race becomes a component within this work's analysis.

To this end, my positionality as a white US woman is an important aspect that influences my larger argument. I am not attempting to assume the perspective of women who were involved in the armed conflicts in the FYR, Rwanda or Cambodia. Furthermore, I am analysing and critiquing the Western intervention, law, feminism, and the media, into these three particular conflicts and establishing the effect this intervention has had on international criminal law and international law. Female defendants are used as a tool in order to examine and unearth the way Western feminist interventions and international criminal law with the international media has shaped the perception of women's roles in armed conflict. Through the analysis of female defendants, as well as the reasons why female defendants do not enter into mainstream conflict narrative, international criminal laws limitations are exposed.

Class also bears a considerable weight in the way it intersects with race and gender.¹⁴⁷ The idea of intersectionality emphasises the different structures of oppression, these sites should not be ranked, but it should be acknowledged that every individual is dealing with various influences, which form interlocking sites of oppression across all societies and communities.¹⁴⁸ Class is another way of understanding the way in which the law is shaped and the way the law engages with individuals, including female defendants. Class is also apparent in the distinction between those who create international criminal law, judges, lawyers, and members of the UN. I am mindful of the role of political economy in peacebuilding and transitional justice and the power that results from coercion as well as the 'resources, benefits, privileges, and authority within the home and society at large'.¹⁴⁹ However, I am unable to explore this aspect fully within the parameters of this thesis.

¹⁴⁶ Kline, 'Race, Racism, and Feminist Legal Theory' (1989) 115, 117, 143.

¹⁴⁷ Collins, 'It's All in the Family: Intersections of Gender, Race, and Nation' (1998) 63, 64.

¹⁴⁸ *ibid* 63.

¹⁴⁹ True, *The Political Economy of Violence Against Women* (2012) 7.

Law does not exist in a world void of influence; it is influenced by power and State relations and affected through people's social influences and viewpoints.

MacKinnon's influence in the creation of international criminal law helped to focus the tribunals on women as victims, void of racial and classist experiences. This viewpoint shaped the way international criminal law understood women's role in armed conflict.¹⁵⁰ Critical legal studies lends itself to unpicking the structural bias of legal institutions, as well as the language of those institutions which is often specialised and set into specific categories that hold "expectations about the values, actors, and solutions" deemed appropriate.¹⁵¹ While many have criticised MacKinnon's work, including Halley, her work does well to draw out the ways women have been excluded from law.¹⁵² When an individual approaches law they carry competing notions within their own understandings; similarly, law in practice contains conflicting notions. Butler's concept of gender and MacKinnon's focus on the experiences of women in conflict can both be used to describe the female defendant herself as well as her surrounding environment.

Throughout this thesis, attention to positionality accepts that the knowledge a person has gained from their own personal experiences is useful, but it must be coupled with the idea that the particular experience is only particular.¹⁵³ Each person only has a limited view, influenced by social situations and sets of experiences, and should not presume to know how others dealt with a similar situation, as they are within their own social constraints and point of view as well.¹⁵⁴ There must be a continuation beyond personal situations, while never assuming that it is possible to completely transcend, as viewpoints are reactional and subjective.¹⁵⁵ The reason this knowledge is beneficial is because it stresses the importance of being self-critical and recognising that there is only an 'improved perspective'.¹⁵⁶ The emphasis of this approach, Bartlett stated is on 'non-arbitrary' truth, this truth is based upon perspective, which

¹⁵⁰ MacKinnon (n 18); MacKinnon (n 105); MacKinnon (n 126).

¹⁵¹ See Koskenniemi, 'The Politics of International Law' (1990).

¹⁵² MacKinnon (n 58); MacKinnon (n 105); MacKinnon (n 112); MacKinnon (n 126).

¹⁵³ Bartlett, 'Feminist Legal Methods' (1990) 881-883.

¹⁵⁴ *ibid.*

¹⁵⁵ *ibid* 882.

¹⁵⁶ *ibid* 885.

of course is limited and needs to be continually reworked.¹⁵⁷ I consider this perspective as a tool to examine my own gender, racial, and class assumptions. The assumptions I carry interconnect and produce a sense of privilege within my writing. This is an important concept to confront from the onset as many Western feminists have been criticised for universalising their own experiences and projecting this onto the international community as a whole.¹⁵⁸ Western feminists have also be cited, as mentioned earlier, for ignoring racial, religious, and class experiences, as victim or defendant is not the only space for intervention.¹⁵⁹ I examine the representation/prosecution of female defendants in international tribunals/courts and Western media, to make sense of Western discourses/narratives, rather than to draw out any ‘truth’ claims about FYR, Rwanda or Cambodia.

4. Conclusion

This chapter has detailed the definitions utilised throughout the thesis, namely ‘gender’, ‘feminism’, ‘female perpetrator, defendant, and suspect’, and ‘narrative’. I have also highlighted the key scholarship in the area of female defendants, while also drawing out the narratives that have been constructed around different aspects of women’s participation in armed conflict, which includes: women outside of traditional roles, justifying women international criminal law, and the focus on sexual violence. Lastly, I outlined my theoretical framework, in order to situate the thesis amongst the existing theories around gender, international law, and women’s experiences in armed conflict. The following chapters each contribute towards answering the unique questions the thesis poses: how can an analysis of female defendants shift the understandings of armed conflict, international criminal law, and gender? Do the narratives on women’s participation in armed conflict, garnered from international media reports and feminist scholarship, influence international criminal legal spaces?

This chapter began with a discussion of governance feminism, and like the authors, I agree that there must be continual efforts to critically engage with the projects and

¹⁵⁷ *ibid.*

¹⁵⁸ Mohanty, *Feminism without Borders: Decolonizing Theory, Practicing Solidarity* (2003) 17-43.

¹⁵⁹ Harris (n 134) 605.

products of governance feminism.¹⁶⁰ This is not meant to assert that all efforts under the banner of governance feminism are inherently flawed, but rather it asserts the need to constantly examine the work feminists undertake, reassessing the intended aims and outcomes of feminist intervention. The critical engagement with feminist work in international criminal law, undertaken in the thesis, is not intended to dissolve feminist gains, but to instead bolster future work.

¹⁶⁰ Halley et al. (n 1) 265, 266.

Chapter Three

Positioning International Criminal Law

1. Introduction

This work focuses on international criminal law, since the 1990s, which brought about the establishment of the ICTY and the ICTR.¹ However, it is important to briefly look back over the history of international criminal law's growth and its place in international law, as well as its critiques. Douzinas and Kennedy's work in conjunction with critical legal studies offers an insight into the creation, aims, and current approach of international law, especially international law's relationship with Western States; similarly, Amann, discusses the relationship between political participation and international criminal law,² while feminist scholarship tends to focus on gendered crimes before the courts and tribunals rather than the institutions themselves.³ These debates relate to the larger theory and methodology of the project by underscoring their link to the lack of critical work on the female defendant to the growth of international criminal law. It is only after articulating the debates that highlight the development of international criminal law through international human rights law, international humanitarian law, and feminist methods, that the greater field of international law is illuminated. Moreover, this allows for the topic of female defendants to retain deeper resonance as a field of study in international law.

In this chapter I focus on the understanding of international criminal which underpins the work of the entire thesis. Section two will discuss the context of international criminal law, briefly outlining its historical development and continued growth. In section three of this chapter I will discuss the connection between international human rights law and international criminal law, also recognising the link to international

¹ The Nuremberg and Tokyo trials were important as developing the importance of international criminal law. However, they were not credited with advancing jurisprudence in the same way as the ICTY and ICTR.

² See Amann, 'Impartiality Deficit and International Criminal Judging' in Schabas, Thakur, and Hughes (Eds.) *Atrocities and International Accountability: Beyond Transitional Justice* (2007); Amann, 'Politics and Prosecutions, from Katherine Fite to Fatou Bensouda' in Andersen and Crane (Eds.) *Proceedings of the Fifth International Humanitarian Law Dialogs* (2012).

³ See Buss, 'Performing Legal Order: Some Feminist Thoughts on International Criminal Law' (2011).

humanitarian law. Section four will situate international criminal law within Western feminist approaches, specifically the way women's roles during armed conflict were shaped and understood during the 1990s. Section five will detail the Ad Hoc Tribunals and Cambodian Court in order to establish the foundations from which the subsequent chapters will emerge.

2. The Context of International Criminal Law

International criminal law is a part of the larger body of public international law and before the end of WWII and the creation of the Nuremberg Trials there was little growth in this area.⁴ The International Military Tribunal was established by the Nuremberg Charter in 1945,⁵ after which the US led Nuremberg Military Tribunal conducted 12 more trials.⁶ The International Military Tribunal's objectives were: "to punish military leaders for waging aggressive war; to punish persons responsible for the commission of war crimes; and to crystallise certain laws of humanity and thereby to deter the repetition of genocide."⁷ These goals along with the continued international recognition of certain human rights,⁸ which were developed even further

⁴ See Donovan, 'The History and Possible Future of International Criminal Law' (1987); Colleen Donovan wrote that International Criminal Law is a part of the larger body of International Law; international law seeks the conservation of human rights by states. Donovan's article, published in 1987, is a representation of international criminal law before the influx of law in the 1990s and it is important to recognise that the idea of international criminal law as a way to safeguard human rights has been very much contested.

⁵ *ibid.* 84; The Nuremberg and Tokyo Trials, although they are being credited with the early advancement of international criminal law, are also seen as a force of great jurisprudence. However, many would argue to the discrimination and unfairness presented in the trials. See Wells, 'War Crimes and Laws of War' (1984).

⁶ The Nuremberg Trials prosecuted crimes that occurred during World War II before the International Military Tribunal at Nuremberg, Germany. The nations who established and conducted the trials were the United States, France, the United Kingdom and the Soviet Union. This is separate from the US based Nuremberg Military Tribunal. See Woetzel, *The Nuremberg Trials in International Law* (1960); Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (2011).

⁷ Donovan (n 4) 84; See Appleman, *Military Tribunals and International Crimes* (1954) (1972).

⁸ Donovan (n 4) 100-101; The following treaties and conventions were given by Donovan as examples for the recognition of human rights in international criminal law: Universal Declaration of Human Rights, UNGA Res. 217, 3 UN GAOR, U.N. Doc. 1/777 (1948); International Covenant on Civil and Political Rights, UNGA Res. 2200A, 21 U.N. GAOR, Supp. (No.16) at 49, U.N. Doc. A/6316 (1966); Optional Protocol to the International Covenant on Civil and Political Rights, UNGA Res. 2200A, 21 U.N. GAOR, Supp. (No.16) at 59, U.N. Doc. A/6316 (1966); European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221, E.T.S. No. 5 (1940); American Convention on Human Rights, O.A.S. Official Records OEA/Ser. K/XVI/1.1, Doc. 65, Rev.1, Corr.1 (1970); UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide, entered into force 12 January 1951; International Convention on the Elimination of All Forms of Racial Discrimination, UNGA Res. 2160A, 20 U.N. GAOR, Supp. (No.14) at 58, U.N. Doc. A/60143, 660 U.N.T.S. 1956 (1966).

after the trials began, signalled that the trials were an important force into international criminal law's expansion.⁹

International criminal law has made continued advances since the Nuremberg and Tokyo trials. Amongst the largest developments in international criminal law to date is the adoption of the Rome Statute in 1998, which established the International Criminal Court, entering into force in 2002.¹⁰ The International Criminal Court (ICC) was created to end impunity through the formation of a central international institute focused on prosecutions of genocide, crimes against humanity and war crimes. Despite the fact that the jurisdiction of the ICC is limited,¹¹ the establishment of a central international criminal court is a landmark achievement. The ICC signals a momentous shift in the consciousness of the international community towards holding individuals accountable for violations to the laws of war on a visible international scale. This was far from prevalent prior to the Nuremberg and Tokyo Tribunals, as the prosecution of individuals after World War I was dismal and signalled extreme impunity.¹² While the work of the International Criminal Court is not a central focus of my thesis, it is important to highlight its growth and potential, both in its progression of international criminal law and in the future of international criminal law. I do not undertake substantial work on the ICC in this thesis, as I am more concerned with the shaping of the status of women in international criminal law in the ICTY, ICTR and subsequent ECCC, which I see as the impetus to the way the ICC understands the role of women in armed conflict.

Concerning the ICC's contribution towards the topic of female defendants, only one woman has been indicted by the International Criminal Court; Simone Gbagbo was the former first lady of Côte d'Ivoire accused of crimes against humanity.¹³ Despite this, Gbagbo never physically appeared before the ICC due to a lack of cooperation

⁹ Donovan (n 4) 100.

¹⁰ UNGA, 'Rome Statute of the International Criminal Court' A/CONF.183/9 (1998) (Last Amended 2010).

¹¹ This will be discussed further in Chapter Six.

¹² An effort to try Turkey for the Armenian genocide was abandoned in 1923 at the Lausanne Conference. The prosecution of Germans for war crimes during WWI was done in German courts, resulting in widespread impunity. See Popoff, 'Inconsistency and Impunity in International Human Rights Law: Can the International Criminal Court Solve the Problems Raised by the Rwanda and Augusto Pinochet Cases' (2001).

¹³ *Prosecutor v Gbagbo* (Indictment) ICC-02/11-01/12 (2012).

with local Ivory Coast authorities, or the willingness of local Ivory Coast authorities to prosecute Gbagbo, emphasising a focus on complementarity. The 2017 Côte d'Ivoire trial of Gbagbo should be considered flawed, as it resulted in Gbagbo being acquitted of war crimes. However, the fact Gbagbo was already serving a 20 year sentence for her part in harming national security, which was a successful trial in the Ivory Coast, does indicate the existence of local justice pursued by Ivory Coast prosecutors and courts.¹⁴ Moreover, the ICC's non-existent support of Gbagbo's trial in the Ivory Coast, due to the lack of conviction for crimes against humanity, indicates a narrow approach to complementarity. This does little to dispel the criticisms of the ICC as an unsupported brand of universalised international criminal justice.

This example highlights the ICC's lack of flexibility in understanding the importance of a local prosecution regardless of specific charges brought, which indicates a disconnect between the ICC and its member States on the matter of complementarity. Nevertheless, the ICC has major obstacles to overcome before it can be considered to be an effective means of international criminal justice. There is a lack of faith in the current manifestation of the ICC, evident in suggestions that the court is focused too heavily on African States, has a limited budget, and a general inability to pursue the extent of international criminals primarily due to the fact major States are not members of the Rome Statute,¹⁵ i.e. the United States.¹⁶ While the issues that exist within the International Criminal Court primarily aid the conclusion of this thesis, they do not take the central focus in this work's substantial chapters. The future of international criminal law, which I discuss in Chapter Seven, turns back to a discussion of the ICC and suggests that if international criminal law is to grow as a discipline it needs to absorb the critique found when discussing the relationship between female defendants and Ad Hoc Tribunals and hybrid courts in the subsequent chapters.

¹⁴ 'Côte d'Ivoire: Simone Gbagbo Acquitted after Flawed War Crimes Trial' (*Human Rights Watch*, 29 March 2017).

¹⁵ Clark, 'Law, Politics and Pragmatism: ICC Case Selection in the Democratic Republic of Congo and Uganda.' In: Clark and Waddell (Eds.) *Courting Conflict? Peace, Justice and the ICC* (2008).

¹⁶ Sriram, 'The International Criminal Court Africa Experiment' in Sriram and Pillay (Eds.) *Peace versus Justice: The Dilemma of Transitional Justice in Africa* (2009)

While the articulation of international criminal law in the Nuremberg and Tokyo Tribunals was essential for the creation of the ICC, the work done in the ICTY and ICTR furthered the understanding of international criminal law as a discipline. Both the ICTY and ICTR contributed significantly to international criminal jurisprudence and established definitions of criminal acts, which up until this point had not been articulated.¹⁷ Tallgren asserts that it has been the presence of horrific levels of violence that caused the expansion of international criminal law since the 1990s.¹⁸ This combined with the changing international landscape and the dissolving of certain blocs of the Cold War, has allowed different States the opportunity to interact with each other, which has also encouraged international criminal law's growth much more rapidly.¹⁹ The rise in criminal adjudication is an indicator of international criminal law's expansion as one of the fundamental ways of dealing with the aftermath of armed conflicts. The international criminal courts and tribunals are examples of such instances when the international community chose to impose international criminal law. Humphrey argues that tribunals re-emerged, in the form of the ICTY and ICTR, as an attempt to prosecute human rights violations when States were 'unwilling or unable' and to encourage human rights law in circumstances where States did not protect their people from such violence.²⁰ Simonovic argues that the establishment of the ICTY and ICTR was a 'selective' decision made by the international community which indicate that there are only certain times in which they are "capable of and willing to impose implementation".²¹

While I regard the work of international criminal law as an important step in order to reimagine the definition and functions of sovereignty, I see the international criminal structure as a selective enterprise, where the amount of justice possible is directly related to the amount of power a State has, or the powerfulness of a State's 'friends'. Whereby, States that are in positions of power are exempt from prosecution, but are still allowed to play an influential part of the ICC, for instance, as found in the US's

¹⁷ The definition of 'rape' and 'sexual violence' in *Akayesu*, which will be detailed further in Chapter Four.

¹⁸ See Tallgren, *The Sensibility and Sense of International Criminal Law* (2002) 562, 563.

¹⁹ *ibid.*

²⁰ Humphrey, 'International Intervention, Justice and Reconciliation: the Role of the ICTY and ICTR in Bosnia and Rwanda' (2003) 495-496.

²¹ Simonovic, 'The Role of the ICTY in the Development of International Criminal Adjudication' (1999) 446, 453.

position as a permanent Security Council member with the ability to veto cases before the ICC. There are those who could argue that despite these criticisms, there needs to be an international response to violations of international humanitarian law. Heads of States, as well as those in leadership positions including armed forces, or non-State forces need to be held accountable and the international community should stand united stating, ‘never again’, when atrocities are uncovered. Although I agree with this sentiment in principle and while I am not calling for the immediate abolishment of international criminal law, I do wonder if presumptions around international criminal law’s power has led us to this point. Meaning that if less normative value was placed upon international criminal law, then international criminal law, in its current manifestation, would be just one part of the justice processes. This would imply that a larger importance would be given to local or alternative transitional justice mechanisms, and the international would play a lesser role. Therefore, the outcomes of local justice process or alternative spaces of justice might be capable of filtering back and influencing the way justice is conceptualised internationally.

While the international justice system rests on binaries between men and women and violators and victims, alternative justice spaces can bring more fluidity in what are assumed to be definitive gender roles.²² The need for local post-conflict mechanisms to filter back to the international is essential not just for conceptions of justice, but for the understanding of gender roles in armed conflict. The female victim becomes just one manifestation of women’s roles in armed conflict contrasted with the female defendant, due to the fact that local nuanced stories of gender experiences, such as male victims and female defendants, have a greater chance of being filtered to the international. The concept is discussed again in Chapter Seven.

Furthermore, what is embedded in the development and history of international criminal law is its complicity in the promotion of men as defendants and women as victims. What international criminal law has supported through its development is the limited understanding of gender, which will be further assessed in the discussion on feminist methods below. The growth in the twentieth century, of international law, specifically including the areas of international criminal law, international

²² Alternatively, they can solidify harmful local gender practices.

humanitarian law and international human rights law, has been dependent upon the promotion of women as victims. It is from this starting point that the thesis begins its analysis of the female defendant in the following chapters.

3. International Human Rights Law and International Criminal Law

The new emphasis on human rights emerged during the beginning of the 1990s, which encouraged accountability and an end to impunity, as demonstrated by the focus on international criminal law and establishment of tribunals.²³ Douzinas writes that in the 1990s human rights became the new ideology of the world. He further states, “All recent wars and occupations have been carried out wholly or partly in the name of human rights, democracy, and freedom. Human rights became part of a political philosophy and sociology.”²⁴ Despite the impressive gains afforded individuals by human rights provisions,²⁵ I argue, following Douzinas, that human rights have also been a way for States to justify abhorrent behaviour, by cloaking military intervention or ‘democratic intervention’ in their desire to promote human rights in the Global South. Similarly, Chandler argues that human rights are connected to States’ need to protect their sovereignty.²⁶ Human rights are used simultaneously to theoretically justify violence and to encourage the punishment of those who deploy violence. Douzinas argues that human rights have been adopted as a tactic to ensure other non-Western States seek pro-Western policies using acceptable ‘human rights language’.²⁷

Human rights can offer protection against corrupt power, but they can also be used by States to avoid scrutiny of policies abroad (humanitarian intervention) and internally (emphasis on civil and political over social and economic rights). However, the importance of human rights as a way to articulate the oppression one faces as the hands of State or institutions should not be dismissed. Human rights language while criticised for becoming the lingua franca of State sponsored entities often promoting a neoliberal project, also benefits non-State entities as well. If the international human rights agenda employs language that everyone is familiar with, then it stands to reason

²³ Zacklin, ‘The Failings of Ad Hoc International Tribunals’ (2004) 541-542.

²⁴ Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (2007) 12.

²⁵ Donovan (n 4).

²⁶ Chandler, ‘The Limits of Human Rights and Cosmopolitan Citizenship’ in Chandler (Ed.) *Rethinking Human Rights Critical Approaches to International Politics* (2002) 31, 134.

²⁷ Douzinas (n 24) 7, 31, 43.

it can also be a way for activists and citizens on the ground to frame their frustrations using a language with which States understand. This becomes a way of employing a corrupted agenda against those who corrupted it in the first place, resulting in real gains.²⁸ Far from the calls for the invocation of human rights by protesters against government mistreatment of its citizens, are the State officials who use the language of human rights to aid in their State objectives, which do not always carry altruistic motives. One of the many issues with the usage of human rights language by State institutions is as Kennedy states, the use of human rights as a way to frame violence ‘on the battlefield’.²⁹ This has also been another linchpin where international human rights law and international humanitarian law have been found to be similar, albeit not a necessarily positive attribute. Whereby the use of law as a way to justify violence and privilege killing is all the more evident.³⁰

Increasingly, the rhetoric of the international human rights agenda has been integrated into political speeches and State-centric approaches to garner support for military interventions.³¹ However, the use of human rights as a tool in any circumstance can come at a cost, meaning that while I am not calling for the dismantling of the human rights agenda, I am calling for critique of the way human rights language is used, and to continually assess the so called gains made in the name of human rights. As demonstrated through examples found within the link between environmental law and human rights, granting someone their human rights can come at the cost of denying other rights in the long term.³²

²⁸ Engle, ‘Feminism and Its (Dis)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina’ (2005) 785-786.

²⁹ See Kennedy, ‘Lawfare and Warfare’ in Crawford and Koskeniemi (Eds.) *Cambridge Companion to International Law* (2012) 179.

³⁰ *ibid.*

³¹ President George Bush Jr., State of the Union Address to a Joint Session of Congress and the American People, (21 September 2001). In the President’s speech he noted: Afghanistan's people have been brutalized - many are starving and many have fled. Women are not allowed to attend school. You can be jailed for owning a television. Religion can be practiced only as their leaders dictate. A man can be jailed in Afghanistan if his beard is not long enough. The United States respects the people of Afghanistan - after all, we are currently its largest source of humanitarian aid - but we condemn the Taliban regime. It is not only repressing its own people, it is threatening people everywhere by sponsoring and sheltering and supplying terrorists. By aiding and abetting murder, the Taliban regime is committing murder.

³² Cullet, ‘Right to Water in India – Plugging Conceptual and Practical Gaps’ (2012) 62.

International criminal law has been used as a way to punish those who violate grave breaches of international humanitarian law during armed conflict. The relationship between international humanitarian law and human rights is such that international humanitarian law interprets and applies human rights ideals and it is the worst of international humanitarian law violations that are prosecuted under international criminal law. International criminal law has developed the terminology used to define genocide and crimes against humanity, the worst violations of human rights law. International humanitarian law and international human rights law also developed work on women and humanitarian issues, for example, as these areas gained prominence into the second half of the twentieth century with the advent of world conferences and conventions such as CEDAW,³³ the global consciousness turned to altruistic aims. These issues became widely accessible through international broadcast media in the 1990s,³⁴ led people to international criminal law, as a way of rectifying the abuses they saw in the area of international humanitarian law. In particular, international criminal law responded to the atrocities women faced in particular with the recognition of sexual violence. This recognition of sexual violence has framed the way female defendants are understood in armed conflict, as female victims have dominated the consciousness around women's roles in armed conflict.

This critique of international human rights law's development, situates the project of the female perpetrator in a much larger arena than just her association with international criminal law, but more widely within the framework of international human rights law as well as international humanitarian law. This work highlights the political aims behind international criminal law's expansion, as well as international law's focus on human rights. Some of the intricacies brought forth by addressing the female perpetrator are embedded in the problems raised in relation to international criminal law, international human rights law, and international humanitarian law. However, the quest for recognition of female defendants would possibly expand the political aspects of international criminal law and permit further imperialism in the

³³ I am referring to the four UN Women World Conferences including: Mexico City in 1975, Copenhagen in 1980, Nairobi in 1985, and Beijing in 1995. UNGA, Convention on the Elimination of All Forms of Discrimination Against Women A/RES/34/180 (18 December 1979).

³⁴ See Thussu and Freedman, *War and the Media: Reporting Conflict 24/7* (2003); Bessaiso, 'Media Strategies and Coverage of International Conflicts: The 2003 Iraq War and Al-Jazeera' (PhD thesis, Cardiff School of Journalism Media and Cultural Studies) on file with Cardiff University (2010).

name of human rights. By this I mean that female defendants could be the justification for international criminal law's continued prosecution of individuals outside Western States. Therefore, supporting the prosecutions of female defendants before international criminal courts would not necessarily reduce Western interventions into non-Western States. However, prosecuting more female defendants could disrupt the female victim mentality of international criminal law and international human rights law, as Western States have used the violation of human rights of non-Western women as justification for military intervention.³⁵ The importance of raising awareness of these issues around the topic of female defendants in relation to the outcomes of this thesis is to illustrate that there is no clear answer or solution to these debates. However, what this does illuminate is the complexity of the topic of female defendants and the international legal dilemmas that are embedded in this discussion as well. I will continue to develop and explain the complexities of this topic throughout the thesis, and offer recommendations in Chapter Seven.

4. Western Feminist Approaches in the Development of International Criminal Law

Through the focus on human rights and the promotion of women's issues, feminists have contributed to the development of international human rights law as well as international criminal law in equally substantial ways. Another way international criminal law and international human rights law align is in the representation of women through predominantly liberal and radical US feminist reform strategies. International criminal law has been influenced by radical feminists, as seen in the ICTY and ICTR via the focus on female victims of sexual violence, which reproduces female sexual vulnerability as the paradigm female experience of conflict.³⁶ Liberal feminists have shaped key components of international human rights law through creation of The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) in 1979. Both radical and liberal feminists were instrumental in providing nuance and a 'women's' perspective in these two areas of international law.³⁷ However, the liberal and radical strands of feminism would appear to have

³⁵ Bunting, 'Can the spread of women's rights ever be accompanied by war?' (*The Guardian Opinion*, 2 October 2011).

³⁶ See Heathcote and Otto (Eds.), *Rethinking Peacekeeping Gender Equality and Collective Security* (2014).

³⁷ Kapur, 'Erotic Justice: Law and the New Politics of Postcolonialism' (2005) 135, 136.

extremely different understandings of the way women and gender should exist within international law. Despite this both liberal and radical strands work much better together than one might expect. Liberal feminist ideals focus on equality and gaining access to areas of the law that have traditionally been male dominated, achieved by law reform, increased representation, and participation.³⁸ A few areas liberal feminists have made developments in are employment and education. However, an issue within the liberal approach is that women are required to enter into a world already constructed by men.³⁹ Liberal feminist law reforms do not sufficiently challenge the assumption that the law itself is free from male dominance and that once women secure places in government or politics, for example, the past inequalities will disappear. Moreover, liberal feminism is unable to accommodate the differences of women who do not fall in line to their proposed legal reforms, which keep patriarchal dominance intact. The critique of liberal feminists further suggests that the biases found within the law cannot be irradiated by adding new 'women focused' policies, rather the law is itself structurally biased.⁴⁰ Liberal feminists have shaped the international human rights agenda, with CEDAW embracing their vision of equality between men and women. However, it is not only liberal feminists that have shaped the understanding of human rights.

Radical feminists see the inequalities women face as a product of male dominance, arguing that political and sexual hierarches that exist in society benefit men, and gains made by liberal feminist to aid women still sit within the structure of male dominance. Radical feminists, like MacKinnon, see the power held by men within society directly linked to the subordination of women found in the legal system. Radical feminists specifically focus on sex based harms as the basis of women's subordination. What the liberal feminists and radical feminists have in common is the influence over different realms of international law. The work of radical feminists in international criminal law, based on a 'structuralist view of sexual subordination', resulted in the Ad Hoc Tribunals reclassifying the criminality of rape and sexual violence to carry

³⁸ Charlesworth and Chinkin, *The Boundaries of International Law: A Feminist Analysis* (2000).

³⁹ *ibid.*

⁴⁰ See Lacey and Jackson, 'Introducing Feminist Legal Theory' in Barron et al (Eds.) *Introduction to Jurisprudence and Legal Theory Commentary and Materials* (2002).

more gravity.⁴¹ This displays the tendency of international criminal law to acknowledge Western radical feminist's point of view.

The human rights agenda has presented governments with a useful tactic to garner support for their activities by seemingly bolstering the use of human rights. While seeking to justify certain wars, such as the armed conflicts in Iraq and Afghanistan for example, States have often claimed the liberation of women as their motive for armed conflict.⁴² Within the rhetoric linking human rights and the liberation of women, the female victim is predominant. Kennedy writes that, the human rights movement has continued to increase the prevalence of women depicted through stereotypical victim-centred roles within legal documentation, and as the human rights discourse continues so will these limiting descriptions of women.⁴³ MacKinnon, as well as others,⁴⁴ encouraged the inclusion of women in international criminal law by focusing on violence against women, and in particular sexual violence.⁴⁵ This focus has included certain experiences of women in law, creating assumptions about all women's experiences of armed conflict. The prevalence of both liberal and radical feminist legal reforms in international law, while an important step toward adding gender perspectives into global governance debates, has resulted in negative effects by reducing the amount of diversity assumed to exist within feminist discourse from the perspective of mainstream legal critiques. Both the radical and liberal feminist approach ignores feminist approaches across non-Western contexts, which include post-colonial feminisms. The Western radical and liberal feminist approach also limits women's diverse experiences in conflict spaces and reproduce women as victims in order to gain laws protection reproducing a limited binary of female experiences.

⁴¹ Halley et al, 'Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law' (2008) 67, 68.

⁴² See Al-Ali and Pratt, *What Kind of Liberation? Women and the Occupation of Iraq* (2009); Heathcote and Otto (Eds.), Introduction in *Rethinking Peacekeeping Gender Equality and Collective Security* (2014).

⁴³ Kennedy, 'Boundaries in the Field of Human Rights: The International Human Rights Movement: Part of the Problem?' (2002) 105.

⁴⁴ See Stiglmeier, *Mass Rape: The War Against Women in Bosnia-Herzegovina* (1994).

⁴⁵ Kapur, 'The Tragedy of Victimisation Rhetoric Resurrecting the Native Subject in International/Post-Colonial Feminist Legal Politics' (2002); Kapur (n 37) 97-99.

International human rights law and international criminal law have both developed reforms based on gender, which have included radical and liberal feminist approaches. These radical and liberal feminist approaches primarily come from US or Western feminist experiences and agendas that have focused on violence against women as well as discrimination, instead of equally important feminist topics, such as, poverty or labour rights and access to resources. The Western feminist perspective, whether it be radical or liberal, has become the voice from which all feminist perspectives must be shaped through or contend with, in international legal spaces. By positioning the female victim as the focus of mainstream conflict narratives within international human rights law, international criminal law, as well as within the Women, Peace and Security rhetoric, the Western feminist agenda has continued to play a role in limiting the experiences of women, which ultimately has hampered the development of international criminal law. Understanding the female victim's rise to prominence within international discourse helps highlight the focus on human rights, Western feminist intervention, and the development of international criminal, leading to the creation of the ICC, throughout late twentieth century. Since the rise of 'victim feminism' coincided with the expansion of international criminal law, the relationship between international criminal law and the human rights agenda then becomes an essential perspective into the way women have been defined and viewed in international law. These ideas can be seen in Kapur's work; she writes that victim feminism, present in international criminal law, has aided the international human rights discourse in reinforcing narrow views of women, gender, ethnicity, and sexuality.⁴⁶ It is in interrogating these relationships that the place of female defendants in international criminal law becomes all the more problematic, as female defendants uneasily exist in a space that is influenced by existing binaries found within law and relationships of power embedded in the legal discourse itself.

Within the ICTY many feminists, including MacKinnon, did not account for the differences in the lived realities of people with different ethnicities or religions, which affected the way they experienced violence during the Yugoslavian conflict.⁴⁷ Some feminists assumed all women who were connected to the conflict were raped;

⁴⁶ Kapur (n 37) 127.

⁴⁷ Engle, 'Judging Sex in War' (2008) 951-956; Engle (n 28) 784-788.

feminists and journalists became increasingly frustrated when women refused to discuss their stories.⁴⁸ This approach was criticised due to the assumption that the majority of women were victims of sexual violence, and also because the differences in the multiple ethnic groups present a part of the conflict, which influenced the ways these groups dealt with sexual violence, were largely ignored.⁴⁹ To say that international criminal law is based upon commonality suggests there is an assumed collective understanding, but often, as in the case of certain feminist working in the ICTY, that assumed understanding is often from a white Western and Christian perspective. The perception that women from outside of the Global North require ‘saving’ persists and perpetuates a narrative and undermines representations of the breadth of women’s experiences in armed conflicts, including women as defendants.

The perspective I adopt within this thesis, with regards to international criminal law, takes into account the surrounding environment of international law that continues to shape and give meaning to the normative understanding of international criminal law. The influence of critical legal studies (CLS), or rather new approaches to international law (NAIL), underscores my work in this thesis, and its fundamental assumptions underpin the perspective I take in relation to international law. The indeterminacy of law and the influence of power in international law inform my approach,⁵⁰ as well as the use of language which is never free from bias and requires a deconstruction of hierarchies as well as the universalisation of legal principles and aims.⁵¹ I recognise that law’s power has, as in the case of female defendants, influenced the way the international community understands women’s roles in armed conflict. Primarily amongst these influencing factors are the human rights agenda and the Western feminist intervention into international criminal law developments from the mid-1990s. I am not suggesting that the increased appropriation of human rights by States in order to justify abuses should result in a rejection of human rights entirely as a mode for empowerment or that feminists are responsible for progressing an international criminal legal system that ‘harms’ women.

⁴⁸ Engle (n 28) 794-795.

⁴⁹ *ibid.*

⁵⁰ See Kennedy, ‘The critique of rights in critical legal studies’ in Brown and Halley (Eds.) *Left Legalism/Left Critique* (2002); Koskeniemi, ‘The Politics of International Law’ (1990); Matsuda, ‘Looking to the Bottom: Critical Legal Studies and Reparations’ (1987).

⁵¹ See Schiff Berman, ‘From International Law to Law and Globalization’ (2005).

Another result of the human rights and international criminal law expansion in the late 1990s, as well as Western feminist intervention, has been a lack of nuance around the array of identities both men and women assume during armed conflict. In one of the sub-claims evident throughout the thesis, I argue that female defendants' lack of visibility within international criminal legal structures, has further contributed to missed opportunities in the development of gendered, racial, and classist understandings in armed conflict.

5. International Tribunals and Courts

The relationship between international humanitarian law and international criminal law has been touched upon in the previous section, as has the expansion of international criminal law in the 1990s. However, I would like to now briefly move back to international criminal law's development and fundamental concepts. First, I will focus on two principles of the international criminal legal system. Namely, the concepts of individual criminal responsibility and complementarity, both of which are necessary to discuss in order to understand the international criminal law's history and grasp the larger picture of international criminal law as a discipline. Traditionally, States were the primary subjects of international law and State responsibility, now laid out in the Draft Articles on State Responsibility,⁵² governed the behaviour and relationship between States. In respect to the laws of war, the Hague Conventions of 1899 and 1907 were the first substantial codification of the duties of a State during armed conflict.⁵³ Yet, this only cited violations of the Conventions by States, as illegal not criminal and individual criminal liability was not recognised as such. However, with the creation of the Nuremberg and Tokyo Trials, the concept of the individual responsibility in international criminal law was developed through international jurisprudence for the first time.⁵⁴

⁵² International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Supplement No. 10 (A/56/10), chp.IV.E.1 (November 2001)

⁵³ See generally, inclusive of separate treaties, the First Hague Conference (May 18–July 29, 1899) adopted three conventions and three declarations the Second Hague Conference (July 15–October 18, 1907) adopted 13 conventions and one declaration.

⁵⁴ I do acknowledge that after WW1 the culpability of the German Kaiser was acknowledged in the Treaty of Versailles.

This shift from State to individual responsibility was articulated in the Judgement of the Nuremberg Tribunal,⁵⁵ which was reiterated again in the more recent Rome Statute, stating “crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”⁵⁶ The Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and the Charter of the International Military Tribunal formed in London in 1945,⁵⁷ established the crimes that could be tried before the Nuremberg court, as war crimes, crimes against peace, and crimes against humanity.⁵⁸ Despite the work of Lemkin to articulate the crime of genocide,⁵⁹ and the subsequent creation of The Convention of the Prevention and Punishment of the Crime of Genocide, adopted by the U.N. General Assembly in 1948, genocide was not a crime under the jurisdiction of the Trials.⁶⁰

Earl argues that while no one was indicted for the crime of genocide in Nuremberg, Lemkin’s work was still influential to those who drafted the Nuremberg Charter. This is evidenced by the Nuremberg Charter’s description of count three of War Crimes, which states:

they conducted deliberate and systematic genocide, via., the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial, or religious groups, particularly Jews, Poles, and Gypsies and others.⁶¹

The inclusion of the word ‘genocide’ into the United Nations Charter is just one example of the way the creation and proceedings of the Nuremberg and Tokyo Trials developed the elements of international crimes, which would eventually be used by

⁵⁵ United Nations, Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (8 August 1945); UNGA International Law Commission, The Charter and Judgement of the Nürnberg Tribunal: History and Analysis Appendix II., A/CN.4/5 (3 March 1949) [hereinafter *Nuremberg Charter*].

⁵⁶ *Rome Statute* (n 10).

⁵⁷ *Nuremberg Charter* (n 55).

⁵⁸ *ibid.*

⁵⁹ Lemkin is regarded as having developed the definition of the term and crusaded tirelessly to have it incorporated into the Nuremberg Trials.

⁶⁰ *Genocide Convention* (n 8).

⁶¹ *Nuremberg Charter* (n 55)

the International Criminal Court, articulated in the Rome Statute.⁶² Influenced by the Hague Conventions and the Nuremberg and Tokyo Trials there was a need to update the previous Geneva Conventions, this resulted in the Geneva Conventions I–IV in 1949.⁶³ Additional Protocols I and II, of the Geneva Conventions, created in 1977 further solidified international humanitarian law and the protections entitled in both international and non-international armed conflicts. The notion of individual criminal responsibility was reaffirmed through the subsequent Geneva Conventions and Additional Protocols, as well as the Genocide Convention.⁶⁴ Yet, it is through the process set in motion by the Nuremberg and Tokyo Trials that individual criminal responsibility for international crimes developed.⁶⁵ The ICTY, ICTR, ICC, and other international criminal courts and tribunals have subsequently focused on three categories of international crimes: grave breaches of the laws of war or war crimes, crimes against humanity, genocide, and the crime of aggression, although the later has yet to be put under the jurisdiction of the ICC.⁶⁶

With individual responsibility there is the concern that in prosecuting individuals for crimes in international law, the State escapes prosecution. Holding individuals to account for criminal acts does not allow them to hide behind the State due to their position within the State, to avoid prosecution.⁶⁷ Yet, the State can be seen to be involved in international crimes such as genocide, a crime that involves a systemic

⁶² *Rome Statute* (n 10) article 6, 7, 8.

⁶³ The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 75 UNTS 31, adopted in 1864, revised in 1949, Article 49; The Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 75 UNTS 85, adopted in 1949, Article 50; The Geneva Convention Relative to the Treatment of Prisoners of War 5 UNTS 135, adopted in 1929, revision in 1949, Article 129; Geneva Convention Relative to the Protection of Civilian Persons in Time of War 75 UNTS 287, adopted on 12 August 1949; Protocol Additional to the Geneva Conventions of 12 August 1949, Article 146, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) 1125 UNTS 3, adopted on 8 June 1977, Article 85.

⁶⁴ *ibid*; *Genocide Convention* (n 8) article 4.

⁶⁵ This is not dismissing the argument for State responsibility of genocide. See, for example, Milanović, 'State Responsibility for Genocide' (2006).

⁶⁶ The crimes are based on charters and conventions that relate to the laws of war as well as the Statutes of the ICTR and the ICTY. War crimes were highlighted in the Geneva Conventions as well as Additional Protocol II and Art III common to the Geneva Conventions and are defined in the Charter of the International Military Tribunal, Nürnberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 by the General Assembly of the United Nations; Crimes Against Humanity were defined in the Nuremberg Charter as well as the Tokyo Trial, ICTY, ICTR, and SCSL; *Genocide Convention* (n 8).

⁶⁷ UNGA, Diplomatic Intercourse and Immunities A/RES/1288 (5 December 1958).

operation of extermination, one that is so complex it necessitates the organisation of a 'State like' entity. This was alleged in the *Bosnia and Herzegovina v. Serbia and Montenegro* case before the ICJ.⁶⁸ While the State is responsible for violations of international humanitarian,⁶⁹ the notion that a State could be held *criminally* responsible was removed by States from the Article on State Responsibility in 1999, while a State will still be liable for breaches of international law. The possibility of State criminal responsibility could be a future development of international criminal law if the crime of aggression is to come under the jurisdiction of the ICC. The definition of the crime of aggression indicates an involvement of the State, as the crime must involve the actions an individual with control of a State's political or military capacity.⁷⁰ While the crime of aggression denotes individual criminal responsibility, it is implicit that States, as a result, are involved in the commission of such crime. In this way, even if the State themselves cannot come under criminal jurisdiction, it certainly bares the possibility of offering a way for the international community to 'name and shame' States whose leaders are involved in the practice. As Nollkaemper argues both State and individual responsibility are related and state responsibility can "address the systemic causes of individual criminality".⁷¹ Likewise, the Security Council retains the authority under Article 39 of the UN Charter to find States responsible for acts of aggression and to respond if necessary.

Discussing individual responsibility in relation to female defendants draws out questions of gender and leadership. Understanding and accepting that female defendants exist and also hold positions of power within a State disrupts the assumptions that global leadership gender dynamics primarily concern men. Moreover, the assumption persists that the defendants brought before international courts and tribunals are more likely to be men because political and military leaders are more likely to be men. Nevertheless, there are many examples of female leaders

⁶⁸ Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia-Herzegovina v Serbia and Montenegro*), No. 122 (11 July 1996).

⁶⁹ Geneva Conventions (n 63).

⁷⁰ *Rome Statute* (n 10) article 8; For the purpose of this Statute, "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

⁷¹ Nollkaemper, 'Concurrence between Individual Responsibility and State Responsibility in International Law' (2003) 639.

who participate in ordering military action or are involved in actions that would be considered to be violent. For example, Margaret Thatcher ordered military action in the Falkland Islands, which for some was regarded as a crime of aggression;⁷² Condoleezza Rice and Hillary Clinton, two former US Secretaries of State, have been accused of being complicit in potential breaches of international law via US government military action, such as drone strikes and torture tactics.⁷³ The examples of women in the West who exercise military power, which causes violence, are not typically represented as defendants. It appears that even if Western military actions are considered illegal in international law, those leaders in the West who are involved, be it man or woman, are not as readily labelled defendants unlike the leaders outside of the West.

While non-western examples such as Nyiramasuhuko and Gbagbo exist, the emphasis on their gender by the West would appear to be a fascination of female defendants in the Global South by Western audiences. This fascination seems to both ignore the complicity of Western female political leaders in violence and render the female leadership crimes abroad as abhorrent and exceptional. This indicates that the focus on gender is a Western preoccupation that does not manifest in the same way in local context, for instance in Rwanda or the Ivory Coast. The prosecution of Gbagbo by local courts can be argued to be focused on local politics and not in a preoccupation of gender.

The principle of complementarity, found in the Rome Statute of the International Criminal Court, states that the work of the ICC will be complementary to the work of national jurisdictions, and therefore the ICC will only try a case when the State party is 'unwilling or unable to do so'.⁷⁴ However, this is not the first time the concept of complementarity was practised in international criminal law. After World War I, war crimes were tried in domestic courts, notwithstanding the Commission on the

⁷² Thompson, 'Remembering the Falklands War the Crisis that Defined the Iron Lady' (*National Review*, 14 June 2017).

⁷³ Torture: Harden, 'Condoleezza Rice approved 'torture' techniques' (*The Telegraph*, 23 April 2009) ; Drone Strikes: Zenko, 'Hillary Clinton's Hawkishness Revealed in her Emails' (*Newsweek Opinion*, 13 June 2016); Entous and Barrett, 'Emails in Clinton Probe Dealt With Planned Drone Strikes' (*The Wall Street Journal*, 9 June 2016).

⁷⁴ UNGA, 'Rome Statute of the International Criminal Court' A/CONF.183/9 (1998) (Last Amended 2010) Preamble and Article 1, 17.

Responsibilities of the Authors of War and on Enforcement Penalties recommending war criminals to be tried by the Allied Tribunals.⁷⁵ Despite the fact that Germany agreed initially to respect the jurisdiction of the court and turn over suspected German war criminals, they later refused and a compromise was reached, which resulted in Germany trying a small number of those accused by the Allies,⁷⁶ before their court at Leipzig.⁷⁷ The Versailles Treaty emphasised the need to prosecute individuals if Germany did not do so. Article 228 of the Treaty states that the German government will respect the right of the Allied and Associated Powers to try individuals before military tribunals.⁷⁸

Article 288 highlights the importance and primacy of international tribunals, or rather tribunals outside of Germany's domestic jurisdiction.⁷⁹ The agreement to allow the German court in Leipzig to carry out trials is an example, El Zeidy states, of complementarity.⁸⁰ The international community, despite having jurisdiction, allowed Germany to retain jurisdiction and prosecute individuals in their national courts, emphasising the importance of local justice processes. This shows the concept of complementarity in practice, despite international courts being given primacy in the Treaty of Versailles. This principle was later echoed in the Rome Statute, which theoretically makes the ICC a court of 'last resort', giving primacy to national jurisdictions.

After World War II the International Military Tribunal was established in order to try the most senior war criminals, with domestic courts expected to take the majority of the prosecutions.⁸¹ The rationale behind this was to see a greater number of war

⁷⁵ El Zeidy, 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law' (2002) 871.

⁷⁶ Referring to the Allies and Associated Powers.

⁷⁷ El Zeidy (n 75) 872; This is referring to Germany's initially acceptance of the Versailles Treaty (Article 228 and 230) and the later refusal at the Paris Peace Conference by Kurt von Lersner. The 'Allies' compiled a list of roughly 895 persons alleged to be war criminals. Once the compromise was reached Germany passed legislation to counter act Article 228.

⁷⁸ Treaty of Peace with Germany, Treaty of Versailles (10 January 1920) Article 288.

⁷⁹ El Zeidy (n 75) 872. Similarly, after WWI Turkey agreed in the Treaty of Sevres to allow the Allied Powers to prosecute individuals. The Treaty of Sevres was never ratified and when the subsequent Treaty of Lausanne was put in place it did not discuss prosecution. The situation with Turkey after the war was similar to that of a German, where domestic prosecution was allowed in order to maintain stability within Turkey.

⁸⁰ *ibid* 873.

⁸¹ *Nuremberg Charter* (n 55).

criminal tried in the domestic courts where their crimes occurred, in the territory where the individuals they harmed were located.⁸² However, the Nuremberg Tribunal did not have a direct relationship with domestic courts, both the international and domestic criminal courts carried different jurisdiction and prosecuted different crimes.⁸³

The Nuremberg Tribunal tried those whose offences had no exact geographical location; the rest of the suspected criminals were tried within one of the four zones, within Germany, set up by the Occupying Powers.⁸⁴ Due to the fragmentation that existed between the four zones, as they were controlled by different powers, the Allied Control Council passed Law No. 10, specifying the acts recognised as a crime.⁸⁵ The principle of complementarity after World War I and II, while different, display a tendency to take into consideration the environment post armed conflict. While after both World Wars there was the focus on trying individual internationally, there was an understanding that national courts play a key role in the criminal justice process. World War I and II are just two examples of the existence complementarity principle, subsequent examples include the Convention on the Prevention and Punishment of the Crime of Genocide, the 1949 Geneva Conventions, as well as the Ad Hoc Tribunals and hybrid courts. Each instance contributing to the understanding of complementarity found within the Rome Statute.

Complementarity, while a main principle of the creation of the ICC, is not without its critiques as well. Burke–White states that instead of the Office of the Prosecutor demonstrating “passive complementarity” where the ICC only steps in with States fail to prosecute individuals themselves, the OTP should adopt a policy of, “active complementarity” working with and assisting national jurisdictions to encourage accountability.⁸⁶ Trahan suggests that the concept of complementarity with reference

⁸² El Zeidy (n 75) 874, 875.

⁸³ *ibid* 876.

⁸⁴ *ibid*.

⁸⁵ For a discussion of the Nuremberg Trials Final Report Control Council Law No. 10 Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity see Taylor, ‘Final Report to the Secretary of the Army on The Nuremberg War Crimes Trials Under Control Council Law No. 10 (15 August 1949).

⁸⁶ See Burke-White, ‘Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice’ (2008).

to the crime of aggression, may need to be rethought, with primacy to prosecute resting with the ICC, due to the fact that national courts may be biased and decide to prosecute solely based on the desire to keep prosecution out of the International Criminal Court.⁸⁷

Gbagbo's case, as discussed briefly above, was tried before local Cote d'Ivoire courts in 2015, and has been argued by Heller to be an example of 'radical complementarity'.⁸⁸ Gbagbo was charged with disturbing the peace, organising armed gangs and undermining State security and was sentenced to 20 years imprisonment.⁸⁹ However, the ICC stated that despite Gbagbo being sentenced to prison, her charges did not reflect the status of crimes against humanity to which she was indicted for by the International Criminal Court and therefore the prosecution of Gbagbo, which resulted in 20 years imprisonment, was not a successful example of complementarity. Heller has stated that despite the focus on sovereignty found in Article 17 of the Rome Statute, the article also includes the 'same conduct' requirement, which was the reason why the ICC did not find the 2015 Ivory Coast trial to be sufficient.

The Office of the Prosecutor stated that the charges were not of 'substantially the same conduct' as the ones in the ICC indictment. What Heller argues is that ICCs reluctance to consider the 2015 Ivory Coast's prosecution of Gbagbo is too restrictive and inconsistent with the ICC Statute.⁹⁰ Heller concludes that until the ICC re-evaluates its relationship with local courts it will not fulfil its mandate.⁹¹ Heller's work on complementarity illustrates an important argument that I revisit in Chapter Seven: focusing on the relationship between domestic law and international law will be argued to be an important element in international criminal law's future development. Discussing their history and the debates surrounding these concepts illuminates the complexity and interconnectedness of the elements found in international criminal law. It also displays the evolving nature of international

⁸⁷ See Trahan, 'Is Complementarity the Right Approach for the International Criminal Court's Crime of Aggression- Considering the Problem of "Overzealous" National Court Prosecutions' (2012).

⁸⁸ See Heller, 'Radical Complementarity' (2016).

⁸⁹ *Prosecutor v Gbagbo* (Indictment) ICC-02/11-01/12 (2012).

⁹⁰ Heller (n 88) 2.

⁹¹ *ibid* 38.

criminal law, especially when viewing international criminal law's development temporally.

The difficulties when dealing with or developing international criminal law can often be attributed to its dual nature, international law and criminal law. Tallgren writes of this distinction when describing international criminal law, arguing that international law is based upon a theoretical commonality between States, all acknowledging certain norms or rules and being equal.⁹² When relating the concept of State sovereign equality to international criminal law, one would assume that this would manifest itself by ensuring that all those who violate grave breaches of international humanitarian law would be brought to justice. However, the privilege and power that exists amongst the five permanent Security Council members and their nationals provides a shield to the prosecution of the most powerful and their allies.⁹³ Likewise, it is unlikely that post-conflict States will have stable internal legal structures for prosecuting international crimes in the way that States might have that engage in armed conflict abroad. To assume that international criminal law can be a place of equals ignores the inequalities present between those who promote the benefits of international criminal law, those States that are subject to the prosecution/indictment of nations,⁹⁴ and those who are most commonly exposed to international criminal law's mechanisms. Assuming international criminal law exists between equals dismisses the disparities and problems within certain areas of law that international criminal law addresses. Sovereign equality is an important international principle, embedded in the UN Charter, and some areas of international law, such as international environment law, do develop the idea of common, but differentiated responsibility. However, sovereign equality also disguises the histories of imperialism and colonialism that continue and perpetuate inequalities.

⁹² Tallgren (n 18) 571, 580, 592.

⁹³ Specifically referring to the five permanent member of the UN Security Council, US, UK, France, Russia, and China, as well as UNSC members and their 'friendships with States outside the UNSC, i.e. US and Israel US.

⁹⁴ However, there is evidence of States undertaking the process of self-referral to the ICC, as in the case of the Democratic Republic of the Congo; Press Release of 19 April 2004, 'Prosecutor Receives Referral of the Situation in the Democratic Republic of Congo'.

Criminal law aims to be largely predictable, but it is also is “a local interpreter of common values,” as well as being involved with solving problems and preventing future ones.⁹⁵ With international criminal law in many ways functioning as a reflection of the Western domestic criminal legal system and international law encompassing a great range and scale of law, combining the two has been difficult. It is in negotiating the tenets of international criminal law where the law has found difficulty. Often the issues that are the most complex have been the sites where international criminal law has developed the least, for example sexual violence deployed against men which has often been overlooked during and after armed conflict,⁹⁶ as well as the focus of this research, the actions of female defendants. These are just two areas where international criminal law has not been properly developed. The lack of cases of female defendants perpetuates the notion that particular women who have deployed violence and faced prosecution are the exception of female behaviour in armed conflict.

Capitalising on the increased attention to human rights and the shock pertaining to the atrocities committed during the hostilities in Yugoslavia and Rwanda, the United Nations Security Council established the ICTY and ICTR. It was determined that the situation in the former Yugoslavia constituted, “a threat to international peace and security”.⁹⁷ This declaration was required to activate Article 41 of the Charter, which the tribunals are established under. The International Criminal Tribunal for the former Yugoslavia was established in 1993 by way of a United Nations Security Council resolution.⁹⁸ Resolution 827 contained the initial statute for the ICTY, that statute would be amended nine further times; the ICTYs statute lists the tribunal’s jurisdiction and organisational structure.⁹⁹ The ICTY deals with crimes committed in

⁹⁵ Tallgren (n 18) 562.

⁹⁶ Cases before the ICTY and ICTR, in regards to sexual violence against men, include: *Prosecutor v. Akayesu*, (Trial Chamber Judgement), ICTR-96-4-T (2 September 1998); *Prosecutor v. Mučić et al* (Trial Chamber Judgement) IT-96-21-T (16 November 1998); *Prosecutor v. Furundžija* (Trial Chamber Judgement) IT-95-17/1-T (10 December 1998); *Prosecutor v. Musema* (Trial Chamber Judgement and Sentence) ICTR-96-13-T (27 January 2000); *Prosecutor v. Kunarac et al* (Trial Chamber Judgement) IT-96-23-T & IT-96-23/1-T (22 February 2001); *Prosecutor v. Semanza*, (Trial Chamber Judgement and Sentence) ICTR-97-20-T (15 May 2003).

⁹⁷ UN Security Council Resolution 827, S/RES/827, 25 May 1993.

⁹⁸ *ibid.*

⁹⁹ Statute of the International Criminal Tribunal for the Former Yugoslavia, adopted by Security Council Resolution 827, U.N. Doc. S/RES/827 (1993).

the territory from 1991 to 2001 and its jurisdiction is centred upon four groupings of crimes: grave breaches of the Geneva Conventions, violations of the laws and customs of war, genocide, and crimes against humanity.¹⁰⁰

In 1994 the UN Security Council created the ICTR, after recognising that the situation in Rwanda also constituted “a threat to peace and security” and determining that prosecuting those who violated international humanitarian law would help bring peace and reconciliation amongst those affected.¹⁰¹ In November 1994 the UN Security Council passed the resolution 955, which created the statute for the International Criminal Tribunal for Rwanda.¹⁰² The Tribunal was required to prosecute violations of international humanitarian law within Rwanda between 1 January 1994 and 31 December 1994, as well as violations of law committed by Rwandan citizens in neighbouring States.¹⁰³ The ICTR would punish the crimes of genocide, crimes against humanity, violations of Article 3 common to the Geneva Conventions and Additional Protocol II.¹⁰⁴ With the creation of the ICTY and ICTR, international lawyers began prosecuting crimes that were at one time beyond their reach due to the lack of an ‘international criminal code’.¹⁰⁵ Until the creation of the Tribunals there was not a sufficient legal basis to hold individuals to account for crimes, which was established with the Statutes of the two Tribunals. Previously, States were reluctant to give up their sovereignty to an international court or tribunal, but the establishment of the Ad Hoc Tribunals showed that previous barriers to prosecution, such as State sovereignty and the exercise of domestic jurisdiction, could be overcome.

¹⁰⁰ *ibid* Article 8.

¹⁰¹ Statute of the International Tribunal for Rwanda, adopted by Security Council Resolution 955, U.N. Doc. S/RES/955 (1994) [hereinafter *ICTR Statute*].

¹⁰² *ibid*.

¹⁰³ *ibid* Article 7.

¹⁰⁴ *ICTR Statute* (n 101); The violations set forth by the Additional Protocol II and Article 3 common to the Geneva Conventions were listed as follows, but not limited to: Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; (b) Collective punishments; (c) Taking of hostages; (d) Acts of terrorism; (e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; (f) Pillage; (g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples; (h) Threats to commit any of the foregoing acts.

¹⁰⁵ Zacklin (n 23) 541.

The importance of the interpretation of war crimes in the Tribunals highlights the development of international criminal law from the Nuremberg and Tokyo Trials. Danner notes that the international prosecutions in Nuremberg and Tokyo led to ‘decades of silence’ not further international prosecutions.¹⁰⁶ However, with the establishment of the Ad Hoc Tribunals international criminal law expanded and continued to develop with the subsequent hybrid courts and the ICC. The statutes and jurisprudence garnered from the ICTY and ICTR have influenced the definition of crimes as well as their prosecution in later international criminal courts. The rest of the section will detail the definitions of the crimes included in the Ad Hoc Tribunals and the subsequent establishment of the ECCC.

In the ICTY ‘violations of the law of war’ included grave breaches to the Geneva Conventions of 1949, Article 2, and Violations of the Law or Customs of War, Article 3.¹⁰⁷ War crimes in Article 2 refer to eight acts, which include amongst others, torture, wilful killing, and compelling a prisoner of war to serve in the hostilities.¹⁰⁸ Article 3 has been broadly interpreted, it includes five acts but is not limited by these listed acts, as the Appeals Chamber has expanded Article 3, to “all violations of international humanitarian law” other than the grave breaches referred to in Article 2.¹⁰⁹ The jurisprudence from the ICTR establishes that a violation of Article 4 of the Statute must be committed in Rwanda, during non-international armed conflict, related to the conflict, and a serious violation of Article 3, common to the Geneva Conventions and of Additional Protocol II.¹¹⁰ The Tribunal also concluded that the perpetrator must have been a part of the armed forces and that the victim be a civilian.¹¹¹ The ICTR Statute in Article 4 included acts such as violence to life, health,

¹⁰⁶ Danner, ‘Constructing a Hierarchy of Crimes in International Criminal Law Sentencing’ (2001) 417.

¹⁰⁷ *ICTY Statute* (n 99).

¹⁰⁸ *ibid.*

¹⁰⁹ *Prosecutor v Tadić* (Trial Chamber Opinion and Judgement) ICTY-94-1-T (7 May 1997) para 616; The Appeals Chamber Judgement stated four conditions must be met in order to trigger the jurisdiction of Article 3: (i) the violation must constitute an infringement of a rule of international humanitarian law; (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met . . .; (iii) the violation must be ‘serious’, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim . . .; (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.

¹¹⁰ *ICTR Statute* (n 101) 70.

¹¹¹ Danner (n 106) 458.

physical or mental well being of persons, taking hostages, acts of terrorism, collective punishments, outrages upon personal dignity including humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault, pillage, the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples and threats to commit any of the aforementioned acts.¹¹²

Crimes against humanity are similarly described by both the ICTY and ICTR. In the ICTY Statute they are defined under Article 5 as: murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution on political, racial and religious grounds, and other inhumane acts.¹¹³ For the acts listed above to be considered criminal under international criminal law, they must be done with clear intent.¹¹⁴ The reason crimes against humanity are considered to be different from war crimes is found in the ICTR Statute, which states the defendant must have committed the act, “as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds”.¹¹⁵ The ICTY stated that the act must be both widespread and systematic against a civilian population, meaning that the accused must have the knowledge that the act will affect more than one victim and was done a result of a certain policy or plan.¹¹⁶

Genocide is distinct from both of the two other crimes because of the special case of intent. Its existence in the ICTY and ICTR comes from the 1948 Genocide Convention which states, “Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group.”¹¹⁷ The Tribunals continued that the victim must have been a part of the identified group and the perpetrator committed the acts with the idea to destroy said group.¹¹⁸ The acts

¹¹² *ICTR Statute* (n 101) art. 4.

¹¹³ *ICTY Statute* (n 99) art. 5; *ICTR Statute* (n) art. 3. Both Statutes state these acts are either ‘murder-type’ or ‘persecution’ crimes.

¹¹⁴ Danner (n 106) 455.

¹¹⁵ *ICTR Statute* (n 101) art. 3.

¹¹⁶ Danner (n 106) 459.

¹¹⁷ *ICTY Statute* (n 99) art. 4; *ICTR Statute* (n 101) art. 2.

¹¹⁸ *Prosecutor v Akayesu* (Trial Chamber Judgement) ICTR-96-4-T (2 September 1998); *Prosecutor v. Jelusic*, (Trial Chamber Judgement) IT-95-10, 66 (14 December 1999).

that could comprise genocide included “killing members of the group” and “causing serious bodily or mental harm to members of the group.”¹¹⁹ The two Statutes also established crimes that are related to genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide.¹²⁰

After the establishment of the ICTY and ICTR, other international courts were created, capitalising on international criminal law’s growth as a justice mechanism, to deal with the aftermath of violent conflicts. In 2001 the Cambodian National Assembly passed a law to create a court to try crimes committed during the Khmer Rouge regime, which lasted from 1975 until 1979.¹²¹ The Cambodia government wanted the assistance of the international community, but felt that the trials must be held in Cambodia using Cambodian people to comprise the court, with foreign assistance.¹²² The ECCC was created in 2003 through a legal agreement in conjunction with the Cambodian Government and the United Nations.¹²³ The ECCC prosecutes crimes under the Cambodian Penal Code of 1956 and the Geneva Convention of 1948, crimes against humanity, grave breaches of the Geneva Conventions of 1949, crimes in the Hague Conventions for the Protection of the Cultural Property in the Event of Armed Conflict of 1954 and crimes in the Vienna Convention on Diplomatic Relations of 1961.¹²⁴ Since the Cambodian Code of Criminal Procedure was drafted in 2007, after the hybrid court drafted its statute, any inconsistencies would then refer to international rules of procedure.¹²⁵ Hybrid courts theoretically are designed in order to embrace both local and international criminal justice systems with local courts having the benefit of trying the accused locally adhering to local legal principles. However, in Cambodia there is a question as to whether the ECCC has benefited the Cambodian legal system.¹²⁶ This discussion will

¹¹⁹ *ICTY Statute* (n 99) art. 4(2)(a)-(b); *ICTR Statute* (n 101) art. 2(2)(a)-(b).

¹²⁰ Danner (n 106) 462.

¹²¹ Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, as amended, Reach Kram No. NS/RKM/1004/006 (2004) [hereinafter *ECCC Statute*].

¹²² *ibid.*

¹²³ UNGA Res 57/228/ B (13 May 2003).

¹²⁴ *ECCC Statute* (n 121).

¹²⁵ Peiti and Ahmed, ‘A Review of the Jurisprudence of the Khmer Rouge Tribunal’ (2010) 168.

¹²⁶ Ainley, ‘Justifying Justice: Verdicts at the ECCC’ (*Justice in Conflict Blog*, 16 Sep 2014) 2.

be expanded in Chapter Six. Cambodia was not the only hybrid court in international law. Other institutions include the Special Court for Sierra Leone, Ad Hoc Court for East Timor, Iraqi High Criminal Court, Truth and Reconciliation Commission in South Africa, and the Special Tribunal for Lebanon.

Through the development of the concepts of individual responsibility and complementarity, with the expansion of international criminal law in the 1990s, the power and reach of international justice has become an influential element in a post-conflict climate. From the establishment of the Ad Hoc Tribunals and the subsequent hybrid Cambodian Court the manifestation of international criminal law has changed to respond to criticisms and the need to incorporate growing understandings of crimes, since the Nuremberg and Tokyo Trials. The female defendant, while not a new phenomenon, has emerged in the Ad Hoc Tribunals and hybrid Cambodian Court, which was not the case in Nuremberg or Tokyo despite the fact women were involved in the atrocities of WWII. While the progression of female defendants visibility after WWII proceedings is a positive gain, as it aids in expanding the experiences women are presumed to hold during armed conflict, it also does not fully encapsulate the presence of female defendants with only two women brought before the Ad Hoc Tribunals, and two women brought before the Cambodian Court. The necessity in discussing the establishment of the Ad Hoc Tribunals and the progression of international crimes, is to understand the development of international criminal law, which has resulted in both positive and negative gains, and its presence in the narrative around the lack of attention to female defendants.

6. Conclusion

In conclusion, this chapter undertook a brief survey of the field of international law in order to draw out the connections between international humanitarian law, international human rights law, and international criminal law. The recent development of international criminal law, starting in the 1990s, has also developed the rhetoric that equates victims and violators to female and males. This binary was aided by the Western radical and liberal feminist intervention, where sexual violence against women was positioned at the centre of their agenda. Along with the global movement towards humanitarian methods of international law, such as CEDAW, and a push to recognise human rights violations around the world, international human

rights law also simultaneously developed through both Western feminism and international humanitarian and criminal legal expansion. The female victim of sexual violence develops as a result of the advancements in the aforementioned areas of international law and is further shaped by the work of the ICC and the Women, Peace, and Security agenda. What this analysis emphasises is the climate that exists in international law, which has prevented the disruption of the male violator/female victim binary. Therefore, the opportunity to learn from the female defendant, an active agent in armed conflict, is ignored.

The discussion of the creation of the tribunals and courts framed the legal and historical context in which female defendants must contend. The female defendant's existence within the international legal system may not have been of chief concern as new international criminal courts and tribunals were created, but her existence is nevertheless a cause for analysis. Despite female defendants not being the primary target for prosecutors, the processes of international criminal law are presumed to be gender neutral and there is no legal barrier preventing female defendants from being brought before the tribunals. However, Western imaginations and international law prioritise men as military decision makers and then as soldiers and, by extension, defendants. Women, conversely, are thought of on the receiving end of men's actions. In the following three chapters I take an in-depth look at three international criminal law spaces: the ICTY, ICTR and the ECCC to analyse further the presence, and absence, of female defendants in international criminal law.

Chapter Four

The International Criminal Tribunal for the Former Yugoslav Republic

1. Introduction

The creation of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in 1994 marked the first time international criminal law actively investigated and prosecuted sexual violence against women in armed conflict, as the Nuremberg and Tokyo Trials overlooked the greater range of harms against women.¹ The framing of the armed conflict in the Former Yugoslav Republic (FYR) by the international media, and the lobbying and influence of Western and local feminists, helped to keep crimes involving sexual violence in the spotlight. With this attention, international criminal law made gains in sexual violence jurisprudence and along with the work of the International Criminal Tribunal for Rwanda (ICTR), the ICTY has been hailed as an important step in providing avenues for prosecution of sexual violence and highlighting a previously unacknowledged set of crimes that occur in times of armed conflict. This importance notwithstanding, the work of the international media and predominately Western feminists, reinforced by the work of the Yugoslav Tribunal, contributed towards a narrative that relegated women's roles in armed conflict to that of victims. As such, the mainstream conflict narrative around the FYR, emphasises the binary of male/violator and female/victim, and therefore ignores the existence of female defendants.

The ICTY tried and convicted one female perpetrator, Biljana Plavšić, while local courts convicted many women who committed crimes during the armed conflict in the FYR.² However, the existence of female defendants within the armed conflict in the

¹ See Plesch, *Human Rights After Hitler: The Lost History of Prosecuting Axis War Crimes* (2017).

² Martinez, 'Kentucky Woman Indicted for Bosnian War Crimes' (*CBS News*, 18 March 2001; Cerkez, 'US Extradites War Crimes Suspect to Bosnia' (*NBC News*, 27 December 2011); 'Bosnia Arrests 'Female Monster'- Wife of Warlord 'Serb Adolf'' (*Mirror UK*, 22 December 2011); Oliver, 'The US Single Mother who was Actually a War Criminal: Killer becomes first Woman to be Convicted of Bosnian War Crimes' (*The Daily Mail*, 1 May 2012).

FYR has continually been left out of the mainstream understanding of the conflict itself. This is further evidenced by the lack of nuance around the few representations of female defendants available. Women who committed crimes during the conflict in the FYR are represented as an aberration and remain outside of Western feminist scholarship.³ Female defendants also remain an uncomfortable topic for the media, evidenced by the headlines and commentary on their actions.⁴ The ICTY has reproduced the gender binaries found within the victimisation rhetoric of Western feminists and in doing so has failed to strengthen international criminal law by not allowing for the breadth of women's experiences in armed conflict to enter into the mainstream conflict narrative. Furthermore, the representation of women as victims has subsequently dominated discussions on women's roles in conflicts internationally. Others may argue that the lack of interrogation of female defendants is an acceptable concession for increased awareness and protection of women in armed conflict, particularly given the heinous crimes of sexual violence that surfaced during and after the conflict in the Former Yugoslav Republic. The narrowing of women's roles in armed conflict has an effect on the international legal system, and ultimately harms women. This harm is not only due to lack of acknowledgement of the range of women's experiences in armed conflict, but also the reinforcement of reductive gender norms and ideologies embedded in this approach.

This chapter contributes towards the thesis through highlighting the reasons why female defendants have remained outside of mainstream narratives on the FYR. In doing so, the chapter details the ways in which the ICTY, as well as the FYR, has been interpreted along gender binaries that reaffirm women as victims and ignore the broader range of women's actions in armed conflict. The discussion of the ICTY as a legal space that remains performative in its function, reaffirming a specific view of women and femininity, is directly linked to the way gender and thereby female defendants are understood. What will be proven is that there is not one element that has relegated female defendants to anecdotal in the conflict of the FYR, it is a

³ Conklin, 'Special Note' in Vranić *Breaking the Wall of Silence: Voices of Raped Bosnia* (1996) 15, 18.

⁴ Barrouquere and Schreiner, '“Lovely” Ky. Woman Accused of Horrific War Crimes' (NBC News, 18 March 2011); 'Bosnia Arrests “Female Monster” - Wife of Warlord “Serb Adolf”' (*Mirror UK*, 22 December 2011); Oliver, 'The US single mother who was actually a war criminal: killer becomes first woman to be convicted of Bosnian war crimes' (Daily Mail, 1 May 2012).

combination of misinterpretations centred upon ethnicity, the conflict's history, as well as women's roles, predicated by Western feminists, the media, and international criminal law.

Section two of this chapter will briefly outline the context of the armed conflict in the FYR. By discussing the history of the conflict, it is possible to see the formation of the mainstream conflict narrative as well as the parts of the conflict that were removed from focus. This section will also analyse the international media response as well as the conflict's links to ethnicity. The third section will discuss the ICTY in order to situate the legal framework as well as to highlight the courtroom as a performative legal space as well as analysing the case of Biljana Plavšić. The third section will also discuss local justice processes. The fourth section will critique the work of Western feminists in and around the FYR. Through analysing different tenets of both feminist legal theories and international criminal law, as well as representations of the armed conflict, in relation to the FYR, and drawing on post-colonial/poststructuralist scholarship,⁵ this chapter will explain why female defendants have not entered mainstream narratives on the FYR.

2. The Mainstream Narrative of the Former Yugoslav Republic

The role of the international media shaped international understanding of the events in the Former Yugoslav Republic and where sexual violence was concerned, the media raised awareness of certain crimes being committed, while leaving the existence of other experiences and roles undertaken by women and men out of focus. The situation in the FYR was framed through the overemphasis of ethnic hatred and the focus on sexual violence against women. Moreover, this shaped the perception of the international community regarding the region's influence in collective security matters. This section will articulate why the FYR is an important case study. The way ethnicity was misrepresented and how the international media incorporated the stories of sexual violence to encourage military intervention will be detailed in order to understand the way violence against women shaped the mainstream narrative of the armed conflict.

⁵ This is referring to Kapur and Mohanty's work, which was discussed in Chapter One and Two, and will be utilised again later in this Chapter.

Macro financial issues, which led up to the armed conflict, remained on the periphery when the international community sought to discern the situation in the FYR.⁶ Differences between ethnicities and religions were often highlighted as the motivating factor for the conflict, while in reality there had been a history of integration of ethnicities, and racial and ethnic dimensions were often overplayed in discussions of how conflict erupted in the region.⁷ Much of the response from outside the FYR to the armed conflict, was flawed from the very outset. Despite the discord faced by the people in Yugoslavia due to the local media,⁸ the rise of political leaders like Milosevic, or the periods of violence in the years leading up to the early 1990s, many Yugoslavs never imagined that these hostilities would actually bring about a war.⁹

In Borovo Selo on May 2, 1991, the fighting began, for what would mark the beginning of the armed conflict in the Yugoslavian territories.¹⁰ The rise of Slobodan Milosevic in 1986 to the office of the president of the League of Communists in Serbia, has been highlighted as a key factor into the reimagining of Serbian consciousness and national identity.¹¹ The political motives of leaders created ethnic divisions that inflamed underlying discontents. This can be seen in Orford's work, which positions the economic hardship caused by international monetary policies as a key factor in the armed conflict.¹² Between the years of 1991-1995 the war in the Former Yugoslav Republic claimed between 200,000 and 250,000 lives, created more than three million refugees, produced around 20,000 reported cases of rape, and approximately 50,000 reported cases of torture.¹³ However, as Zarkov writes there is no possible way of knowing the full extent of the sexual violence in the territories,¹⁴

⁶ See Orford, 'Muscular Humanitarianism: Reading the Narrative of the New Interventionism' (1999).

⁷ See Simić, *Surviving Peace Surviving Peace* (2014).

⁸ Zarkov, *The Body of War, Media, Ethnicity, and Gender in the Break-up of Yugoslavia* (2007) 3; Zarkov compares the international media focus on the FYR to the 'media war' happening inside the FYR.

⁹ *ibid* 5.

¹⁰ Stitkovac, 'Croatia: The First War' in Udovicki and Ridgeway (Eds.) *Yugoslavia's Ethnic Nightmare: The Inside Story of Europe's Unfolding Ordeal* (1995) 153.

¹¹ See Pesic, 'Serbian Nationalism and the Origins of the Yugoslav Crisis' (1996).

¹² See Orford, 'Locating the International: Military and Monetary Interventions after the Cold War' (1997) 451.

¹³ See Ivkoviac and Hogan, *Reclaiming Justice: The Ideal and the Reality* (2011).

¹⁴ Zarkov (n 8) 6.

which could also be true of the amount of reported torture and deaths, during the conflict in the FYR.

The international community's response included both political and diplomatic actions, the creation of The International Conference on the Former Yugoslavia, and economic measures.¹⁵ The United States, the European community, and the United Nations understood the Serbs to be the aggressors of the armed conflict.¹⁶ There was also a belief amongst the international community that the conflict was a fight between democracy and communism, this in turn made the realities of the difficult to comprehend.¹⁷ Weller also highlights the lack of United Nations Security Council effectiveness and desire to respond to the violence, as well as the international community's generally inconsistent policy.¹⁸ At the time there was no practise of the Security Council intervening in 'internal conflicts', once a conflict is considered 'international' that the international community may display military force.

From the start of the hostilities in the FYR the UN had focused on the armed conflict as an internal situation.¹⁹ The UN implemented 'safe areas' in the FYR, with Security Council Resolution 836 in 1993, mandated the United Nations Protection Force, UNPROFOR, as the peacekeeping force for Sarajevo, Bihac, Srebrenica, Goražde, Tuzla and Zepa.²⁰ However, in July of 1995 the genocide in Srebrenica took place, and coupled with the increased reports of widespread sexual violence, the international community felt compelled to act. Tuathail describes the fall of Srebrenica as 'unique' due to its location, referred to in international media as the worst massacre in Europe since World War II.²¹ The US then pursued NATO action,²² and the UNPROFOR was removed with the signing of the Bosnia and Herzegovina

¹⁵ McGoldrick, 'Yugoslavia the Responses of the International Community and of International Law' (1996) 380-381.

¹⁶ *ibid.*

¹⁷ Koch, 'Conflicting Visions of State and Society in Present day Yugoslavia', in 'van den Heuvel and Siccum (Eds.) *The Disintegration of Yugoslavia* (1992) 191, 193.

¹⁸ Weller, 'The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia' (1992) 569.

¹⁹ Berdal, 'The Security Council, Peacekeeping and Internal Conflict after the Cold War' (1996) 76, 77.

²⁰ UNSCR 836, S/RES/836, (1993).

²¹ Ó Tuathail, 'The ethnic cleansing of a safe area: The fall of Srebrenica and the ethics of UN-governmentality' in Smith and Proctor (Eds.) *Geography and Ethics* (1999) 121.

²² Shattuck, *Freedom on Fire: Human Rights Wars and America's Response* (2003)152.

peace agreement in November of 1995.²³ After the armed conflict in the FYR the global pattern of intervening in internal armed conflicts that are seen as having international reach, has been more prevalent amongst UN Security Council actions regarding collective security measures. Amongst the narrative of international intervention into the FYR the other influencing factors, aside from Srebrenica and reports of ‘mass rape’, was the geographical location of the conflict in Europe and the characterisation of the armed conflict as a fight between communism and democracy. However, the financial hardships faced in the region by International Monetary Fund interventions, which Orford discusses, rarely became part of the mainstream narrative of the armed conflict.

Prior assumptions about the people of Yugoslavia, and the role of assumed deep-set ethnic hatred fuelling the conflict influenced reporting, affected editorials, and changed the understanding of the events unfolding before reporters.²⁴ Sadkovich writes that due to the fact many journalists could not speak the language or leave the major cities, the news that was reported internationally during the conflict in the Former FYR was often misleading.²⁵ Since reporters did not understand the area’s history, politics, or culture the news was often “Americanized”.²⁶ Sadkovich states that, “people and things familiar to the audience make up the bulk of the news.”²⁷ This caused much of the conflict to be unreported in the United States due to an assumed lack of similarities of Yugoslavians with US citizens.²⁸ Sadkovich further writes that ‘ordinary’ people do not make headlines, and ‘victims’ or ‘dissidents’ are not relatable to US audiences.²⁹

Headlines reflected bias amongst news agencies and often the tendency when reporting on the Yugoslav conflict was to sensationalise.³⁰ For example, *The Guardian* published an article on the 23rd of July 1992 entitled ‘Serb Jihad in a

²³ Berdal (n 19) 84.

²⁴ Sadkovich, *The U.S. Media and Yugoslavia, 1991-1995* (1998) xiii.

²⁵ *ibid* 80.

²⁶ *ibid*.

²⁷ *ibid*.

²⁸ *ibid*.

²⁹ *ibid*.

³⁰ Zohar, ‘Misrepresentation of the Bosnian War by Western Media’ (2012) 98.

Bosnian Town'.³¹ This headline reaffirms assumptions that the Serbs were the aggressors during the armed conflict and calling an event a 'jihad' reiterates to the audience that the conflict was controlled by Muslim aggressors. Similarly, Zohar references the demonising of Serbs and comments on the "barbaric" Balkan culture as common in media representations at the time.³²

Reporters have also garnered criticisms for their handling of reports. CNN's Christiane Amanpour is one such example. Amanpour has stated, "I am not a political reporter, I am not a diplomatic reporter. I do wars; I do crises. I don't do politics."³³ Kinzer of the New York Times has commented on Amanpour's reporting, "She was sitting in Belgrade when that market massacre happened, and she went on the air to say that the Serbs had probably done it. There was no way she could have known that."³⁴ UN report also blamed the Bosnian Muslims for the market massacre.³⁵ Foerstel notes that the CNN's stance has been tied to the United States Department of State's policy at the time.³⁶ Foerstel states that the BBC's Nik Gowing recognised the common anti-Serb reporting in Bosnia and deemed it "a secret shame" for journalism as a whole. This example reiterates the tendency to blame Serbian people for the conflict, which produces consequences such as an assumption that all Serbs were in an advantageous position during the conflict, and that they were not also victims. However, this is not ignoring the rise of Serb nationalism and the atrocities produced as a result.

The media reporting suggests the need to ascertain who are the victims and violators of the conflict, which denotes a lack of understanding of the nuances of armed conflict. Meaning that victims can be potential perpetrators and defendants can be victims. This relates to female defendants, as the victim/violator binary has been reinforced by the work of the ICTY in relation to gender, in order to associate women with the role of victim and men with the role of violator.

³¹ O'Kane, 'Serb Jihad in a Bosnian Town' (*The Guardian*, 1992).

³² Zohar (n 30)108.

³³ Foerstel, 'The Balkan Wars: A Media Driven Disaster' (1999); Paper delivered to the First Hearing of the Independent Commission of Inquiry to Investigate U.S./NATO War Crimes Against the People of Yugoslavia, 31 July 1999, New York.

³⁴ *ibid.*

³⁵ *ibid.*

³⁶ *ibid.*

Dunkley writes how media coverage can have lasting effects on the conflict itself. For example, a British news team from Independent Television News (ITN) visited the Trnopolje refugee camps on August 5, 1992.³⁷ They captured a photo of a heavily emaciated man behind a barbed wire fence. This image broadcasted the Serbs as the new Nazis.³⁸ Broadcasting images of the Holocaust contributes to an understanding that the conflict in the FYR is international. Years after the conflict George Kenney, former State Department employee who worked on Yugoslavia, published an article entitled, 'How Media Misinformation Led to Bosnian Intervention'.³⁹ The article stated how ITN's pictures of the Trnopolje camp encouraged war and the use of Western troops.⁴⁰ Dunkley writes that after the photo was released the British government readied 1,800 soldiers as peacekeepers for deployment, and US President Clinton requested military action against the Serbs while campaigning for the White House.⁴¹ The international media played a part in presenting a distinct view of the conflict in the Former Yugoslav Republic.

Within the territories, as nationalism continued to gain strength, ideals around the female subject began to centre. The local media of Serbia and Croatia also influenced the population in the Former Yugoslav Republic within regards to depictions of gender and the female body. Zarkov states, that in both Croatia and Serbia the victimised body was represented in the media as female; however, the two images looked very different.⁴² In Serbia, Zarkov states, that the "media war" entailed a denial of any ethnic element belonging to the armed conflict, and instead focused on the victimisation of the Serbs.⁴³ In Croatia, the nation-state was the focus of the 'media war'.⁴⁴ During the conflict the media viewed 'female' and 'ethnic' as the same thing. The female body was represented as the place where the media

³⁷ *ibid.*

³⁸ *ibid.*

³⁹ Kenney, "How Media Misinformation Led to Bosnian Intervention" (*Living Marxism*, 1997).

⁴⁰ *ibid.*

⁴¹ *ibid.*

⁴² Zarkov (n 8) 85-86.

⁴³ *ibid.* 86.

⁴⁴ *ibid.*

victimised.⁴⁵ Through both gendered and sexualised scenes the Serbian media also portrayed the female body as a victim and a symbolic representation of all Serbians.⁴⁶

In Croatia, the female body was also often represented through images of motherhood.⁴⁷ The nation-state was also a key figure linked to the image of the mother. The mother-child element mirrors the nation and the desire for the emergence of the new State.⁴⁸ Representation is a crucial aspect in the way media portrays conflict, gender, and violence. Whether it is in the international or local media's reporting on the conflict, or in the images of 'womanhood' or sexualised violence deployed within the territories, the understanding of the female body within the FYR was inexplicably linked to the understanding of the conflict itself. The female body was simultaneously to be protected as a physical bearer of the nation, or violated and destroyed, belonging to the enemy. During the conflict in the Former Yugoslav Republic the focus on ethnicity was often used by the national media and scholars alike, and through this ethnic representation the female played an essential role in the way the collective state understood their place in the conflict. Through propaganda the female body was used to bolster a sense of victimisation and in turn strengthen the resolve of those fighting in the conflict, intended to effectively increase violence.

While the international media contributed greatly to the Western understanding of sexual violence perpetrated against women in the Former Yugoslav Republic, it also shaped the way sexuality was comprehended, through its debates and silences. In particular, the international media distinguished between the male experience and the female experience in armed conflict. Fair views the media as having the ability to greatly affect the understanding of gender, stating, "The news media play an important role in the social construction of gender wherein news stories, carrying a variety of meanings about gender, interact, confirm, and contradict each other as they are decoded by audience members."⁴⁹ The lack of attention or recognition of male

⁴⁵ *ibid* 101.

⁴⁶ *ibid* 101.

⁴⁷ *ibid* 115.

⁴⁸ *ibid*.

⁴⁹ Fair, "The Body Politic, the Bodies of Women, and the Politics of Famine in U.S. Television Coverage of Famine in the Horn of Africa" *Association for Education in Journalism and Mass Communication* (1996) 3.

victims of sexual violence is evident across reportage during the conflict in the FYR. Zarkov states, that the most typical and abundant images of the armed conflict was starving Muslim men photographed behind barbed wire and women, shown with their faces in anguish, over the rapes they faced.⁵⁰ Men were simultaneously the victim and violator, yet their pain and often documented torture is almost permitted, as a punishment for the sexual violence they were assumed to have committed.

During the conflict in the FYR the media played an influential role in developing the conflict's narrative. Bratic states, that while the media is not capable of eliciting certain behaviour, it is capable of nurturing different beliefs, feelings and points of view.⁵¹ The media is not the only force of change and cannot create what does not already exist in a given society.⁵² Despite this the international media is capable of deciding, and representing, the meaning of an event, rather than the event itself determining the meaning.⁵³ The importance of the media then, is to illuminate the bias underlying within a conflict or within the political system or agenda. However, media is complicit in constructing their version of reality.⁵⁴ When the media highlights women as a certain type of member of the State these ideas are understood and reproduced, underscoring the media's ability to pull out certain aspects of a conflict to bolster an agenda. It is not surprising that the international media highlighted the conflict as an ethnic and religious strife and while misunderstandings of different ethnicities were apparent, centring the focus on ethnic terms that were unfamiliar to audiences was another way of directing attention away from the international involvement in the current conflict's origin. The reports of sexual violence against Bosnian Muslim women bolstered the view that Serbian men were perpetrators of sexual violence.

While there was an increased portrayal of Serbian men as perpetrators of sexual violence,⁵⁵ Zarkov notes that there was an absence of Serbian victims of sexual

⁵⁰ Zarkov (n 8) 156.

⁵¹ Bratic, 'Examining Peace-Oriented Media in Areas of Violent Conflict' (2008)493.

⁵² *ibid.*

⁵³ Hartley, *Understanding News* (1982) 15.

⁵⁴ See Carey, *Communication as Culture: Essays on Media and Society* (1989).

⁵⁵ *ibid* 149.

violence in the international media.⁵⁶ Zarkov writes that, the Serbs residing in both Croatia and Bosnia had been largely ignored by the international community in the early 1990s, regarding the internal struggles they faced.⁵⁷ This can be seen as contributing towards the ethnic discord in the conflict. Zarkov further notes that by the international media coverage failing to recognise the sexual violence committed against Christian Croatian and Serbian women, Muslim women were, therefore, the more prominent symbol of victims of sexual violence during the armed conflict.⁵⁸ Constructing Muslim women as sexually vulnerable during the conflict reinforces ethnic and religious lines respectively, between each region in the FYR and the binary of victims and violators. This construction emphasised that violence was not only perpetrated against women because they are women, but because they are also Muslim. Whereas the violence Serbian women experienced went largely unreported during the armed conflict.

The use of differences, or religious difference, was a way of distinguishing between different ethnic and national alliances. Often the territories defined citizenship as synonymous with both religious and ethnic identity.⁵⁹ Recognising the connection between ethnicity, religion, and nationalism is important to identify as the positions in this chapter are developed. This section has emphasised the representations of women in the FYR, where the focus on ethnicity and religion underscores women who are perceived to be need of Western intervention. This rhetoric still permeates to present day, as international law remains preoccupied with ways to protect foreign women from foreign men.⁶⁰ The lack of visibility of female defendants in international law is the result of representations of gender and foreign bodies, which create differences between victims and Western agents.

While the narrative expressed above rests within common understanding of the conflict and the FYR's history, Orford notes that the cause of the violence is not only

⁵⁶ Zarkov (n 8) 151.

⁵⁷ *ibid* 86.

⁵⁸ *ibid* 131.

⁵⁹ Rieff, *Slaughterhouse: Bosnia and the Failure of The West* (1995) 68-69.

⁶⁰ President George Bush Jr., State of the Union Address to a Joint Session of Congress and the American People (21 September 2001).

related to ethnic or religious tensions.⁶¹ Orford suggests that counter to this conception is the idea that capitalism and international relations share the blame for the reasons behind the conflict.⁶² Tensions arose as a result of the 'new world order' being established.⁶³ Klemencic highlights Germany's support for the breakup of the Former Yugoslav Republic as an important element in the FYR conflict, viewed as a decision to advance German economic interests after its reunification.⁶⁴ Klemencic also states that with all the States and different organisations working on the crisis in Yugoslavia proved difficult to coordinate efforts.⁶⁵ Among other weaknesses in the international response to the violence, there was an overall lack of international interest at the outset of the conflict. European States, such as Germany, and the United States were themselves in the middle of economic shifts and were reluctant to enter into further international commitments.⁶⁶

The influence of international financial institutions during the decades leading up to the conflict, contributed to the environment within the Former Yugoslav Republic.⁶⁷ Orford notes, that the practices installed to manage Yugoslavia's foreign debt all contributed to changes in policy within the territory.⁶⁸ These changes implemented within the state ultimately encouraged instability and the inclusion of new alliances, with the rise of Milosevic.⁶⁹ This account, taking into consideration the financial and international influence, displays a different viewpoint that situates the conflict in an environment outside of just an ethnic and religious history.

Due to the continued economic and political changes from the mid 1980's into the 1990s the stability of the country was a certain risk, especially once programs and policies in the FYR were sped up to comply with International Monetary Fund (IMF)

⁶¹ Orford (n 6) 681.

⁶² *ibid.*

⁶³ *ibid.*

⁶⁴ Klemencic, 'The International Community and the FRY/ Belligerents, 1989-1997' in Ingraio and Emmert (Eds.) *Confronting the Yugoslav Controversies: A Scholar's Initiative (Central European Studies)* (2012) 156, 158, 159; See also Kinzer, 'Europe, Backing Germans, Accepts Yugoslav Breakup' (*The New York Times*, 1992).

⁶⁵ Klemencic (n 64) 159, 160.

⁶⁶ Carr, 'German and US Involvement in the Balkans: A Careful Coincidence of National Policies?' (1995).

⁶⁷ Orford (n 12) 451.

⁶⁸ *ibid* 452.

⁶⁹ Orford (n 6) 682.

pressure.⁷⁰ As the FYR began implementing policies attached to the IMF loan to repay past debts, the domestic economic effects were drastic and often attached to political aims.⁷¹ Included in these changes were developments that favoured the financial process, ultimately benefiting certain nationalities, firms, and republics.⁷² It is not difficult to see why a nationalist sentiment was easy to cultivate with in a territory whose government was losing control due to neoliberal economic reforms. However, after seeing the influence of the IMF and other international financial institutions it is clear why the focus remained upon the region's history of conflict and the assumed minor ethnic tensions of the past.

In order to understand the way female defendants are positioned in the Yugoslavian context one must look to the narrative that surrounded the conflict which includes economic influences as well as the use of media to effectively produce specific understandings of women, men, ethnicity, and religion. The female subject was constructed by the assumed understanding of the armed conflict by Western media, which was premised on the victim/violator binary along ethnic and religious lines. This promoted the trope that Bosnian Muslim women were in need of 'saving' from sexual violence deployed by Serbian men, further entrenching distorted views of ethnicity and religion. Due to the publicised sexual violence in the FYR by the media, international efforts focused on curtailing the abuse of women in armed conflict. The next section will begin to describe and problematise the Tribunal, established to address the aftermath of the conflict, as well as the Western feminist intervention in the ICTY. Both the ICTY and Western feminists have further embedded the understanding of women as victims, limiting the possibility of acknowledging women as potential defendants.

3. The International Criminal Tribunal for the Former Yugoslavia

This section will discuss the work of the ICTY as well as local understandings of femininity and masculinity during the armed conflict in the FYR. The work of the ICTY and the way the female body was represented in the FYR, I argue must be understood in conjunction with the Western feminist intervention, as both reproduced

⁷⁰ Orford (n 12) 455.

⁷¹ *ibid* 453.

⁷² *ibid*.

the female subject as victim. The case of Biljana Plavšić will be discussed as an alternative experience to the female victim. Plavšić's actions will be interrogated based on perceived constructions of female gender.

3.1 The establishment of the ICTY and local understandings

The ICTY was an unprecedented move for the international legal community and can be said to be a result of the increasing attention toward human rights, evident since the start of the 1990s.⁷³ It was the first judicial organ created by the United Nations Security Council.⁷⁴ The jurisprudence of the ICTY has resulted in an expansion of international criminal law and the defining of key international criminal legal terms. In 1999 an indictment was made against Slobodan Milosevic, an acting head of state for crimes committed in the FYR conflict as well as violence in Kosovo.⁷⁵ As of 2017, more than 4,650 witnesses have testified before the ICTY.⁷⁶ The Tribunal has indicted 161 persons, and concluded proceedings for 154 accused.⁷⁷ Of those concluded cases 83 were sentenced, 13 referred back to national jurisdiction and the rest either were sentenced, acquitted, had their indictments withdrawn, on the final stages of their trial, or are deceased.⁷⁸ Within these cases, one woman has been brought to the Tribunal charged with international crimes, Biljana Plavšić. The ICTY's proceedings offer a documented account of the atrocities that took place in the Former Yugoslav Republic and are an insight into the way the international community negotiates the aftermath of an armed conflict.

The International Criminal Tribunal for the Former Yugoslavia has contributed substantially to the jurisprudence on sexual violence crimes in international law.

⁷³ Zacklin, 'The Failings of Ad Hoc International Tribunals' (2004) 541-542; Zacklin stated that a new surge of human rights also emerged during the beginning of the 1990's, which encouraged accountability and an end to impunity, as demonstrated by the focus on ICL and establishment of tribunals. See also Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (2007). Douzinas wrote that in the 1990s human rights became the new ideology of the world.

⁷⁴ Not to be confused with the International Military Tribunal at Nuremberg which was established by the Allies.

⁷⁵ *Prosecutor v Milosevic*, (Second Amended Indictment) IT-02-54-T (23 October 2002); *Prosecutor v Milosevic*, (Second Amended Indictment) IT-02-54-T (22 November 2002); *Prosecutor v Milosevic*, (Second Amended Indictment) IT-02-54-T (16 October 2001).

⁷⁶ 'Witness Statistics', (ICTY Website) <<http://www.icty.org/sid/10175>>.

⁷⁷ 'Key Figures of the Cases', (ICTY Website) <<http://www.icty.org/sections/TheCases/KeyFiguresoftheCases>>.

⁷⁸ *ibid.*

Displayed on the Tribunal's website is a section entitled *Sexual Violence and the Triumph of Justice* there are links to statistics, videos, and documents referring to the court's notable advances in the legal understanding of sexual violence crimes.⁷⁹ Since the ICTY began 78 individuals have had sexual violence charges included in their indictments, and of those 32 have been convicted, as of September 2016.⁸⁰ Four others were convicted for failing to prevent or punish perpetrators of sexual violence crimes.⁸¹

Prosecutor v Tadić, was the first international criminal trial since Nuremberg and Tokyo, and the first international trial to involve sexual violence, as well as the first trial for sexual violence against men.⁸² Duško Tadić was the President of the Local Board of the Serb Democratic Party in Kozarac and accused of forcing a detainee to bite the testicles of another detainee.⁸³ He was found guilty of cruel and inhumane treatment as well as inhumane acts.⁸⁴ *Prosecutor v Mucić et al*, included four individuals, three of which, Esad Landžo, Zdravko Mucić, and Hazim Delić, were charged with sexual violence when they were working at a prison camp in Čelebići.⁸⁵ The charges included sexual violence against both men and women, and judgement noted that rape may constitute torture under customary international law.⁸⁶ The trial of *Kunarac*, included Serbian Army officers Dragoljub Kunarac, Zoran Vuković and Radomir Kovač, who were accused for their roles in sustaining the 'rape camps' in Foča.⁸⁷ The case was the first conviction in the ICTY that found rape and enslavement as crimes against humanity. During the trial women testified that they were subjected to sexual violence as well as forced to complete household chores.⁸⁸

⁷⁹ 'Sexual Violence and the Triumph of Justice', (ICTY Website) <<http://www.icty.org/en/in-focus/documentaries/sexual-violence-and-triumph-justice>>.

⁸⁰ 'Sexual Violence', (ICTY Website) <<http://www.icty.org/sid/10586>>; ICTY Statute (n) Article 7(1).

⁸¹ Statute of the International Criminal Tribunal for the Former Yugoslavia, adopted by Security Council Resolution 827, U.N. Doc. S/RES/827 (1993) Article 7(3).

⁸² *Prosecutor v Tadić* (Trial Chamber Opinion and Judgement) ICTY-94-1-T (7 May 1997).

⁸³ *ibid* para 198.

⁸⁴ *ibid* 285.

⁸⁵ *Prosecutor v Mučić et al* (Trial Chamber Judgement) IT-96-21-T (16 November 1998) para 3, 4, 5.

⁸⁶ *ibid*.

⁸⁷ *Prosecutor v Kunarac* (Trial Chamber Judgement) IT-96-23/1 (Feb. 22, 2001) para 9 2, 22, 28, 30-43

⁸⁸ *ibid*.

Prosecutor v Krstić, found that the rapes were tied into the overall consensus that rape, was a part of the consequences of the ‘ethnic cleansing campaign’.⁸⁹

Despite these prosecutions, criticisms centre on how prevalent sexual violence was during the conflict. Advocates and feminists wanted even more international case law to reflect the extent of sexual violence perpetrated during the conflict in the FYR. The sexual violence that occurred in the Former Yugoslav Republic was often based on gender in its application. The prevalence of sexual violence against women was significant; yet, it is almost impossible to know exact figures.

The European Fact-Finding Team stated more than 20,000 Muslim girls and women were raped in Bosnia since 1992.⁹⁰ The Coordinating Group of Women’s Organizations of Bosnia and Herzegovina’s report suggests a figure closer to 50,000.⁹¹ Skjelsbaek and Smith state that the use of figures of sexual violence in different international and national publications instilled a sense of hatred and aggression as the conflict continued amongst all sides, which became another way to politically manipulate people.⁹² This manipulation of statistics that Skjelsbaek and Smith discuss can also be seen within the international media, as rape and sexual violence was often the main focus of Western and international media coverage,⁹³ and Western and local feminist response also centred upon this topic. The sexual harms against women, was the main site for interrogation into the understanding of femininity in this conflict. However, assuming that the violence done to the female body is the only experience woman had during armed conflict limits perceptions of gender as well as women’s autonomy. Only focusing on what is done to the female body, rather than what the female body does, which includes acts of aggression and violence as well as acts of peace, limits the ability for international criminal laws to adequately address the aftermath of armed conflict.

⁸⁹ *Prosecutor v. Krstić* (Trial Chamber Judgement) IT-98-33-T (2 August 2001) para 616.

⁹⁰ UNICEF, ‘The State of the World’s Children 1996’ (1996).

⁹¹ Meznaric, ‘Gender as an Ethnomarker: Rape, War, and Identity Politics in the former Yugoslavia’ (1994).

⁹² Skjelsbaek, ‘Is Femininity Inherently Peaceful? The Construction of Femininity in the War’ in Skjelsbaek and Smith (Eds.) *Gender, Peace and Conflict* (2001) 54.

⁹³ *ibid.*

Looking into the cases in the international court establishes men as the default perpetrators in the armed conflict of Former Yugoslav Republic. Women were accused of committing criminal acts, but were not brought before the international tribunal, except in the case of Biljana Plavšić.⁹⁴ Arguments that seek to account for this difference centre on a belief that women do not commit crimes on the same scale or frequency, and when women do commit crimes, it is often assumed that women commit crimes that are less severe or of a lesser scale than their male counterparts. It is important to note that the work done here is not meant to unearth the specific intentions of the prosecutors who seek out possible cases or to suggest that women and men share equal roles and experiences in armed conflict. This research is instead meant to expose the presence of female defendants, as well as issues within the international criminal system itself. This study also focuses on the possibilities that the women who perpetrate crimes, are ignored not only by international prosecution, but by the way women's acts during conflict are understood.

In contrast to the ICTY, of the prosecuted persons in local judiciaries, women have been among those indicted, charged, and sentenced, with more frequency than in the ICTY, which will be addressed later in the chapter. Sjoberg and Gentry point to gender norms as a way of punishing women for their criminal offences and highlighting that by committing crimes they have failed in their roles as a women.⁹⁵ Female defendants who are brought before international courts are shamed within the media and the focus often falls onto their gender. Reports of male defendants do not include commentary on their crime violating their masculinity, if anything war crimes would give evidence of their masculine identity.⁹⁶ Criminal acts are then often masculine by definition.

Within the FYR, the conflict produced a limited perspective of male and female bodies and further entrenched stereotypical conceptions of femininity and masculinity. The female body was used as a representation of the state, and often depicted as maternal.⁹⁷ Kesić discussed the gender imagery used in the FYR conflict

⁹⁴ *Prosecutor v Plavšić* (Trial Chamber Judgement) IT-00-39&40/1-S (27 February 2003).

⁹⁵ Sjoberg and Gentry, *Mothers, Monsters, Whores: Women's Violence in Global Politics* (2007) 15.

⁹⁶ Engle, 'Judging Sex in War' (2008) 941, 956-957.

⁹⁷ Zarkov (n 8) 69-70.

as tied to a patriarchal past, and a way to strengthen public support in both the media and official government statements.⁹⁸ Motherhood was seen as both positive and negative in certain cases. The representations of women's bodies varied. The local media often focused on the female form as a nationalist signifier and enforced the view that 'she' must be protected.⁹⁹ In Croatia and Serbia 'the feminine' was used in media propaganda as a prop to assert or bolster national and ethnic sentiments.¹⁰⁰ Femininity was seen as something that needed protection, and in turn the female is then vulnerable to violence. If she is signified through her body as a representation of the land she inhabits, then a violation to her is a violation against the state itself.

The sexual violence women faced was assumed to be connected with 'being' a woman, or a part of their femininity. Zarkov's work seeks to analyse the way femininity is comprehended and often used during the armed conflict in the FYR. Zarkov identifies femininity and women, as well as masculinity, during the conflict, as inhabiting both the universal and the particular.¹⁰¹ This is expressed when the female identity is used to represent general notions of the state while also inhabiting a specific lived experience as a Serb or Croat.¹⁰² Skjelsbaek and Smith also point to the universal and particular understandings of women during the conflict, they describe sexual violence as an act directly perpetrated within a traditional male/female hierarchy, that sought to harm the woman specifically as well as the general ethnic group that she identifies.¹⁰³ The position of the female body, as having the ability to be both general and specific, centres women's roles on filling whatever aspect the State requires. Her existence is only to benefit the State. Kesić writes that as the conflict in the FYR continued the roles of women were more and more based around passivity, and in turn strengthened a masculinity based on aggressiveness.¹⁰⁴ The

⁹⁸ Kesić, 'Women and Gender Imagery in Bosnia: Amazons, Sluts, Victims, Witches, and Wombs' in Ramet (Ed.) *Gender Politics in the Western Balkans: Women and Society in Yugoslavia and the Yugoslav Successor States* (2010) 188.

⁹⁹ See generally Zarkov (n 8) 20-42.

¹⁰⁰ *ibid* 82, 86.

¹⁰¹ *ibid* 12.

¹⁰² *ibid* 86.

¹⁰³ Skjelsboek, 'Sexual Violence and War: Mapping Out a Complex Relationship' (2001) 55.

¹⁰⁴ Kesić (n 98) 187.

imagery of the feminine and masculine was deeply tied to produce support for the war.¹⁰⁵

The existence of a female perpetrator disrupts the gendered understandings of violence that are premised on men perpetrating violence against women. Female defendants also dispel notions that a women's relationship to the nation is tied to either maternal characteristics or the venerable body, as Biljana Plavšić's case demonstrates. Plavšić was a Serbian official who used her position as a leader in order to further the extremist national ideals the Serbian Democratic Party.

Masculinity in the Former Yugoslav Republic was demonstrated through an increased sense of nationalism and often ethnic pride. Slobodan Milošević was seen as the Serbian symbol of masculinity and in turn patriarchy as well.¹⁰⁶ The violence that resulted on all sides demonstrated an extremely aggressive form of nationalism.¹⁰⁷ Papić states, that this type of masculinity was necessary to encourage participation in the military.¹⁰⁸ Masculinity being tied to authority, power, and dominance.¹⁰⁹ Enloe writes that the image of the soldier is tied to the masculinity of Serbian men.¹¹⁰ Zarkov also points to some of the silences in the lived experiences of men in armed conflict, as further signifiers of masculinity. For example, the lack of attention to men who were the victims of sexual violence by the mainstream conflict narrative, identifies that men who experience this type of violence are not seen as masculine, but instead tied to the feminine.¹¹¹ Zarkov writes that identifying the Croat man as a victim of sexual violence, which was tied to representations of homosexuality and emasculation, would subvert the work done to promote Croatia as a powerful nation.¹¹²

¹⁰⁵ *ibid.*

¹⁰⁶ Kepkay, 'Gendercide and the Bosnian War' (2011) 69-70.

¹⁰⁷ Papić, 'Nationalism, Patriarchy and War in ex-Yugoslavia ' (1994), 117.

¹⁰⁸ *ibid.*

¹⁰⁹ Greenberg, 'Nationalism, masculinity and multicultural citizenship' (2006) 322.

¹¹⁰ Enloe, 'All the Men Are in the Militias, All the Women Are Victims: The Politics of Masculinity and Femininity in Nationalist Wars', in Lorentzen and Turpin (Eds.), *The Women and War Reader* (1998) 54.

¹¹¹ Zarkov, 'The Body of the Other Man: Sexual Violence and the Construction of Masculinity, Sexuality and Ethnicity in the Croatian Media', in Moser and Clark (Eds.), *Victims, Perpetrators or Actors? Gender, Armed Conflict and Political Violence* (2001) 69.

¹¹² *ibid* at 80.

The differences and the understanding of masculine and feminine within the Former Yugoslav Republic is not limited to a linear account of men and women. Zarkov states that, masculinities and femininities in the Former Yugoslav Republic are both intertwined and not mutually exclusive.¹¹³ In order to comprehend the way these categories are displayed, it is necessary to acknowledge the relationships these categories have with one another, relating to and shaping each other.¹¹⁴ Zarkov also resists the urge to classify acts as feminine or masculine, this however, has been the way women and men's experiences in war have been described. Acts displayed by women that fall outside of the traditional or appropriate feminine category are then seen as unfeminine.¹¹⁵

In popular representations of masculinities and femininities in the Former Yugoslav Republic conflict masculinity is tied to violent nationalism and the feminine is linked to sexual violence inflicted upon women. The traditional modes of understanding gender are continually reproduced so that the masculine gender is imagined as the primary perpetrator of violence and the female gender receives this violence.¹¹⁶ The lack of acknowledgement of female defendants cannot be explained as simply as to say it follows traditional female/male relationships that observe certain understandings of femininity and masculinity.

The female defendant sits in contrast to the identity constructed around women in the Former Yugoslav Republic, yet she is still a woman. Female defendants are said to display characteristics that are usually reserved for men, but also fills female roles of mother, wife, and daughter. I argue that identifying women as a defendant reinforces the idea that she inhabits multiple identities at once. If the gendered way of understanding people during the conflict was a part of a plan to bolster national pride and encourage a view of the State that maximises its possibility to fight battles and

¹¹³ Zarkov (n 8) 10.

¹¹⁴ *ibid.*

¹¹⁵ *ibid* 13.

¹¹⁶ This also acknowledges that military violence is built around the idea of legitimate male on male violence.

gain land then these ideals of men and women are created. Then the female defendants cannot be said to be absent from this mind-set.

Female defendants have always been a reality in armed conflicts, but within the presumed gender binaries of armed conflict she has been carefully forgotten. The female defendant's identity as a woman seemingly becomes irrelevant, when she is seen as acting in accordance with an extreme nationalistic sentiment. The connection between the perception of the female and male body inside the FYR during the conflict directly relates to the work of local feminists, as their work reiterated a narrative of war that predominantly positioned women as victims amongst nationalist representations.¹¹⁷ This will be further discussed in the next section.

The female body offers one explanation as to why violent crimes committed by women are not as easily understood as crimes committed by men.¹¹⁸ Sjoberg and Gentry highlight the belief that women who chose to engage in committing violent crimes defy the assumption that women are nonviolent, pure, and innocent.¹¹⁹ The female form is tied to its relationship to reproduction. Creating or destroying a nation centres upon birth, sexual violence then is a way to control this process. MacKinnon has discussed the sexual violence in the conflict in the Former Yugoslav Republic, as a specific strategy and plan.¹²⁰ MacKinnon also writes that while generally violations of sexual violence can be perpetrated against men and women alike, when sexual violence is perpetrated against women specifically it is often tied to reproduction or sexual in nature.¹²¹ Fisher states that the role of sexual violence in the Former Yugoslav Republic was employed as a policy of forced impregnation, connected to the intent to destroy a certain population.¹²² As mentioned above, centring women's roles on motherhood and reproduction focuses the role of females to a specific part of the nation. The universal and particular, as Zarkov noted, is a part of masculinity and femininity. However, it is a certain type of universal and particular: depicting women as members of a state or ethnicity and displaying the characteristics of motherhood is

¹¹⁷ Zarkov (n 8) 217.

¹¹⁸ *ibid.*

¹¹⁹ Sjoberg and Gentry (n 95) 15.

¹²⁰ MacKinnon, 'Rape, Genocide, and Women's Human Rights ' (1994) 9.

¹²¹ *ibid.* 6.

¹²² Fisher, 'Occupation of the Womb: Forced Impregnation as Genocide ' (1997) 92-93.

seen as common place, but a woman who is both a mother and who engages in physical conflict is not something that is easily imagined.

It is also important to stress that identifying sexual violence as a tool of war is not enough to solve all of the issues affecting women in armed conflict. Suggesting that rape is used specifically against women because they are women, does not then disavow women from committing acts of violence themselves. Women who were raped and also political or military actors in the conflict do not ‘fit’ preconceived notions of women’s lives during conflict. Women who commit crimes in armed conflict, crimes which have also been sexual in nature,¹²³ have been brought before international and national courts. However, when examples of women who commit crimes are prosecuted within international courts and tribunals or appear in media headlines they are viewed as exceptional examples, and therefore their stories are not necessary to integrate into the mainstream narrative of an armed conflict. This diminishes the larger involvement of women and their capacity to perpetrate crimes. The ICTY has reproduced the gendered categories that existed within the violence itself: instead of disrupting, it recreates gender biases within the court.

3.2 Interrogation of Biljana Plavšić

There was only one case before the ICTY involving a female perpetrator, Biljana Plavšić. Plavšić was the Serbian representative to the collective Presidency of Bosnia and Herzegovina, member of the collective and expanded Presidencies of the Bosnian Serb Republic, and had de facto control and authority over members of the Bosnian Serb armed forces.¹²⁴ Subsequently, Plavšić plead guilty to crimes against humanity.¹²⁵ The Trial Chamber gave weight to Plavšić’s guilty plea as well as her statement of remorse she made in court.¹²⁶ In her plea she admitted that she ‘victimised countless innocent people’, she suggested that a mix of fear and obsession led her to dismiss the allegations of criminal acts being committed.¹²⁷ Plavšić

¹²³*Prosecutor v Nyiramasuhuko and Ntahobali* (Amended Indictment) ICTR-97-21-1 (2001); *Prosecutor v Nyiramasuhuko et al* (Judgement and Sentence) ICTR-98-42-T (2011).

¹²⁴ *Plavšić Case* (n 94).

¹²⁵ *ibid* Section 2.

¹²⁶ *ibid*.

¹²⁷ Statement of Guilt: Biljana Plavšić, (ICTY Website) <<http://www.icty.org/en/content/statement-guilt-biljana-plavšić>>.

admitted that she did not seek to investigate the crimes against non-Serbs, but rather focused on ‘innocent Serb victims’.¹²⁸ Plavšić’s guilty plea did not include any reference to specific crimes, both Del Ponte and Subotić have stated that the guilty plea was extremely general and therefore carried little meaning for Plavšić’s victims.¹²⁹ Plavšić was eventually sentenced to 11 years imprisonment, but only served two-thirds of the sentence before being released.¹³⁰

What is particularly interesting about Plavšić’s case is her admission of guilt in front of the ICTY, which helped to reduce the charges against her as well as her sentence. What was not within the purview of the court was the redaction of her confession she published while in prison.¹³¹ The redaction was published by a Swedish newspaper, *Vi Magazine*. Plavšić stated, “I have done nothing wrong. I pleaded guilty to crimes against humanity so I could bargain for the other charges.”¹³² Plavšić was the only high-ranking officer to admit guilt before the ICTY. The reason Plavšić’s case is of note because her behaviour and attitude while serving her sentence casts aside preconceived notions of how women are presumed to feel and act, especially after committing a crime, yet the way her actions were framed in the media reaffirms her role as a woman.

The connection between remorse and gender seems to presume that women are more likely to feel guilty after committing a crime.¹³³ Therefore, when Plavšić retracted her statements in prison and instead displayed that she has not benefited from any rehabilitation, she contrasts herself from stereotypical gender roles. However, the treatment of Plavšić’s case by the ICTY and the international and local media reinforces rather than disrupts dominant understandings of women’s roles in conflict, through the reduced charge sheet and sentence, ultimately treating her more leniently than her male counterparts. Plavšić was seen as an aberration of the way women should act, while at the same time she still maintained her femininity. The crimes

¹²⁸ *ibid.*

¹²⁹ Subotić, ‘The Cruelty of False Remorse: Biljana Plavšić at The Hague’ (2012) 46.

¹³⁰ *ibid.*

¹³¹ Plavšić, *Svedočim* (2005).

¹³² Uggelberg Goldberg, ‘Plavšić retracts war-crimes confession’ (*Bosnian Institute*, 2009).

¹³³ See Niedermeier et al, ‘Exceptions to the Rule: The Effects of Remorse, Status, and Gender on Decision Making’ (2001).

Plavšić committed were highlighted in the international and local media, she was termed the ‘Iron Lady’ or ‘female Mengele,’ along with stories of her sexual relationship with a Serb leader names ‘Arkan’ or ability to encourage displays of violence.¹³⁴ Both are characteristics that reference her feminine sexual appeal or ‘whore’ like behaviour, with accounts detailing Plavšić’s relationship with Arkan and other members of the Republic Srpska and her nurturing mothering side by encouraging men to fight in the conflict.¹³⁵ When Plavšić was serving her sentence her good behaviour was praised by ICTY Tribunal President Patrick Robinson, as was her cooking and baking, signs she was readjusting to ‘proper’ womanly life.¹³⁶ Plavšić never seemed to slip outside designated female roles, even when her actions were less than desirable they were still framed within feminine gendered language.

It is not strange that Plavšić’s actions were framed from a gender biased lens or that her actions do more to support the ‘female identity’ than to disrupt it. This work is arguing that to suggest female defendants somehow *actually* break the idea of what it means to be women would be false. Women have always committed violence and disruption. Maybe that is why when highlighting the ways specific women buck ideas of gender, it is actually doing more to support limited notions. Every action ‘outside’ strict gender binaries can be explained back through femininity. If Plavšić is encouraging genocide, then she is like a mother encouraging children. If Plavšić is corrupt and viscous, then she is somehow enthralled in an influential sexual relationship and also a female monster. Every ‘wrong’ action can be attributed back to a traditional female role. Even when Plavšić is in prison serving a sentence for international crimes, she is still described to be on good behaviour by baking in her leisure time. Butler’s work on performativity links to Plavšić’s situation, her actions are described to reproduce her female gender as normal.¹³⁷ Tyler and Cohen discuss Butler’s work on gender performativity, they detail that this includes the process of repeating ‘normal’ gender acts, allowing others to recognise and validate one’s gender.¹³⁸

¹³⁴ Sjoberg and Gentry (n 95) 156, 157.

¹³⁵ *ibid.*

¹³⁶ Subotić (n 129) 49.

¹³⁷ Butler, *Gender Trouble Feminism and the Subversion of Identity* (2006) 189.

¹³⁸ Tyler and Cohen, ‘Spaces that Matter: Gender Performativity and Organizational Space’ (2010) 179.

Plavšić's statement of remorse in court and her reported actions while in prison all function to reaffirm her gender and ultimately mitigate her culpability. However, as Butler states that subversion is not simple, even when Plavšić admits to committing international crimes or redacts her confession in prison her actions still upholds 'heterosexual hegemony'.¹³⁹ The relationship between the normative gender performance and heteronormativity then further embed a gender binary of different male and female behaviours.

In a conversation between Butler and Braidotti, Braidotti stated that in the FYR nationalism was more prevalent than sexual difference as a means of identification, one was identified as Bosnian, Serbian, or Croatian woman.¹⁴⁰ National identity remains essential, and in many ways a representation of the conflict as a masculine display of power, tied to the nation-state. Considering Plavšić's case it is important to note her ethnic and national identities in order to frame Plavšić's actions as a female perpetrator. If the goal is to offer a full narrative of an armed conflict, then gender cannot be utilised as the only tool, as it seems to reaffirm a limited understanding of the context of women's actions in conflict. Braunmuhl, using Butler's work within a courtroom setting, illuminates why female perpetrator's actions do not break through strict binaries around gender. Braunmuhl states, that while the performance of a woman in court who displays actions that are 'assertive' and 'strong', pushes against patriarchal and even colonial discourses, this performance is only set within very narrow set of limits, framed 'by the norm of autonomy'.¹⁴¹

While a female perpetrator's actions can be seen as disruptive in some cases, her existence is framed through the 'norm'. After Plavšić committed crimes, her remorsefulness is influential on the outcome of the case and her femininity stays intact even while serving her sentence. This does not however suggest that Plavšić's actions are then considered to be masculine, falling on the opposite side of the male/female binary. Plavšić is a criminal, but never as 'bad' as a male criminal. Her actions never become masculine, they are only 'non-feminine', she enters a

¹³⁹ Kotz interview with Judith Butler, 'The Body you Want' (Artforum, 1992).

¹⁴⁰ Braidotti interview with Judith Butler, 'Feminism by Any Other Name' (1994) 35, 36.

¹⁴¹ Braunmuhl, 'Theorizing Emotions with Judith Butler: Within and Beyond the Courtroom' (2012) 232.

subcategory of what is means to be female and therefore is permitted to remain unrepresentative of women's experiences in conflict. Sjoberg and Gentry point to this notion as well, in Plavšić's case they cite that both the prosecution and the defence pushed for a lighter sentence, as Plavšić was a women and therefore was assumed to be 'less dangerous' than a man.¹⁴²

Only one female tried in the ICTY would suggest that women's involvement as defendants did not become a part of the narrative that surrounded the conflict, established through Tribunal proceedings.¹⁴³ Identifying that women were charged with crimes in the FYR and other conflicts not only draws attention to their existence, but also allows a deeper discussion into the way other identities interact. It is beneficial to give evidence of female defendants and suspects both locally and internationally, but beyond this little else can be gained from merely citing examples of women who commit crimes without further analysis of the context and the factors that influence the exception of the female perpetrator's actions. Plavšić's case displayed a different story than the mainstream account of women's experiences during the conflict in the FYR, but also unearthed the way gender is interpreted and reaffirmed through the media, biased analysis, and the law.

The understanding of gender within the ICTY cannot be said to have been solely shaped by an acceptance of stereotypical gender categories. It is clear that there were tangible actions that reinforced ideals of female victimhood. The intervention of feminists led to important advances in international law concerning the prosecution of and awareness of sexual violence in armed conflict. However, feminists' actions also supported an idea of women in conflict that can also be seen as limiting, reinforcing a victimisation narrative.

3.3 Local processes

In local judiciaries, women have been among those indicted, charged, and sentenced, with greater frequency than in the ICTY. Identifying that women were charged with crimes in the FYR and other conflicts not only draws attention to their existence, but

¹⁴² Sjoberg and Gentry (n 95) 156

¹⁴³ This is referring to an international perspective gained through the ICTY. Local courts have produced more examples of women engaging in acts of violence.

also allows a deeper discussion into the way identities interact. It is not beneficial to merely ‘count the women’ who perpetrate crimes, whether this is a strategy for political inclusion or in documenting crimes committed by women. Recounting the crimes in tremendous details, inspires shock that ‘a woman did that’, but this is not able to dislodge deep set gender binaries or gendered norms. Recounting female defendants’ tales or counting the number of women involved should only be seen as a first step in establishing female defendants as a large discipline of study.

In an effort to relieve some of the Tribunal’s case load the ICTY began transferring cases to national jurisdictions. The Court of Bosnia and Herzegovina (BiH) is a domestic court of the State of Bosnia and Herzegovina which includes international judges and prosecutors. It was established on 3 July 2002 by the Parliament of Bosnia and Herzegovina with the Law on the Court of BiH and promulgated on 12 November 2000 by the High Representative for Bosnia and Herzegovina.¹⁴⁴ BiH is based in Sarajevo. The Republic of Serbia Office of the War Crimes Prosecutor, based in Belgrade, was founded on 1 July 2003, following the passage of the Law on Organization and Competence of State Bodies in the Proceedings against War Crimes Perpetrators.¹⁴⁵ The courts of Bosnia and Herzegovina and Serbia have had the most success to date, issuing warrants, indictments, and commencing and completing trials. In 2012 Human Rights Watch reported that Bosnia and Herzegovina’s Special Department for War Crimes had completed over 200 cases dealing with serious violations of international law.¹⁴⁶ The Office of the War Crimes Prosecutor in the Republic of Serbia has indicted 184 individuals.¹⁴⁷

In 2003 Croatia established new chambers that would deal specifically with war crimes cases were formed within the County Courts in Zagreb, Osijek, Rijeka and

¹⁴⁴ ‘Law on Court of Bosnia and Herzegovina’ “Official Gazette” of Bosnia and Herzegovina No. 29/00,

“Official Gazette” of the Federation of Bosnia and Herzegovina No. 52/00,
“Official Gazette” of the Republika Srpska No. 40/00 (12 November 2000).

¹⁴⁵ ‘Law on Organisation and Competence of Government Authorities in War Crimes Proceedings’ (OSCE Mission to Serbia and Montenegro, amended by the Parliament of Serbia in December 2004); ‘OSCE Update Judicial Institutions in Serbia’ (September 2011).

¹⁴⁶ ‘Justice for Atrocity Crimes Lessons of International Support for Trials before the State Court of Bosnia and Herzegovina’ (*Human Rights Watch*, March 2012).

¹⁴⁷ The Office of the War Crimes Prosecutor, Statistics,
<<http://www.tuzilastvorz.org.rs/en/cases/statistics>>.

Split.¹⁴⁸ Resolution 1244 of 10 June 1999, the Security Council established an international presence on the territory of Kosovo, United Nations Mission in Kosovo (UNMIK) with the task of administering the territory and population of Kosovo.¹⁴⁹ In April 2016 the Human Rights Advisory Panel released its final report on the UNMIK, stating that the UNMIK was a ‘total failure’.¹⁵⁰

The work of the Bosnian State Court has demonstrated their ability to try and convict individuals involved in the armed conflict in the FYR. For example, Rasema Handanovic, participated with other members of her unit in the executions of three civilians and three soldiers.¹⁵¹ Handanovic pleaded guilty and agreed to testify against other former members of her unit under a plea bargain agreement.¹⁵² The Court of Bosnia & Herzegovina sentenced her to five-and-a-half years in jail.¹⁵³ Albina Terzic and Marina Grubisic-Fejzic were both former members of Croat forces. The Court of Bosnia and Herzegovina sentenced Albina Terzic, a former member of the Croatian Defense Council, to five years in prison for crimes against Bosnian Serb civilians illegally detained in the northern Bosnian town of Odzak in 1992.¹⁵⁴

The Trial Chamber of the Bosnian State Court found Terzic guilty of inhumanely treating prisoners held in the Odzak elementary school and the Strolit factory buildings in the summer of 1992.¹⁵⁵ According to the verdict, Terzic beat Bosnian Serb prisoners, let a dog loose on them and tortured, abused and molested them in other ways.¹⁵⁶ While Terzic was initially sentenced to 5 years in prison her sentence was reduced to 3 years imprisonment.¹⁵⁷ Marina Grubisic-Fejzic is on trial before

¹⁴⁸ ‘ICTY Development of Local Judiciaries’ (ICTY Website) <<http://www.icty.org/sid/10462>>.

¹⁴⁹ UN Security Council Res 1244 (1999).

¹⁵⁰ ‘Human Rights Advisory Panel Annual Report 2015/2016’ (8 April 2016) para 121.

¹⁵¹ ‘Muslim becomes first woman to be convicted of Bosnian war crimes’ (The Telegraph, 30 April 2012); ‘Five and a Half Years for Rasema Handanovic’ (*Balkan Transitional Justice Report*, 30 April 2012).

¹⁵² ‘Rasema Handanovic’s Plea Bargain Agreed’ (*Balkan Transitional Justice Report*, 13 March 2012); Office of the *Prosecutor of Bosnia and Herzegovina v Rasema Handanović*, (Appeal Judgement) S 1 1 K 009162 12 Kro (30 May 2012).

¹⁵³ *ibid.*

¹⁵⁴ ‘Albina Terzic Sentenced to Five Years in Prison’ (*justice report*, 19 October 2012).

¹⁵⁵ *ibid.*

¹⁵⁶ *ibid.*

¹⁵⁷ Dzidic, ‘Female Bosnian War Criminal’s Sentence Cut’ (*The Balkan Insight*, 27 September 2013); *Prosecutor of Bosnia and Herzegovina v Albina Terzić* (Appeal Judgement) S 1 1 K 005665 11 KrI (13 December 2012).

Court of Bosnia and Herzegovina war crimes section, as a part of the Zelenika et al. case.¹⁵⁸ Grubisic-Fejzic is charged with taking part in crimes against several hundred Bosnian Serbs from the territory of municipalities of Mostar, Ljubuski, Capljina and Stolac, who were imprisoned in the Dretelj camp in 1992.¹⁵⁹ The prosecution specified that Grubisic-Fejzic attacked prisoners on several occasions, and took part in forcing them to have sexual intercourse.¹⁶⁰

Nada Kalaba, a part of the Ovčara 1 (Vujović and Others) Case in the Republic of Serbia, Office of the War Crimes Prosecutor, was sentenced to nine years imprisonment in 2009 for taking part in the 1991 massacre in the eastern Croatian town of Vukovar.¹⁶¹ Monika Ilic-Simonovic, a native of Brcko, was married to Goran Jelisic, a convicted murderer and concentration camp torturer.¹⁶² The two allegedly committed crimes against imprisoned non-Serbs in Brcko at the beginning of the 1992-95 Bosnian war.¹⁶³ Jelisic, who called himself the "Serb Adolf", was sentenced in 2001 to 40 years in jail by the ICTY.¹⁶⁴ Ilic was sentenced by the Brcko District Court to two and a half years in prison.¹⁶⁵ The Cantonal Court in Bihac in north-west Bosnia indicted Bora Kuburic and Radmila Banjac for allegedly physically and mentally abusing the detained nurse, who was a member of the Bosnian Army's Una-Sana operational unit, in the summer of 1992.¹⁶⁶ These shocking examples document the roles some women played in the violence in the FYR, roles that have not been documented or publicised in international accounts of the conflict.

¹⁵⁸ 'Dretelj Crimes Trial to Begin mid June' (*justice report*, 5 June 2012).

¹⁵⁹ Ucanbarlic, 'Female Bosnian Croat Fighter Denies Abusing Poisoners' (*justice report*, 25 March 2014).

¹⁶⁰ *ibid.*

¹⁶¹ *Prosecutor v Ovčara I – Miroљub Vujović et al* KTRZ 3/03 (12 March 2009); Upon appeal the court increased Kalaba's sentence to 11 years. However, due to constitutional appeal lodged by Radak, the case is now on appeal for the second time.

¹⁶² 'Bosnia Arrests 'Female Monster' - Wife of Warlord 'Serb Adolf'' (*Mirror UK*, 22 December 2011).

¹⁶³; Cerkez, 'Bosnian Police Detain Female War Crimes Suspect' (*USA Today*, 21 September 2011); 'Witness Says Monika Ilic Poured Acid on Wounds' (*Balkan Insight*, 4 September 2012).

¹⁶⁴ *ibid.*

¹⁶⁵ Arnautović 'Sentence against Monika Karan-Ilic Reduced' (*BIRN BiH*, 11 October 2013); The Brcko District is a court within Bosnia and Herzegovina. The Brcko district has an independent judiciary consisting of the court entrusted with first instance jurisdiction and the appellate court.

¹⁶⁶ Durakovic, 'Female Bosnian Serb Fighters Indicted for War Crimes' (*justice report*, 3 April 2014).

Local judiciaries carried the ability to effectively contribute to the narrative around the armed conflict, especially evident as they began to investigate and prosecute war crimes and the prosecution of both female and male defendants. The ICTY is not where international criminal law ends for the armed conflict in the Former Yugoslav Republic, as it continued throughout State judiciaries. While the perceived value of the ICTY over local courts can be said to exist in certain cases internationally,¹⁶⁷ a level of complementarity is necessary in order to fully address large scale violations after a conflict. Ideas of complementarity, reserved for the workings of the ICC notwithstanding, is a useful tool in the work this study intends to do as well.¹⁶⁸

Complementarity can be difficult to imagine in a post-war climate, where local courts are seen as embedded in corruption and discriminatory against difference, especially after a conflict that was so deeply entrenched in difference as the conflict in the FYR. However, recognising the ICTY as the primary space of post-conflict justice misses the larger story that surrounds the conflict. Looking into the local courts as a connection to the larger picture of post-conflict justice grounds this study's focus by creating a way to trace the female defendant through multiple legal realms while identifying the way she is understood, through both inside and outside the courtroom.

The link between the local and international also brings to light differences in the international perspective on female defendants and the local understanding of those who commit crimes during conflict. Theories of representation and differences in the way women's contribution is discussed in a post-war society is not only evident in the way women's connection to violence is viewed, but it is also essential to look at the way women as victims of sexual violence are framed. By understanding the way women's role as the victim was expressed and understood at both the international and national level a deeper image of female roles in war is developed. The post-conflict justice story told in local courts needs to feed back into the way international actors, and Western feminists, approach and understand conflict, as well as gender in conflict.

¹⁶⁷ Brown, 'Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals' (1998) 394.

¹⁶⁸ See Pocar, 'Completion or Continuation Strategy?' (2008); El Zeidy, 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law' (2002).

3.4 Feminist responses to sexual violence during the conflict in the Former Yugoslav Republic

The role of feminists, lobbyists, and NGOs was paramount in the successful prosecution of sexual violence crimes in the ICTY. In order to promote adequate prosecution, civil society NGOs and activists wrote briefs, held seminars, were involved in press work, and requested meetings.¹⁶⁹ A great deal of lobbying was required to encourage sexual violence to stay in the spotlight, during the ICTY's creation and life. Feminists, especially within NGOs, credited themselves with the development of normative law.¹⁷⁰ However, feminist and scholars have debated the effectiveness of international criminal judgements that dealt with women's experiences as victims in war.¹⁷¹ It is amongst those who engaged with debates around sexual violence that a victim narrative was developed.¹⁷² Scholars encouraged the growth of this narrative, as it also positively facilitated an important step into the area of women in international law. MacKinnon was an advocate of international criminal law's work on aiding women who have been victimised by sexual violence crimes, along with her view that law was a form of male power she advocated for a stricter reading of crimes that dealt with violence against women.¹⁷³ However, it has been argued that the work done around the Tribunal concerning women in conflict reinforces the idea that women only hold the role of the victim and are generally acknowledged to be in continual need of protection.¹⁷⁴

In the debates surrounding the ICTY, many feminists pushed for rape to be seen as genocide. MacKinnon vehemently advocated that the rape by Serbs was genocide.¹⁷⁵ She said that the difference between "everyday rape" and rape in the legal definition

¹⁶⁹ Halley et al, 'From the International to the Local in Feminist Legal Response to Rape, Prostitution/ Sex Work and Sex Trafficking: Four Studies in Contemporary Governance Feminism' (2007) 342.

¹⁷⁰ *ibid.*

¹⁷¹ Engle, 'Feminism and Its (Dis)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina' (2005) 785-786.

¹⁷² Kapur, *Erotic Justice, Law, and the New Politics of Postcolonialism* (2005) 120.

¹⁷³ MacKinnon, 'The ICTR's Legacy on Sexual Violence' (2008) 214, 215.

¹⁷⁴ Evidence of this is present when shifting through ICTY, ICTR, SCSL, and ICC cases. Engle (n 96) 952.

¹⁷⁵ Engle (n 171) 785-786.

was a product of male dominance, and therefore suspect.¹⁷⁶ MacKinnon saw rape as difficult to define because she also stated that male dominance is also implicated in sex.¹⁷⁷ MacKinnon states that if sex is usually done to women then force should not be the focus, rather consent should be more debated upon.¹⁷⁸ MacKinnon further argues that men engage in sex and often have no idea that they have violated women; therefore, the definition of rape should be defined by its meaning from a women's point of view irrespective of whether the man believed he committed an act of sexual violence or not.¹⁷⁹ The women's perspective promoted within MacKinnon's work is often noted a predominantly Western and white.¹⁸⁰

Feminists and journalists who interacted with the ICTY were frequently frustrated as they tried to elicit stories of sexual violence.¹⁸¹ Alongside the fact that many interpreted women's silence on the issue of rape as acknowledgement, made it impossible to view Bosnian Muslim women as anything other than rape victims. Likewise, MacKinnon's work is also often criticised for seeing all women as a unified group.¹⁸² Many of the advocates who wanted rape to be seen as genocide, in the ICTY, believed that rapes by Serbian men of Croatian and Bosnian Muslim women constituted genocide, but as the conflict continued and Croatia became an more of an aggressor, these same advocates shifted their definition of 'rape as genocide' to only the rape of Bosnian Muslims.¹⁸³ It was then when MacKinnon began to favour a definition that distinguished between "every day wartime rape" and the wartime rape committed by the Serbs.¹⁸⁴ This, Engle states, is the suggestion that rape during armed conflict is worse than "everyday rape".¹⁸⁵

Other feminists disagreed with the focus on genocidal rape. Copelon argued that genocidal rape is horrific as well as obvious; therefore, associating rape with genocide

¹⁷⁶ *ibid.*

¹⁷⁷ MacKinnon, 'Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence' (1983) 647.

¹⁷⁸ *ibid* 650.

¹⁷⁹ *ibid* 652.

¹⁸⁰ See Harris, 'Race and Essentialism in Feminist Legal Theory' (1990).

¹⁸¹ Engle (n 171) 790.

¹⁸² This critique is found in the work of Harris, Halley, and Kapur amongst others.

¹⁸³ Engle (n 171) 785-786.

¹⁸⁴ *ibid.*

¹⁸⁵ Engle (n 171) 785-803.

creates the possibility of rape becoming invisible. Meaning that if rape is elevated to the level of genocide, then when women are raped for reasons other than genocide their experiences will be invisible.¹⁸⁶ Copelon further notes, “women are targets not simply because they 'belong to' the enemy [...] They are targets because they too are the enemy; [...] because rape embodies male domination and female subordination”.¹⁸⁷ Copelon, states that with this rhetoric, once again Balkan women were assumed to be victims of rape in war.¹⁸⁸ Autesserre, in her work on the Congo, also noted that focusing on the rape of women overshadows other issues, such as the sexual violence against men and boys as well as other equally horrific forms of violence.¹⁸⁹

Despite the difference in opinion, other misunderstandings were apparent. Engle address these two positions by stating that despite their difference in opinion over the issue of genocide both sides carried large assumptions about the ethnic differences between Serbs, Croats, and Bosnian Muslims.¹⁹⁰ Engle asserts that some journalist and advocates assumed all women were powerless victims, incapable of defending themselves, taking sides, and participating in war.¹⁹¹ Feminists, like MacKinnon, felt sexual violence by Serbs was genocidal, others disagreed. Those who disagreed argued that taking such a position would somehow deny the extent to which women were always harmed in war, especially in the conflict in the FYR. This latter camp believed that rape on all sides should be considered genocide, but not because they were perpetrated against a certain ethnic group but because they were perpetrated against “women” as a group.¹⁹²

Different feminist perspectives carried large assumptions about women’s response to sexual violence. Engle goes on to state that those who argued for greater legal protection for women from sexual violence often used the argument that rape brings

¹⁸⁶ Copelon, ‘Surfacing Gender: Re-Engraving Crimes against Women in Humanitarian Law’ (1994) 246

¹⁸⁷ *ibid* 262.

¹⁸⁸ *ibid* 264.

¹⁸⁹ Autesserre, ‘Dangerous Tales: Dominant Narratives on the Congo and their Unintended Consequences’ (2012) 15.

¹⁹⁰ Engle (n 171) 794.

¹⁹¹ *ibid* 795.

¹⁹² *ibid*.

shame on women as well as the community.¹⁹³ Engle's argument is that this process of shaming gives power to rape and because rape is not in every war it is not universal or inevitable, therefore shame is not universal or inevitable.¹⁹⁴ Engle explains that there are conflicts that do not deploy rape and sexual violence as tools of war; therefore rape and sexual violence do not necessarily occur whenever there is a conflict. She further notes that feminists and advocates who assume that all raped women are in some way shamed also increase the shame themselves.¹⁹⁵ Engle states that the ICTY, at the urging of feminists, has limited women's stories and denied sexual, political, and military agency.¹⁹⁶ At the same time, all men, especially Serbian men, were seen as potential sexual perpetrators. This further solidifies women and men's role in armed conflict along gender lines. Furthermore, this makes the visibility of female defendants unlikely, as the actions of female defendants is outside the typical parameters of female behaviour in armed conflict.

While sexual violence was the focus of international feminist study, the work and nuances amongst local feminists was not recognised.¹⁹⁷ The national debates amongst local feminist scholars underwent shifts as the conflict continued. Before the conflict began Benderly noted that Yugoslav feminism was directly opposed to nationalism and expressed solidarity across the different territories.¹⁹⁸ After it was clear that the conflict would in fact continue many feminists began working to end the conflict; they established anti-war groups, groups for women refugees, centres for those affected by violence, and telephone lines for support.¹⁹⁹ However, Zarkov goes on to state that as the conflict continued so did the divisions between different groups of feminists.²⁰⁰ Differences arose in the conceptualisation around nationalism and the conflict's aims. Generalisations about feminists from Serbia were pervasive throughout the territories, and sexual violence accusations were directed at Serbs and

¹⁹³ Engle (n 96) 953.

¹⁹⁴ *ibid* 942.

¹⁹⁵ *ibid* 958.

¹⁹⁶ *ibid* 941.

¹⁹⁷ Zarkov, 'Feminism and the Disintegration of Yugoslavia: On the Politics of Gender and Ethnicity' (2003) 1.

¹⁹⁸ *ibid* 2.

¹⁹⁹ *ibid*.

²⁰⁰ *ibid*.

Croats.²⁰¹ National feminists from Croatia were determined to argue that only Croat and Muslim women were victims of sexual violence and Serb men were the only perpetrators.²⁰² In Serbia there were national women's groups which moved away from feminism and then anti-nationalist feminists, which also existed in Croatia as well.²⁰³ "The Women in Black" movement, a feminist anti-war movement, went even further stating that it is not beneficial to strive to increase the amount of women cited with having been involved in sexual violence, as this changes nothing about the women's suffering. Their focus was with each individual and less importance was given to the law and the international version of 'justice'.²⁰⁴ While feminists of all sides were involved in many other projects, it is the characterisation of victims and violators by national feminist that is the most interesting point for this study. Feminists on all sides had difficulty in defining the perpetrators and the victims, during the conflict. Some groups did acknowledge that their own ethnic forces were also involved in acts of sexual violence;²⁰⁵ others focused their work on all women harmed by the conflict and established links with other States as well.²⁰⁶

However, despite the nationalist or anti-nationalist perspective both sides focused on women and their experiences in the conflict, which was often displayed through the lens of the victim. Zarkov comments on this point as well, stating that all feminists, local and international, assumed women were powerless and men were active players.²⁰⁷ Women who were capable of perpetrating or permitting violence and men who were powerless were insufficiently acknowledged.²⁰⁸ Zarkov writes that this mentality grounded the stereotypical notions of masculinity and femininity, which relate to the construction of ethnicities and the armed conflict. Both international and

²⁰¹ *ibid.* 5.

²⁰² *ibid.* 6.

²⁰³ *ibid.* 7.

²⁰⁴ *ibid.*

²⁰⁵ *ibid.* 8. Zarkov states, Croatian anti-nationalist feminists, for example, were the first to explicitly accuse Croatian forces of raping Serb and Muslim women, and to condemn national and international demonization of Serb men and the Serb nation, be it by mainstream politicians or by American feminists such as MacKinnon.

²⁰⁶ *ibid.* Zarkov states, Serbian anti-nationalist feminists also directed their activities towards all women, regardless of their ethnic background. They were among the few to establish links with Albanian women from Kosovo, for example.

²⁰⁷ *ibid.* 13.

²⁰⁸ *ibid.*

local feminist work entrenched the view of women as victims.²⁰⁹ Women who perpetrated crimes were not a part of the representations of women in armed conflict. The work of feminists resulted in a victim feminism that in turn perceives cases like Plavšić, as rare instances where women act contrary to the dominant narrative.

4. Victim Feminism

Undertaking an analysis of victim feminism not only illuminates the perception of gender, but also highlights the environment that was created within international criminal law in the 1990's which as shaped the way women's roles in armed conflict are understood. This section will detail the Western feminist intervention and the way limited perceptions of gender in armed conflict influenced international law as well as the development of feminist aims. The work of the Western feminists in international criminal law in the 1990s also underscores the relationship to the women in the Global South.

The relationship between the masculine and feminine, seen within the Former Yugoslav Republic, is then reproduced via the court cases after the conflict. If the gendered interactions of the ICTY are interrogated, then it is clear that while not implicitly discussing the court's own preconceived genders ideals, it all the same produces these categories. The evidence of a gendered understanding of the court exists within the courts silences. It is not only the lack of female defendants within the conflict narrative that seem to signal a limited view of gender in the ICTY, it is also the lack of awareness of male victims of sexual violence. Despite the fact that examples of male victims of sexual violence entered the Tribunal and the jurisprudence contains prosecutions of male sexual violence,²¹⁰ male victims have been given limited attention in the overall conflict narrative. This extends beyond the international community understanding that sexual violence against men took place in the FYR, but there is a need highlight the relatively limited interrogation of the ways in which masculinity in armed conflict has prevented male victims from seeking services and reporting crimes.

²⁰⁹ Zarkov (n 8) 217.

²¹⁰ See *Prosecutor v Mučić et al* (n 85); *Prosecutor v Tadić* (Trial Chamber Judgement), IT-94-1 (26 January 2000); *Prosecutor v. Češić* (Trial Chamber Judgement), IT-95-10/1 (11 March 2004); *Prosecutor v Todorović* (Trial Chamber Judgement) IT-95-9/1 (31 July 2001); *Prosecutor v. Simić* (Trial Chamber Judgement), IT-95-9/2 (17 October 2002).

Referencing the discussion above, the male victim disrupts the understanding of male roles in armed conflict.²¹¹ Skjelsbaek discussed the use of sexual violence as a display of power, and sexual violence against men as a way of ‘feminising’.²¹² By intently focusing on women as victims of sexual violence, women’s roles in conflict become defined by the potential of violence inflicted, and men are specifically seen as the perpetrators of sexual violence.²¹³ Butler notes that juridical power not only represents ‘subjects before the law’, but also produces it, which in effect allows law’s hegemony to continue.²¹⁴ What this means for women and their relationship with the law, as well as their relationship with feminism, is that often the entity that exists to end oppression is the very entity that fosters the oppression.²¹⁵ Therefore, using the law to aid women’s lack of representation before it, comes at the cost of also limiting women’s roles, if the representation in law reinforces female vulnerability. While Butler’s discussion of ‘law’ varies, in this case law is used as the juridical law, found in the international legal system. Relating Butler’s work to international criminal law, and more specifically, the presence of women as victims and violators, develops the idea that certain people are able to stand before the law and others are not.²¹⁶ This is bound within a heteronormative system of power. Female defendants are not fully realised as subjects in international criminal law; however, it is not enough just to say that female defendants disrupt the binary of men and women.

One reason why the female defendant cannot enter into the imagination as a violator in international criminal law, may be because laws that deal with violence against women are often based upon heterosexual notions of what men ‘do’ to women. Female defendants do not fit into this concept, as they act against both women and men in a way that does not uphold the heteronormative hierarchy between women and men in law. MacKinnon’s work on dominance theory is utilised in part by this thesis, as she states that women’s subordination is based upon a social construction of

²¹¹ Engle (n 96) 956-957.

²¹² Skjelsboek (n 103) 225.

²¹³ Engle (n 96) 956.

²¹⁴ Butler (n 137) 2.

²¹⁵ *ibid.*

²¹⁶ *ibid* 2, 3.

sexuality, which men use as a mechanism for dominance.²¹⁷ However, the “women” implied in MacKinnon’s work is not an aspect further relied on in this thesis. Harris highlights the need to acknowledge that MacKinnon’s understanding essentialises women, suggesting there is one ‘woman’ under all different forms of identity.²¹⁸ This aspect of dominance theory is limited in the image of women theorised, as it appears women need to choose race or gender or another identity.²¹⁹ Moreover, there is no universal truth of what women ‘are’ and having women choose between identities is counterintuitive.²²⁰ The heteronormativity that exists in law is bolstered when women are assumed their gender is the most important identity they inhabit, as women’s role as women is essential to maintain the hierarchy found in law between men and women.

International media headlines often centre on women’s ‘femaleness’ and often imply traditionally female roles when discerning female defendant’s actions. A justification is needed when women step outside of the strict binaries set to encompass acceptable behaviour. Examples of women committing acts of violence are often reported in the media with links to gender roles; an article on Monika Karan–Ilic, who was found guilty of torture, inhumane treatment, and mental abuse by the Court in Bosnia and Herzegovina, read “Bosnia arrests ‘Female Monster’–wife of warlord ‘Serb Adolf’”.²²¹ The article’s headline situates Karan–Ilic as a monster, emphasising the female gender which suggests women do not typically assume this role, while also highlighting her as a wife. Positioning her as a wife of a man referred to as the ‘Serb Adolf’, indicates that her alleged crimes may be similar to those of her husband and yet diminishes her agency as a violent perpetrator. The headline invokes the trope of the dominant husband who controls his wife, and therefore, sustains the heteronormative structure of marriage.²²² The dominant husband in turn influences his wife’s actions and female violence is produced as an offshoot of male violence. Sjoberg and Gentry argue that where the law allows women to be seen as culpable for violent crimes, ‘sex-role

²¹⁷ MacKinnon, *Toward a Feminist Theory of the State* (1989) 217.

²¹⁸ Harris (n 155) 592.

²¹⁹ *ibid* 594.

²²⁰ *ibid*.

²²¹ ‘Bosnia Arrests ‘Female Monster’ - Wife of Warlord ‘Serb Adolf’ (Mirror UK, 22 December 2011).

²²² Blackwood, ‘Marriage, Matrifocality, and “Missing” Men’ in Geller and Stockett *Feminist Anthropology: Past, Present, and Future* (2007).

stereotyping' is still common in punishment and perceptions of agency.²²³ 'Othering' occurs in and around these trials and happens on all levels of the courts.

The accounts of local perspectives on masculinity, femininity, nationalism, sexuality, and ethnicity found in local feminist work, as well as in pro-nationalistic pro-war propaganda, discussed in the previous section, links to the intervention into the FYR by Western Feminists. Batinic states that the work done to unpack the meaning of the female body in the FYR by local feminists was represented in Western publications and in the work of Western Feminists after the armed conflict.²²⁴ The US radical feminist approach, characterised by the work of MacKinnon, focused on sexual violence as the epitome of gender inequalities and thereby ignored economic, cultural, political dimensions. The US feminist intervention also diminished the intersection of gender with other modes of power within the FYR. Therefore, feminist interventions focused primarily on instilling a focus on the sexual violence in the FYR into international criminal law.

The binaries of victim/violator and woman/man were further embedded by the conflict in the FYR and illuminated and discussed by the work local feminists, only to then be utilised and reproduced by Western feminists who intervened through advocacy on behalf of female victims, both during and after the armed conflict. Batinic states that the Western feminist response into the FYR echoes the Western, primarily US, feminist agenda in the 1990s, which resulted in the women of the FYR being symbolised as the 'other'.²²⁵ I argue that both radical US feminism at the time used the conflict in the FYR to further a specific mode of dominance theory that centred on identifying and emphasising the role of sexual violence in the subordination of women. The consequence, however, was to 'other' women in conflict zones, as victims identifiable through the sexual violence assumed to have been inflicted on them.

²²³ Sjoberg and Gentry (n 95) 15.

²²⁴ The feminist journals and magazines referred to are, *Ms.*, *off our backs*, and *Spare Rib*. All of which are cited for their extensive coverage of the armed conflict.

²²⁵ Batinic, 'Feminism, Nationalism, and War: The 'Yugoslav Case' in Feminist Texts' (2001)18.

The way Western feminists have shaped the understanding of sexual violence and gender is also connected to the international media representations of the conflict. Zarkov discusses the Western feminist response to the conflict, stating that in the summer of 1992 the international media began focusing on the sexual violence in the FYR.²²⁶ Zarkov highlights the shift in Western feminist engagement from a discussion of war to an emphasis onto war rapes and a limited understanding of ethnicity.²²⁷ The classification of sexual violence as a result of ethnic identities was problematic, instead there should have been more effort to ascertain the way a certain identity becomes elevated and seen as desirable in a given society.²²⁸ The former approach does not question the structures of the conflict, but rather upholds them and perpetuates their existence. Zarkov states that women survivors of rape and rape camps have also been a part of the efforts to deal with the aftermath of women and rape as well as other conflict related issues.²²⁹ Yet, the international media and Western feminists have depicted these women as helpless and silent,²³⁰ and while sexual violence came to the forefront of international feminist study the work of local feminist was not always sufficiently recognised.²³¹

Through the combination of both local and international presumptions about women's personal experiences within the armed conflict, the dominant narrative around women's roles in the FYR were restricted to passive victims. From this understanding it is possible to see why female defendants have remained on the fringes of the armed conflict's narrative. Butler discusses the universalisation of women's experiences, rebuking the belief that there is one form of oppression based on masculine domination or patriarchy.²³² The term 'woman', Butler states, has suggested a specific identity one that does not take into consideration the way women or rather gender is connected and influences by race, class, ethnic, sexual, and regional identities.²³³

²²⁶ Zarkov, 'Ontologies of International Humanitarian and Criminal Law: 'Locals' and 'Internationals' Internationals' in Zarkov and Glasius (Eds.) *Discourses and Practices of Justice', Narratives of Justice In and Out of the Courtroom Former Yugoslavia and Beyond* (2014) 7.

²²⁷ *ibid* 8.

²²⁸ *ibid*.

²²⁹ *ibid* 7.

²³⁰ *ibid*

²³¹ See Zarkov (n 197).

²³² Butler (n 137) 3.

²³³ *ibid*.

Furthermore, it is important to recognise the way gender oppression exists differently in multiple contexts.²³⁴ Explaining the relationship between Western feminism's relationship to the Third World, Butler writes;

That form of feminist theorizing has come under criticism for its efforts to colonize and appropriate non-Western cultures to support highly Western notions of oppression, but because they tend as well to construct a "Third World; or even an "Orient" in which gender oppression is subtly explained as symptomatic of an essential, non-Western barbarism.²³⁵

Since the urging of Western feminists has resulted in international criminal legal developments on the prosecution of and existence of sexual violence as international crime, which are characterised as a universal experience for women in conflict, the life, oppression, and experiences of women in the FYR was assumed to rest along the lines of Western interpretation, seen in the media, feminist dialogue, and then the ICTY.

Revenge or other associated thoughts of women were seen as a product of the sexual violence that women experienced. If one wanted to join the army or even expressed vengeance, they were seen as exceptional or pathological. Once rape was involved women could be or do nothing else.²³⁶ Journalist Alexandra Stiglmyer equated the desire for revenge with atypical behaviour.²³⁷ She stated that most women who were raped were broken and unable to think about such things as revenge; therefore, those who did so were not normal.²³⁸ Stiglmyer also suggested that most 'victims' were powerless, unable to even take care of their families.²³⁹ Psychiatrists noted that women who have become pregnant as a result are often suicidal, but after an abortion their symptoms turn to aggression.²⁴⁰ In these instances women's experiences are framed through violence she sustained and displaying agency by engaging in armed conflict is presumed to be impossible. The existence of the female defendant, one who

²³⁴ *ibid.*

²³⁵ *ibid.*

²³⁶ Engle (n 146) 795.

²³⁷ *ibid* 795, 796.

²³⁸ *ibid.*

²³⁹ *ibid.*

²⁴⁰ *ibid.*

displays a form of agency and can be seen as capable for her actions, is impossible to reconcile with an image that women are harmed and then act out of pathology or revenge.

These scenarios offer women very little agency: revenge is pathological, potential mothers are suicidal, and rape leaves women 'broken'. By explaining every reaction in relation to rape, there are little options for women to express themselves without one of these stigmas being attached to their actions. Therefore, after experiencing sexual violence women are often solely defined by their experience of rape or sexual violence. To expand on the assumptions about women's other roles in war Engle refers to Conklin, who states, "Men fight other men in war. As a general rule, this is true. It is also generally true that women do not fight wars, though they may contribute in other ways to a war effort."²⁴¹ This effectively deletes women's political agency during war as well. Through feminist critical engagement with the conflict in the Former Yugoslav Republic advances were made within international criminal law and in the recognition of the realities women often faced during times of armed conflict. By assessing the results of feminist efforts this study moves the debate forwards so as to re-examine the role of gender in armed conflict and the way narratives of women's sexual violence has in some cases limited the acceptance of the extent and range of women's involvements during conflict, including as violent actors.

It is through the work of local and international feminists, and the ICTY, that a specific image of the female victim has been reproduced and managed. Jurisprudence that sought to recognise women's role as victims of sexual violence narrowed the narrative around women's participation and elevated men to the position of active participants whether it was in perpetrating crimes or negotiating peace. Women as active participants in the conflict are seen only in relation to "women's issues", for example the activists that protested in order to end the war on behalf of their husbands and sons.²⁴² Local feminists, victims of violence, or even international feminist interventions are restricted to issues that primarily concerned women, and women

²⁴¹ *ibid* 796, 797.

²⁴² Kaufman and Williams, *Women, the State and War: A Comparative Perspective on Citizenship and Nationalism* (2007) 94.

who have been harmed. Women who perpetrate crimes, seemingly display traditional 'male' characteristics and are left out of these representations; however, male victims are also not discussed properly by feminist actors or addressed within the courts, even when their vulnerability would be seen as a 'female' characteristic. Instead of accusing feminists of focusing on the victim, which would have theoretically included male victims, there is rather a narrow focus on what constitutes a 'feminist issue'. Widening the focus of women's role in conflict or the role of feminists around the conflict is encouraged in order to acknowledge the histories and experiences of those whose situation falls outside of the mainstream approach. However, analysing Plavšić's case illustrates that female defendants either escape international notice when they do commit crimes or used their gender as a means for negotiating their culpability.

Continually reaffirming women's role as victims of violence again establishes that women are connected to a specific view of femininity. Criminal courts should be disrupting these binaries and encouraging the understanding of the diversity of women and men's roles. This would establish greater recognition of women as active participants in conflict and prevent assumptions that women remain helpless during times of violence and in fact are as equally capable of extreme violence as men and should, thus, be held accountable for that. Men in the FYR were considered the aggressors, strong, powerful, and a forceful representative of the nation.²⁴³ Conversely, men who were victims of sexual violence remain outside the mainstream understanding of sexual violence in the conflict of the FYR.²⁴⁴ It is through the positioning of rape and sexual violence against women, as a prominent part of the Tribunal that reinforces ideas of masculinity and femininity. Many feminists were interested in men as perpetrators in order to validate their understanding that women were the consummate victims in conflict. Only identifying men as perpetrators reinforces a gender binary established in the conflict as well. However, work have been undertaken by feminists such as Zarkov to analyse masculinity and male victims of sexual violence.

²⁴³ See Jones, 'Gender and Genocide' (2002).

²⁴⁴ The case of *Prosecutor v. Mucić et al.* is an example where sexual violence against men is noted. The account of Mucić's actions included a description of him forcing two male detainees to engage in fellatio with each other. See de Brouwer, *Supranational Criminal Prosecution of Sexual Violence* (2005).

Feminist interventions also highlighted the male and female tropes displayed in international law. Charlesworth discusses the role of men and women in crisis situations and states that women are only recognised as being a part of the crisis when they are violated, and when that violation is seen as a harm to their own social group.²⁴⁵ Through the focus on sexual violence in the ICTY the binaries between man and women, perpetrator and victim are seen as synonymous. Another binary that is maintained through law with the help of Western feminists, is the distinction between sex and gender. Butler's work positions the distinction between sex and gender as a discourse that solidifies the male and female binary,²⁴⁶ a heterosexual hegemony.²⁴⁷ Within this hegemony, the male/female binary, women and men are limited to specific characteristics within the law, and those characteristics have been highlighted by the focus on women as victims of sexual violence.

Without highlighting the different roles of women in the conflict examples of female defendants like Biljana Plavšić are seen as exceptional. Another problem with the rhetoric of victim feminism and highlighting the sexual violence in the conflict is not just that it ignores the other roles women inhabit, but it also identifies rape as special to a particular armed conflict. By framing the Tribunal along the same gender lines as the conflict itself, international criminal law reproduces the same gendered outcomes as the conflict. If women are argued to be disadvantaged during armed conflict, which produces distinct understandings of masculinity and femininity, then creating a tribunal that also predominantly focuses on women as victims and men as perpetrators, reaffirms the gender binaries that helped fuel the conflict and does not allow the possibility that human experience in the conflict is nuanced and varied. Butler writes that sexual violence both disrupts and reaffirms the maintenance of gender binaries.²⁴⁸ Ethnicity in the case of the conflict of the Former Yugoslav Republic also warrants further consideration as the aftermath of the conflict was tied inexplicitly to notions of ethnic division that also depended on specific gendered meanings of violence, nation and victimhood.²⁴⁹ I argue that the gender and ethnic

²⁴⁵ Charlesworth, 'International Law: A Discipline of Crisis' (2002) 389.

²⁴⁶ Butler (n 137) 6, 7.

²⁴⁷ Loizidou, 'The Trouble with Rape: Gender Matters and Legal 'Transformations' (1999) 280.

²⁴⁸ Butler, *Prekarious Life: The Powers of Mourning and Violence* (2004).

²⁴⁹ Buss, 'The Curious Visibility of Wartime Rape: Gender and Ethnicity in International Criminal Law' (2007)

binaries bolstered by the armed conflict further embed the binary of victim/perpetrator, which is essential for the maintenance of the international criminal legal system.

The international criminal legal system, in reproducing these binaries, supports the distinctions between genders and their presumed experiences in armed conflict.

Furthermore, international criminal law through its work has made contributions to the understanding of ethnicity,²⁵⁰ and in doing so has embedded ethnicity as a necessary element in order to understand gender and sexual violence.

While there were debates between feminist scholars, many supported the judgements of the court that dealt with women's experiences as victims in war.²⁵¹

During the process of criminalising sexual violence one thereby makes it all the more prominent. Sexual violence is elevated to a position that it becomes a 'useful' weapon. This relates to the debates around rape as a weapon of war.²⁵² If a group of women who have been raped are seen as being shamed, like Engle notes many feminists used the topic of sexual violence as a way to advocate, which makes rape is all the more desirable to the aggressors of war and solidifies women in gendered notions. Rape and sexual violence becomes more of a tool in war because it is cited by the international community as holding such an important value. To be clear this is not to say that 'future aggressors' see the focus of international courts on crimes of sexual violence, and then proceed to commit crimes because of these actions or find sexual violence more desirable because of its centrality in the courts. When a tribunal focuses on a specific experience of women, as victim, it not only reinforces their one dimensional status it also further cements the general understandings and roles of women and men. Some feminist strategies have used international law to organise an international response to female victims in conflict, and it is within the debates around such strategies where notions of race, class, and gender have also played out.²⁵³

²⁵⁰ *ibid* 8.

²⁵¹ Engle (n 146) 785-786.

²⁵² See generally Kohn, 'Rape as a Weapon of War: Women's Human Rights during the Dissolution of Yugoslavia' (1994) 199.

²⁵³ Kapur (n 147).

A great deal of literature and discussion around the Former Yugoslav Republic has been centred upon the sexual violence. Chinkin discusses this stating that sexual violence perpetrated specifically against women has a long history beyond a specific conflict.²⁵⁴ Chinkin highlights examples from the Second World War to East Timor to showcase sexual violence against women in war as a continual historical problem,²⁵⁵ to see the sexual violence in a conflict as something specific to that situation negates the ongoing crisis of sexual violence perpetrated against women. Charlesworth's work also centres on the movement away from a crisis centred approach of international law.²⁵⁶ Sexual violence occurs during both peace and conflict and a possible shift in focus on sexual violence in conflict to the sexual violence of everyday life could lead to an understanding of the perpetual violence perpetrated against women that is only magnified during a conflict. While it is not being denied that sexual violence can be used in conflict as a specific strategy, as Chinkin stated it can be used as a benefit for soldiers, as a symbol of the nation state, or as a symbol of an ethnic group, examples which are systematic, organised, and on a grand scale.²⁵⁷

The differences between the 'international' and 'local' are also apparent in spaces beyond the courtroom. Zarkov discusses the difference between the 'local' and 'international' identity. She suggests that as much as the acts that are associated with the conflict matter the location of these acts are just as important for international feminists.²⁵⁸ The location of the acts becomes a cause for their existence and 'local' men are classified as sexual perpetrators and women as victims.²⁵⁹ 'International' women and men are then signified as non-violent, non-rapists.²⁶⁰ This ontological shift produces more consequences, Zarkov notes. By using these signifiers to separate the 'local' and 'international' sexual violence in the conflict is then tied to the 'local'.²⁶¹ This binary elevates the position of the international and dismisses and essentialises the realities of the local. Zarkov has noted that this is not dismissing the

²⁵⁴ Chinkin, 'Rape and Sexual Abuse of Women in International Law' (1994) 327.

²⁵⁵ *ibid* 327-328.

²⁵⁶ Charlesworth (n 245) 223.

²⁵⁷ Chinkin (n 254) 328-329.

²⁵⁸ Zarkov (n 8) 10, 11.

²⁵⁹ *ibid*.

²⁶⁰ *ibid*.

²⁶¹ *ibid*.

cultural or ethnic impact, rather it displays the need to understand the impact of such sites and not their use as an excuse. Local and international identities should not be definitively defined and their use goes against a very different feminist desire, to break through these dichotomies that often carry gendered implications. Through use of clear delineations within the local context of masculine and feminine identities, little room is left for the rarely discussed male victims and female defendants. Assumptions about culture and the lived experiences of women were accepted in order to make gains in sexual violence jurisprudence.

5. Conclusion

Due to the work of the ICTY and Western feminist interventions, women's roles in armed conflict have become overwhelmingly understood through the experiences of women as victims of sexual violence. The presence of local women within the ICTY remains predominantly as witness or victims, while women from outside the conflict appear as advocates, lawyers, and even judges, creating the binary of international women as saviours and local women as victims. While the ICTY raised awareness of the violence sustained in armed conflict, it has not led to an alleviation of sexual violence in armed conflict. The higher attention paid to women as victims of sexual violence has led to women being characterised before the law based on what is done to their body, as they are seen as sexually vulnerable, rather than what their body does during armed conflict.

In contrast, Plavšić's situation disrupts the assumption that women are always victims in armed conflict. Analysing Plavšić's case illuminates the existence a female leader who chose to perpetrate crimes during armed conflict. However, despite the alternative perspective Plavšić's case establishes, the way her situation was framed by the media and the court support the stereotypical ideals that women are not perpetrators of violence. Therefore, when women are identified as such their situation is either deemed to be less concerning than if a man were to have committed the same acts. Female defendant's actions are either shamed or displayed as a rare aside to the narrative of conflict involving male violence.

Female defendants have been insufficiently acknowledged in mainstream conflict narratives in the FYR. Although the reasons for this do not solely rest with Western

feminist interventions or even a particular aspect of the conflict or tribunal, they do, however, all contribute to a specific understanding of gender within armed conflict. Gender binaries and the acts traditionally associated with gendered roles were reinforced in and around the Tribunal. I have also argued that these gender binaries permeate feminist interventions. Western feminist needed gender binaries when promoting the importance of sexual violence jurisprudence, positioning women as victims was necessary in order to emphasise violence at the hands of men, which had long been disregarded, as was the case in the Nuremberg and Tokyo Trials. Ethnicity and gender identity also become dependent upon each other, which was evident when the ICTY and Western feminists positioned all Bosnian Muslim Women as victims of sexual violence. The intersection of gender and ethnicity becomes only necessary to acknowledge in relation to the violence women sustained.

The focus on sexual violence in the ICTY was bolstered by international media attention and encouraged this narrow view of women's experiences in the FYR. What was overlooked in the armed conflict was the history of the FYR that led to the outbreak of violence, the religious and ethnic divides within the territories, the role of macroeconomic interventions, as well as the biases carried by the actors who engaged with the FYR post-conflict. The climate that resulted was not able to fully acknowledge the presence of women as defendants, who disrupted the narrow binaries already established around the conflict. Even when women were identified as defendants, such as through the prosecution of Plavšić, their stories are filtered back through feminine language and actions. The female body as well as the male body, and gender, were given meaning via temporal space reflective of the political, social, and ethnic surroundings both inside and outside of the FYR.

Engaging in these discussions, around female defendants, often brings up questions about the aim of this work. The critique of sexual violence jurisprudence does not dismiss its importance or suggest less cases of sexual violence should be prosecuted. However, looking at the instances of female defendants not only illuminates the gaps in international criminal law and feminist interventions into international law, but also problematises what questions are asked about a conflict. Examining the FYR, in particular, unfolds just one situation where female defendants have been left out of mainstream conflict narratives, but contributes to a larger and thereby more

representative understanding on the existence of female defendants in international criminal law.

Chapter Five

The International Criminal Tribunal for Rwanda

1. Introduction

The International Criminal Tribunal for the Former Yugoslavia (ICTY) and The International Criminal Tribunal for Rwanda (ICTR) are often spoken of in tandem. With the establishment of the ICTY and ICTR in 1993 and 1994 respectively, it is understandable why the tribunals would be judged comparatively, as they both share a similar timeline and contribution to international criminal law. The Tribunals gave way to the expansion of international criminal law, which had been dormant since World War II,¹ and ushered in a new focus on sexual violence crimes, at the urging of the wider international community. The two Ad Hoc Tribunals relied on one another for advances in sexual violence jurisprudence, as was the case with the *Akayesu* and *Furundžija* trials amongst others.² While some combined successes and similarities exist between the Tribunals, the international analysis in the aftermath of the Rwandan genocide has fostered four predominant themes, unlike those found around the FYR. Namely, the brutality of the conflict itself, the chaos in Rwanda during the genocide and then after as transitional justice mechanisms took shape, local accountability in the violence, and the sheer scale of the violence and number of those involved.³ These themes are repeatedly acknowledged to be a part of the Rwandan genocide narrative, which contributed towards the work and knowledge around the ICTR.

¹ Zacklin, 'The Failings of Ad Hoc International Tribunals' (2004) 541-542.

² Weiner, 'The Evolving Jurisprudence of the Crime of Rape in International Criminal Law' (2013) 1210-1212; See Fabian, 'Proof and Consequences: An Analysis of the Tadic & Akayesu Trials' (2000).

³ See Liebhafsky Des Forges, 'Leave None to Tell the Story: Genocide in Rwanda' (*Human Rights Watch*, 10 April 2014); Bijleveld et al, 'Counting the Countless: Rape Victimization during the Rwandan Genocide' (2009); Moghalu, 'Image and Reality of War Crimes Justice: External Perceptions of the International Criminal Tribunal for Rwanda' *The Fletcher Forum of World Affairs* (2002); Hakata, 'Home Truths by European Journalists' (*New African*, August 2001); Gourevitch, 'After the Genocide When a People Murders up to a Million Fellow-Countrymen, what does it mean to survive?' (*The New Yorker*, 18 December 1995); Thompson (Ed.), *The Media and The Rwanda Genocide* (2007); Straus, 'How many Perpetrators were there in the Rwandan Genocide? An estimate' (2004).

United Nations sources detail that within the 100 days of the genocide in Rwanda, 7 April to 19 July 1994, between 800,000 to 1 million people died.⁴ The ICTR website states that the rate of killing was four times greater than the Nazi Holocaust.⁵ However, these figures are often referred to in order to make presumptive judgements about the context of the armed conflict. Compared to the armed conflict in the FYR there are differences within the States the conflicts occurred, the way the media reported the events that took place, and in the international community's reaction to the violence. The narratives around the Rwandan genocide and the ICTR, perpetuated a specific type of gender and racial understanding, encouraged by the continual focus on women as victims of violence. Outside of the focus of the international media, feminist intervention, and the ICTR, existed other lived realities of women, women who participated in the Rwandan genocide. While the previous chapter highlighted the focus on sexual violence in the FYR, this chapter will also describe the ways in which the Rwandan genocide was interpreted and therefore understood differently than the conflict in the FYR.

Although, there have been reports on the presence of female defendants and suspects in the genocide, and the ICTR did try and convict Pauline Nyiramasuhuko, it will be shown in this chapter that these instances are embedded within a limiting understanding of gender and race, perpetuated by the heavy focus from the West on women as victims of sexual violence. For example, the way the events of the Rwandan genocide were characterised in the media, often represented a viewpoint of "African savagery".⁶ Female defendants remain in the periphery, concerning stories around the Rwandan genocide and in the ways gender is represented within during conflict, but when stories do surface female defendants are treated along the same lines as the conflict, as both brutal and unlike those who exist in the West. Looking further back in to Rwanda's colonial history offers a means of understanding the system that has shaped how gender and race are conceptualised, and the way these categories are then reproduced onto the ICTR. Examining the representation of female

⁴ 'The ICTR Remembers 20th Anniversary of the Rwandan Genocide', (UNMICT Website) <<http://www.unmict.org/ictr-remembers/>>. However this could be inflated as well.

⁵ 'The Genocide', (ICTR Website) <<http://www.unmict.org/en/genocide>>.

⁶ See Carruthers, 'Reporting War Journalism in Wartime' in *The Media at War* (2011).

defendants in Rwanda and the ICTR, allows wider conclusions about the conflict and global inequalities to be understood.

This chapter will analyse the Rwandan genocide by detailing how the Western perspective concepts of race, class, ethnicity, and gender are woven throughout the armed conflict and directly linked to Rwanda's colonial past. The Western reaction to the conflict in Rwanda, when scrutinised from the perspective of race, can not only offer insight into the way the genocide is conceptualised in international spaces. This analysis can also shed light onto the armed conflict in the Former Yugoslav Republic, especially considering the misuse and misunderstanding of religious and ethnic identities in and around the ICTY. Establishing this premise from the outset affects the way race and ethnicity are seen as a part of the international reaction, as well as a part of the conflict itself. Themes that occur in historical narratives and media analysis, like the brutality, chaos, and the scale of the violence are grounded in a certain racial perspective, with a comparative understanding of other conflicts. While the scale of violence was far from insignificant, my argument rest with the framing of the genocide as a particular African problem. This is where productions of race can assist the discussion, and Western accounts of the Rwandan genocide become suspect, as they can reproduce oppression likened to Rwanda's colonial era. To be clear, comparing the differences between conflicts are to be expected; however, this chapter will assess whether or not these differences are based upon presumed racial and ethnic bias. The benefit of comparing the two conflicts, in certain aspects, is to explain how bias that manifests itself due to forms of discrimination and to highlight the reasons why certain parts of a conflict are overlooked.

The international focus on the brutality of the violence in Rwanda can also be associated with the way the international community understood the sexual violence perpetrated by both males and females against both males and females. The media highlighted the female victims of sexual violence sustained as a result of the genocide perpetrated by males. Feminist interventions, like in the context of the ICTY, interventions into the ICTR encouraged the inclusion of sexual violence crimes in the tribunal's proceedings. The female victim rhetoric that was evident in the feminist intervention in the ICTY was also apparent in the intervention in the ICTR, as many of the same feminists and advocates worked with both Tribunals. The unified efforts

around feminist intervention in the Tribunals is another reason why the ICTY and ICTR are often viewed in conjunction in the literature.

The language used to define gender within the context of Rwanda confines women to victims of sexual violence. The upholding of femininity and the connection of sexual violence, to what it means to be a woman, is deeply embedded within Rwanda's colonial past, and the colonisers encouragement of ideal female qualities.⁷ In the Rwandan context, as opposed to the Former Yugoslavia, the inclusion of women as defendants is more widely acknowledged within feminist scholarship; yet, female defendant's presence in the international courts remains just as minimal as in the ICTY, with one woman tried. I will argue that the higher prevalence of female 's defendants in texts on the Rwandan genocide is grounded in narrow racial understandings. Pauline Nyiramasuhuko, the former head of the Rwandan Women and Children Affairs, was tried for multiple crimes, including the perpetration of rape, something never before attributed to a woman on an international context in the ICTR. Women, including Pauline Nyiramasuhuko, Valerie Bemeriki, Agnes Ntamabyariro, and Rose Kabuye,⁸ amongst others held positions of power in the government as well as positions of combatants in the military groups. Despite this, on an international level, and in mainstream legal discourse, the representation of women in the Rwandan genocide remains limited to victims of sexual violence, as was the case in the ICTY.

The dissection of race and ethnicity also influence the way female defendants are understood in Rwanda. Tying women's participation in the genocide to their ethnic identity limits the autonomy of female defendants. Ethnic hatred did not serve as the sole reason why women participated in the genocide, as this removes women's agency. If women in Rwanda are seen to have participated in violence solely due to ethnic hatred, then the understandings garnered around female defendants remain tied to the Rwandan genocide or to conflicts that mirror the same perceived level of

⁷ See Buscaglia and Randell, 'Legacy of Colonialism in the Empowerment of Women in Rwanda' (2012).

⁸ Rose Kabuye, a former officer in the RPF, was indicted in a French court for her alleged participation in the shooting down of the plane that carried President Juvenal Habyarimana. The charges were dropped in 2009.

brutality. This would assume that the female defendants in the Rwandan genocide are an irregularity related to Rwanda alone.

This thesis recognises that the women who participated in the Rwandan genocide do have unique experiences that relate to an intersection of identities of race, ethnicity, class, and gender. From a wider perspective, examining female defendants in the Rwandan genocide can aid in the way women are understood to participate in armed conflict. Acknowledging the existence of female defendants, adds to the nuance to our understandings of women's roles in armed conflict and contributes to greater understanding of structural biases within international criminal law and Western feminists discourse. However, I argue if the women who participated in the Rwandan genocide are seen as being particular to an ethnic conflict within Africa, then their presence does not encourage a better understanding of female defendants in all armed conflicts. Moreover, it further solidifies the women involved in the Rwandan genocide as an abnormality of women's roles in armed conflict.

This chapter will develop the elements discussed in this introduction as a way to describe the Rwandan genocide and identify the surrounding environment that influences the way female defendants are recognised. The second section in this chapter will briefly describe the history behind the conflict and international media coverage around the Rwandan genocide. The third section will detail the ICTR as well as the media characterisation of Nyiramasuhuko. This section will also examine female defendants found in local justice processes. The fourth section will analyse the feminist response to the ICTR as well as the work on female defendants in the Rwandan genocide. Section four will closely scrutinise race and gender in the ICTR and within Western feminist interventions. Primarily, this will focus on the way race and ethnicity has influence the ICTR and the writings around the Tribunal, unpacking the themes that continually reappear in work around the genocide. This chapter contributes to the larger thesis by interrogating the international media and international legal community's racialised understanding of the Rwandan genocide, which influences the way female defendants are understood.

2. Colonialism, the Rwandan Genocide and Media Representation

Ethnic divisions and hatred dominated the international focus of the armed conflict and influenced the stories and headlines of new reports.⁹ However, Western audiences knew little about Rwanda's colonial past or the ongoing civil war. The Hutu, Tutsi, and Twa speak the same language, share cultural practices, they are not representative of different races, and have coexisted in the same communities.¹⁰ However, the distinctions between the groups were highlighted with the spread of colonialism. The Hutus largely focused on agriculture while the Tutsis herded cattle and often were better represented politically at the bequest of colonisers.¹¹ Belgian colonisation of Rwandan society was organised on the bases of a class system, a hierarchy of Tutsi, then Hutu, and Twa hunter and gatherers, which did not always run smoothly.

This was exacerbated with rebellions by Hutus was often brought about by severe exploitation of the lower classes as different Tutsi kings or *mwami* came to power.¹² However, the difference in class was not founded on the basis of ethnicity.¹³ It was with the division of lands during colonialism that brought the West in as colonial rulers, which cemented the idea that the distinctions between the groups was based upon the Hutu, Tutsi, and Twa being different races. Bornkamm states that the German colonisers believed the Tutsi to be superior, closely related to Europeans through facial features, and began supporting the Tutsi as the superior 'race' aligning themselves with the ruling class.¹⁴ After the German defeat in World War I, Rwanda-Urundi was controlled by a League of Nations mandate under Belgian rule.¹⁵ This change in coloniser reinforced the Tutsi as superior, and through Belgium's rule, compulsory labour was forced upon the Hutus.¹⁶ Identity cards became necessary to discern each individual's 'race', as either Tutsi, Hutu, or Twa.¹⁷ As described in the ICTR court proceedings, the difference between the Hutus and Tutsi was blurred,

⁹ Wall, 'An Analysis of News Magazine Coverage of the Rwandan Crisis in the United States' in Thompson (Ed.) *The Media and the Rwanda Genocide* (2007) 265.

¹⁰ See Bornkamm, *Rwanda's Gacaca Courts between Retribution and Reparation* (2012) 9.

¹¹ *ibid.*

¹² *ibid* 9-11.

¹³ *ibid* 10.

¹⁴ *ibid* 10, 11.

¹⁵ *ibid* 10, 33.

¹⁶ *ibid* 17.

¹⁷ *Ibid* 10.

through marriage or wealth one could change their status.¹⁸ The colonisers, first German, then Belgian, aligned with the Tutsi due to the belief that they shared physical similarities and began to rule by instilling meaning to supposed racial difference.¹⁹ Keeping these aspects of the Rwandan colonial past in mind is important when deciphering the events that unfolded during the armed conflict and as Rwanda began to decolonise tensions continued to rise. In 1956 Belgium setup elections to choose new local organisation members and during this the Tutsi tried to sustain their power.²⁰ After realising the Hutu boasted the majority population, evidenced by groups voting along ethnic lines, unrest increased and so did the continual shifting in ruling bodies between majority groups of Hutu and Tutsi.

Colonialism is also implicated in the Rwandan genocide. Akpome states that Rwanda's colonial past created the groundwork for the genocide and not the impetus.²¹ Akpome does not suggest colonialism is in anyway removed from blame, instead highlights the identities that were created, an essential part of the genocide, were embedded in socio-political constructs.²² Akpome refers to Mamdani's work which details how constructed identities of indigenous peoples were reinforced through discriminatory narratives perpetuated by colonial rule.²³ Mamdani also discusses the narrative of victimhood present in Rwanda's colonial past stating,²⁴ "ever since the colonial period, the cycle of violence has been fed by a victim psychology on both sides."²⁵ This victimhood had led to a cycle that produces perpetrators who were also victims.²⁶ Within this cycle was a pattern of destructive behaviour that consistently reiterated the ethnic superiority of the Tutsis; these narratives were cited to have contributed to the psychology of the genocide.²⁷ The Belgian introduced identity cards were just one of the ways the colonial era reinforced

¹⁸ *Prosecutor v. Akayesu*, (Trial Chamber Judgement), ICTR-96-4-T (2 September 1998) para 80, 81.

¹⁹ *ibid* para 82.

²⁰ *ibid* para 87.

²¹ See Akpome, 'The Narrative Construction of Identity in Contemporary Rwanda: A Study of An Ordinary Man by Paul Rusesabagina (with Tom Zoellner)' (2014).

²² *ibid*.

²³ *ibid* 96.

²⁴ Mamdani, *When Victims become Killers: Colonialism, Nativism, and the Genocide in Rwanda* (2002) 267.

²⁵ *ibid*.

²⁶ *ibid* 267, 268.

²⁷ Akpome (n 21) 202.

divisions; however, despite the existence of different constructed categories the importance of agency and the fluidity of these categories is important to note.²⁸

Much like the colonial project of distinguishing between different groups of individuals, there was a desire by the West to distinguish who the aggressors were in the armed conflict. Mamdani's work highlights the necessity of understanding victims and violators not as separate entities, but capable of existing within one individual. Likewise I have argued, the disrupting of the binary of victim/violator is necessary in order to see women as capable of perpetrating crime. Furthermore, the work of international criminal law has reinforced the category of victimhood in relation to women's experiences in armed conflict. Conversely, the promotion of women in both Hutu and Tutsi populations, due to economic or educational access, allowed women like Pauline Nyiramasuhuko, Agnes Ntamabyariro, Valerie Bemeriki, and Rose Kabuye to commit crimes. Each of these women had accesses to power through their elite status. This is not to suggest that being a member of the elite also shielded them from experiencing possible harm based on their gender or ethnicity. However, it does highlight that the identity of a women is fluid and multiple, signalling the link between being both a possible victim and a possible perpetrator, as well as the complex relationship between leadership, gender, race, ethnicity, and class.

The constructed categories, such as Tutsi versus Hutu or victim versus violator, establish a hierarchy and encourages a power structure that influenced the lived realities of the women and men in Rwanda.²⁹ Mamdani details the colonial definition of a "native", as "an ethnic being" who is the product of a patriarchal rule.³⁰ The link between colonialism and patriarchy relates not only to the way the colonial and post-colonial Rwandan society views gender, but the way gender is understood during and after armed conflict. Burnet details the importance of women and female labour in Rwandan society in pre-colonial and colonial times despite the influence women held in the family and within their patrilineage as daughters, which allowed an increase of

²⁸ *ibid* 203.

²⁹ Mamdani (n 24).

³⁰ *ibid* 31.

power and often land rights.³¹ The colonisation of Rwanda also encouraged men to enter the monetary driven economy.³² This push decreased women's rights and strengthened patriarchal control in Rwanda.³³ Instead of understanding the structure of precolonial Rwanda society, with a special attention to gender relationships, colonisers sought to remake Rwanda in the image of a Western society.

The elevation of a female ideal in colonial times was also equally apparent in the colonial mission. Buscaglia and Randell discuss "female promotion" in colonial Rwanda.³⁴ When Belgium colonised Rwanda they introduced initiatives to improve the position of women in society. As a result, women's roles in Rwanda was dramatically harmed by the emergence of colonialism.³⁵ Colonisers sought to empower women, while at the same time significantly altered Rwandan society to advantage men and encouraged an economically based patriarchal society.³⁶ The specific "empowerment" of women that the colonisers supported was designed to create a more fully developed concept of femininity in Rwanda.³⁷ Buscaglia and Randell identify issues with the Belgium expression of "female promotion", as it assumed there was an ideal standard of femininity that is possible to attain.³⁸ Women in colonial Rwanda were taught to make dresses and clothes, clean their homes, iron, cook family meals, launder clothes, and to be the moral cornerstones of the family, role models to their children and husbands.³⁹ Rwandan women were taught domestic duties, as those who supported the colonisers mission purported that they could free women from an oppressive traditional culture.⁴⁰ Buscaglia and Randell stated that "female promotion" was a key part of colonial social control and aligned with the European ideal of a proper family structure.⁴¹

³¹ Burnet, 'Situating Sexual Violence in Rwanda (1990–2001): Sexual Agency, Sexual Consent, and the Political Economy of War' (2012).

³² *ibid* 101.

³³ *ibid*.

³⁴ See Buscaglia and Randell, 'Legacy of Colonialism in the Empowerment of Women in Rwanda' (2012).

³⁵ *ibid* 69.

³⁶ *ibid*.

³⁷ *ibid*.

³⁸ *ibid*.

³⁹ *ibid* 71, 72.

⁴⁰ *ibid* 72.

⁴¹ *ibid* 73.

The act of colonising the women of Rwanda imposed specific ideals of gender roles, and indicated the importance of what are considered to be ‘proper’ female tasks. This reordering of gender also diminished the value of traditional culture and societal make-up. Furthermore, the act of civilising and indeed imposing new gender relations positions the civilised against the uncivilised. When the coloniser reimagines definitions of what a Rwandan female should be, it is evident that any derogation of those characteristics would be deemed uncivilised. It is then that links between femininity, race, and colonialism become apparent. It is from this perspective, where the female perpetrator in the Rwandan genocide remains outside of the history of the armed conflict.

Through reimagining Rwandan gender roles, colonialism positioned Rwandan women as in need of being saved, this rhetoric can be seen within the US radical feminist intervention in the ICTR where women are viewed as victims in need of assistance almost as if colonial mindset continued. While one could argue that after armed conflict women are in special need of assistance, I argue that the problems that result from positioning women as always already in need of aid relegates women to powerless positions incapable of displaying agency within armed conflict. Therefore, female defendants are not readily recognised as a part of the genocide’s history. The legacy of colonial mindset also distance the women in Rwanda from the perception of leadership capability. The presumption that women in Rwanda needed to be reimagined in the Western ideal also limits that presumed ability for Rwandan women to access realms of power in what was considered to be an uncivilised and tribal culture by the West. After the genocide, women are expected to step into leadership roles in Rwanda, as indeed they have. Little discussion of how women’s leadership, at least amongst elites, exists before and during the genocide.

After years of violence, with a civil war beginning in 1991, and continued political unrest, on 4 August 1993 the Rwandan Government signed the Arusha Accords that ended the war which began in October 1990.⁴² Despite the accords the political tension continued, propaganda from the government permeated the social climate, as

⁴² *ibid* 102.

well as assassinations of key political and government figures, all with Rwanda close to bankruptcy.⁴³ Then on April 6th 1994 President Juvénal Habyarimana of Rwanda and President Cyprien Ntaryamira of Burundi, returning from a meeting in Dar-es Salaam to discuss the implementation of the Arusha Accords, were killed in an airplane crash at Kigali airport.⁴⁴ Many deemed the plane crash an assassination and accused opposite party leaders of the deaths of Rwanda and Burundi's presidents. Others accused Hutu extremists, for causing the incident in order to ignite further hatred.⁴⁵ Afterwards, roadblocks were set up by the Rwandan Army around Kigali and by 7 April mass violence and killings began in Kigali and soon spread throughout the country.⁴⁶

The Rwandan genocide refers to a very specific period beginning after the plane crash and extending for 100 days. Despite the ongoing armed conflict, the ICTR, as well as global interest, focused only on the 100 days of the genocide and not the overarching conflict. A few of the earmarks of the conflict have been the high amounts of sexual violence as well as the use of the Rwandan media to spur, primarily, the killing of Tutsi and moderate Hutus. Yanagizawa-Drott's research on the role of media in the Rwandan genocide shows that broadcasts encouraging the killing of Tutsis had a significant effect on civilian citizens as well as the military.⁴⁷ This data even went so far as to show how a single popular radio station spurred around 51,000 perpetrators, accounting for 10% of the conflicts overall violence.⁴⁸ However, numbers like these have very little way of being proven. Not only would one need to interview each perpetrator to see exactly what spurred their killing or taking part in the violence, but this line of thinking ignores the other factors that would have lead someone to participate, such as fear for their own lives and family or peer pressure and so on.

While the broadcasts had the ability to influence the attitudes that contributed to the violence, I argue that one cannot use the *Media Case* as a way to judge all Rwandans.

⁴³ *ibid* 102, 105.

⁴⁴ *ibid* 106.

⁴⁵ 'Rwanda inquiry concludes Hutus shot down President's Plane' (*The Guardian*, 12 January 2010).

⁴⁶ *Akayesu Case* (n 18) para 107.

⁴⁷ See Yanagizawa-Drott, 'Propaganda and Conflict: Evidence from the Rwandan Genocide' (2014); *Prosecutor v Nahimana et al* (Appeals Chamber Judgement) ICTR-99-52-A (2007).

⁴⁸ Yanagizawa-Drott (n 47) 18.

To assume that the media can influence someone who had no intention of participating, but would hear a broadcast and then immediately take up arms, denies the people of Rwanda a great deal of agency and intellect. However, one cannot deny the ‘power of words’ as Judge Pillay discussed in the judgement of the *Media Case* before the ICTR. The use of words to inspire and encourage hatred is not unique to Rwanda,⁴⁹ but the judgement of an international tribunal that recognised the influence of words is significant as it points to the media as an important agent in society that should bear responsibility for its misuse of power. Similarly, I argue that the international media also carries great power in its ability to shape the understanding of an armed conflict. The international media attention around the Rwandan genocide also significantly shaped the narrative of the armed conflict, indicating to viewers that Africa was a place of brutal tribalism. The US and UK media produced an understanding about the genocide that focused the scale and magnitude of the violence. The sexual violence portrayed in the international media solidified the binaries of victim and perpetrator.

Sexual violence was perpetrated on a mass scale with Hutu militia groups, Interahamwe, and Rwandan Armed Forces bearing the biggest blame, along with sexual violence perpetrated by ordinary citizens. Sexual violence was argued to have been perpetrated as a part of a larger plan of Tutsi destruction.⁵⁰ The sexual violence was often perpetrated by multiple people at a time, with foreign objects, after other violence and torture, and on the young and old alike.⁵¹ Women who were raped often had just witnessed the death or torture of loved ones.⁵² Social stigma was another element that added to the desirability of rape against both men and women.⁵³ This is where analysing the intersection of gender helps in understanding sexual violence in this context. Rape was seen as a social stigma, but that was not restricted to men trying to harm women in this way. During the Rwandan genocide women perpetrated rape against both women and men and men against both women and men. Much of the sexual violence sustained by women during the genocide can be tied to their

⁴⁹ See Herf, *The Jewish Enemy: Nazi Propaganda during World War II and the Holocaust* (2006).

⁵⁰ See Nowrojee, ‘Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath’ (1996).

⁵¹ *ibid.*

⁵² *ibid.*

⁵³ *ibid.*

reproductive ability, which was a source of power for women in pre-colonial Rwanda, as well as the perceived superior beauty of Tutsis instilled by colonisation.⁵⁴ Rape during the genocide was used a tool and a means to affect not only the lives of the women themselves, but their families, husbands/men, and society as a whole.⁵⁵ In this way sexual violence is clearly identified as part of a power structure, a gendered hierarchy within the society, where women's bodies are tied to the production of the State. Therefore, rape, which has the potential to produce children is essential as it would bolster the ethnicity of those who committed sexual violence. The destruction of an ethnicity through rape is based on an extremely gendered view of ethnicity, which would pass from the father and not the mother. Colonialism is then reproduced within the way the violence was carried out during the genocide and again with international justice mechanisms.

Misinterpretation of the armed conflict in Rwanda influenced the stories and headlines of global news reports.⁵⁶ Much of the conflict at the beginning remained unknown to Western audiences, especially in the United States, irrespective of the fact that the war began over a year earlier than the armed conflict in the FYR. Audiences were more familiar with the political and historical circumstances that lead to the armed conflict in the FYR. Despite the media shift from disinterest with regard to the Rwandan conflict to intense scrutiny of sexual violence victims, international audiences knew little about Rwanda's history. Dallaire stated that early on the news reports of the genocide did not make it to the public, as editors choose to instead focus on local US issues.⁵⁷ Dallaire recalls that once news of 'mass killings' spread reporters began coming in and out of Rwanda in mass.⁵⁸

Media reports then became centred on descriptions of excessive violence and brutality, which distance Rwanda from 'civilised' viewers, as well as shaped the way people involved in the Rwandan genocide are seen and understood. The international

⁵⁴ Burnet (n 31) 109.

⁵⁵ *ibid.*

⁵⁶ Caplan, 'Rwanda: Walking the Road to Genocide' in Thompson (Ed.) *The Media and the Rwanda Genocide* (2007) 32.

⁵⁷ Dallaire, 'The Media Dichotomy' in Thompson (Ed.) *The Media and the Rwanda Genocide* (2007) 14.

⁵⁸ *ibid* 15.

media has continually overlooked Africa or when they do report, do so with limited attention to specific topics, as was the case with Rwandan genocide,⁵⁹ and the work of the ICTR. Establishing the way the media responded to the genocide in Rwanda is necessary as it underscores the international perception to the armed conflict, with regard to the sexual violence perpetrated and the embedded racial aspects evident in the initial disinterest to the more graphic news headlines and reports. Each aspect of the international media response contributes to a climate that reinforced gender roles in perceptions of the conflict and subsequently the manner female defendants are analysed in relation to the armed conflict.

Much like the media framed the armed conflict in the FYR, the media also influenced the perception of the genocide in Rwanda. Myers, Klak, and Koehl have described the differences in the reporting on the conflicts in Rwanda and the FYR as being told through two different 'frames'.⁶⁰ For example, as Myers, Klak, and Koehl have analysed, on April of 1994 *The New York Times* reported that Rwanda's conflict was 'tribal warfare'⁶¹ while the FYR was "everyone's war".⁶² The media went further, using terms such as "bloodthirsty", "savage", "gangs", "orgy", and "terror" to describe Rwanda suggesting that the conflict was not sophisticated, but embroiled in a primal type of battle.⁶³ The FYR was instead seen by the media and in turn audiences as a strategic conflict involving the use of military tactics.⁶⁴ Many reports indicated that the Rwandan conflict was simplistic, Hutu against Tutsi, with Tutsis seen as good and Hutus as evil.⁶⁵ In the UK, Holmes stated that the media failed to differentiate between the RPF and government fighting on the front lines as well as the systematic killing taking place behind the frontline.⁶⁶ The media coverage in the US and UK

⁵⁹ See Carruthers, 'Tribalism and tribulation: media construction of "African savagery" and "Western humanitarianism" in the 1990s', in Allan and Zelizer (Eds.) *Reporting War: Journalism in Wartime* (2004).

⁶⁰ Myers et al, 'The Inscription of Difference: News Coverage of the Conflicts in Rwanda and Bosnia' (1996) 22.

⁶¹ McFadden, 'Western Troops Arrive in Rwanda to Aid Foreigners' (*The New York Times*, 10 April 1994).

⁶² Kifner, 'The World; Through the Serbian Mind's Eye' (*The New York Times*, 10 April 1994).

⁶³ Myers et al (n 60).

⁶⁴ *ibid.*

⁶⁵ Carruthers (n 59) 164.

⁶⁶ Holmes, *Women and War in Rwanda: Gender, Media and the Representation of Genocide* (2013) 130.

created indifference about the conflict; the term ‘CNN effect’, was used to acknowledge that the media has the ability to influence government policy.⁶⁷

The US and UK media, perpetuated misunderstandings and fostered disinterest in the genocide. Mamdani, stated that the international response to Darfur was done to remedy the lack of response in Rwanda, even when the two conflicts were nothing alike.⁶⁸ As the genocide continued UK media began highlighting the sexual violence against women during the Rwandan genocide affirming assumptions around brutality and savagery.⁶⁹ Wall writes on Rwandan genocide media coverage in the United States, stating that the vivid language used in news reports encouraged the view that the armed conflict was ‘brutal tribalism’.⁷⁰ Wall reiterates the words used by the US media when referring to the genocide, words like ‘ethnic’, ‘slaughter’, ‘carnage’, and ‘tribal’.⁷¹ This positions international audiences as different from those involved with the Rwandan genocide.

Since Raphael Lemkin coined the term ‘genocide’ to refer to Nazi politics and practice, the study of genocide has developed and evolved with the new understandings garnered from different conflicts.⁷² While genocide existed long before WWII, much of the early academic research is based around the Holocaust.⁷³ While many scholars seek to move beyond the Holocaust as a benchmark to judge all other mass killings against, many still find that the Holocaust lingers as representation of what is ‘genocide’.⁷⁴ Moses states that genocides are not all similar, but there are certain elements that occur commonly, albeit in different ways.⁷⁵ This thesis is concerned with the cultural and racist presuppositions that enter into the work of Western scholars when they relate and describe mass killing, especially in the

⁶⁷ *ibid.*

⁶⁸ Mamdani, *Saviors and Survivors: Darfur, Politics, and the War on Terror* (2010) 6-8, 22.

⁶⁹ Holmes (n 66) 69, 189.

⁷⁰ Wall, ‘An Analysis of News Magazine Coverage of the Rwandan Crisis in the United States’ in Thompson (Ed.) *The Media and the Rwanda Genocide* (2007) 265.

⁷¹ *ibid.*

⁷² See Ferrara, ‘Beyond Genocide and Ethnic Cleansing: Demographic Surgery as a New Way to Understand Mass Violence’ (2015); Moses, ‘Revisiting a Founding Assumption of Genocide Studies’ (2011).

⁷³ *ibid.*

⁷⁴ Moses, ‘Paranoia and Partisanship: Genocide Studies, Holocaust Historiography, and The ‘Apocalyptic Conjuncture’ (2011) 554.

⁷⁵ Moses (n 72) 297.

Rwandan context. Moses also writes that there should not be a strict adherence towards comparing contemporary situations to the Holocaust.⁷⁶ Moses quotes Weber while encouraging others to uncover a true account of events saying, ‘uncomfortable facts and the stark reality of life’ are truly important to represent when detailing a genocide.⁷⁷ In the case of the Rwandan genocide ‘uncomfortable facts’ would include the existence of female defendants, which have only rarely entered the mainstream discussion around the conflict or remain a cautionary tale, in the case of Pauline Nyiramasuhuko, or as a way to shame women for engaging in the genocide. This shame is not because they committed crimes, but because they are women who committed crimes and somehow their gender is assumed to create more guilt.

The way gender is represented in the Rwandan genocide is not necessarily from a factual standpoint, but embedded within limiting gendered and racial ideals. When the Rwandan genocide is described using terms such as brutal, savage, and chaotic, it is distanced from the Holocaust and other genocides which are often described as orderly and exact.⁷⁸ These descriptive words also distance the Rwanda context from ‘civilised’ viewers when used by international media outlets, as well as shaping the way people involved in the Rwandan genocide are seen and understood. The Western media highlighted the sexual violence against women in the Rwandan genocide and coupled these descriptions of brutality and savagery. When the international media does report on Africa they do so with limited attention to detail, as was the case with Rwanda.⁷⁹ Western media outlets continually offer reports, which tend to reproduce colonial biases. The accounts of Africa as a place of mystery and tribalism has long plagued the States within the continent,⁸⁰ and despite this clearly biased and far removed account it is a dominant narrative deployed by those seeking to create a certain limited image or provoke a specific understanding.

When looking deeper into the characteristics around genocide, certain elements are distinct, as Moses stated, these elements are present regardless of the presumed

⁷⁶ Moses (n 74) 556.

⁷⁷ *ibid.*

⁷⁸ Holocaust is an example of ‘orderly’ genocide.

⁷⁹ Carruthers (n 59).

⁸⁰ See Ferguson, *Global Shadows: Africa in the Neoliberal World Order* (2006).

assumptions made around the nature of the Rwandan conflict. Namely that genocide is a highly orderly process, despite what seems like an unruly chain of events, the killing of a specific group takes leadership and thorough forethought.⁸¹ Stokes and Gabriel state that genocide requires multiple elements in order to sustain mass killing.⁸² Genocide needs bureaucratic cooperation, technology, and is embedded with its own cultural values.⁸³ It needs a military force, intelligence, as well as informal networks of communication and groups that contribute to the core goal.⁸⁴ Stokes and Gabriel go on to explain that genocide is extremely controlled; aside from the killings themselves which need to be executed, resources must be available with people instructed to carry out certain tasks.⁸⁵ Even the act of killing has elements of organisation, people need to be gathered and bodies need to be dealt with afterwards.⁸⁶ Female participation in the planning and execution of genocide also denotes the leadership capacity of women in Rwanda and negates Western assumptions around the lack of female leaders in Rwanda.

The Rwandan genocide was highlighted by the media in distinct ways, depictions focused upon: the brutality of the conflict itself, the chaos during the genocide and then after as justice mechanisms took shape, and the sheer scale of the violence and number of those involved. This tends to invoke a picture of disorganisation and purposelessness. The ICTR was also influenced by the media characterisation of the genocide, Mamdani refers to the submission to the Tribunal from Africa Direct, which summarised articles written in *Living Marxism*, from 1995 and 1996, stated the conflict was not genocide, but a ‘scramble for survival [...] in the economic wastelands of Africa’.⁸⁷ This, Mamdani argues, is indicative of the misunderstanding of the conflict, and the reason Africa Direct is seen as relevant is because this is just one example of a NGO who is directly informing the Tribunal, having the power to

⁸¹ See Moses, ‘Genocide and the Terror of History’ (2011).

⁸² Stokes and Gabriel, ‘Engaging with Genocide: the Challenge for Organization and Management Studies’ (2010) 1.

⁸³ *ibid.*

⁸⁴ *ibid.*

⁸⁵ *ibid* 3.

⁸⁶ *ibid.*

⁸⁷ Mamdani (n 24) 5, 202; ‘Lessons from Rwanda, Africa Direct Discussion Paper No 1’ (September 1995); This submission sums up several articles on Rwanda that appeared in the London-based periodical, *Living Marxism*, December 1995 and March 1996.

speak with authority on an armed conflict while also misunderstanding the conflict.⁸⁸ Moreover, the Rwandan genocide was extremely well thought out and efficient. Any armed conflict along these same parameters that involves a large number of people following a specific mindset, requires a considerable amount of planning and organisation. Stokes and Gabriel also point out that within the organisation, planning, and management of genocide, issues of power and hierarchy also play a role.⁸⁹

Conceptions of power and a hierarchy amongst State manifested in Rwanda, evident when neighbours turned against each other. Stokes and Gabriel use Blok and Freud's work to link the fact that groups, like the Hutus and Tutsi, who lived next to and with one another can perpetrate violence against one another.⁹⁰ This large scale killing is seen as a way of re-establishing a group's identity.⁹¹ Identity in the Rwandan case is shaped by the colonial and post-colonial process of separation of Hutu, Tutsi, and Twa through identity cards, as well as favouritism in political roles by both German and Belgian governments.

The Rwandan genocide was discovered to have been planned months in advance, despite what seemed like a random and spontaneous outbreak of violence.⁹² A Human Rights Watch document detailing the Rwandan genocide, points out that long-term structural elements as well as immediate decisions created an environment that was ripe for genocide.⁹³ A "civilian self-defense system" was used in order to encourage people to kill Tutsi and moderate Hutus.⁹⁴ Tutsis were defined as the 'enemy' and it was believed that all Tutsi were unified behind the concept of Tutsi hegemony.⁹⁵ Not only was there an armed element of the conflict, but it was also an administrative and political task that utilised the organs of the state.⁹⁶ The reasons behind the genocide

⁸⁸ Simons and Crawford, 'Rwanda: the Great Genocide Debate' (*Living Marxism*, March 1996).

⁸⁹ Stokes and Gabriel (n 82) 5.

⁹⁰ *ibid* 9.

⁹¹ *ibid*.

⁹² See 'The Rwandan Genocide: How it was Prepared' (*Human Rights Watch Briefing Paper*, April 2006).

⁹³ *ibid*.

⁹⁴ See 'The "Organization of Civilian Self-Defense" Document' in *The Rwandan Genocide: How it was Prepared* (*Human Rights Watch Briefing Paper*, April 2006).

⁹⁵ See "Definition of the Enemy" in *The Rwandan Genocide: How it was Prepared* (*Human Rights Watch Briefing Paper*, April 2006).

⁹⁶ *ibid*.

were not based upon hatred of the Tutsi population for its own sake or an intense amount of fear, but rather entrenched in the legacy of colonial rule, poverty, scarcity of land, the ongoing war, and the use of multi-party politics.⁹⁷ As detailed above the use of gender as a tool during colonialism underscored the differences between the civilised and uncivilised, or rather the coloniser and the colonised. Embedded within this is the colonial ruling elite's elevation of one ethnic group, which also promoted an understanding of class relations within the society that favoured Tutsi.

Colonialism shaped the gender relations in Rwanda as well as ethnicity, both of these factors in turn have contributed towards the way women are perceived in armed conflict. Furthermore, the experiences women are expected to have during armed conflict are limited to stereotypical feminine characteristics that were promoted during colonialism. Through examining the background colonial Rwanda and establishing its connection to the separation of so-called difference which was a predominant element of the armed conflict, it is then possible to see the connection to the way gender was understood during the armed conflict, after as international justice mechanisms took place, and when attempting to discern the existence of female defendants.

3. International Criminal Tribunal for Rwanda and the Status of Women

This section will first detail the work of the ICTR, focusing on the prosecution of sexual violence crimes. The case of Pauline Nyiramasuhuko will then be analysed, highlighting the way her gender was perceived by the international media and academics. Nyiramasuhuko position as a female leader will also be examined. This section will end with a discussion of the Western feminist intervention in the ICTR. While Nyiramasuhuko's case did garner international attention, the hypervisibility of the sexual violence against women remained the dominant narrative of women's experiences in the Rwandan genocide.

3.1 The ICTR and sexual violence

The ICTR was established to address the genocide and serious breaches of international humanitarian law grave breaches of international humanitarian law that

⁹⁷ *ibid.*

occurred during the Rwandan genocide. Discussing the ICTR underscores the climate of criminal justice that influenced the ways in which gender, race, class, and ultimately how female defendants are addressed in international law and by the international community. Identifying that the situation in Rwanda constituted “a threat to peace and security” and determining that prosecuting those who violated international humanitarian law would aid in restoration of peace and the reconciliation amongst those affected, the UN Security Council created the ICTR in 1994.⁹⁸

The ICTR was the first international court to convict persons responsible for genocide, rape as a crime against humanity, and to include rape as an instrument of genocide, as described in the *Akayesu* case.⁹⁹ The term rape was defined in international criminal law for the first time as, “a physical invasion of a sexual nature under circumstances which are coercive.”¹⁰⁰ Ericksson states that while international law has long prohibited rape, there still was not a definition of ‘rape’ in international law until the work of the ICTR. Sexual violence was also defined in the *Akayesu* case as, “any act of a sexual nature ... under circumstances which are coercive”.¹⁰¹ However, despite the jurisprudence on crimes of sexual violence, the ICTR failed to capitalise on the success of the *Akayesu* judgement and the gender jurisprudence outside of the *Akayesu* case has been far from adequate, considering how common sexual violence was during the armed conflict.¹⁰² Askin also notes that there was very little effort by the Prosecutor’s office to investigate the allegations of sexual violence.

The ICTR also contributed to gender crimes in other, less direct, ways.¹⁰³ Askin notes that judges would often discuss crimes of sexual violence in the judgements of trials that did not include crimes of a sexual nature in the original indictment, this can be seen as a way of keeping sexual violence crimes in the jurisprudence.¹⁰⁴ In the *Kayishema* and *Ruzindana* case, although the indictment did not include sexual

⁹⁸ Statute of the International Tribunal for Rwanda, adopted by Security Council Resolution 955, U.N. Doc. S/RES/955 (1994).

⁹⁹ *Akayesu Case* (n 18)

¹⁰⁰ *ibid* para 598.

¹⁰¹ *ibid*.

¹⁰² Askin, ‘Gender Crimes Jurisprudence in the ICTR’ (2005) 1007, 1008.

¹⁰³ *ibid*.

¹⁰⁴ *ibid* 1013.

violence, the Trial Chamber did make reference to the rapes committed during the armed conflict and the overarching scale of sexual violence in the genocide.¹⁰⁵ While the ICTR did influence sexual violence jurisprudence it is also important to note that the court has been criticised, as evidenced from the lack of sexual violence in the initial indictments.¹⁰⁶ Charlesworth and Chinkin have stated that the ICTR was much slower to indict individuals for mass rapes than the ICTY, and many felt that the wider genocide in Rwanda would pull the focus from sexual violence crimes, due to its scale.¹⁰⁷

One criticism by feminists was that the ICTR investigators were less than adequate. Nelarva, references Neuffer, who states that the investigators were mostly white males, who had no experience in dealing with these specific crimes, the reference to the investigators appearance was made to illustrate the reason why many women did not feel comfortable talking about their experiences to the investigators.¹⁰⁸ Nowrojee also stated, that case involving rape and sexual violence suffered from many obstacles, which was in direct relation to the investigations taking place, as well as a lack of attention by the prosecutor's investigation on rape and sexual violence, and a lack of communication between the investigation teams and the trial teams.¹⁰⁹

The investigators lacked sufficient training but, not in investigative skills, rather they had no training to elicit information about sexual violence and this noted as having seriously damaged the effectiveness of the investigations.¹¹⁰ Nowrojee has criticised the ICTR for failing rape victims, as the process of international criminal law has, in addition to the failings listed above, caused further anguish and suffering due to the scrutiny of their lives, faced during a trial.¹¹¹ Nowrojee questions if international criminal law is designed to aid justice for victims or if international criminal law was rather for 'international justice'. This thought underscores the normative value placed

¹⁰⁵ *Prosecutor v Kayishema et al* (Trial Chamber Judgement) ICTR-95-1-T (21 May 1999).

¹⁰⁶ Askin (n 102) 1008.

¹⁰⁷ Charlesworth and Chinkin, *The Boundaries of International Law: A Feminist Analysis* (2000) 323.

¹⁰⁸ Nelaeva, 'The Impact of Transnational Advocacy Networks of the Prosecution of Wartime Rape and Sexual Violence: the Case of the ICTR' (2010) 9.

¹⁰⁹ Nowrojee, "Your Justice is Too Slow": Will the ICTR Fail Rwanda's Rape Victims?' (2005) 12.

¹¹⁰ *ibid.*

¹¹¹ *ibid* 26.

on international criminal law and will be revisited in Chapter Seven when assessing the future of international criminal law.

While the prosecution of sexual violence crimes faced multiple struggles and was not to the level it should have been considering the amount of sexual violence within the conflict, it was nevertheless, a central focus of the Tribunal's jurisprudence.

Prosecutors, Richard Goldstone, Louise Arbour, and Carla Del Ponte, had assured that rape and sexual violence would be properly addressed, yet feminists have stated that there was no strategy in place to do so.¹¹² Under Del Ponte, the sexual assault team was dismantled and in an effort to speed up cases some of the charges were eliminated, rape charges were the easiest to remove.¹¹³ What has remained outside of the Tribunal's purview was the crimes women committed during the genocide.

The next section will analyse Pauline Nyiramasuhuko's case before the ICTR. This marked the first women brought before an international criminal tribunal.

Nyiramasuhuko's case also contained charges of sexual violence, which is significant as it was the first time a woman was charged with inciting acts of rape. It is beneficial to discuss the case of Pauline Nyiramasuhuko for two main reasons: first it creates the space for discussion around Nyiramasuhuko's actions and the difficulty people, including news reporters, her family, and even Nyiramasuhuko herself, had reconciling her actions with her gender. Second, it moves the conversation from just an understanding of the biases found within public reaction to Nyiramasuhuko's crimes towards a nuanced understanding of the complexities found when people try to makes sense of a female perpetrator. This, I argue, is not based on merely 'making sense of her gender' or role as a mother in relation to her crimes, but in the case of Nyiramasuhuko has more to do with Western constructions of racial difference and her geographical location in Africa.

¹¹² *ibid* 10.

¹¹³ *ibid* 25 The reasoning behind why rape charges were so easily dropped needs to be examined on a case by case basis. William Fenrick, former Senior Legal Adviser to the Chief Prosecutor of the ICTY, said that the ICTR might have been less concerned with rape and sexual violence seeing as the genocide in Rwanda was overshadowing everything else.

3.2 Pauline Nyiramasuhuko

Pauline Nyiramasuhuko was the Minister of Family and Women's Development in the Interim Government of Rwanda at the time up to her indictment,¹¹⁴ a member of the National Revolutionary Movement for Development, and a political figure in Butare prefecture.¹¹⁵ She was tried in conjunction with her son, Arsène Shalom Ntahobali before the ICTR.¹¹⁶ Nyiramasuhuko's indictment accused her of using a roadblock that was set up near her home to identify, abduct, and kill Tutsi.¹¹⁷ Nyiramasuhuko was also said to have accompanied by her son and other militia, entered the prefecture offices to abduct Tutsi refugees.¹¹⁸ Nyiramasuhuko was accused of encouraging the killing of Tutsi on multiple occasions, and engaged in crimes of a sexual nature, by inciting rape.¹¹⁹

Nyiramasuhuko was indicted with conspiracy to commit genocide, genocide, complicity in genocide, crimes against humanity, and violations of Article 3 common to the Geneva Conventions and Additional Protocol II.¹²⁰ Nyiramasuhuko was also charged with rape as genocide and crimes against humanity, for inciting Hutu men to rape Tutsi women.¹²¹ The charge of crimes against humanity included, murder, extermination, inhumane acts, and persecution on political, racial, or religious grounds.¹²² Nyiramasuhuko was convicted on 9 of the 11 charges.¹²³ She was found guilty of conspiracy to commit genocide, genocide, extermination, rape, and persecution as crimes against humanity, and violence to life and outrages upon personal dignity as war crimes.¹²⁴ Nyiramasuhuko was eventually sentenced to life in

¹¹⁴ *Prosecutor v Nyiramasuhuko and Ntahobali* (Amended Indictment) ICTR-97-21-1 (2001) 4.2.

¹¹⁵ *ibid.*

¹¹⁶ *ibid* section 4.3.

¹¹⁷ *ibid* section 5.1, 6.15, 6.24.

¹¹⁸ *ibid.*

¹¹⁹ *ibid* 6.53.

¹²⁰ *ibid* para 6098, 6099.

¹²¹ *Prosecutor v Nyiramasuhuko* (Appeals Chamber Summary Judgement) ICTR-98-42-A (14 December 2015) 5.8 [hereinafter *Nyiramasuhuko Case*].

¹²² Nyiramasuhuko was also charged for killing and causing violence to health and to the physical or mental well-being of civilians and part of an armed conflict. She was also charged with serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II which included outrages upon personal dignity, humiliating and degrading treatment, rape, and indecent assault.

¹²³ *ibid.*

¹²⁴ *ibid.*

prison, which was later reduced to 47 years imprisonment.¹²⁵ Nyiramasuhuko was the first woman to be tried by an international court and was the first woman ever to be indicted and convicted for rape as a crime against humanity.

Nyiramasuhuko was considered by Prime Minister Kambanda as one of the ‘inner circle’, which was said to have been responsible for organising the genocide,¹²⁶ and was the main instigator of the genocide in Butare.¹²⁷ International news outlets expressed shock as Nyiramasuhuko stood trial; she was described as looking like a “dear aunt” and not a killer, due to her contradictory appearance and dress.¹²⁸ Butler, questions if the use of a perpetrator’s face in the media serves to humanise or dehumanise, as “the face” then becomes representative of a specific frame of understanding about a conflict or military action.¹²⁹ Pointing to Nyiramasuhuko’s appearance, which is supposedly portraying a motherly or nonviolent demeanour, her face becomes a call to all viewers as something to be afraid of, as the Rwandan genocide contained women who, although seemed harmless, were responsible for committing international crimes. Conversely, the media also painted Nyiramasuhuko as a monster and especially highlighted her role as mother standing trial with her son, in order to distance her from the qualities of a ‘true’ woman.¹³⁰ Other reports on Nyiramasuhuko’s role as a woman were centred upon the shame her actions brought to all women, and the exceptional nature of her participation in the genocide.¹³¹ The two qualities, women’s assumptions with regard to biological nature and women’s ability to commit crimes were positioned to be irreconcilable.

News reports, writers, scholars, victims, Nyiramasuhuko herself, and her family all had a difficult time connecting her actions with her being a woman and a mother.¹³² Writers and scholars pointed to sexist notions to explain Nyiramasuhuko’s actions.

¹²⁵ *Nyiramasuhuko Case* (n 126) 48.

¹²⁶ Sperling, ‘Mother of Atrocities: Pauline Nyiramasuhuko’s Role in the Rwandan Genocide’ (2005) 637.

¹²⁷ *ibid.*

¹²⁸ Landesman, ‘A Woman’s Work’ (*The New York Times Magazine*, 15 September 2002); Hazeley, ‘Profile: Female Rwandan killer Pauline Nyiramasuhuko’ (*BBC*, 24 June 2011).

¹²⁹ Butler, *Precarious Life: The Power of Mourning and Violence* (2006) 141.

¹³⁰ Moshenberg, *The Rwandan Glass Ceiling (Africa is a Country*, 29 June 2011).

¹³¹ Barad, ‘Rwanda’s Mother and Son Genocidaires’ (*Pambazuka News*, 2011).

¹³² Moshenberg (n 130).

For instance, Rowles stated that Nyiramasuhuko's case is an example of the evils of feminism, which he blamed for caused Nyiramasuhuko to value power over life.¹³³ What Rowles assumes is that feminism is a new phenomenon and that it was feminism that spurred Nyiramasuhuko to commit criminal acts. In this way female defendants seem to fall in rhetoric that blames the 'emergence' of women into positions of power which is purported to encourage women to abuse that power, this falls into the stereotype that women are not capable of possessing the mental capacity to inhabit traditional male positions. However, the existence of women committing violence or criminal acts has been present throughout history and judging from the lack of feminists willing to engage with the topic of female defendants, it would appear that feminism is opposed to discussing the concept of women committing crimes.¹³⁴

In the same way Rowles accuses feminism as the reason for Nyiramasuhuko's actions, feminists point to Nyiramasuhuko as an aberration, a rare example of women committing crimes on the same scale as men. Women committing crimes are similarly distanced from feminist debates, but I argue they should be a part of feminism. This is not to say feminists should celebrate female perpetrators and defendants the same way women are celebrated when holding careers previously only reserved for men, for instance. Feminism should instead be a focus on the construction and performance of gender. However, undertaking an analysis of female defendants illuminates the ways in which femininity and masculinity have influenced the way women's actions are categorised as well as allowing the exploration of the personal biases revealed when women who commit crimes are exposed. Both of these opinions, whether it be Rowles or Western feminists, signal a need for explaining away female perpetrator's actions. I argue due to the feminist scholarship around women as victims, feminism has failed to fully integrate the possibility that women are both potential victims and potential agents. What has been more common, is to understand women as needing to be saved, through the work of US radical feminism, i.e. victim feminism, or as women who have been empowered through the work of US liberal feminism and strive towards formal modes of equality in law. Ultimately, there has been a lack of

¹³³ Sperling, and Sjoberg and Gentry both cite, Rowles, 'Feminist Atrocity' (24 October 2002).

¹³⁴ I am careful here in phrasing, as the history of women's activism, which often entails protest, minor crimes, or self-sacrifice, is an important part of feminism in any context.

engagement beyond this binary of women as needing to be save/empowered. Therefore women as defendants does not enter into the narrative when trying to discern an armed conflict, thusly the engagement with female defendants in armed conflict has been limited in mainstream feminist dialogue.

Victims and Nyiramasuhuko's family all signalled motherhood, as either something that made her crimes worse or as a defense.¹³⁵ To view Nyiramasuhuko's crimes as worse because she was a mother, points to a conception of motherhood that is wholly transformative for women in a gendered fashion. I am not arguing that some women do not find motherhood to be a life changing experience. However, to assume that when women become a mothers that they also are freed from the ability to commit violence or criminal acts, whatever the context, is not only limiting for women, but negates so much of the work done to give women autonomy in motherhood.¹³⁶

When men are on trial there is typically little mention of their parental status. Drumbl notes, that in the case of *Ntakirutimana et al.*, Elizaphan Ntakirutimana was referred to in the media by his profession, disregarding the fact he was a father on trial before the ICTR, with his son, Gérard Ntakirutimana.¹³⁷ Conversely, Nyiramasuho and her son's relationship was heavily focused upon. Instead of focusing on female defendants relationships to their experience of motherhood, there needs to be further interrogation around how the gendered understandings of parenthood are used to dismiss women's agency. This occurs to the extent that even when there is evidence of committing heinous crimes motherhood seems to offer a way to deny such allegations.

Nyiramasuhuko stated that she had no power, no capability and therefore was not guilty.¹³⁸ Nyiramasuhuko also cited sexism as the reason she was being prosecuted, because she was an educated woman.¹³⁹ Sperling has noted that either Nyiramasuhuko chose to use gender as a means of casting doubt onto her actions, or she believed that

¹³⁵ See Drumbl, 'She Makes me Ashamed to Be a Woman': The Genocide Conviction of Pauline Nyiramasuhuko' (2013).

¹³⁶ See Rich, *of Woman Born: Motherhood as Experience and Institution* (1976).

¹³⁷ Drumbl (n 135) 593.

¹³⁸ Sperling (n 126) 650.

¹³⁹ *ibid.*

women truly did not have the capacity to commit acts that would require a substantial amount of power.¹⁴⁰ It is not unthinkable that Nyiramasuhuko would chose to use her gender as a way to deny crimes, this a strategy that relies on the presumed bias of those judges within the ICTR. What is more interesting is if in using her gender as a defense Nyiramasuhuko truly believed that women did not have enough power to commit international criminal acts. However, it is clear from the research done around the genocide that women were involved in perpetrating crime.

Nyiramasuhuko's class, her position as a powerful government official in Rwanda, has been rarely discussed in media or academic work. Her role as a leader and as a women highlights the misconceptions in Western understandings of African women in power. Elite women did have access to power during the Rwandan genocide and therefore were more able to participate in leadership crimes, like Nyiramasuhuko. However, the Western intervention after armed conflict only highlights women's leadership roles in Africa, in relation to peacebuilding efforts. Again, the usefulness of female defendants as a tool is expounded in order to discuss the way women are exceptionalised through Western feminist work or international law. Typically, women's behaviour is excused when they are discovered to have engaged in violence or they are seen as deviant women.

Moreover, classifying female defendant's actions moves the debate further away from making positive gains in the way women are understood to act in armed conflict. For example, the discussion needs to shift away from exceptionalising women's actions that do not fit into the mainstream narrative around women in conflict, and instead question why powerful women's propensity to commit violence is under discussed. Examples of Thatcher, Clinton, and Rice were discussed briefly in Chapter Three, as Western women who engage in violence, because their actions as leaders are not seen in the same way female defendants are understood. This positions women's actions differently dependent upon their global location, which is directly related to the privilege of the Global North over the Global South, based on race, class, and different conceptions of gender.

¹⁴⁰ *ibid* 650-653.

Nyiramasuhuko's case is not the only time women were involved in the Rwandan genocide. Hogg states that of 'Category 1' genocide suspects, 47 are women.¹⁴¹ The list of 'Category 1' suspects includes those in leadership roles in the government, political parties, the military and religious organisations, as well as planners, organisers, instigators and direct perpetrators of genocide and crimes against humanity.¹⁴² It is important to note that during the Rwandan genocide that while there were no women *Prefects* or *Bourgmestres*, there were 1472 *Conseillers*, of which 17 were women.¹⁴³ Hogg writes that many more women were *Responsables*, administrative leaders.¹⁴⁴ On a local level there are many more examples of female defendants. 'ordinary women', a category referring to those suspects not in leadership positions and accused of Category 2 or 3 crimes in the Rwandan justice system, perpetrated crimes during the genocide as well.¹⁴⁵

Examples of female defendants, like that of Rose Kabuye, have been exhibited in the work of Adler, Loyle, and Globerman as well as in Nicole Hogg's research in Rwanda.¹⁴⁶ Even though many of the participants in their studies are without names, it is evident that the number of women accused of genocide or genocide related crimes is far more prevalent than the single prosecution of a women at the ICTR would suggest. Hogg reported in 2010 that around 2000 women were still awaiting trial in Rwanda for crimes related to the genocide.¹⁴⁷ Some women involved in the genocide denied their crimes using gender as a defence, like Nyiramasuhuko. Hogg has states that women who were awaiting trial were actively denying their involvement due to the fact they were women.¹⁴⁸ During Hogg's research she interviewed women in prison either serving sentences or awaiting trial, two of these women stated, "I am a women, I had no power" and "I am really surprised they put me in the first category. I

¹⁴¹ Hogg, "'I never poured blood': Women accused of genocide in Rwanda' (L.L.M. thesis, McGill University) on file with McGill University (2001).

¹⁴² *ibid.*

¹⁴³ 'Rapport National du Rwanda aux Nations Unies pour la Quatrième Conférence Mondiale sur les Femmes, September 1995, Beijing (China)', Kigali (1995) 15. 47.

¹⁴⁴ Hogg (n 141) 94.

¹⁴⁵ *ibid.*

¹⁴⁶ See Adler et al, 'A Calamity in the Neighbourhood: Women's Participation in the Rwandan Genocide' (2007); also see Hogg (n 141).

¹⁴⁷ *ibid* 70.

¹⁴⁸ *ibid* 89.

am a women.”¹⁴⁹ Military leader Major Anne-Marie Nyirahakizimana, who was sentenced to death by a Kigali Military Court in 1999, claimed in her defence that she was powerless, and that being a women limited her ability to stand up to the Interahamwe militia.¹⁵⁰

If women are claiming that their gender equals a lack of power even while perpetrating violence, then it is possible that women are either using their gender to remove responsibility or do not see their gender as their primary mode of identity, meaning gender is not a relevant factor in their perpetrating or not perpetrating crime. Furthermore, they may not associate the ability to participate in the genocide as a form of agency. Analysing Nyiramasuhuko’s actions based on gender, highlighting her ability to disrupt gender ideals of typical ‘female’ behaviour only provide part of the context. She used her gender to deny criminal allegations, this it may be conceivable gender was also useful in order to obtain a ministerial position within the government, which happened to be a position that was related to the welfare of women. Nyiramasuhuko’s actions were more closely related to her extremist view of her Hutu ethnicity. Her place as a Hutu in Rwandan society, and her ability to perpetrate acts resulted from her position in society and extremist political view, had little to do with her being a woman. Extremist ethnicity, which was a main focus of the conflict itself, needed to become the central tool of analysis for academics and the ICTR. What it means to be a woman in Rwandan society and indeed an educated woman, may be very different from the perspective of the West. It is not beneficial to interpret the actions of female defendants in Rwanda from a gendered point of view without also taking into account the way class, education, and ethnicity intersect in the Rwandan context.

International law often constructs the assumption that women, if acknowledged in legal discourse, are by default the perpetual victim. Therefore, when women are seen as the violator, international legal processes rest on the gender binaries found within its structure. International law and society both reiterate that women are the victim, women are not the violator, and likewise women in armed conflicts need to be

¹⁴⁹ *ibid.*

¹⁵⁰ *ibid* 96.

protected and saved. The case of Pauline Nyiramasuhuko, a woman in power who used her position to cause harm, is considered to be an aberration and decidedly not the norm, despite existence of evidence to the contrary. Pauline Nyiramasuhuko is an excellent example, in order to probe further into discussions on gender in female defendants. While this recognition of a woman as a perpetrator should have indicated a greater understanding of the role of women in conflict; however, the ICTR failed to indict any other women. There were other women in leadership roles within Rwanda, such as Agnes Ntamabyariro, Valerie Bemeriki, and Rose Kabuye, yet they remained outside the purview of the Tribunal. The trial and conviction of Pauline Nyiramasuhuko did not encourage a broader realisation of women's active participation in crime during the Rwandan genocide, instead it gave evidence to the contrary.

Women's actions are therefore comparable to men within their specific involvement in the genocide. However, women's contribution to the loss of life warrants further scrutiny in order to properly access the best way to restructure and reconcile a society. Women in Rwanda, after colonialism, had limited leadership roles, this directly links the mechanism of colonialism with the production of limited female subjectivity in Rwanda to the way Rwandan women are assumed to act during armed conflict. When women do act outside of the produced victim narrative, they are easily labelled as uncivilised exceptions to the way women as a whole act in armed conflict. However, there are examples women in high positions, elite Hutu women who contributed to the genocide, which reiterates the need to unpack the relationship of class to other identities such as ethnicity and gender. The smaller number of female defendants prosecuted at the ICTR is less about women's nature and more about women's access to leadership and the domestic roles forced onto women during colonialism. This allows the connection between female defendants and intersectionality to take shape, interrogating the way gender, race, and class construct privilege.

Trying a woman internationally, for crimes committed during armed conflict, shows tremendous growth from the international legal community concerning women's involvement in conflict. Nyiramasuhuko's case would appear to disrupt the stereotype of women as victims without power, due to the fact that Nyiramasuhuko was a minister within the government and not only did she commit criminal acts, but she

was also found to be guilty of inciting rape. Finding a female guilty of inciting acts of rape is contrary to the way women are predominantly assumed to act during armed conflict. Despite the apparent disrupting of gender lines, Nyiramasuhuko's case fell back onto stereotypical female roles.

Nyiramasuhuko herself used her gender as evidence why she could not have committed the crimes for which she was accused. Nyiramasuhuko also was tried with her son, Arsène Shalom Ntahobali, which continually reaffirmed her roles as a mother. Not only is Nyiramasuhuko seen as a mother, but a manipulative controlling mother who pushed her son to commit crimes and then rewarded those crimes with the opportunity of sexual violence. Many would cite Nyiramasuhuko as a "bad" mother, and therefore braking the convention of women as doting mothers. However, there is a tendency to only allow women to inhabit one role. They cannot be both a criminal and a mother, or rather a criminal and a "good" mother. To be certain, Nyiramasuhuko is not being argued to be a model parent, but her case offers a way to discuss the multiple roles women inhabit during armed conflict.

3.3 Local processes

The government of the Rwandan Patriotic Front (RPF) did not want to encourage impunity or widespread amnesty by way of a Truth and Reconciliation Commission after the genocide, so it established special chambers of its ordinary and military courts and eventually a modern adaption of the traditional Rwandan Gacaca Court system.¹⁵¹ After recognising that the specialised chambers in Rwanda, setup by Organic Law No 08/96 to deal with those accused of committing crimes of genocide, crimes against humanity, and those crimes associated with the two categories, where unable to process all of those who remained in prison, a modern approach to the traditional Gacaca justice system was proposed.¹⁵² The Gacaca Courts are a reimagined traditional national justice system that centres upon truth and reconciliation.¹⁵³ The system is grounded in the people of the community as well as in the hope that open confession will repair some of the damage brought about by the

¹⁵¹ Bornkamm, 'Rwanda's Gacaca Courts Between Retribution and Reparation' (2012) 24-25.

¹⁵² *ibid.*

¹⁵³ Westburg, 'Rwanda's Use of Transitional Justice after Genocide: The Gacaca Courts and the ICTR' (2010) 337.

armed conflict.¹⁵⁴ Those who confess can reduce their sentence, and the court also allows anyone to accuse someone of wrongdoing.¹⁵⁵ The rules of the Gacaca court are codified in the Rwandan Transitional National Assembly Organic Law 40/2000 on January 26, 2001.¹⁵⁶

The Rwandan justice system has three different categories of criminals relating to the timeframe of 1990 and 1994, as well as the genocide, which the Gacaca courts have also utilised.¹⁵⁷ Category one includes rapists and those in leadership positions.¹⁵⁸ Category two is separated into three subcategories for the purpose of sentencing; one is for well-known murderers, torturers, and persons who committed dehumanising acts on a dead body, two includes ordinary killers and those who intended to kill, but did not, and three is for those who committed acts without the intent to kill.¹⁵⁹ Category three is for those who committed property offences.¹⁶⁰ Some of the characteristics of the Gacaca courts were that the trials often took place in the village of the accused, confession had an effect on the sentence especially if the accused testified before identified as a suspect, and during the trial the judges and community members listened to the accused, accusers, and to anyone else who wished to speak.¹⁶¹

The lack of access to court files, considering the large amount of cases it processed, is just one reason why the Gacaca Court system has been prone to criticism. Many have accused the Gacaca courts for being too idealistic or another arm of the government, State sponsored justice. Others have commented on the court's lack of due process, or its connection to a corrupt post armed conflict society, as well as the court's ability to be manipulated by the elites of the community.¹⁶² However, Clark suggests that this

¹⁵⁴ *ibid.*

¹⁵⁵ *ibid.*

¹⁵⁶ See Organic Law No. 40/2000 of 26/1/2001 Setting Up Gacaca Jurisdictions and Organizing Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed Between October 1, 1990 and December 31, 1994 (2001) [hereinafter Organic Law No. 40/2000], available at <http://www.inkiko-gacaca.gov.rw/pdf/Law.pdf> (amended in 2004 and 2007).

¹⁵⁷ Westburg (n 153) 339.

¹⁵⁸ *ibid.*

¹⁵⁹ *ibid.*

¹⁶⁰ *ibid.*

¹⁶¹ *ibid* 339-340.

¹⁶² Clark, 'Bringing the Peasants Back in, Again: State Power and Local Agency in Rwanda's Gacaca Courts' (2014) 8 *Journal of Eastern African Studies* 195.

understanding of the court discounts the agency of the people of Rwanda.¹⁶³ Clark goes on to say that despite arguments against Gacaca, which cited the courts as unengaged with the population, there is overwhelming evidence of open debate and discussion as well as active local involvement.¹⁶⁴ Gacaca courts setup after the genocide also signalled the involvement of women, who comprised around 40% of the judges in the court.¹⁶⁵ The representation of women in an extremely public space allows the narrative of the genocide as well as the country's reconciliation to be enhanced by different perspectives. There is a great deal of work done around Gacaca; however, this research is not delving into these debates, but recognises the need to acknowledge the larger discussion surrounding the Gacaca Courts.

It is estimated that the Gacaca Courts tried around two million suspects, of which approximately ten percent were women.¹⁶⁶ Further examples of female perpetrators include: Valerie Bemeriki who was tried by the Gacaca Courts and received a life sentence; Dr. Jeanne Marie Nduwamariya was also tried in absentia by the Gacaca Courts and received a life sentence; Agnes Ntamabyariro was tried by national courts in Kigali and received a life sentence; and Virginia Mukankusi, was one of 24 people publicly executed in Rwanda after the genocide.¹⁶⁷

In the local context where the Gacaca Courts have tried female defendants, Brown states that female suspects before the Court made up 10% of the total population of those tried, after acquittals this eventually resulted in around 60,000 women being incarcerated.¹⁶⁸ The reason why the inclusion of Gacaca is important is because a reinvented traditional Rwandan transitional justice mechanism was capable of recognising the participation of women in the genocide. I am not implying that Rwanda, therefore, has disrupted gender binaries or dispelled limited notions of female and male experience in armed conflict. However, I am suggesting that there needs to be a greater discussion between local and international legal mechanisms

¹⁶³ *ibid* 194.

¹⁶⁴ *ibid* 202.

¹⁶⁵ *ibid* 203.

¹⁶⁶ Brown, *Gender and the Genocide in Rwanda: Women as Rescuers and Perpetrators* (2017) 92, 92.

¹⁶⁷ Maier, 'Women Leaders in the Rwandan Genocide: When Women Choose To Kill' (2013) 12.

¹⁶⁸ Brown, 'Female Perpetrators of the Rwandan Genocide' (2014) 461.

after a conflict in order to situate not only the conflict narrative, but also the experiences and subsequent needs of a post-conflict community.

3.4 Feminist intervention in the ICTR

When the establishment of an international tribunal in Rwanda began many Western feminists started to focus their efforts on sexual violence crimes. While initial reports on sexual violence in the FYR and Rwanda were ignored, reporting on sexual violence by the media was substantially greater in the FYR.¹⁶⁹ Bedont and Martinez describe the publicity surrounding the “mass rapes” in both the FYR and Rwanda, as the driving force in the creation of the ICTY and ICTR.¹⁷⁰ Feminists along with NGOs urged indictments in the ICTR to include rape and sexual violence and were paramount to the prosecution of sexual violence crimes as well as keeping sexual violence in focus.¹⁷¹ MacKinnon, writes that the prosecutors often did not charge rape when murder charges were present.¹⁷² MacKinnon states,

A parallel judicial pattern can be discerned in the seeming reluctance of the Tribunal, at times, to hold a man responsible for a sexual violation another man committed, when it is willing to hold the same man responsible for murder committed on virtually the same evidence, at the same time and place, by and against the same people.¹⁷³

The ICTR found it difficult to charge men, not with the acts they committed themselves, but, acts that other man committed on their behalf, which was key when accusing someone of inciting rape.¹⁷⁴ MacKinnon further states that the underlying impression given by the prosecutors is that men would not likely commit murder without orders, yet they would rape on their own without the orders of a superior.¹⁷⁵ This, she says, falls into the ‘boys-will-be-boys’ theme and shows that the Tribunal does not believe that the rapes were truly the leaders fault. Seeing rape as an ultimately probable action, says more about the underlying nature of sexual violence

¹⁶⁹ Haddad, ‘Mobilizing the Will to Prosecute: Crimes of Rape at the Yugoslav and Rwandan Tribunals’ (2010) 125, 126.

¹⁷⁰ See Bedont and Martinez, ‘Ending Impunity for Gender Crimes under the International Criminal Court’ (1999).

¹⁷¹ *ibid* 11.

¹⁷² MacKinnon, ‘The ICTR’s Legacy on Sexual Violence’ (2008) 214-215.

¹⁷³ *ibid* 104.

¹⁷⁴ *ibid*.

¹⁷⁵ *ibid*.

crimes. If sexual violence can be seen to be an act that does not necessarily require coaxing, then there is more work that needs to be done uncovering the strong social aspects of gender and power, in particular the myth that male physiology leads them to have strong sexual urges to the extent of committing acts of sexual violence when the opportunity presents itself.

The act of men committing sexual violence and women the victims of that violence is perceived as inevitable during armed conflict. These roles, both that of the victim and violator become synonymous with the gender of the individual. Men are the perpetrators, which reinforces masculine qualities and women are the victims, highlighting their passive femininity. MacKinnon also states that the willingness to drop rape charges, as previously noted, was present especially when murder charges were retained shows the lack of importance placed on prosecuting rape, in the Tribunal. MacKinnon further describes that there seems to be a higher standard of credibility for witnesses to rape than for witness to murder and that all of these instances combine, MacKinnon states, demonstrate a push towards impunity.¹⁷⁶ Female leaders who perpetrate rape would be even more difficult to charge as their gender defies the male perpetrator/female victim of sexual violence binary.

In the ICTR, there was a lack of financial resources, political will, administrative and technical problems, survivors-witnesses were not protected properly, and sexual violence, and although it was widely known to be widespread throughout the conflict did not take centre stage.¹⁷⁷ Nelarva writes,

Genocide, war crimes, and crimes against humanity must "shock the conscience of mankind" to qualify as international. Whether or not rape and sexual violence should be viewed in such terms is largely a determination made by legal professionals, primarily the Chief Prosecutor.¹⁷⁸

The ICTR in many ways was considered to be an afterthought when compared to the ICTY; Mutua describes the ICTR as, "a sideshow to the Yugoslav Tribunal" and only in existence because the conflicts in the Former Yugoslavia and Rwanda were

¹⁷⁶ *ibid.*

¹⁷⁷ Askin (n 102) 1008.

¹⁷⁸ Nelaeva (n 108) 15.

showcased simultaneously in the media.¹⁷⁹ The lack of interrogation around the context that led up to the ICTR adds to the misunderstanding around divisions in Rwanda and determined the conflict was a specific problem for the African continent. This also raises questions around international perceptions of the conflict; viewing the genocide as merely ethnic may shift the need to explore the deeper issues around Western perceptions of the African continent, lingering colonialism, and the assumption of all non-Western women as oppressed, are present within the conflict and relegates the lessons learned from Rwanda to an ‘African issue’.

The international and local binary can also be seen in the work of feminists. Mohanty’s work counters the work above done by the Western “white middle class” feminist, who have often been criticised for universalising their own experiences and projecting them onto the international community as a whole, as well as universalising “Third World” women as victims.¹⁸⁰ The assumption made by Western feminists is that their perception of gender, or the way gender and race interacts, mirrors the experience of the rest of the world. This is then projected onto Third World women, as their lives are understood through the lens of the West and their voices are assumed to be united as one ‘Third World woman’ perspective. This position taken by Western feminists is one of privilege. Mohanty sees the Third World as being created by the First World,¹⁸¹ and in doing so the First World actors dictate the way agency of women in the Third World should look. The agency of the Third World woman is often assumed to revolve around women’s disadvantage due to the corrupt or instability of the governmental or socio-economic system they find themselves.

The assumption that Rwandan women ‘need’ saving, embeds the Western failure to see women leaders as already existing in Africa, and in Rwanda in particular, which automatically reinforces a form of victim feminism and dismisses the very possibility of female defendants. Kapur also discusses the interplay between Western feminism and post-colonial feminism, and see the international women’s rights movement as strengthening a female victimisation rhetoric through a focus on violence against

¹⁷⁹ Mutua, ‘Never Again: Questioning the Yugoslav and Rwanda Tribunals’ (1997) 178.

¹⁸⁰ Mohanty, *Feminism without Borders: Decolonizing Theory, Practicing Solidarity* (2003) 46.

¹⁸¹ *ibid* 47.

women.¹⁸² Kapur notes that the discussion of ‘metanarratives’ around women as victims has equated all women with the same experience of sexual violence and objectification.¹⁸³ Kapur has criticised MacKinnon’s work for essentialising women and gender, though assuming gender is the basis of women’s oppression and that women must “prioritise issues of sexuality and sexual violence”.¹⁸⁴

This brief review of the work of feminists in the ICTR displays the overarching focus on securing sexual violence jurisprudence. While it is evident that sexual violence was a large part of the genocide, by limiting women’s roles in conflict to victims of sexual violence, the ways colonialism, race, ethnicity, and gender interplay within the ICTR cannot be adequately addressed. The lack of initial indictments with sexual violence charges and the lack of will in the ICTR, occurred at a time where there was an increased awareness of sexual violence in armed conflict by Western feminists, coupled with the beginnings of a turn from the international legal community to push women’s issues.¹⁸⁵ Constructions of ethnicity in the ICTR and within the genocide itself entered debates, influencing international perceptions of the violence, but not as a tool of analysis. The international media effectively ‘othered’ those involved in the armed conflict, and referred to ‘ethnic issues’, but did not recognise the extent to which this influenced actions of those involved in the violence. Therefore, instead of focusing on sexual violence, as something done to women because they are women, there needed to be more work done around the way Hutu and Tutsi ethnicity, and military extremism influenced the perception of vulnerability during the conflict. This would have allowed for a reading of the conflict that incorporated both men and women as victims of sexual violence and both women and men as perpetrators of violence. Understanding the extremist perception of ethnicity would have also disrupted gender, race, and sexuality, as sexual violence and the perpetration of violence would not have been assumed to rest along gender lines.

¹⁸² Kapur, ‘The Tragedy of Victimisation Rhetoric Resurrecting the Native Subject in International/Post-Colonial Feminist Legal Politics’ (2002) 5.

¹⁸³ *ibid* 10.

¹⁸⁴ *ibid* 9.

¹⁸⁵ This is referencing the current UN Women. Peace, and Security agenda.

Discussion of sexual violence also infer notions of masculinity and femininity. Campbell argues that sexual violence reinforces ideas of masculinity and femininity, through continually repeating sexual acts, norms associated with either the male or female body.¹⁸⁶ Law needs the masculine and feminine to order bodies in a specific way, focusing on a masculine understanding of sexuality, or as Campbell terms it, “an active masculine body that penetrates a passive female body”.¹⁸⁷ Campbell gives an example of the sexual nature involved when a woman is forced to take her shirt off versus the absence of the sexual perceptions when a man is forced to take his shirt off.¹⁸⁸ That is why often when men are victims of sexual violence, there is often the notion that this ‘feminises’ the victims in the eyes of the perpetrator. With the focus on sexual violence the binary between men and women remains even more rigid. The distinction between gender and sex is therefore enhanced, as gender becomes a societal/cultural interpretation of sex. A woman who rapes a woman, is a ‘man’, as rape is a male offense and there are only two genders a person is allowed to inhabit. These notions problematise the presence of sexual violence and rape in international criminal law, and highlight the complexity of both issues.

The female defendant, and especially a female defendant who is involved in committing acts of sexual violence and rape, is then left in a limbo, she is equivalent to a man in committing the act, but is never allowed to fully retain the rights a responsibilities of a man in the view of international law and the media. When Nyiramasuhuko argues femininity as a defence she reaffirms the narrative around women’s lack of culpability for committing crimes in armed conflict, and reinforces the notion that women are not active agents displaying autonomy in armed conflict, even when that autonomy means committing violence.

Through only focusing on the narrative of women as victims, Western feminists centred upon gender as a mode of analysis and thereby ignored the other factors that influenced the conflict. This in particular leads to missed opportunities to gain valuable insights into the ways in which gender intersects with other identities. If

¹⁸⁶ Campbell, ‘The Gender of Transitional Justice: Law, Sexual Violence and the International Criminal Tribunal for the Former Yugoslavia’ (2007) 417.

¹⁸⁷ *ibid* 418.

¹⁸⁸ *ibid*.

these identities are not scrutinised, in order to discern their influence on the ICTR and in the genocide, then the narrative of the conflict renders itself inadequate to aid in post-conflict justice. By highlighting, in this case, the role of women who perpetrate crimes it then becomes possible to create a space that can address the injustices within an armed conflict and to theorise the complexity of gender norms and the diversity of gendered experiences.

4. (In)Visibility of Female Defendants

Despite the existence of female defendants, present in the armed conflicts in the Former Yugoslavia and Rwanda, female defendants remain on the fringes of a conflict's history. When female defendants are discussed, their gender is often used as an attempt to explain the reasons why they committed crimes.¹⁸⁹ This does not assume that women commit crimes based on gender, but rather that their gender holds the key as to why they would be involved in such actions. Their actions are in need of explanation, not just because they committed crimes, but because they sharply contrast with what people deem to be appropriate female behaviour.¹⁹⁰ Shock and confusion when women are involved in violent crime is common,¹⁹¹ but the need to continually tie women who commit crimes to their gender moves this chapter's discussion away from merely fact finding examples of female defendants, and toward a deeper commentary on what it means to be a woman in an armed conflict situation.

The work in the previous sections details the context around the history and transitional justice in the ICTR, and shows not only the system female defendants are surrounded by, but also the opinions of the Western feminists working around the ICTR, which give evidence as to why female defendants remain outside of a common understanding of armed conflict. The intersection of class and gender, shown in the Western understanding, as well as the understanding of those who engaged with female defendants was also highlighted. This section will consider the reasons behind the higher visibility of female defendants in Rwanda than in the Former Yugoslavia. By listing the works that have discussed female defendants, this section will link the chapter's discussion with the publicised characteristics present in the Rwandan

¹⁸⁹Sperling (n 126) 637-651; See Drumbl (n 135); Maier (n 167) 13.

¹⁹⁰Maier (n 167).

¹⁹¹Drumbl (n 135) 564.

genocide. Namely, this includes the Western notions of African brutality and savagery, which connect with the perceptions of female defendants in the Rwandan genocide. Despite the fact that the texts on the Rwandan genocide recognise female defendants more often than in the Former Yugoslavia, it will be demonstrated that this recognition of female defendants is closely associated with a Western perspective of race and femininity, and does not contribute towards acknowledging women as defendants more broadly within Western feminist discourse or international law. The higher visibility of women who commit crimes in Rwanda is not due to a more inclusive understanding of women's roles in conflict. Rather, it is due to a highly racialised understanding of Rwanda that stretches back to Rwanda's colonial history. The depiction of the Rwandan genocide as uncivilised and tribal was also highlighted in the introduction and second section of this chapter, this contributes towards the way female defendants were understood in the genocide as well.

Female defendants exist within different contexts, influenced by tradition, local society, and often, colonial history. There is not one *type* of female defendants and it is not possible to identify women who do perpetrate crimes by placing them into certain traditional female archetypes. This thesis does not support a dialogue that focuses on establishing categories to define women, but instead shows that while societal gender roles play a part in influencing the way women commit genocide, war crimes, or crimes against humanity, it does not prevent women from being active participants in their communities during armed conflict. Men and women can be involved in armed conflict in different capacities, and their actions are not necessarily the same; however, this does not diminish their influence on the conflict.

Understandings of gender in a society will often influence to what extent a woman is capable of being involved in armed conflict, but these understandings are far from absolute. The idea that people actually fit into specific roles with no deviation has never been the case, instead it is the perception of those in society who reinforce these gender specific messages. One of the arguments in this chapter, and the thesis in general, is that female defendants do exist and have existed throughout history, yet somehow they remain thought of as an uncommon occurrence when discerning the events of an armed conflict. There is a need to understand why female defendants remain on the periphery and to ask how the discussion around female defendants

allow gender to be reimagined. Looking at the traditions, the colonial aspects, and the work of international law is also important to show that there is no formula or standard conclusions that can be made around female defendants in any conflict.

Women in the context of the Rwandan genocide were predominately visible as victims of sexual violence and/or violent crimes. The jurisprudence of the two Ad Hoc Tribunals influenced one another and often advances in sexual violence understanding in one tribunal benefited the cases of the other, as was shown in the *Akayesu* trial when rape and sexual violence were defined.¹⁹² The other aspects of women's roles in armed conflict, outside of their status as victims of sexual violence, is extremely varied between the FYR and Rwanda. The discussion of women in the Former Yugoslav Republic as perpetrators of crimes is limited despite their existence in both international and local courts. However, in Rwanda the existence of female defendants has been more widely written on and discussed. Field work and research into the women in Rwanda in prison awaiting trial, as well as discussions around the shocking nature of Rwandan women's crimes all contribute to an alternative view of women in the genocide. Yet, this scholarship seems to signal a troubling aspect of Western engagement into the Rwandan genocide that is coupled with the notions of chaos and brutality.

Texts that discuss the acts of Rwandan women in relation to gender do so to expose the different roles of women in the genocide or specifically confront notions about what femininity means in conflict. However, the topic of race is not as clearly identified in these instances. It seems imperative to inject an understanding of race from the perspective of both the local Rwandan context as well as the outside perspective. Highlighting women who have engaged in violent crimes during the genocide indicates how these women have failed in upholding their gender and need to either be condemned or explained. Explanations around the inner workings of the gender roles in Rwandan society can also be understood as the West taking what is interpreted to be brutal, tribal, and unorganised actions and making them relatable to Western standards.

¹⁹² *Akayesu Case* (n 18).

Nyiramasuhuko's actions were read along gender lines only, and the ways in which her extremist ethnic views as well as her class influenced her actions were not discussed.¹⁹³ Due to this Nyiramasuhuko exists as a one dimensional character, an aberration of women's participation in the Rwandan genocide and unique due to her position within the government. In reality she was one of many women who participated in advancing the agenda of the genocide, but because her presence contrasts so strongly with the victim narrative that was bolstered by Western feminist, female defendants have not become part of the genocide narrative. When women are found to have been defendants in Rwanda the reaction the media and scholars deploy is based on the view that all women were victims and therefore female defendants actions are seen as even more shocking. The women who have perpetrated genocide undo their femininity by displaying characteristics contrary to the strict female gender roles set out by Western standards during the colonial era. Considering Rwanda's colonial past and the reimagining of Rwanda's gender roles, the link between colonialism and imposed Western ideal of femininity is apparent within the text surrounding female defendants in the Rwandan genocide.

In the Rwandan context, scholarship has highlighted women as defendants more often than in the Former Yugoslavia, for example. Maier states that more female defendants' crimes are documented in the Rwandan genocide than any other armed conflict.¹⁹⁴ While the Rwandan genocide's short time frame and large death toll make the conflict unique, the higher visibility of female defendants in the published work surrounding the conflict relates to stereotypical notions of femininity, masculinity, and race as well as Rwanda's colonial history. I argue the higher number of texts around women's involvement in the genocide infers that Western writers and academics are more comfortable associating violent behaviour to African women. The international media perceptions of the genocide, which included language of brutality and savagery, facilitates the acknowledgement of the existence of female defendants in armed conflict. Positioning Rwandans as tribal and chaotic creates the image that affirms colonial understandings of an uncivilised population, one where women display the opposite of stereotypical feminine qualities.

¹⁹³ Holmes (n 66) 69, 70, 269.

¹⁹⁴ Maier (n 167) 157.

The examples of text not only demonstrate the inclusion of female defendants in the scholarship, but also the way gender is used in the author's conceptions of female acts in conflict. Hilsum discusses the emerging evidence of female defendants after the genocide.¹⁹⁵ Gulaid wrote on women as female defendants of the Rwandan genocide, highlighting their need to retain agency, instead of viewing their actions as a result of male dominance and conditioning.¹⁹⁶ Jones highlights the inclusion of women at all levels of the genocide as well as the tropes that constrain women to innocent bystanders and men as continual violators.¹⁹⁷ Fielding also echoes Jones' work by seeking to use the Rwandan genocide as a way to shift the focus away from a victim narrative that seems to have dominated studies on gender and conflict.¹⁹⁸ Sharlach discusses women as agents of the genocide as well as victims of its violence.¹⁹⁹ Sharlach also highlights the roles of women pre-genocide, and establishes that despite their political underrepresentation women still were amongst the political elite.²⁰⁰ Adler, Loyle, and Golberman undertook extensive research in Rwanda in order to reveal the motivations behind women's participation in the genocide.²⁰¹ Holmes pointed to the role of the media and their focus on either female victims or 'hyper masculine' killers.²⁰² Brown discussed the role of female defendants suggesting that by continuing to ignore women as active participants negatively affects post-conflict peace and justice.²⁰³ Hogg has done extensive research in Rwanda around women's role in the genocide as well as gender relations within the country.²⁰⁴ Hogg also discusses the use of gendered imagery as either mothers or monsters, the status of women in power, and the lack of representation of women tried in the judicial system.²⁰⁵ As previously mentioned, Sperling, Smeulers, Linton, Sjoberg and Gentry,

¹⁹⁵ Hilsum, 'Women Killers in Rwanda' (Humanitarian Exchange Magazine, 1995).

¹⁹⁶ Gulaid, 'Ordinary Women: Understanding Female Agency in the Perpetration of Genocide' (*Armenian Weekly*, 21 January 2011).

¹⁹⁷ See Jones, 'Gender and Genocide', *Journal of Genocide Research* (2002).

¹⁹⁸ See Fielding, *Female Genocidaires During the Rwandan Genocide: When Women Kill* (2013).

¹⁹⁹ See Sharlach, 'Gender and Genocide in Rwanda: Women as Agents and Objects of Genocide' (2007).

²⁰⁰ *ibid.*

²⁰¹ Adler et al (n 150).

²⁰² See Holmes (66).

²⁰³ See Brown, 'Female Perpetrators of the Rwandan Genocide' (2014).

²⁰⁴ See Hogg, 'Women's participation in the Rwandan genocide: mothers or monsters?' (*International Review of the Red Cross No. 877*, 2010).

²⁰⁵ *ibid.*

as well as Drumbl, also discuss the participation of women in the Rwandan genocide, paying particular attention to Nyiramasuhuko.

There have also been blog posts regarding women's roles as defendants; Luft warns against merely separating people into victims or violators and that both male and female narrative are harmed by the lack of fluidity between gender ideals in the Rwandan genocide.²⁰⁶ Each of these works support that idea that post-conflict reconstruction and rehabilitation will not be as effective if female defendants are left out of discussions. Ignoring the crimes women commit and expecting them to reintegrate into society not only misses the opportunity to rehabilitate women who participate in armed conflict, it also prevents individuals from receiving justice after suffering harms committed by female defendants.

Many authors have used female participation in genocide as a platform in order to discuss female roles in armed conflict, others have similarly focused on women's roles, and in doing so called attention to the assumptions about femininity and masculinity. Waller discusses that both men and women are capable of committing genocide.²⁰⁷ African Rights and Yvonne Leggat-Smith discuss the role of women as defendants in the Rwandan genocide describing the women who actively participated in the genocide, detailing their profession and the high number of educated women, as well as the reasons behind their participation.²⁰⁸ *Mother Jones* published an article on women rebuilding Rwanda post-genocide and briefly mentioned women's role as defendants, choosing to focus on the ways women have positively impacted Rwandan society.²⁰⁹

Despite the surge in text around female defendants in the Rwandan genocide, which is as Maier suggested is unique to the Rwandan armed conflict, the greater awareness of women's involvement in genocide does not necessarily reflect a greater understanding of what roles femininity and masculinity play in armed conflict. While many texts

²⁰⁶ Luft, 'Not Just Victims and Perpetrators: Understanding Rwanda's Genocide, Twenty Years-On' (*Political Violence at a Glance*, 9 April 2014).

²⁰⁷ Waller, *Becoming Evil: How Ordinary People Commit Genocide and Mass Killing* (2007) 266-268.

²⁰⁸ *ibid.*

²⁰⁹ Acquaro and Landesman, 'Out of Madness, A Matriarchy' (*Mother Jones*, February 2003).

seek to reimagine the way femininity and masculinity co-exist in female defendants or how being female should not automatically infer that a woman is inclined to act in a certain manner; other texts infer that women who kill or commit crimes such as genocide, unlike men who do the same, require explanation and are themselves exceptional. They are viewed as exceptional not just because of the acts they commit in relation to their gender, but because the situation of the Rwandan genocide is exceptional.

The existence of women who perpetrate crimes is not novel or in any way unique to approach the conflict and genocide in Rwanda. However, through especially highlighting the actions of female defendants in Rwanda, actions that need less explanation when perpetrated by men, authors contribute to the implied divide around gender roles in conflict. It is not to say authors definitively support the separation of gender roles, or write on this topic out of shock. However, it does not seem authors subversively highlight female defendants' actions in order to overturn dominant narratives and expose areas of women's lives that are often ignored. The topic of female defendants contains an uncomfortableness for many feminist generally.²¹⁰ In contrast, authors seem more comfortable discussing Rwandan women who perpetrate crimes in the genocide.

The existence of so many account of female defendants in Rwanda also indicate a local and international divide. Butler discusses the topic of violence in relation to US engagement with Afghanistan or regarding the situation in Palestine; however, this is also useful in relation to the existence of female defendants. Butler questions, "What is real?" and "Whose lives are real?"²¹¹ The existence of victims of sexual violence in Rwanda was more readily dismissed based on the fact that women who were victims experienced violence that was perceived as occurring as a result of the dehumanisation of Rwandan and African societies. Due to the modes of power that exist through Western discourse in feminist work, the media and international law the

²¹⁰ Evidenced by the feminist scholarship cited above after the torture in Abu Ghraib, as well as the work Christina Taylor has discussed. After the Troubles in Northern Ireland a film was broadcasted on TG4 by Loopline films titled 'Mna and IRA', afterwards the public reaction was one of disbelief and anger that women were alleged to have been actively involved in the armed conflict.

²¹¹ Butler (n 129) 33.

lives of those without power are all the more precarious.²¹² This is evidenced by the initial disinterest in the genocide or preceding conflict by Western audiences. When the media did report it positioned Rwanda as distinct and distant from its viewers, unlike the case in the FYR. Within the non-recognition there is no grieving, as the people of Rwanda are always situated between life and death, with no common connection to the Western viewer.²¹³

Female defendants then exist in the Rwandan genocide as women, who because of their actions as defendants, often fall into the male position in the male/female binary, yet are reaffirmed as well by the reaction many scholars and writers have had in relation to women taking part in the genocide. The texts around Rwandan female defendants represent Rwandan female defendants as different from 'normal' women constituted by Western feminism, but it is unclear if these women were ever considered to be 'real' in the first place.

Exposing the actions of Nyiramasuhuko and the other female perpetrators and defendants in Rwanda, exposes understandings of both race and gender within Western feminists and international legal interventions. Crenshaw's work on intersectionality discusses the way women of colour are often constructed by identities such as race and gender, and it is when these identities intersect vulnerabilities are created.²¹⁴ When speaking of women of colour within the context of the thesis I am referring to the perception of women of colour, regardless of their geographical location, from the perspective of Western white feminists. Women of colour, or in this case women on the African continent, fall into a space between identities of gender and race, as their experiences transcend both categories.²¹⁵ This argument is often used when noting the lack of will to prosecute those who have perpetrated sexual violence against women, somehow, because the lived realities for women in Africa are more complicated, their situations are easily ignored.²¹⁶ This can

²¹² Butler, *Frames of War: When Is Life Grievable?* (2009) 1-3.

²¹³ *ibid* 36.

²¹⁴ Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1993) 1241.

²¹⁵ *ibid*.

²¹⁶ Green, 'Gender Hate Propaganda and Sexual Violence in the Rwandan Genocide: An Argument For Intersectionality in International Law' (2002) 756.

be seen in the ICTR, where there was a lack of will to prosecute sexual violence claims, despite the widespread knowledge around sexual violence crimes. The ICTR has been cited as failing the people of Rwanda for many reasons, but what proves to be a connection between the view toward female defendants and the way the aftermath of the conflict was situated is the media characterisation of the genocide.

Female defendants remain largely ignored in conflict narratives, although in Rwandan genocide have become more visible. This visibility can be attributed to the way ethnic divisions were highlighted during the conflict and throughout Rwanda's colonial history and the international media attention related to these instances. The attention paid to female defendants places these women in a space between discussions around race, gender, and ethnicity. The vulnerabilities created by the intersection of race and gender categories are argued to be one of the reasons why sexual violence becomes a weapon of war.²¹⁷ Female defendants' actions exist along the divide between Hutu and Tutsi, as Hutu women participated during the genocide, which supports the presumed distinction created during colonialism between the groups. The work around female defendants in Rwanda highlights how constructions of femininity and masculinity, which need to be reimagined, especially concerning armed conflict. However, women participate in criminal acts in all armed conflicts. Therefore, perceptions of strict gender roles need to be broken down in every armed conflict. The issue with especially focusing on the women in Rwanda, which is reinforced by the substantial amounts of texts regarding female participation, makes it seem as if this problem is contained within Africa alone. Women who disrupt patterns of expected gendered behaviour and engage in genocide are positioned as problem specific to the Rwandan situation and a cautionary tale to the rest of the world. The mission of the coloniser to import Western feminism did not work and therefore women are acting against presumed proper standards.

The international media, through the use of graphic language in order to depict the genocide in Rwanda as particularly chaotic and uncivilised, shaped the way the conflict was understood and in many ways relatable to the larger public in the US and

²¹⁷ Baaz and Stern, *Sexual Violence as a Weapon of War?: Perceptions, Prescriptions, Problems in the Congo and Beyond* (1988).

UK. Consequently, the conflict in Rwanda did not carry the same level of parity to the lives of Western audiences. The way race and ethnicity was misunderstood extended to the aftermath of the armed conflict, including both justice processes and the scholarly material written on the topic.

Women's role in the Rwandan genocide is easier to discuss and point to if the conflict itself is seen as chaotic, brutal, and shocking. Women's participation would be a product of this. However, women's participation in genocide is not new or relegated to Rwanda alone. The argument that women were more involved in the Rwandan genocide because of the access to weapons, does not ring true. My argument is not indicating that there were more women involved in the Rwandan genocide, but that more women are recognised. As far as the access to weapons, often the female defendants in Rwanda was involved in crimes void of direct physical violence, examples include women pointing out hiding places of Tutsi, and making the militia aware of Tutsi friends or family or looting Tutsi property: given these are leadership crimes the failure to recognise Rwandan women as defendants because they were political actors offers an important insight into perceptions of gender and race.²¹⁸ The media within in the US and UK as well as the international legal response's own positionality has limited discussions around Rwanda and kept highly racialised understandings of the events that took place.

5. Conclusion

Within the context of the Rwandan genocide the female defendants was an important aspect of the conflict. Despite the lack of attention in the ICTR, female defendants are acknowledged throughout scholarly work on Rwanda. In the scholarship surrounding the genocide, female defendants were more visible and discussed more often than the female defendants in the Former Yugoslav Republic. Accounting for the awareness of female defendants in Rwanda leads to discussions around gender and race in order to offer a broader understanding of the interactions that interplay within the way female defendants are viewed.

²¹⁸ Hogg (n 141) 78.

The surrounding climate of the genocide, focus in international criminal law on sexual violence, as well as the text written on female defendants is used by this thesis to argue that there is not only one way to see women who perpetrate crimes in armed conflict. By looking at female defendants, dialogues on the spectrum of women's experiences and engagements in armed conflict are possible, in this instance examining the role of women as political leaders. Butler highlights the dichotomy between a need to strive for a world where vulnerability of the female body is protected while at the same time the body does not then become eradicated.²¹⁹

One of the main issues with discussing female defendants in conflict, or rather women in armed conflict is that women's bodies need to be protected from violence as all bodies do, however there is an issue in retaining vulnerability. Some would say that the victim rhetoric by Western feminists has pushed women's bodies to be too vulnerable; however, the female defendants body in many ways is not allowed to be vulnerable. The ability for women to be violent is considered by many feminist as a negative, amplified by the uncomfortableness feminists have in discussing women who perpetrate crimes, as recognising these women allows them to be 'just as bad as men'.²²⁰ On the contrary this work suggests that vulnerability, evident when women are publically shamed as defendants and often signified as 'bad' women, is not allowed to reside in female defendants.

Regarding the texts on female defendants in Rwanda, it is not being suggested that they are strictly unnecessary or detrimental, but it is their volume that is being critiqued in comparison to texts on female defendants in other conflicts. Gender, race, colonialism, ethnicity all weave themselves into the discussions around female participation in Rwanda and question why texts on women who perpetrate genocide in Rwanda are more widely available than other conflicts while recognition of women as leaders in Rwanda seems to be told as a predominantly post-conflict narrative. If race is a part of the way female defendants' actions are carried out and observed, then it is also possible that the way these actions are understood by those who write on the subject is also embedded within a racial misunderstanding. The depictions of

²¹⁹ Butler (n 212) 42, 43.

²²⁰ Quarmby, 'Why are we shocked when women commit violent crimes?' (*Independent*, 30 May 2016).

brutality, chaos, tribalism, and savagery are all reaffirmed when the amount of female participation, in conjunction with the written work on female defendants. Rwanda can then be wrongly read to be a society so violent and 'backwards' that even 'their women' chose to commit genocide.

Chapter Six

The Extraordinary Chambers in the Courts of Cambodia

1. Introduction

The Khmer Rouge attempted to create an environment in Cambodia where men and women were treated equally.¹ During the Cambodian genocide women played a key role in supporting the Khmer Rouge regime (Communist Party of Kampuchea, CPK). Some women choose to take part in the regime while others were coerced. The entire population was forced to undertake various tasks based on age. The crime of forced marriage, evident within the armed conflict, relied on women and men inhabiting strict gender roles.² The regime encouraged pregnancies within marriage, in order to expand the population, which would in turn assist Cambodia with its expanding agricultural production under the CPK.³ Women attained high levels of leadership within the Khmer Rouge, and some were indicted for grave breaches of international humanitarian law as a result.⁴ While information that supports the high presence of women in the CPK is not as apparent in the academic literature around the Cambodian Genocide, female defendants are visible within the Extraordinary Chambers in the Courts of Cambodia (ECCC).

In Cambodia, female defendants appear more frequently in the court and court transcripts, but this has not necessarily translated a wider acknowledgement of their existence. The existence of four women, who were a part of the leadership of the Khmer Rouge, Ieng Thirith, Khieu Ponnary, Yun Yat, and Im Chaem, offer examples of women in power documented as allegedly committing criminal acts.⁵ While some women attained high levels of leadership in the Khmer Rouge, other women inhabited

¹ Jacobsen, *Lost Goddesses: The Denial of Female Power in Cambodian History* (2008) 182, 218.

² De Langis et al, 'Like Ghost Changes Body: A Study on the Impact of Forced Marriage under the Khmer Rouge' Regime (2014).

³ Lobato, 'Forced Pregnancy During the Khmer Rouge Regime: Acknowledging Forced Pregnancy As a Distinct Crime in the ECCC Proceedings' (2016).

⁴ *ibid.*

⁵ *Prosecutor v Ieng Thirith* (Decision on Reassessment of Accused Ieng Thirith's Fitness to Stand Trial Following Supreme Court Chamber Decision of 13 December 2011) 002/19-09-2007/ECCC/TC (2012);

lower level positions as cadres.⁶ However, wider accounts of the genocide fail to acknowledge women in positions of power who committed crimes and limit the stories of female experiences during this period. This is evident in the intervention of international criminal law, the Asia Pacific Regional Women's Hearing, as well as within Cambodia.

Ieng Thirith's case before the ECCC was dismissed due to her being deemed unfit to stand trial,⁷ and Im Chaem was initially charged in absentia and later her case was dismissed. In addition, Khieu Ponnary and Khieu Thirith were given amnesty by the Cambodian government.⁸ The silences within the histories around the genocide are not only evident within the ECCC, but in the lack of interrogation around the experiences within the Khmer Rouge as well. While most justice mechanisms, news reports, and feminist interventions, around armed conflicts focus on women as victims, the experiences of women and men during this period of Cambodian history is quiet on multiple accounts. Recent work has started to bring discussions and understandings of the genocide to light, prior to this there has been a culture of denying the events that have occurred.⁹

Focusing on the importance of post-conflict justice and the international community's interaction with armed conflict and criminal law, the ECCC offers a unique perspective on the effectiveness of hybrid courts and opens up the opportunity to ask questions regarding the relationship between international and domestic law and the intersection of gender and class. The ECCC, due to its lack of proximity to the time period of the actual crimes committed and the length of the trials themselves, has made few gains. Many of those who have been brought to trial were too elderly and unwell to see the process through.¹⁰ Multiple cases are currently incomplete and few have begun, in comparison to other international criminal tribunals/courts. Some would suggest this is the product of a hybrid court like the ECCC, where the merging

⁶ Linton, 'Women Accused of International Crimes: A Trans-Disciplinary Inquiry and Methodology' (2016) 171.

⁷ Men were also deemed unfit to stand trial as well before the ECCC.

⁸ Becker, 'Chieu Ponnary, 83, First Wife of Pol Pot, Cambodian Despot' (*The New York Times*, 3 July 2003).

⁹ Dismissal of events, rather than a need to move on.

¹⁰ Charges dismissed in February of 2017.

of international and local understandings results in a delayed and difficult process.¹¹ Others would blame the slowness of the creation of the ECCC as the main issue.¹² The female defendants involved have either been dismissed, given amnesty, or tried in absentia. Looking into the international criminal cases of female defendants in Cambodia as well as the connection between the local and international justice system progresses this thesis from the chapters on the ICTY and ICTR. This chapter expands the discussion around the way law in multiple forms regards women in armed conflict.

One of the larger goals of this thesis is to assess the usefulness of international criminal law's mechanisms in a post-conflict climate. To this end, it is important to interrogate the work of other forms of post-conflict justice, like the Asia Pacific Regional Women's Hearing, as these spaces may allow the experiences of those affected by the conflict to be heard without the limitations found within international criminal law. By creating the space for alternative forms of justice, specifically those focusing on women's experiences in armed conflict, discussions on female defendants should be theoretically more likely to become a part of the conversation. It is beneficial that women's tribunals offer a space for healing and understanding of a conflict; however, these spaces do not always open up the possibility of alternative viewpoints on women's lived experiences. Women based tribunals do offer a way for survivors to move on and a method for articulating experiences. However, women based tribunals or people's tribunals often do not dislodge the underlying gender norms found within the armed conflict or within Western understandings of the conflict and post-conflict justice. This aspect is an important part of progressing the dialogue around female defendants and lends itself to understanding the boundaries of law. Yet people's tribunals as a method of justice should not be abandoned, this chapter will continue the conversation.

In section two, I will first address the period of the Khmer Rouge, acknowledging the historical and colonial aspects related to the conflict, while especially focusing on the situation of women. Gender, culture, and class will be used as tools of analysis. The

¹¹ See Hamilton and Ramsden, 'The Politicisation Of Hybrid Courts: Observations From The Extraordinary Chambers In The Courts Of Cambodia' (2014).

¹² *ibid* 17-20.

third section will include a description of the ECCC and the trials. Section Four will look at female defendants within the Khmer Rouge and specifically Ieng Thirith, Khieu Ponnary, Khieu Thirith, and Im Chaem. This section will also explore the lack of evidence of female crimes in the literature and history on the conflict in Cambodia, using this to further the discussion on the victim/agent paradigm.

The fifth section will discuss what the Cambodian genocide contributes to understandings of marriage and sexuality, as three of the women mentioned above were connected to the Khmer Rouge through their marriages to key figures in the government. Questions around marriage in Cambodian culture, and its implication in the disavowal of agency when one's husband engages in crimes is an important and unique facet of female defendants in this instance. Considering the majority of female defendants evident within ECCC documentation were the wives of Khmer Rouge leader and in many cases were leaders themselves, this thesis will discuss the presumptions around marriage in South East Asian culture from a Western perspective. This is done to dispel the idea that the wives involved in perpetrating crimes only did so because their husbands were also committing crimes.

Section six will examine the Asia Pacific Women's Hearing and the story of victims in the region. The Victims Support Section of the ECCC, in partnership with Cambodian Defenders Project and Transcultural Psychosocial Organization began the project "Women and Transitional Justice in Cambodia" in 2011, this project offers a different perspective on women's own interpretation of the armed conflict as well as the process of alternative forms of justice. The seventh section of this chapter will analyse the limits of law in connection with the subject of female defendants in general. Feminist intervention and the undesirability of highlighting the instances when women commit violent/criminal acts build on the analysis in previous chapters. In this chapter, I argue that gender is not a sufficient tool on its own to interrogate the existence of the female perpetrator and that law and the international community continue to deny the existence of women who commit crimes while employing the female gender as an excuse.

2. History of the Khmer Rouge

This section begins by focusing on the background surrounding the Khmer Rouge regime as a way to give context to the genocide as well as the Court. A brief look to the colonial history of Cambodia draws out both the gender norms that emerge during the period of French colonial rule. This section will also highlight Cambodia prior to the period of French colonisation. While the focus on precolonial Cambodia is a departure from the previous two chapter's contents, it is important in this case in order to trace the understanding of both gender, and marriage. Cambodia, the Khmer Rouge, and the makeup of the ECCC offer a unique backdrop for exploring these concepts further. The history of the Khmer Rouge's reign of power in Cambodia will, for these purposes, be limited to the period of 1975-1979, despite its reach beyond these dates.

While the colonial context is the starting point for this section and provides a lens for analysis, I am not suggesting that the modern day or 1970's Cambodia is solely the result of the colonial project. For this section's purpose, the point in drawing on the pre-colonial past is done to understand the various discriminations, land reconfigurations, and political undercurrents that continue to be relevant during colonialism and when the Khmer Rouge took power in 1975. The 18th century saw shifts in relations between Cambodia and its neighbours. This included the expansion of Vietnamese presence in parts of Cambodia as well as the backlash to this presence by the Khmers, which again shifted into a Khmer Vietnamese cooperation during the Vietnamese Civil War in 1771.¹³

During the 19th century Siam and Đại Việt (Vietnam), Buddhist and Confucian Kingdoms, both vied for control of Cambodia, as had been the case in earlier time periods as well.¹⁴ Power shifted from each Kingdom and the migration of Vietnamese to Cambodia spurred genocidal murders of ethnic Vietnamese at the hands of Cambodians.¹⁵ Siam's rule was also severe, ethnic Chinese were killed after migrating

¹³ Kiernan, 'Serial Colonialism and Genocide in Nineteenth-Century Cambodia', in Moses (Ed.) *Empire, Colony, and Genocide: Conquest, Occupation and Subaltern Resistance in World History* (2008) 205-208.

¹⁴ *ibid.*

¹⁵ *ibid.*

from Vietnam to Cambodia, the Siam forces burned down villages and forced migration of Khmer and Chinese civilians, while Khmer anti-Siam forces are recorded as killing Siam troops.¹⁶ During the Vietnamese occupation of Cambodia those who resisted such rule targeted and killed ethnic Vietnamese, and when Vietnamese forces withdrew in the 1840s Thai forces also targeted and murdered Vietnamese as well.¹⁷ Throughout this time period reconstruction of settlements and shifts in boundaries continued. In 1859 French gained control of Vietnam and by 1863 Cambodia was also a French Protectorate, which signalled a halt to the Vietnamese and Thai quest for control of Cambodia and the start of European expansion into Southeast Asia.¹⁸

When the French took control of the Cambodian territory, in 1863 the resistance to the colonial regime encouraged Cambodian and Vietnamese populations to work together against their coloniser.¹⁹ What is evident when researching the pre-colonial history of Cambodia, besides its continual shift in land and peoples, is that religion and race play very prominent roles in shaping key events. The summary above is partial and focused on few major instances, in order to show that the history of Cambodia is interwoven with the presence of religion. Hansen states that ‘Khmer Buddhist thought’ was a way to respond and analyse the ‘sociopolitics of modern experiences’ in the late nineteenth and early twentieth century.²⁰ Hansen also reiterates that religion is not national, but moves across multiple borders.²¹ Cambodia needs to be understood through the lens of religion and the politics and aim of the French in preventing and managing certain religions.²² Before discussing the reign of the Khmer Rouge, I will highlight the way gender was understood and demonstrated prior to the presence of European colonisers and then during French colonial rule. The topic of female defendants in the Khmer Rouge benefits from the discussion on colonialism and religion in Cambodia, as the way women and their actions are

¹⁶ *ibid.*

¹⁷ *ibid.*

¹⁸ *ibid.*

¹⁹ *ibid.*

²⁰ Hansen, *How to Behave: Buddhism and Modernity in Colonial Cambodia, 1860–1930 (Southeast Asia: Politics, Meaning, and Memory)* (2007) 10.

²¹ *ibid.*

²² *ibid.*

understood is directly linked to the society they exist within, which has been shaped by political and religious modes of power.

While the wide variety of roles women have inhabited in Cambodian culture have not always entered into the Western understanding of Southeast Asian culture, women were essential part of its history and development. Frieson notes that the presence of women as warriors in Cambodian territory can be traced back to the Angkorean Kingdom (which began around the 9th Century), and that women were political consultants, revolutionaries, protectors of Buddhist temples as well as conduits of peace.²³ Cambodian women have protected territories and upheld certain ideals of racial superiority, but they also have been viewed as figures representing the nation state.²⁴ Furthering such claims, Jacobsen highlights the legend that the first ruler of Cambodia was an unmarried female warrior named Liu Yie.²⁵

Women of high standing were able to appeal to upper classes for legitimation similar to men, allowing political authority.²⁶ Although it is acknowledged that women have participated actively in a long and complex history. Cambodian culture's range of narratives around women details a picture that is extremely complex. Jacobsen describes the high levels of power women achieved in the early part of Cambodian history and the subsequent shift during the nineteenth century.²⁷ However, as Jacobsen also points out in the Angkorian period even though matrilineality remained prevalent, and there were women that were often held in high esteem, women's lives for the most part still remained inexplicably linked to marriage.²⁸

Importantly, in 1837 the *Cbpab Srei* was written by Ang Duong, as a set of guidelines for women.²⁹ These guidelines created an image of the ideal woman: one which does not question the ways of the men in her life and who is fervently pleasant, diligent,

²³ Frieson, 'In the Shadows: Women, Power and Politics in Cambodia' (2001) 1.

²⁴ *ibid* 4-8.

²⁵ Jacobsen (n 1) 1.

²⁶ *ibid* 31.

²⁷ *ibid* 4.

²⁸ *ibid* 42-45.

²⁹ *ibid* 119.

quiet, and hardworking, in order to support her husband and family.³⁰ The Cbpab Srei also gives examples of women who are arrogant and disobey the conditions of ideal behaviour, all the while warning Cambodians of what can happen when women do not follow this specific set of rules.³¹ The Cbpab Srei's influence in Cambodian society seems to have been enhanced by French colonisers.

The French colonisers created an atmosphere of strict gender roles relating to not only their ideas about gender, but their views on Cambodia's culture and religion. The coloniser had contradicting ideas of women in colonial Cambodia, seeing Cambodian women the modest female and the other as the seductive sexually inhabited temptress.³² Jacobsen noted that nineteenth and twentieth century French novels represented French men as heroes and Cambodian women as passive sexual beings.³³ Many French colonisers took Cambodian wives, and instilled a situation where women gained materially as a result.³⁴ French women sought to educate Cambodian women whether it be in the home or in school, a part of the civilising mission.³⁵ Women's place and importance in Cambodian history was diminished or dismissed all together and practices were implemented in order to force women to take their husband's surnames.³⁶ The educational system in colonial Cambodia encouraged the use of the Cbpab Srei and wrongly assumed that the Dhammayut literature, from which the Cbpab Srei was a part of, was an accurate representation of Cambodian society and daily life in the 19th century.³⁷ Jacobsen writes that these concepts were then viewed as traditional concepts that existed before colonialism in what was considered to be Cambodia's golden age.³⁸

The colonial shift in gender expectations illuminates the reasons why when post-colonial Cambodia began searching for its pre-colonial past, there was a sense of

³⁰ Jacobsen, 'Misogyny, Malice, and Male Privilege in Cambodia: The Cbpab Srei [c.1800]' (2015) 40.

³¹ *ibid.*

³² Jacobsen (n 1) 150.

³³ *ibid.*

³⁴ *ibid.*

³⁵ Jacobsen (n 1) 149, 150; See Edwards, 'On Home Ground: Settling Land and Domesticating Difference in The 'Non-Settler' Colonies Of Burma And Cambodia' (2003).

³⁶ *ibid.*

³⁷ Jacobsen (n 30) 21.

³⁸ *ibid.*

return to assumed 'traditional' and narrow ideals of women's roles in society. Post-colonial Cambodia also saw the first women's movement which like the CPK flowed from a nationalist perspective, despite the general acceptance that men still remained in the leading position within society.³⁹ Women in these movements encouraged nationalism and emphasised 'traditional' ideals of women, and yet many women outside the movement wanted Cambodian women to reach for the same rights as European women.⁴⁰ The nationalist movement, like noted above, was mixed with the French view of women as well as strict hierarchies promoted during colonialism.⁴¹ Jacobsen points to French colonialism as a major influence for the modern understanding of Cambodian identity.⁴²

Like the *Cbpab Srei*, 'Khmer Daughters', the work of the Kampuchea newspaper is an example of the inclusion of women into the nationalist struggle, as well as another set of guidelines women must conform.⁴³ The article suggested how Khmer daughters and wives should act and keep the house in order, focus only on the family, and do all things with the purpose of benefiting the family and State.⁴⁴ The unique approach newspaper articles had was not to exclude women from its effort, but to make women the conduit through which messages about appropriate female behaviour were to be passed. All the while, only allowing women to possess agency and independence to the extent that it served the patriotic purpose of extreme nationalistic Khmer Rouge movement. Other literature also supported women's roles within the specific brand of nationalism. During the armed conflict in Cambodia during the 1970s against Lon Nol rule and the United States, which was led by the Khmer Rouge rule, women were involved in the fighting. Frieson states that women were on the frontlines fighting, transferring weapons and messages, and taking care of male soldier's wounds and food preparation.⁴⁵

³⁹ Jacobsen, 'Riding a Buffalo to Cross a Muddy Field': Heuristic Approaches to Feminism in Cambodia' in Roces and Edwards (Eds.) *Women's Movements in Asia Feminism and Transnational Activism* (2010) 209.

⁴⁰ *ibid.*

⁴¹ *ibid.*

⁴² Jacobsen (n 1) 148.

⁴³ Frieson (n 23) 5.

⁴⁴ *ibid.*

⁴⁵ *ibid* 9.

The creation and advancements of the Khmer Rouge regime can be traced to the Communist Party of Kampuchea, as a resistance to French colonial rule which ended in 1954.⁴⁶ The CPK, officially founded in 1960, began their armed rebellion in 1967 with the Samlaut uprising.⁴⁷ The CPK took control in 1975, invading Phnom Penh.⁴⁸ After the Khmer Rouge attained power they subjected citizens to forced labour,⁴⁹ and forcibly transferred individuals, with many being relocated to the countryside from the capital.⁵⁰ The CPK strongly opposed Vietnamese-Cambodians as well as any Cambodians who did not approve of the Khmer Rouge.⁵¹ Many died of starvation during the Khmer Rouge's reign, others were killed because they opposed the CPK or did not have the desired ethnic background, with Chinese, Vietnamese, and Chams facing the largest threat as well as Thai and Lao people.⁵² By 1979, around 1 million people died from causes related to being overworked, starvation, disease, lack of medical care, and execution.⁵³ Religion was another target of the Khmer Rouge, Buddhism was expelled and Marxist ideals were seen as paramount.⁵⁴ Uniformity and equality were also promoted by the Khmer Rouge as the cornerstone of their new policy; however, this did not correlate between the general population, soldiers, and leaders of the CPK.

While the Khmer Rouge created an atmosphere of genocide, forced labour, migration, and communal living, it also propagated a specific idea of equality between all 'accepted' peoples based on their ability as workers. This supposed equality did not translate into actual lived equality and it becomes evident that there are two primary starting points from which gender needs to be addressed within this time period. First, the understanding of gender roles within the practices of the Khmer Rouge and second, the gender consciousness within the ranks of the Khmer Rouge itself. Frieson states that Cambodia, like other South East Asian populations, sees women as

⁴⁶ Kiernan, *How Pol Pot Came to Power Colonialism, Nationalism, and Communism in Cambodia, 1930-1975* (2004) xlii.

⁴⁷ *ibid* 193, 249.

⁴⁸ *ibid* xxxix.

⁴⁹ *Prosecutor v Kaing Guek Eav* (Judgement) 001/18-07-2007/ECCC/TC (26 July 2010) para 320.

⁵⁰ *ibid*.

⁵¹ Kiernan (n 46) xi.

⁵² *ibid* xxv.

⁵³ Defalco, 'Justice and Starvation in Cambodia: The Khmer Rouge Famine' (2014) 46.

⁵⁴ Kiernan, *The Pol Pot Regime: Race, Power, and Genocide in Cambodia Under the Khmer Rouge, 1975-79* (2008) 57.

prominent in the family, having the ability to inherit wealth and property as well as paramount in the economy and marketing.⁵⁵ Frieson further states that on the surface Cambodian women fall into the public/private divide, but in reality their role in the economics of the State, even from the position of ‘typical’ household duties, brings their work into the public realm.⁵⁶ This links to the understanding of gender throughout this thesis, as social organisations are paramount in shaping how gender is perceived and lived. Likewise, the identification of certain tasks that men and women undertake create a hierarchy both politically and socially. However, when the Khmer Rouge took over control and the family structure was destroyed women lost a great deal of the agency they held in this realm.⁵⁷ Frieson identifies the effect of this type of communism mixed with nationalism had on women in Cambodia.

Within the Khmer Rouge, women who were married and over 30 years of age worked alongside men, women over 50 years old took care of infant children, and adolescent girls were agricultural workers.⁵⁸ Women offered themselves to male cadres who rewarded their sexual interactions with food.⁵⁹ Women who then became pregnant as a result of intercourse with cadres were seen as tarnishing the State and punished accordingly.⁶⁰ With sex outside of marriage not permitted and the severe toll of poor care and food resulting in many women not menstruating, young Cambodians were forced into mass marriage ceremonies in order to encourage the birth of new revolutionaries.⁶¹ There are estimates that around 250,000 women were forced to marry soldiers in the Khmer Rouge.⁶² As the conflict continued, the Cambodian population continued to decline due to starvation, disease, and regime killings. The extent to which women were seen to participate in the Khmer Rouge is unknown. Women’s roles in the Democratic Kampuchea (DK) leadership will be explored more thoroughly in the next section, this section however, sought to contribute to the general understanding around those subjected to the DK regime. Harms such as

⁵⁵ Frieson (n 23) 2.

⁵⁶ *ibid.*

⁵⁷ *ibid* 9.

⁵⁸ *ibid* 11.

⁵⁹ *ibid.*

⁶⁰ *ibid.*

⁶¹ *ibid.*

⁶² See Chan and Suon, ‘Red Wedding: Women under the Khmer Rouge’ (Film) (2012).

starvation, malnutrition and improper medical care upon women in Cambodia suggests the possibility that these effects of conflict may have had a greater influence on women's lives than sexual violence, which has tended to take focus when discussing women's experiences in armed conflict.

3. Extraordinary Chambers in the Courts of Cambodia

The role of the Extraordinary Chambers in the Courts of Cambodia in providing an account of the events during the genocide, as well as the courts creation and its progress will be detailed in this section, as the politics around these developments helps to assess the court's successes and failures. Understanding the way gender is conceptualised in the ECCC further develops the discussion around female defendants by assessing the narratives on the conflict. With the DK regime ending in 1979 the extent of the damage sustained in the region was only beginning to be realised by the rest of the world.

While a request for a Cambodian Tribunal was made by the Co-Prime Ministers of Cambodia to the United Nations Secretary General in 1997,⁶³ the Court did not come into existence until 2003. The creation of the Extraordinary Chambers in the Courts of Cambodia was a difficult process; due to its delay in commencement and resulting lack of proximity to the armed conflict itself has produced countless negative critiques. The United Nations and the Cambodian Government signed an agreement in June of 2003 while the local legislation was created by the Cambodian Parliament in 2001 and modified in 2004.⁶⁴

Despite the issues within the court, the ECCC created the circumstances which lead to the international community cooperating with the local criminal justice system, creating a hybrid court. The connection between the international and local and its importance in the progression of the international legal system will be detailed much more fully in the sixth chapter. The negotiation process between the United Nations and the Government of Cambodia was long and difficult, as the UN wanted to ensure that the court kept the ideals of international law at its core and the Government of

⁶³ Peiti and Ahmed, 'A Review of the Jurisprudence of the Khmer Rouge Tribunal' (2010) 166.

⁶⁴ *ibid.*

Cambodia wanted to retain Cambodian characteristics.⁶⁵ The Tribunal itself, in both the Pre-Trial Chamber and the Trial Chamber have noted that the court exists within the Cambodian system, but with special characteristics, as it is an independent entity that is not reviewed by, nor reviews other court's decisions.⁶⁶

Since beginning operations the court's caseload consists of just four cases, with the second case being divided into two smaller cases. Case 003 against Meas Muth and 004 are still in the investigation phase with Ao An, and Yim Tith,⁶⁷ having been charged.⁶⁸ Kaing Guek Eav was tried in Case 001 and was convicted of crimes against humanity and grave breaches of the Geneva Convention, initially sentenced to 35 years imprisonment with 16 years deducted for time served and illegal detention by the Cambodian Military, his sentence was then increased to life-imprisonment by the Supreme Court Chamber.⁶⁹

Case 002, split up into two separate cases 002/01 and 002/02, included indictments against Ieng Sary, Ieng Thirith, Nuon Chea and Khieu Samphan. Ieng Sary died in March of 2013 and Ieng Thirith was found unfit to stand trial. In Case 002/01 Nuon Chea and Khieu Samphan were convicted of crimes against humanity and subsequently sentenced to life imprisonment in August of 2014. They are currently appealing this decision.⁷⁰ Case 002/01 was the first case to reach a verdict, which took

⁶⁵ *ibid* 165.

⁶⁶ *ibid* 167.

⁶⁷ *Prosecutor v Im Chaem*, (Dismissal of Case against Im Chaem) (Press Release) (22 February 2017).

⁶⁸ Case 003: On 14 December 2015, the International Co-Investigating Judge charged Meas Muth with genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, violations of the 1956 Cambodian Penal Code, namely premeditated homicide; Case 004: On 9 December 2015, the International Co-Investigating Judge charged Yim Tith with genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, violations of the 1956 Cambodian Penal Code, namely premeditated homicide; On 14 March 2016, the International Co-Investigating Judge charged Ao An with genocide, crimes against humanity, violations of the 1956 Cambodian Penal Code, namely premeditated homicide.

⁶⁹ The Supreme Court Chamber can hear appeals against decisions and judgements issued by the Trial Chamber. Four Cambodian judges and three international Judges comprises the Supreme Court Chamber. Any decision by the Chamber requires an affirmative vote of at least five out of seven judges; ECCC Case 001

⁷⁰ ECCC Case 002/01 commenced on 21 November 2011. The hearing of evidence in case 002/01 ended on 23 July 2013 and the closing statements concluded on 31 October 2013. The trial judgement was pronounced on 7 August 2014. Nuon Chea and Khieu Samphan were found guilty of crimes against humanity and sentenced to life imprisonment. Both accused have filed appeals against the judgement, and appeals proceedings are ongoing.

eight years and a cost of over 200 million US dollars.⁷¹ Case 002/02 is the second trial against Nuon Chea and Khieu Samphan with additional charges filed from the initial Case 002, which include genocide, forced marriages, internal purges, treatment of Buddhists in Tram Kok Cooperatives, and targeting of former Khmer Republic Officials with limited locational scope. Trial hearings started in 2014 and evidence began being presented in January of 2015.⁷²

While the court has provided procedural and substantive jurisprudence, as authors Peiti and Ahmed, have suggested, it can also be argued that the advances in international law are not substantive and marred with accusations of corruption and personnel strikes due to months of overdue wages.⁷³ This is all in conjunction with a court that has spent more than hundreds of millions of dollars, with only four cases in its caseload with varied levels of completion. However, Stephen Rapp, US Ambassador for War Crimes, stated that the ECCC showed people that they would not escape prosecution.⁷⁴

The Office of the Prosecutor at the ECCC highlighted the transparency witnessed by Cambodians through the workings of the court and claimed that the court strengthened the work of the legal professionals in Cambodia and its beneficial influence would be felt long after the court closes.⁷⁵ Ainley analyse the way the ECCC influences the perception of international justice by Western politicians, lawyers, and NGOs. Ainley argues that there has been no evidence that the ECCC has benefited the Cambodian legal system, as a focus on fair trials, and an end to impunity and corruption persisted in Cambodia since the ECCC began.⁷⁶

While there is no denying the symbolic and beneficial act of having victims to recount their experiences, it was beneficial to publicly acknowledge the pain and suffering

⁷¹ Ainley, 'Justifying justice: verdicts at the ECCC' (*Justice in Conflict Blog*, 16 Sep 2014).

⁷² Case 002/02 refers to the second trial against Khieu Samphan and Nuon Chea where additional charges from the Closing Order in Case 002 will be heard. Trial hearings in Case 002/02 commenced on 17 October 2014, and the presentation of evidence started on 8 January 2015.

⁷³ Mydans, 'Corruption Allegations Affect Khmer Rouge Trials' (*The New York Times*, 9 April 2009); 'Cambodia: Workers at Khmer Rouge Tribunal Strike' (*The Associated Press*, 2 September 2013).

⁷⁴ Ainley (n 71) 2.

⁷⁵ *ibid.*

⁷⁶ *ibid.*

they survived, as well as illuminate the narrative around the conflict.⁷⁷ However, Ainley has suggested that while the value of justice in the Court is important, the consequences are just as important to interrogate. Ainley states that the gains made by the court are “too little and too late”, with very few leaders taking the blame for large levels of violence. These criticisms, along with the lack of will on behalf of Prime Minister Hun Sen to participate in the Court, as well as corruption and delays, have also been expressed by Amnesty International as well as Human Rights Watch.⁷⁸

The ECCC, being a hybrid court, would seem to be a pragmatic way to approach international criminal justice, especially considering the length of time between the conflict and the establishment of the court. With the age of the leaders, many found to be unfit for trial and others already having died, it would be impossible to expect a thorough and complete understanding of the conflict and a legal process that tries the individuals most responsible. However, this would also assume that if the court was set up closer to the end of the hostilities that it would have been more beneficial. The ICTY and ICTR had the benefit of being close in proximity to the conflict, however both Tribunals were not without their array of problems.

What the ECCC highlights is the issues within international criminal law that extend beyond mere timing of prosecution, local governmental support, or the continuation of justice aims after trials. Due to the ECCC being a hybrid court, it has tended to flag up the tensions between the international and local. Within this tension is the understanding of women’s roles in armed conflict that do not necessarily move from the local to the international context. The local conflict included women within the Khmer Rouge Regime, and in the ECCC women who were involved in the armed conflict have been included through either prosecutions or within court documentation. While this seems to be a positive development, especially in light of the work done within this thesis, I argue this has less to do with a nuanced understanding of women’s role, but rather the result of the long period of time between the conflict itself and the establishment of the court. This discussion will be

⁷⁷ *ibid.*

⁷⁸ *ibid.*

expanded in the forthcoming sections, however now it is important to also interrogate the other ways in which the ECCC has been beneficial.

Discussing the ECCC allows further analysis of the effectiveness of international criminal law more generally. International criminal law, and with the creation of the ICC, is a criminal justice system that in theory requires the acceptance and endorsement of the States involved. Rwanda and Cambodia publicly distanced themselves from the workings of international criminal law after the trials did not develop in line with the desires of the State. The ICC needs States to have actively subscribed to its tenets in order to benefit from them, unless a UN Security Council referral has been made. The reluctance of governments to involve themselves in international criminal law may be due to political motives that safeguard impunity of its leaders, and an embeddedness of the governments in corruption, much like what existed in the armed conflict. The unwillingness of governments to cooperate with international courts and tribunals are often based in a worry over the international community's misrepresentation of the State's people, culture, and history. Heller suggests that the international criminal law has been accused of only selectively picking certain armed conflicts to intervene. This idea is further sustained by the international media's focus on certain types of conflicts and geographical areas.⁷⁹

What underlies most of the issues presented here is the lack of understanding between the international and local. While this topic will be explored more fully in the subsequent chapter, it is clear that the differences between the local and international process and understanding of justice has limited the ECCC. This may seem to be too simplistic or an easy suggestion, to merely blame the entire structure of the international legal system. However, the international system and international criminal law's focus on binaries is a source of many of these problems. Us/them, good/bad, international/local, these pairs highlight the differences carried by international law when it enters the space of the domestic. Assuming that domestic justice concepts cannot be adequate to aid in transitional justice within a State post-conflict, also assumes that the culture itself is also somehow wrong or inadequate.

⁷⁹ See Heller and Simpson (Eds.), *Hidden Histories of War Crimes Trials* (2013).

This reads as hypocritical, as many Western governments have been involved in grave breaches of human rights while they simultaneously censure other States' behaviour.⁸⁰

The lack of trust given to the work of international criminal law by certain governments, evidenced after armed conflict, is also apparent in the signing and ratifying of the Rome Statute. Many States are reluctant to place their citizens in the hands of the International Criminal Court, and with good reason as many treaties, conventions, and great amounts of customary international law are made with great advantages to powerful States. While the less powerful States, whose citizens have been the target of international criminal law prosecution, remain in a position of less influence within international law's mechanisms. Even powerful States such as the US are reluctant to let the International Criminal Court have access to its citizens and former heads of State, and while that may be based upon a strategic plan to save face in the international community, it can also be read as a lack of faith in the international criminal legal system. If less powerful States do not see their values and culture reflective in international law more broadly, then international criminal law is a site where a State's rich and nuanced history might be easily ignored within the court. The contribution of powerful States to the issues that underpin armed conflicts,⁸¹ and the international community's lack of assistance in issues that are insufficiently framed under military crisis narratives,⁸² would signal that international law is too often focused on crisis and not conflict prevention.⁸³

What the ECCC shows is that the issues within the international criminal legal system cannot merely be addressed by changing prosecutors, adjusting administration, providing funds, or speeding up trials. The challenges to international criminal law are the same challenges international law faces. At the heart of this discussion is a lack of equality amongst States, and this idea of inequality extends to the existence of female defendants, or rather the dismissing of female defendants in international criminal law and armed conflict narratives.

⁸⁰ 'China Rails against U.S. for Human Rights Violations' (*Reuters*, 9 March 2017).

⁸¹ See Orford, 'Muscular Humanitarianism: Reading the Narrative of the New Interventionism' (1999).

⁸² Charlesworth, 'International Law: A Discipline of Crisis' (2002) 389.

⁸³ *ibid.*

4. Female Defendants

The presence of women within the leadership or cadres of the Khmer Rouge has not been fully detailed and I question whether it would ever be possible to understand the full extent of female participation in the organisation, planning, execution, and maintenance of the Khmer Rouge regime. The first part of this section will examine the women who were identified in the court documents of the ECCC as holding a leadership role within the Khmer Rouge and in doing so were accused or assumed to be implicit in committing criminal acts. Due to the fact that no cases of female defendants before the ECCC have made it to the judgement stage of trial and some women have received amnesty from prosecution, the knowledge of female defendants actions are not explicitly derived from the court. The names of these women have been listed in court documents, which is an important development not seen in the ICTY or ICTR, akin to the way judges in the ICTR discussed sexual violence crimes within judgements even if no such charges were present.⁸⁴

The ECCC, by listing names of influential women, has also kept the knowledge of these women within the court's understanding of the genocide. The women that will be discussed below are those who the court listed as wives of high powered Khmer Rouge leaders, with the exception of Im Chaem.⁸⁵ Women who inhabited lesser roles in the Khmer Rouge are also evident within the Khmer Rouge Regime; however, this literature is not as abundant.⁸⁶ The second part of this section will also assess the victim-agent paradigm in relation to the cases of female defendants. The association of the female defendants in Cambodia to their roles as wives will also link into the discussion around victims and agents, in particular their levels of assumed agency.

Ieng Thirith, Khieu Ponnary, and Yun Yat, are all examples of women in positions of political and military power and who have been accused of using their station to their advantage in order to commit criminal acts. Ieng Thirith was the Khmer Rouge's social affairs minister. Her husband was Ieng Sary, foreign affairs minister, and her

⁸⁴ See Askin, 'Gender Crimes Jurisprudence in the ICTR' (2005) 1013.

⁸⁵ Chaem is not listed in relation to her husband, she is charged for crimes she committed under the regime.

⁸⁶ Linton (n 6) 171.

brother-in-law was leader Pol Pot, Saloth Sar. Thirith is described by Chhang as being an influential member of the CPK party, able to exert her power as the social affairs minister during the regime's rein.⁸⁷ Chhang further stated that Thirith was documented denying basic healthcare, ordering the "re-education" of traitors, and participating in the organisation of mass forced marriage.⁸⁸ Thirith was also in control of the main radio station in Hanoi, entitled National United Front of Kampuchea (FUNK), which encouraged the spread of propaganda, censored news reports, and broadcasted the interrogations of prisoners of war.⁸⁹ Despite receiving amnesty in 1996 from the government, she was arrested in 2007 to be tried in the ECCC.⁹⁰

In Case 002, the prosecutor alleged that Thirith was directly responsible for having aided in the planning and instigation of crimes against humanity including murder, extermination, enslavement, deportation, imprisonment, torture, persecution on political and racial grounds, and other inhumane acts, genocide, and grave breaches of the Geneva Convention, which included wilful killing, torture, causing great suffering, depriving prisoners of war or civilians the rights of a fair trial, unlawful deportation, and confinement of a civilian.⁹¹ The prosecution alleged that she was directly responsible, due to her position as Minister of Social Affairs, for ordering the commission of crimes against humanity, other inhumane acts, and persecution on racial grounds.⁹² Joint Criminal Enterprise was also alleged for crimes against humanity, genocide, and grave breaches of the Geneva conventions in conjunction with Nuon Chea, Ieng Sary, and Khieu Samphan.⁹³ Ieng Thirith was indicted on the 15th of September 2010 on the charges listed above in relation to international criminal law and she was also charged with homicide, torture, and religious prosecution under the 1956 Cambodian Criminal Code.⁹⁴ In September of 2012

⁸⁷ 'Ieng Thirith: 'First Lady' of Cambodia's Khmer Rouge dies while facing charges of genocide, crimes against humanity' (*ABC News Australia*, 22 August 2015).

⁸⁸ *ibid.*

⁸⁹ *Prosecutor v Nuon Chea et al* (Closing Order) 002/19-09-2007-ECCC-OCIJ (15 September 2010) para 25.

⁹⁰ 'Khmer Rouge Man and Wife Arrested' (*The Associated Press*, 12 November 2007).

⁹¹ *Prosecutor v Nuon Chea et al* (n 89) para 1563.

⁹² *ibid* para 1209, 1210, 1290, 1291, 1295.

⁹³ *ibid* para 1538.

⁹⁴ *ibid* 402.

Thirith it was determined to be unfit to stand trial in 2011, due to dementia, and later released.⁹⁵

Khieu Ponnary was the former spouse of Pol Pot and sister of Ieng Thirith, who like her sister studied in Paris during the 1950s and was the first Cambodian woman to receive a baccalaureate degree.⁹⁶ Due to mental health problems she did not retain a prominent public position in the genocide, despite her marriage to Pol Pot Ponnary. Ponnary was nevertheless considered to be the “mother of the revolution” and along with Pol Pot, Ieng Sary, and Ieng Thirith were the centre of the ruling party.⁹⁷ Ponnary was granted amnesty in 1996 and died in 2003.⁹⁸ Ponnary was documented as having ‘direct’ involvement.⁹⁹

Yun Yat, listed in ECCC court documents, was the wife of Son Sen, Deputy Prime Minister for National Defence, who held the position of Minister of Education in the Khmer Rouge Cambodia, and in 1977 took control of the Ministry of Propaganda, which merged into the Ministry of Culture, Training, and Education.¹⁰⁰ Yun Yat and her husband were accused of treason and espionage in 1997 against the still functioning Khmer Rouge movement, allegedly spying for Second Prime Minister Hun Sen and the Government of Vietnam. They were then executed along with nine of their relatives.¹⁰¹

Im Chaem, who was a soldier under the Khmer Rouge and put in charge of worksites, was charged in absentia in March of 2015, with crimes against humanity including murder, extermination, enslavement, imprisonment, persecution on political grounds, and other inhumane acts at the Phnom Trayoung security centre, and crimes against

⁹⁵ *Prosecutor v Ieng Thirith* (Decision on Reassessment of Accused Ieng Thirith's Fitness to Stand Trial Following Supreme Court Chamber Decision of 13 December 2011) 002/19-09-2007/ECCC/TC (2012).

⁹⁶ Becker, ‘Chieu Ponnary, 83, First Wife of Pol Pot, Cambodian Despot’ (*The New York Times*, 3 July 2003).

⁹⁷ Sambath, ‘The Story of Khieu Ponnary, Revolutionary and First Wife of Pol Pot’ (*The Cambodia Daily*, 20 October 2001).

⁹⁸ ‘Khmer Rouge Man and Wife Arrested’ (The Associated Press, 12 November 2007).

⁹⁹ Sambath (2001) (n 97).

¹⁰⁰ *Prosecutor v Nuon Chea et al* (n 89).

¹⁰¹ Sambath, ‘The Veil of Secrecy is Lifting On the Last Days of the Khmer Rouge’ (*The Cambodia Daily*, 8 April 2000); Mydans, ‘Khmer Rouge said to Execute a Top Aide on Pol Pot’s Orders’ (*The New York Times*, 14 June 1997).

humanity including murder, enslavement, imprisonment, and other inhumane acts at the Spean Sreng work area. Chaem was also charged with homicide as a violation of the 1956 Cambodian Penal Code, at both the Phnom Trayoung security centre and Spean Sreng work area.¹⁰² Cheam who at the time was living as a Buddhist nun, was accused by a witness before the court, in connection with Case 002/02, as being especially cruel and responsible for the death of his parents.¹⁰³ The case of Im Chaem does not follow the typical pattern of focusing on key leaders; Im Cheam has claimed in an interview with *Time* that she had no idea that the Khmer Rouge was practicing said policies and was following their superior's orders.¹⁰⁴ Chaem was indicted with Case 004/01, but the case was subsequently dropped in February of 2017.¹⁰⁵

Im Chaem's position as a female cadre of the Khmer Rouge is not an anomaly in the Cambodian genocide. Linton's work states that the participation in the atrocities of the Khmer Rouge was not limited to men and despite knowledge of the involvement of women in the atrocities during this period, their existence has been downplayed in official records.¹⁰⁶ Within the ruling elite women were promoted to positions of power, Ieng Sary's daughter, was appointed head of the Calmette Hospital although she was still in secondary school.¹⁰⁷ Ieng Sary's niece was given a job as English translator for Radio Phnom Penh, despite the fact she had not mastered the language.¹⁰⁸ Linton's focus on female cadres in the Khmer Rouge has uncovered that women participated in all levels of the regime, but this inclusion of women into the ranks of the Khmer Rouge did not happen immediately. Linton, So, and Chhang have stated that initially civilian women were in low level, low publicity roles that stayed in line with strict gender ideals around what is considered "women's work".¹⁰⁹

¹⁰² Statement of the International Co-Investigating Judge regarding Case 004 (Extraordinary Chambers in the Courts of Cambodia, 3 March 2014)

¹⁰³ Wright, 'Survivor Tells Tribunal of Im Chaem's Cruelty' (The Cambodia Daily, 28 July 2015).

¹⁰⁴ Brady and Srok, 'Why Some Khmer Rouge Suspects May Never Face Trial' (*Time*, 22 September 2011).

¹⁰⁵ Charges dropped

¹⁰⁶ Crane, 'Female Cadres of the Khmer Rouge' (*Phnom Penh Post*, 1 August 2015).

¹⁰⁷ Wood, 'Tracing the Last Breath: Movements in Anlong Veng' (PhD Dissertation Rice University) (2009) 347.

¹⁰⁸ *ibid.*

¹⁰⁹ Crane (n 106).

A woman's role was initially to provide for male counterparts: transporting weapons, supplies and food. However, as the reign continued women were able to move through the ranks and by the end of the regime's years of power, had positions in all levels. Tuy Kin was a female cadre under the Khmer Rouge having joined when only 14 years old, she was arrested, charged and jailed for her role in the killing of 300 prisoners at Phnom Penh's S-21 prison.¹¹⁰ Linton's work demonstrates that women in the Khmer Rouge committed mass atrocities and that their participation was not due to the fact that their agency was taken away and they were forced to participate. On the contrary, women were committed to the cause and ideals of the Khmer Rouge regime, as were their male colleagues.¹¹¹ Linton's work dismisses the assumption that if women are targeted due their gender, they would not participate in the politics of that regime. By understanding that women were often simultaneously, violators and victims in Cambodia, dialogue is created expanding on the diversity of women's experiences. This argument does not deny the existence of women who were forced to join the Khmer Rouge and only appeared to have subscribed to the party's political aims.

In the previous chapters on the ICTY and ICTR, many women contributed towards the violence and crime in the conflict, irrespective of the larger amount of sexual violence against the female body. Therefore, reading a conflict along gender lines is not enough, as it would support the assumption that female participation is minimal due to the violence against the female body and that 'women' all share one experience. Rather, looking at class, nationalism, and extremist ethnicity, allows for the agency of women and the beliefs of those women who participate in armed conflict to begun to be understood. Instead of moving through each one of these identities in relation to the women of the Khmer Rouge, this section will explore what has prevented women from being acknowledged to possess multiple modes of identity. It is through the lens of international criminal law, which focuses on a certain perspective of victor and violator that does not look to the women who participated on either side and committed crimes therein.

¹¹⁰ *ibid.*

¹¹¹ *ibid.*

The discussion around the presence of female cadres in conjunction with the evidence of women high in the Khmer Rouge leadership not only disrupts the notion that women do not play a central role in armed conflict, but also disrupts images of cultural stereotypes, prominent in Western accounts of Southeast Asia.¹¹² This also disrupts the Western construction of a Cambodian female subject within the international perception of the genocide which links to the construction of the strict gendered female subject during French colonial rule. While the existence of lower level female soldiers who participated in the regime may have been denied or ignored,¹¹³ the acknowledgement of female leaders is more visible because of the ECCC.

Ieng Thirith, Khieu Ponnary, Yun Yat, and Im Chaem have all been identified in the court documents of the ECCC, with charges filed by the court directly against Ieng Thirith and Im Chaem. Only eight persons have come within the purview of the court and two of these are women. This signals a shift from the previous tribunals in the former Yugoslavia and Rwanda, which did not represent the larger presence of women or named women in positions of power in the court documents. The existence of female defendants, within the documents of the ECCC not only suggests an awareness of the participation of women, but that their acts are more or less on the same level as the males accused. Yet, the existence of charges against female defendants within the court does not dismiss the issues the ECCC faces with completing cases.

Due to the structure of the armed conflict and the society in place under the Khmer Rouge, women were afforded positions of power. Moreover, as it has been demonstrated in previous chapters the existence of female defendants in the Former Yugoslavia and Rwanda is evident albeit more often in lower level roles. Women did exist at various levels in both the former armed conflicts. Whether it was because male counterparts had higher roles within the conflict and were therefore more desirable to pursue by the Tribunals or possibly because limited gender ideals still hold sway in the minds of the prosecutors and investigators; women were not as

¹¹² Monto, 'Prostitution, Sex Work, and Violence: Lessons from the Cambodian Context' (2014) 74.

¹¹³ Crane (n 106).

evident in the Ad Hoc Tribunals. Of the few cases before the ECCC two women were focused upon and court documentation points to the involvement of other women, although it does not discuss their level of participation. It can be suggested that due to the timing of the hybrid court, and its distance from the events, prosecutors were desperate for any involved person still living and able to stand trial and even willing to put women before the court. Drawing on the last two chapters, which identified a general uneasiness to see women as a part of the leadership who perpetrated genocide, it would appear in some ways Cambodia is different.

When women's participation in armed conflict is ignored, dismissed, or seen as a cause for concern, which followed in the way women were written on and represented in the Former Yugoslavia and Rwanda, then it is in Cambodia where a different narrative has developed. The next part of this section will look at the concepts of the victim and the agent and how Cambodian women in power during the Khmer Rouge straddled this binary. The higher visibility of female defendants in leadership roles identified by the work of the ECCC will be explored by first contemplating the role of agent and victim. This will be done in this section and then carried into the fifth section on the Asia Pacific Women's Tribunal and victimhood.

To categorise female leaders who were accused of perpetrating crimes in Cambodia as either victim or violator would be counterproductive; however, the Cambodian conflict gives a perspective into the way women are commonly perceived in armed conflict and aids discussions around what makes someone an agent. People who perpetrate crimes are most commonly seen as actors in charge of their own lives, but those who are commonly seen as defendants tend to be men, therefore beyond what makes someone a victim or violator there is the presence of a gendered element. Unless duress is involved in the perpetration of crimes, *men* remain capable of making their own decisions. Women in armed conflict are often seen to be victims and even when agency appears to be displayed they are relegated back to their victim status, as was the case when women are assumed to have been raped regardless of actual admission of this fact.¹¹⁴ Women in the Former Yugoslav Republic who were raped

¹¹⁴ Kay Cohen and Hoover Green, 'Were 75 percent of Liberian Women and Girls Raped? No. So Why is the U.N. Repeating That Misleading 'Statistic'?' (*The Washington Post Opinion*, 26 October 2016).

and then took up arms were seen as only making such a decision due to the after effects of sexual violence.¹¹⁵ Some women in Cambodia entered into the higher ranks of the Khmer Rouge believing in their cause and choosing to participate actively in the regimes activities. In some cases, after the fact, women denied their knowledge of the extent of the activities or their willingness to partake.¹¹⁶ However, while men's agency is automatically assumed, women are assumed to be victims first, and agents only after their autonomy is proven.

Despite the international denial in regards to the high amounts of lower ranked female participation in the Khmer Rouge, as Linton pointed out, which harkens back to earlier chapters on Western denial of violent women, the situation in Cambodia can be said to take on a different viewpoint entirely. Women have garnered a stronger focus in the ECCC, considering their prevalence in relation to the number of persons brought before the court, and their actions would seem to be looked at alone, with their gender seen as irrelevant to their culpability, evident merely by the fact they are publicly brought before the court. However, the little work done both academically and institutionally around the contribution of female defendants in general in the Cambodian genocide, who have been left out of the greater memory and history of the Khmer Rouge reign until recently, might suggest to some a wider gendered denial of women participating. The lack of acknowledgement of female defendants affirms a stereotype that women do not participate in armed conflict and that South East Asian culture does not accept women as defendants. However, this assumes that the lack of work on female defendants in Cambodia is based on gender stereotypes, and not a larger denial of the genocide from all standpoints. If many Cambodians themselves want to forget about the genocide, then some of the push to remember and recounting history would be a Western influence.

Furthermore, since female defendants in Cambodia were often associated with their position as wives it still sits uneasy in a Western mind-set of marriage in South East Asia. As traditional Cambodian marriage has been dominated by what would be

¹¹⁵ Referencing the discussion in Chapter Three on women who participated in the FYR conflict after experiencing sexual violence.

¹¹⁶ Jacobsen, 'Riding a Buffalo to Cross a Muddy Field': Heuristic Approaches to Feminism in Cambodia' in Roces and Edwards (Eds.) *Women's Movements in Asia Feminism and Transnational Activism* (2010) 214.

termed in the West as ‘arranged marriages’,¹¹⁷ scholars such as Pande and Chantler, who discuss South Asian marriages, have suggested that the traditional Western ideas of marriage which rest on romantic love, are a result of a hegemonic neoliberal system.¹¹⁸ This would position the Western idea of marriage as constrained by modes of power, which further embed patriarchal dominance. At the same time, the Western conception of marriage understands arranged marriage to be limiting and problematic. Relating the work of Pande and Chantler to South East Asian marriages, I would argue that the same presumptions found around non-romantic based Western notions of marriage in South Asian spaces, also exist in the minds of the West when viewing South East Asian marriages. As a result, female defendants who are wives of high Khmer Rouge officials do not enter into the international narrative around the Cambodian genocide.

Armed conflict and genocide produces a specific understanding of agency, usually bolstered by a narrow conception of gender roles. A woman is physically engaged in committing crimes, but often her actions justified or explained through a victimised state. The presence of female defendants within armed conflict sits uneasily between victim and agent. While in many cases women and men are simultaneously victims and violators, the association of certain actions as either masculine or feminine, further separates women and men to victims and violator. From this perspective, it would appear that in order to be a violator one would need to have complete autonomy within their society. However, I argue that this is essentially an irrelevant component in identifying women as violators, as it is not autonomy that is necessary for women to be in positions in order to commit crimes and be prosecuted before international courts. I further argue that the intersection of gender, race, class, ethnicity, religion, and geographical location create the conditions that limit women’s perceived possible autonomy, which thereby establish women at the bottom of the ‘hierarchy of autonomy’.

Acknowledgement of the actions of female defendants tends to lead to the labelling of a feminine stereotype. This is also demonstrated in Sjoberg and Gentry’s work as

¹¹⁷ Marcher, ‘Arranged Marriages Blamed for Failing Families’ (*Phnom Penh Post*, 20 August 1999).

¹¹⁸ See Chantler, ‘What’s love got to do with marriage?’ (2014); Pande, ‘I arranged my own marriage’: arranged marriages and post-colonial feminism’ (2014).

well, as women who engage in violence are on one hand labelled a ‘mother, monster, or a whore’, or the actions of women who commit violence are described in detail. However, when Weare writes on female killers, she notes that women are either, ‘mad’, ‘bad’, or ‘victims’.¹¹⁹ This was seen with the characterisation of female defendants described in previous chapters. Furthermore, there has not been the same amount of vilification of female defendants in the Khmer Rouge, which differs from the female defendants in the FYR and Rwanda, possibly due to their lack of visibility in Western consciousness and media.

Despite the limited news headlines condemning the female defendants of Cambodia and labelling them as monsters, the stories that have been cited around the actions of women cadres or leaders in Cambodia find women, like Im Cheam, denying their responsibility in committing criminal acts. Women in lower level women positions in the Khmer Rouge were documented denying their involvement in the genocide.¹²⁰ Often when women deny their participation in the violent side of armed conflict it is attributed to women out of line with traditionally accepted female behaviour or rather their gender is used as a reason why they could never have done such an act. This was shown to be the case in Rwanda, where Nyiramasuhuko and other female defendants denied wrongdoing due to the fact that they were women and claimed that women do not act in such a manner.¹²¹ This perspective should not then carry on to all armed conflicts, as any denial of involvement in the genocide can be the result of a cultural denial of the armed conflict and not issues arising from a gendered lens. The claiming of innocence supports the argument that labelling is done as a means of making sense of women’s actions. Even if in these cases women are not being labelled, but rather labelling themselves as unaware or innocent, they contribute to a passivity or lack of intention towards the crimes they are accused of committing.

Weare and Morrissey, both state that in an effort to explain the behaviour of ‘women who kill’, a woman is labelled as a victim, but this simultaneously erases rationality,

¹¹⁹ Weare, ‘The Mad’, ‘The Bad’, ‘The Victim’: Gendered Constructions of Women Who Kill within the Criminal Justice System’ (2013) 350.

¹²⁰ Crane (n 106).

¹²¹ This is referencing the discussion on Nyiramasuhuko in Chapter Four.

responsibility, and agency.¹²² The ‘bad’ woman is seen as evil or a monster, and thus without humanness.¹²³ Since she is seen as a monster she is abnormal and not a part of the society, but a threat to it. This ignores the influence of society and culture on a women’s actions, and takes away ‘human agency’.¹²⁴ Agency is not automatically assumed for female defendants, as it is with men. By placing women into the category of ‘bad’, ‘evil’, ‘monster’, ‘victim’, ‘helpless’, or ‘whore’ she cannot disrupt binaries. Instead, Morrissey states, the woman is kept in a state of silence and passivity.¹²⁵ This also bares long lasting effects, even for those who adopted the assumed appropriate female characteristics of women who commit crimes, as they solidify feminine stereotypes within the law and society.¹²⁶ Weare states, “The use of these labels may allow individual women, in particular circumstances, to win their battle but they do little to allow women to win the war against having to conform to appropriate feminine behaviour or asserting their individual agency.”¹²⁷

I argue that there is an issue with naming and shaming the women who commit crimes as monsters, or similar terms, since their actions are seen far from acceptable societal behaviour, this is due to the fact that most of the shame that comes with identifying female defendants is based on their gender. When confronted with female defendants, it is easier to label women in order to make sense of their actions. While it is not being suggested that women who commit crimes should be celebrated because their crime breaks the stereotype of femininity; conversely, allowing women to be seen as capable human beings with the propensity to act in all manner of ways, does more to aid the overall status and ability of women in general. Of course, the harms committed by women and men need to be appropriately dealt with while caring for their victims. However, when women commit crimes and are then labelled, their agency is taken away, which leads to issues for women globally, as this contributes to a denial of individual agency and a reaffirming of strict feminine behaviour.¹²⁸ It also

¹²² Weare, (n 119) 351; See Morrissey, *When Women Kill: Questions of Agency and Subjectivity* (2003).

¹²³ Weare (n 119).

¹²⁴ *ibid.*

¹²⁵ *ibid* 352.

¹²⁶ *ibid* 353.

¹²⁷ *ibid.*

¹²⁸ *ibid.*

does their victims a great disservice, by suggesting the actions female defendants commit are of little consequence. This bolsters a further denial of criminal justice for both female defendants and their victims. Weare notes that when women are brought before courts their cases often involve a ‘trial of character’, which does not focus on the actual crimes being committed, further gendering the criminal justice system.¹²⁹

The victims who suffers at the hands of female defendants are harmed again when society and criminal justice does not take the crimes committed by women as displays of agency, without the need to make sense of their actions through the process of labelling. Pearson states, “...it radically impedes our ability to recognise dimensions of power that have nothing to do with formal structures of patriarchy.”¹³⁰ Pearson goes on to state that if women and their acts of aggression, and agency in that aggression are ignored, then the way violence exists in society, and certainly during and after armed conflict, cannot be properly addressed or stopped.¹³¹ When female perpetrator’s actions are ignored then male violence becomes reaffirmed as ‘normal’ violence. The existence of female defendants and the way they are ‘dealt’ within society and the law should be a concern for everyone.

5. Marriage in the Khmer Rouge

Another facet of female participation in the Khmer Rouge which needs to be explored is marriage. Marriage carries with it many assumptions of status, power, and freedom which often vary depending on the geographical location and culture of the couple. In Cambodia three of the female defendants mentioned by the ECCC were married to high ranking Khmer Rouge officials which allowed them access to a different realm or society not afforded to other married women in Cambodia. Marriage for these women led to their higher visibility within society, regime, and access to political appointments, which allowed them to carry out acts causing severe harm. While the West has stereotypically viewed marriage in South East Asia as extremely limiting, the institution of marriage in these cases needs to be scrutinised. The perception of traditional South East Asian marriage by the West as merely just ‘arranged marriage’

¹²⁹ *ibid.*

¹³⁰ Pearson, *When She Was Bad...: Violent Women and the Myth of Innocence* (1998) 243.

¹³¹ *ibid.*

echoes the French colonial ideological mandate of seeking to civilise non-Western concepts or institutions like marriage.¹³² At the same time, the concept that wives are automatic defendants when their husbands commit harm, due to men having more power in marriage, will be discussed.

The women in Cambodia who were in positions of power due to their marriage to party leaders, were also active in the CPK party and ideology around the Khmer Rouge. Ieng Thirith, Khieu Ponnary, Yun Yat were all the wives of men in high political positions. Khieu Ponnary was the wife of Pol Pot, and Ieng Thirith, the sister of Ponnary, was married to Ieng Sary, the four together making up the most powerful part of the Khmer Rouge regime, with the two sisters becoming the most powerful women in the State. Yun Yat and her husband Son Sen were also part of the CPK Standing committee, as was Pol Pot, Ieng Thirith and Ieng Sary. Ieng Thirith was the only woman brought before a court, contributing to the process of identifying the women who are visible within the consciousness around the genocide. The relation of these women to marriage is important, as the stereotype of marriage in most cultures is seen as traditionally limiting for women. The methodology of this thesis has been to look at the surrounding environment to fully understand what influences female defendant's visibility. In this case it is not marriage that has limited women, but has aided in elevating them to a publicly visible status. It is therefore required to look at marriage in relation to the cultural environment and how marriage influences the way women are understood in Cambodia.

Marriage is an important cultural milestone in Cambodia for both men and women.¹³³ Women gain in marriage a position in society and access to areas that would typically be out of reach for single women, such as politics and economics. The Khmer Rouge regime destroyed many of the traditions common to Cambodian society, kinship responsibilities, religious ceremonies, and private land ownership all suffered; marriage like many of these other arenas was also harmed due to forced marriage ceremonies that did not adhere to previous rigorous matching process, and the effects

¹³² Jacobsen (n 1) 239.

¹³³ Surtees, 'Negotiating Violence and Non-Violence in Cambodian Marriages' in Sweetman (Ed.) *Gender, Development and Marriage* (2003) 31.

of this change in marital relations were felt even after the Khmer Rouge fell.¹³⁴ Within the politics of the Khmer Rouge there was a desire to remove the bourgeoisie and capitalist classes, forming an entirely proletariat class of peasants.¹³⁵ Despite this, the leadership of the Khmer Rouge resided amongst the bourgeoisie middle class, who were, as Vickery stated, “petty bourgeois radicals overcome by peasantist romanticism”.¹³⁶ The marriage arrangements amongst the leaders in the Khmer Rouge was decidedly different than the newly imposed marriage conditions forced upon so many ‘lower level’ Cambodians.

While the leadership married for connection and alliances, amongst other qualities, the majority of Cambodians under the CPK were forced into situations that negated their family ties, previous marriages, and living arrangements. Others were forced to undergo marriages that the ruling class deemed necessary for the survival of the regime, without the typical benefits or earmarks associated with traditional Cambodian marriages. This construction of the new ‘type’ of Cambodian marriage, what would later be criminalised as forced marriage, was in many ways used to control sexuality within the newly reformed State. The ruling class was able to shape their ideal society through a combination of forced marriage, undertaken to ensure a survival of the party’s ideology for future generations, banning sex outside marriage, and promoting sex inside marriage. Controlling sex can be seen a desire of power by the ruling class over the working class, the control of working class sexuality is a way to solidify the ruling class’ place. The Khmer Rouge regime claimed that its aim was to break down the previous societal structure. However, in reality they bolstered their own ruling elite at the cost of the rest of the population.

This discussion, in addressing female defendants during the Khmer Rouge, is focusing on marriage within Cambodian society before and while the regime came into power. Marriage for both women and men was a way to secure alliances, showcasing power and strength amongst families, and benefited other members of the

¹³⁴ Heuveline and Poch, ‘Do Marriages Forget Their Past? Marital Stability in Post–Khmer Rouge Cambodia’ (2006) 99, 1000.

¹³⁵ Ronayne, *Never Again?: The United States and the Prevention and Punishment of Genocide since the Holocaust* (2001) 56.

¹³⁶ Vickery, *Cambodia 1975-1982* (1984) 287.

family as well.¹³⁷ Through this contract women gained respect as mothers and wives; Surtees states that within this process the boundaries within the public and private blurred and allowed women to transition between.¹³⁸ Marriage is not an arrangement viewable only from the perspective of romantic love, but takes root deep within the fabric of Cambodian society and relations. If the understanding of marriage is shifted to focus on strong units and partnerships and away from the disillusion around gender and power within family units or even romance, then the status of female defendants can be seen from a new perspective. This means that without the pretext of the debates around the way marriage disproportionately harms women, marriage is addressed from the stance of a social contract done to promote the betterment of both parties, albeit in ways directly relating to the genders of each party.

Accepting that marriage was approached in this way in Cambodia prior to the reign of the Khmer Rouge regime and that both members, however gender specific their tasks were, existed within a marriage to create a certain product for society whether it be offspring, political or business alliances, or land ownership. This product was most easily attended through men and women following particular gender specific tasks, notwithstanding the fluidity women experienced within marriage. This research starts from the realisation that marriage exists in society, and discussing it is not making a judgement or supporting the way it manifests. While feminists may endeavour to break apart or reform these (often oppressive) institutions, like marriage, ignoring the benefits marriage brought for women in the leadership of the Khmer Rouge, even within an assumed restrictive environment, does not help to illuminate the situation of women or female defendants in the Cambodian genocide. While it is impossible to completely remove oneself from a deeply entrenched perspective on marriage based upon their culture and geographical location, by looking at marriage outside of typical gendered ideals, it is possible to better understand the context in which women and men existed in Cambodia and therefore offer a more nuanced approach to marriage in this context.

¹³⁷ Jacobsen (n 1)33-35.

¹³⁸ Surtees (133) 31.

The presence of female defendants holding leadership positions in Cambodia is not necessarily detailed through a lens of gender, but marriage. It is not useful to make an argument that women are less likely to become defendants because of their gender, as in some cases it is their gender in relation to their ability to become wives that elevates them to the position of power. A leader is then capable of committing crimes through the power their married status entails. This is not to say that there are not gender forces that affect female leaders in their daily interactions, but that blaming gender for not allowing women to act or be recognised as defendants is not valid. There is still evidence that women, despite their leadership gains, were often relegated to gender typical domestic tasks, as mentioned above. However, the way women transformed their status in the Khmer Rouge from domestic tasks to leadership positions, including those in lower level leadership positions, can be likened to the way women have continually navigated through marriage, blurring boundaries, and attaining higher levels of power and mobility. As was the cases with the Schutzstaffel (more commonly known as the SS) in World War II women who were married to SS or Gestapo men were directly involved in committing crimes taking part in shootings, encroachments, robbery, and exploitation, or indirectly by domestic or emotional stability.¹³⁹ Szejnmann states that women were not passive, but actively worked in the same way as their male counterparts within the SS and Gestapo.¹⁴⁰

If women in positions of power are given greater access through a traditional mode of gendered category in marriage, but their access to power is not restricted by their gender, as long as it is attained through the specific means of marriage, then gender does not serve as the sole mode their lives should be analysed through or are affected by. Likewise, women who are lower level defendants are not necessarily denied their place in Cambodian history because they are women, but because society as a whole seeks to dismiss a genocide. The government in Cambodia has battled the denial of the genocide and have fought to make the history of the conflict visible to future generations; despite these efforts, for long periods of time many people refused to recognise certain important places and events of the Khmer Rouge regime.¹⁴¹ Until

¹³⁹ Szejnmann, 'Perpetrators of the Holocaust: A Historiography' in Jensen and Szejnmann (Eds.) *Ordinary people as mass murderers: perpetrators in Comparative Perspectives* (2008) 42.

¹⁴⁰ *ibid.*

¹⁴¹ Peter and Bopha, 'Critics Say Genocide Denial Law Carries 'Great Risks' (*The Cambodia Daily*, 3 June 2013).

quite recently, and in some cases still today, the memory of the genocide was limited to certain spaces, almost mentally compartmentalising the trauma and its effect.¹⁴² Stereotypical notions about gender are no longer a definitive reason for female defendants' lack of acknowledgement. This also can aid in removing gender as a convenient excuse for why female suspects and defendants deny their participation or why more female defendants are not recognised through history. If this is the case in Cambodia, then this it is a unique situation, as it makes female defendants somehow on one hand less visible in Western media and detailed literature around the conflict and on the other visible in court proceedings and thereby within the conflict's history from inside Cambodia.

In fact, from the above discussion, it might be concluded that gender is more of a preoccupation drawn from Western feminist influences. The international focus of the conflict remains tied to defining women's roles through gender and using gender to analysis the entirety of women's participation. Gender becomes ultimately unhelpful as the only mode of analysis when discerning the position of female defendants in the Cambodian armed conflict, since it is not only ideas on gender that has limited the acknowledgement of female participation, but general genocide denial combined with local concepts of marriage and elitism within the Khmer Rouge, as well as a limited Western feminist intervention. In an effort to discern the way marriage influenced the Khmer Rouge the Western intervention centred upon forced marriage, and missed the opportunity to recognise the way marriage amongst the leadership influenced politics and women's roles, often enabling women's access to the public sphere. Adopting a narrow focus that assumes women's suffering during the armed conflict was only the result of forced marriage or sexual violence, misses the ways such as lack of medical attention, and starvation harmed women during the regime. Focusing concern on the elements around female defendants that prevent recognition and thereby limit all women's autonomy shifts the starting point of women in armed conflict and does not assume all were powerless victims.

¹⁴² Buncombe, 'Cambodia Passes Law Making Denial of Khmer Rouge Genocide Illegal' (*Independent*, 7 June 2013).

6. A Brief Comment on the Asia Pacific Regional Women's Hearing

The Asia-Pacific Regional Women's Hearing on Gender-Based Violence in Conflict was held in Phnom Penh, Cambodia on October 10 and 11 October 2012, by the Cambodian Defenders Project in partnership with Transcultural Psychosocial Organization Cambodia and the Victim Support Section of the Extraordinary Chambers in the Courts of Cambodia.¹⁴³ While it was not constructed for just Cambodian testimonies, its objectives were to uncover the truth about armed conflict, uphold a sense of justice, address reparations, and encourage the non-recurrence of widespread and systematic State violence.¹⁴⁴ The Hearing's approach was victim focused, offering a way for those affected during the armed conflict to publicly state their version of events and the harms done to them. The Hearing provided a non-judicial means of support for the work of other transitional justice mechanisms within Cambodia by addressing gaps and extending to areas not yet fully developed. This process has also added to international awareness and incorporating international actors has also widened the net, showcasing the attention paid worldwide. Some may argue that the scope of the Hearing was narrow and due to its role as a non-governmental organisation created a limited impact.¹⁴⁵ While these criticisms are noted in order to encourage governmental participation in non-judicial transitional justice mechanisms, they do not necessarily discuss the value of such mechanisms.

Focusing a women's hearing on gender-based violence within a conflict highlights women as the victim in armed conflict and further elevates the story of the victim as the main narrative of women in conflict. This suggests that the primary way women faced harm during the Khmer Rouge regime was through sexual violence. The experience women had during the Khmer Rouge included a multitude of traumas which are not linked to sexual violence: starvation, lack of medical care, forced labour, the breaking up of families, loss of religion, personal property, and so on, were all problems encountered by both women and men during the armed conflict. Women who sustained sexual violence seem to be the sole focus when alternative

¹⁴³ See Panel Statement from Asia-Pacific Regional Women's Hearing on Gender Based Violence in Conflict, (10 and 11 October 2012).

¹⁴⁴ Ye, 'Transitional Justice through the Cambodian Women's Hearings' (2014) 28, 30, 31, 32.

¹⁴⁵ *ibid* 37.

transitional justice mechanisms take place, due to the silences in the ECCC on sexual violence. It is not being suggested that sexual violence is not a worthy focus or a serious problem that needs addressing; however, it seems that it is the only issue being addressed from the female perspective.

When conflict enters and exits, the devastation that is left behind spans through people's everyday lives and while pinpointed traumas like sexual violence are often life changing events themselves, there is little being done to address the totality of women's experiences in armed conflict. From the international perspective, women within armed conflict are only valuable and in need of assistance when she is the victim of a gender based act of violence, in particular sexual violence. This does not dismiss that other NGOs are in place to deal with the other after effects of conflict, but these are done so separately. Instead, a hearing that looks at the experiences of women in an armed conflict which range from starvation, loss of children, loss of identity, and as well as sexual violence might be more useful. The sexual violence that occurs in armed conflict is just that, within an armed conflict and exists next to a multitude of other harms, therefore it is necessary to address the surrounding climate of women's lives as well. If the point of such hearings, is to understand the 'truth', as problematic and embedded as this may be, then it needs to do so in a process that understands that each act of gender based violence does not happen in a vacuum.

Another after effect of projects like the Asia-Pacific Regional Women's Hearing is that it reveals the barometer that the international community operates through. The strength of tribunals like the Asia Pacific Hearing (2012), the Women's International War Crimes Tribunal on Japan's Military Sexual Slavery (2000) or the Guatemala Women's Tribunal (2010) amongst others,¹⁴⁶ is found in their ability to distance themselves from the control of Western State powers. Much like the premise of the

¹⁴⁶ While this list is not exhaustive, Otto references these as alternative mechanisms. They include: The World Court of Women against War, for Peace, Cape Town (2-9 March 2001), The World Court of Women against Racism, Durban (30 August 2001), The International Court of Women against Neoliberal Policies in Latin America, Havana (February 2005), The African Court of Women on Poverty, World Social Forum, Nairobi, Kenya (22 January 2007); The World Courts of Women on Poverty in the US, Oakland, California (10-13 May 2012), Philadelphia, Pennsylvania (18-20 October 2013), The Court of Women on Crimes against Women related to the Violence of Development, Bangalore (28 January 1995), The World Court of Women on US War Crimes, World Social Forum, Mumbai (18 January 2004), Nga Wahine Pacifika: The Pacific Court of Women on Uranium Mining, Nuclear Testing and the Land, Auckland (2-3 September 1999).

Gacaca Court, which was established after the Rwandan genocide. While the Gacaca Court contained punitive measures, it also focused on communal rebuilding.¹⁴⁷ The Asia Pacific Hearing was specifically informal and cathartic in focus, emphasising restorative not retributive justice. However, analysing the Western focus on post-conflict justice displays the eagerness to fund initiatives on conflict-related sexual violence, evident in the Asia Pacific Hearing. This eternally casts women not only as victims of war, but as always sexually vulnerable. By choosing to intervene on behalf of women when they are the victims of sexual violence the international and local community is signalling how they believe women exist in armed conflict, dictates what gender harms are important, and how such judgement is necessary to elevate domestic institutions and governments.

The focus on women in armed conflict is primarily done through sexual violence rather than the multitude of experiences women face; therefore gender norms are set within narrow boundaries without taking account for the nuances in women's understanding of their own position within their society. Women who deviate are not taken into account. When this happens gender is reaffirmed in international spaces as looking a specific way and domestic practices viewable from the outside, fall into gender stereotypes. The thought of disrupting stereotypical practices does not enter the discussion, such as women who perpetrate crime or the status of marriage in Cambodia. It does not help that in these situations the domestic arena has just been through conflict and large scale upheaval, but this should not indicate that there is nothing to be learned from the cultural practices and societal gender interpretations.

The importance of discussing the Women's Hearing in this chapter is to draw attention to the ways the international community can shape and uphold gender norms in the international and local through international mechanisms that do not follow the standard judicial pattern set by courts. Using the example of the Women's Hearing highlights the international perspective beyond the direct work of the courts. Due to the process of the Women's Hearings it is evident that some stories do not fit within these limited guidelines. The Hearing demonstrates a feminist space and another

¹⁴⁷ See Clark, 'Bringing the Peasants Back in, Again: State Power and Local Agency in Rwanda's Gacaca Courts' (2014).

opportunity to gauge where female defendants sit within a discussion around women's experiences in armed conflict. Female defendant's experience in armed conflict does not fall into the gender norm supported by international organisations, like the Women's Hearing. The process in Phnom Penh only focused on the women who were victims of sexual violence and therefore limited the narrative around women's experience. However, Otto has stated that the process at the Hearing was cathartic for the participants.¹⁴⁸

The Hearing, while a different form of engagement with armed conflict, still emphasises that women's primary experience in conflict is one of sexual violence. Women's ability to engage with violence and crime is unrelated to the way they understand their role in conflict, which includes the possibility of committing crimes. Some may question the value of such processes and aim, others may suggest that regardless of their benefits, female defendants have no place in hearings on sexual violence against women. The emphasis placed on sexual violence against women rivals any other understanding of women in international law; the reason hearings like the Asia Pacific Women's Hearing exists is to address the harms experienced by women in the Cambodian genocide that are predominately overlooked by the courts. If this is the case then, the Hearing's would ideally encompass all instances that did not find proper acknowledgement within traditional legal institutions.

7. The Limits of Female Defendants and Feminism

The discussion throughout this chapter and the discussions in the previous chapters on the ICTY and ICTR all display the limits surrounding the topic of female defendants within international criminal law and Western/mainstream feminist understandings. Looking more broadly at this topic seems to hold a mirror up to the practices and mind set of feminist scholars. Meaning that by exposing female defendants, this topic exposes feminism. Western feminists and their reaction to women who perpetrate crime has often been negative or has garnered a general dismissal of female defendants' actions. Feminists must be weary of their own agendas and assumptions, in order to live up to the claims they have made of aiding women. What needs to be

¹⁴⁸ Chapter on file with author, Otto, 'Testimonies of Protest and Survival: People's Tribunals and the Politics of Listening' Forthcoming in Byrnes and Simm (Eds.) Peoples Tribunals and International Law (2017/2018) 10-15.

included in the mainstream feminist agenda is the understanding that women are human beings capable of displaying the range of emotions and actions. From the work discussed above, on Women's Hearings, it is often the case that women are presumed to be on the side of 'the good', making positive moral choices and therefore are to be praised and protected. Once women attain the same level in society as men, it is assumed by many feminists and scholars that they will change and better the organisations and institutions they inhabit.

7.1 International Perspectives

In 2004, the US television show, *60 Minutes II* featured a story on prisoner abuse, highlighting the Abu Ghraib prison in Iraq and publicising the torture committed against Iraqi detainees by US soldiers.¹⁴⁹ Afterwards, many were outraged over the undeniable torture and the US government's policies and practices, more broadly. However, after these initial reactions the debates on this topic quickly became centred on a new focus. It was as if suddenly, upon examining the pictures more closely, that people realised the US soldiers were not all men.¹⁵⁰ It was a female US soldier that was holding the other end of the dog leash, it was a female US soldier giving a thumbs up next to a dead body and behind a pile of naked and handcuffed Iraqi men. These women were said to have done the unthinkable, and not just because they engaged in torture, but because they are women who should know better.¹⁵¹ Many people could not come to grips with the reality of the way these women voluntarily acted.

These photos challenged the stereotypes of women because as it was said that women are expected to kind, peaceful, and less violent, women do not behave this way, women are better than 'this'.¹⁵² This assumption of goodness was only related to the female soldiers and not the male soldiers who were often pictured next to the women. Ehrenreich, Melone, Gronnvoll, Engle, Holland are just a few of the authors who have written on the topic and in doing so expressed their own or the public's reaction to the

¹⁴⁹ Hewitt, 'Abuse of Iraqi POWs by GIs probed' (*60 Minutes II CBS Worldwide*, April 2004).

¹⁵⁰ *ibid.*

¹⁵¹ Melone, 'We've Come a Long, and Wrong, Way' (*Tampa Bay Times*, 7 May 2004).

¹⁵² *ibid.*

female soldier's participation.¹⁵³ While Engle has referred to female perpetrators in a book review, Ehrenreich, Melone, Gronnvoll, and Holland have argued that when confronted with women who commit crimes their own assumptions about women's roles are brought to light, which in their case meant an assumption of stereotypical female roles and actions. What the presence of female defendants in Abu Ghraib reveals is a tendency for scholars and the media to fall back to the presumed characteristics of women, which in many cases reinforces the idea that women are calm, mothering, nurturing, and peaceful. This is the mind-set that also makes women vulnerable during times of conflict. The harms that women face other than sexual violence do not enter into focus.

The focus on the gender of the US female soldiers in Abu Ghraib also ignores the often embedded masculine hegemonic military culture that has influence regardless of a woman's female gender. Sasson-Levy writes that female soldiers in "masculine" roles adopt characteristics of male combat soldiers.¹⁵⁴ Sasson-Levy states that the female soldier assimilating into masculine culture shows both resistance to and compliance with the military gender order.¹⁵⁵ Therefore, women's adoption of masculine hegemonic State-centric identity practices can be interpreted as in compliance with military norms, and the act of being a soldier is tied to an identity that often exudes both hyper-masculinity and the importance of the State. I

When women act as combat soldiers, they reproduce a perception that embeds the soldier within a *type* of masculine performativity. From this perspective, the violent acts of female military personnel are of less of a challenge to the gendered aspect of the military order.¹⁵⁶ My argument is not to promote military participation, but to recognise that women's identity within military spaces is influenced by a military culture that affects both men and women. Men in military spaces are also bound to reproduce a version of extreme masculinity that has been developed as an 'effective'

¹⁵³ Holland, 'The Enigmatic Lynndie England: Gendered Explanations for the Crisis at Abu Ghraib' (2009) 246-248; Gronnvoll, 'Gender (In)Visibility at Abu Ghraib' (2007) 373; Ehrenreich, 'Feminism's Assumptions Upended' (2007) 171.

¹⁵⁴ Sasson-Levy, 'Feminism and Military Gender Practices: Israeli Women Soldiers in "Masculine" Roles' (2003) 441.

¹⁵⁵ *ibid.*

¹⁵⁶ *ibid.*

way to achieve gains for the State. Men are also constrained and manipulated by the culture within the military.¹⁵⁷ Highlighting the culture that exists within the military displays another element of the environment that influences the perception of female defendants. Further work into military culture, from the perspective as female defendants who undertake roles of military actors, can address persistent issues that influence the understanding of gender in armed conflict in international law.

The reaction to female defendants relates to the larger subject of international law's engagement with conflict. Charlesworth has highlighted that the crisis approach to international law is evident in mainstream international lawyers, and subsequently mainstream feminist engagement with armed conflict. Charlesworth states that these actors only focus on issues when they reach a critical point and because of this, it is possible to ignore the problems that could be addressed prior to avoid such a situation.¹⁵⁸ A crisis mentality has emerged around conflict related sexual violence, due to this, other harms women face besides sexual violence are not addressed, for example the disproportional effect everyday economic harms have on women.¹⁵⁹ Charlesworth's work on the crisis approach also relates to the higher percentage of female defendants in the purview of the ECCC.¹⁶⁰ Due to the fact the ECCC was established decades after the crimes took place, this naturally allowed for more time to ascertain the events of the conflict, allowing for the roles women played in the regime to become more apparent. Following the work of Charlesworth distance between the conflict and the court allowed for the context of the armed conflict to be ascertained with far more nuance than if the court was established immediately after the conflict. Nevertheless, I would not argue that waiting multiple decades for a justice mechanism to take place, is the best path towards justice.

Female defendants can offer a site of analysis for feminists to confront their assumptions and biases. If women are to be seen as, fully human, then they must be seen as capable of committing violence or breaking the law. Using female defendants as the centre of this discussion allows feminists the space to question different gender

¹⁵⁷ Unfortunately, this is outside the scope of this thesis, but offers an area of future research.

¹⁵⁸ Charlesworth (82) 389.

¹⁵⁹ *ibid* 391.

¹⁶⁰ *ibid* 384-386.

ideals within a conflict and creates the opportunity to interrogate gender more fully. There seems to be a worry that if it is discovered that women make questionable decisions, then somehow women's credibility is diminished and the practices in place to protect them will become less desirable or supported by international or local legal mechanisms. While combating sexual violence has made substantial gains in international law and produced important jurisprudence, there are questions as to whether this has actually lessened the amount of sexual violence committed.

However, if women and men were viewed in armed conflict within the range of actions they continually enact/experience, as both victims and violators, and if international law did not limit women and men to the binary of female victims and male perpetrators, then it would stand to reason that the way international criminal prosecution is approached and the aims of post-conflict justice mechanisms would also be more effective in dispensing post-conflict transitional justice. If the trials and processes after armed conflict addressed what occurred during the conflict, then society has a greater possibility of rebuilding community relations, rather than ignoring the existence of women who participated in armed conflict.

In Sierra Leone, Coulter states that women were involved in armed conflict and the experiences of women in Sierra Leone did not fall into the men as violators and women as peacemakers, however these women were not recognised by 'Western' preconceived ideas about women and armed conflict.¹⁶¹ Coulter states that the women who fought in the armed conflict, were not integrated back into society after the conflict ended.¹⁶² As was the case in Northern Ireland after 'The Troubles', female combatants were not integrated into the transitional justice mechanisms, and therefore services and care in order to reintegrate former female combatants into society did not exist.¹⁶³ Ignoring this problem only further stigmatises women who participated and pushes them outside the official record of the conflict.

¹⁶¹ Coulter, 'Female Fighters in the Sierra Leone War: Challenging the Assumptions?' (2008) 56.

¹⁶² *ibid.*

¹⁶³ This work is being undertaken by PhD Student Christian Taylor, at TJ Ulster University, 'Women of the Troubles: Gender, Violence and the Paramilitary in Northern Ireland' (Conference Paper).

7.2 Local Processes

The connection between the international and the local within the context of the Cambodian armed conflict is not relevant only to the fact that the ECCC is a hybrid court, but the understanding of gender norms and their movement between both arenas. While the hybrid court is meant to encourage the flow of knowledge and acceptable norms of law between the whole of the international community and its local legal counterpart, there is not as much understanding around the ways in which typically unspoken norms of gender and gender roles permeate both planes. If knowledge moves between and across the local and the international, then attention to how concepts of gender, class, marriage, and power requires further interrogation. The study of female defendants shows how expectations with regard to gender are reproduced in law without understanding of the diversity of gender. I accept that while it is clear elements from the international move to the local, there is very little movement in the reverse.

Local practices should move to the international plane nuancing arguments and opinions on what is acceptable treatment for women, for example. Instead international, or in most cases Western insights, shape and give limited meaning to the occurrences that take place on the local stage. Amongst transitional justice mechanisms there needed to be an acknowledgement that some of the most significant harm women faced during the Khmer Rouge regime was not necessarily from sexual violence, but rather lack of food, water, and medical care and possibly at the instigation of other women. Instead the Western viewpoint of women as victims of sexual violence in armed conflict dominated the understanding of women's experiences. This perspective does not 'leave space' for women who commit crimes in armed conflict.

Concerns around the limitations of the study of female defendants, typically rest with the idea that while women do participate in armed conflict and do commit crimes their existence is minimal in comparison to the number of male perpetrators. It also assumes that beyond mere identification of women's existence as defendants, little else is necessary. However, this thesis has accounted for the reasons why women who commit crimes need to be recognised and that the reality that these women are not a part of dominant conflict narratives is often a result of multiple elements, including

Western feminist intervention, international media biases, and the central structures of international criminal law. After the discussions on female defendants in the chapters on the FYR and Rwanda, the topic has developed further by including the experiences in Cambodia. At the centre of my thesis, autonomy presents itself as the main aspiration. I do not seek to simplify the topic or to reduce this research into pushing for autonomy amongst women and men. On the contrary, it is much more difficult to realise that in an effort to give prominence to women's lives and actions. The ability of women to be seen as capable of committing a violent act without explanation predicated by her gender is essential if women are to push off oppressive assumptions related to her gender. However, upon exploring this topic I have also found that gender is not the sole mode of identity needed to understand female defendants' experiences relating to race, ethnicity, or class.

This topic does not see female defendants' actions as valuable or beneficial to women, as in there is no need to celebrate their crimes or encourage more crimes. What must occur is a discussion that pushes for the same realisations in reference to men. Men need not be the continual perpetrator incapable of kindness.¹⁶⁴ There is a silence around men who are victims of crimes and women who commit them, yet men who commit crimes are rarely defined by their gender. While this work is striving towards a nuanced form of equality, I also recognise that the concept carries with it heteronormative assumptions around gender. The autonomy I hope this work pushes towards is the realisation that both women are capable of committing criminal acts despite the societal influences which affect the way women and men's needs are categorised and defined.

8. Conclusion

Gender was situated in the ECCC partially within the context of Cambodian society and partially within international norms. The Khmer Rouge sought to create a system where women and men were treated equally. Women participated as cadres,¹⁶⁵ as well as in considerable positions of power like Ieng Thirith, Khieu Ponnary, Yun Yat, and Im Chaem. While the presence of women brought before the Court or mentioned in

¹⁶⁴ Engle, 'Judging Sex in War' (2008) 956, 957.

¹⁶⁵ Linton (n 6) 171.

proceedings as leaders, might be assumed to be because of the Court's hybrid nature. Hybrid courts are designed incorporate local understandings. Cambodia, therefore, recognised the experiences of women as defendants and leaders due to local understanding of marriage and the role of women in society, which shaped the perception of the agency of females who participated in the armed conflict. However, the recognition of female defendants and women in positions of power I argue has more to do with the length of time between the conflict and the court proceedings, which would allow a greater understanding of the events in the court system.

The denial amongst female cadres in the Khmer Rouge of their actions during the genocide can be linked to the general denial of the genocide in Cambodian society. Furthermore, strict gender norms that have been encouraged since the fall of the Khmer Rouge are themselves situated in a society that is recovering from severe schisms which encourage a shift to earlier ideas of gender roles, embedded in French colonial mind sets. Interrogating the Women's Hearing exposes the ways in which the influences of Western feminism on post-conflict justice processes. Much like the discussion in the introduction of this chapter, it is useful to see the instances where Western feminists intervene and how this often supports Western ideas of gender. This Western intervention exists alongside the local Cambodian context where gender plays out differently, yet still seems to allow women to enter into spaces Western feminists often ignore. While the end of this chapter has discussed the need for autonomy and at the same time possibly generated more questions than answers, the next chapter on the international and local will expand this topic further.

Cambodia and the ECCC offer a different perspective on female defendants and how gender exists within transitional justice. It is through the understanding that sexual violence is not the only way women have experienced the armed conflict in Cambodia and that female participation in the armed conflict does not only occur when women's daily lives follow the Western concepts of equality and agency. Cambodian women gain a form of power through marriage and lower level female cadres straddle local concepts of gender and still manage to attain positions that allow them to perpetrate harm, albeit in ways that were seen in some cases to be coercive. This questions the connection of agency with the ability to commit violence. Cambodia is then another

example of how there is not a pre-set understanding of female defendants or their everyday lives.

The larger problem that exists within this work is in configuring where feminist spaces lay. Female defendants seem to sit outside of the conceivable topics feminists engage with, and therefore the boundaries of gender and law are also put into question. As a result, the possibilities open to law and gender are limiting and prevent discussion on certain topics. Feminists need to look to all of the spaces that women inhabit and use this to strengthen their discipline, likewise they need to include the experiences of men that rival traditional norms. In the case of Cambodia, it was not possible to make one specific statement on female defendants. It was also not beneficial to state that there were not enough women brought before the Court, or that gender prevented women from being recognised as defendants.

Chapter Seven

Female Defendants in International and Local Legal Structures

1. The Importance of Discussing Female Perpetrators, Defendants, and Suspects

This thesis opened with a description of Rasema Handanovic, whose story signalled a familiar narrative of a woman faced with the harms of armed conflict, seeking to regain control of her life. However, as the story progressed it was evident Handanovic was also a perpetrator of international crimes during the conflict in the Former Yugoslav Republic. While Handanovic's tale would appear to be unique or particular, this thesis has shown that the existence of complex relationships with violence, within the lives of women who are involved in armed conflict, is not unique or particular. The contrast between Handanovic's experience of sexual violence and the actions she was found guilty of before the Bosnia-Herzegovina Court illustrates that women involved in armed conflict cannot be relegated to merely victims. I have argued for the importance of studying women as female defendants in order to disrupt assumptions that women are only victims or peacemakers in armed conflict. Throughout the thesis this was achieved through an analysis of international criminal law and of Western feminist interventions. The issues identified within the structures of international criminal law, as well as within international legal discourse, on women and their roles within armed conflicts create biases that solidify women as victims and men as defendants.

Female defendants have thus provided a means to identify the inadequacies in the way gender has been interpreted by international law, international criminal law, and Western feminist interventions. Subsequently, my analysis of the existence of female defendants highlighted the way race, class, ethnicity, and gender influence the actors involved during and after armed conflict. These actors exist both in positions inside the boundaries of the armed conflict itself and outside the armed conflict. I have argued throughout this thesis that female defendants' lack of visibility, which has contributed to missed opportunities in the development of gender, racial, and classist

understandings in armed conflict, is particularly due to the way international criminal law has been framed by the Western feminist intervention. By interrogating international criminal law's relationship with female defendants, I have proven that the implications of the lack of visibility of female defendants in international legal studies and feminist studies is symptomatic of greater issues around the Western perceptions of gender and the way gender is understood during armed conflict.

The reasons why this thesis focused on the armed conflicts in the FYR, Rwanda, and Cambodia is due to their specific contributions to international criminal law, as stated in Chapter Two. The Ad Hoc Tribunals, ICTY and ICTR, expanded the tenets of international criminal law that had remained dominant since the end of WWII, and the Nuremberg and Tokyo Trials. From the jurisprudence of the ICTY and ICTR, international criminal law was developed and evolved through the work of subsequent hybrid courts. However, the Ad Hoc Tribunals displayed one *type* of post-conflict justice, which emanated primarily from the international community, with little engagement in local justice processes.¹ Discussing the failures of the Tribunals are also a necessary part of understanding the narrative of international criminal law's development. Through the work of the international community around both Tribunals, a preoccupation with women as victims of sexual violence emerged. The hyper focus on sexual violence became a key element in unpacking the existence of the female perpetrator for this study, and provides another reason why the FYR and Rwandan conflicts were the focus of two chapters of the thesis.

The ECCC being a hybrid court that took into account the need for a greater link between the international and the local, in many ways should have been an answer to the failures of the Ad Hoc Tribunals. Unfortunately, the Cambodia court did not achieve its initial aims or respond to the issues that resulted from the proceedings of the ICTY or ICTR. Another reason for choosing to highlight the work of the ECCC is because of its failures. The ECCC was established decades after the atrocities of the Cambodian genocide took place, and as a result failed to indict the vast majority of leaders responsible, with only four cases before the court. The ECCC also failed to

¹ Maogoto, 'The International Criminal Tribunal for Rwanda: A Paper Umbrella in the Rain? Initial Pitfalls and Brighter Prospects' (2004) 14.

significantly address the sexual violence that occurred during the conflict, suggesting the hypervisibility of sexual violence in the ICTY and ICTR did not extend to the work of the ECCC.² This thesis has critiqued the Western feminist intervention for focusing on women as victims of sexual violence which resulted in a narrowing of women's roles in armed conflict. However, I am not suggesting the prosecution of sexual violence be diminished, only that the Western feminist agenda include the range of women's actions in armed conflict within its purview. Therefore, the limited charges relating to sexual violence crimes before the ECCC is most certainly a failure.

As a result of the analysis found in Chapters Four, Five, and Six there is a question as to whether international criminal law in its current manifestation is the correct or most appropriate avenue for post-conflict justice. The issues facing the International Criminal Court, which continues to lose membership, as this thesis is being written, compounds the urgency for alternative transitional justice methods. This is especially significant for the Syrian armed conflict: the atrocities that have been committed, and continue still, will need to be properly discerned. There will also need to be a form of transitional justice that initially will likely involve the cooperation of other States, as well as local justice mechanisms inside Syria to begin to rebuild. All the more concerning is the congruent terrorism related atrocities committed by ISIS that reach beyond the borders of its self-proclaimed caliphate in Raqqa. The questions that arise over how justice is to be achieved and how best to serve victims of the armed conflict most certainly will need to include the work of the Syrian population. Local transitional justice processes may appear more effective, than an internationally managed justice processes. However, this will depend greatly on how the conflict ends, which immediately reasserts the importance of continuing to interrogate international criminal law. For example, if international criminal trials are desired by the Syrian population for the leaders of the armed conflict, irrespective of who remains in power with the cessation of hostilities, then international criminal law will need to confront the criticism that it supports victor's justice by prosecuting those on both sides.

² Oosterveld and Sellers, 'Issues of Sexual and Gender-Based Violence at the ECCC' in Meisenberg and Stegmiller (Eds.) *The Extraordinary Chambers in the Courts of Cambodia Assessing Their Contribution to International Criminal Law* (2016) 349.

In the previous chapters, I considered local justice processes. The ICTY, ICTR, and ECCC demonstrated the need for the dichotomy between the international/local to be disrupted, as the international has been positioned as superior to local legal processes. This is reiterated in the visibility of the international justice processes over local justice mechanism, as well as the progress and outcomes of local mechanisms not filtering back to and influencing the international reaction to the aftermath of armed conflict. Moreover, the presence of female defendants has entered into local post-conflict justice spaces with greater frequency than in international law and due to the limitations found in the international criminal justice system the representation of women as both victim and perpetrator has been impossible to achieve.

In the following section of this chapter I explore Knop's work as a way to understand the relationship between international courts and tribunals and local courts and processes. At a conceptual level, I use Knop's work on the flow of legal knowledge between the domestic and the international.³ In the third section, I provide a short summary of each chapter before concluding the chapter, and the thesis, in the fourth section. In the last section I detail the way this work can benefit forthcoming international criminal legal prosecutions and mechanisms.

2. From the International to the Local

Arguably, the primary focus of international criminal law is to end impunity of leaders and punish grave breaches of international humanitarian law. The international criminal law structure operates on a punitive rather than restorative basis, unlike alternative justice mechanisms, such as the Asia-Pacific Women's Hearings. International criminal law must not only follow the general principles of criminal law, but also reconcile itself as a part of the international system, dealing with the critiques on the lack of enforcement, the restraints of State consent, and questions with regard to legitimacy. International criminal law responds to crimes across varied social and cultural structures, as well as legal structures, while predominantly entering into a situation post-conflict, prosecuting extreme levels of violence linked to complex conflict dynamics and histories. These characteristics make international criminal law a unique form of criminal law.

³ See Knop, 'Here and There: International Law in the Domestic Courts' (2000).

The international criminal legal system, in addition to focusing on punishing leaders for grave breaches of international humanitarian law, including *jus cogens* violations, should also incorporate stronger mechanisms attentive to history telling as well as taking more active roles in contributing towards repairing a community. International criminal laws structure is already implicated in both activities, but because these are not focused on enough during proceedings it misses the opportunity to develop these elements further. It is essential to punish leaders, tell an accurate history, charge people from each side of a conflict, and rebuild the relationships in a given society, after armed conflict ends. Whether or not the goal of international criminal law includes providing a more nuanced view of gender in the conflict, international criminal law is already implicated in this practice. The mechanisms of international criminal law highlight an understanding of gender that confines women to either victims in armed conflict, usually of sexual violence, or as peacemakers, necessary in post-conflict justice mechanisms in so far as they facilitate UN peace processes.

International criminal law's role as an international project and through the normative value placed upon it by the international community it is a part of shaping the way gender, race, culture, and ethnicity are understood by the international mainstream political actors post-conflict. The background provided in each court case judgement, the international media focus, the way prosecutors pick cases and conduct trials, the witnesses that are chosen to tell their story, and the way the public responds to all of these actions situate international criminal law as an authority when trying to decipher the nuances of an armed conflict, especially by audiences that exist in spaces outside of the armed conflict.

On the domestic level the existence of alternative justice mechanisms and local courts must attend to the majority of post-conflict justice needs, as international criminal law only focuses on the leadership. The emphasis of many local justice mechanisms centres on dealing with the communal aspects after a conflict, something international criminal law can be said to contribute to, albeit in a limited way. Millar argues that "Western-generated theories" and a professionalisation of the transitional justice occupation by the West has meant that Western perspectives on post-conflict justice

remain paramount.⁴ Moyo also recognises the imperialistic tendencies of transitional justice mechanisms, embedded in a ‘liberal bias’ that remains ignorant of the needs of a post-colonial State, in a post-conflict environment.⁵ I argue that international criminal legal mechanisms remain the dominant transitional justice paradigm after a conflict has taken place, and many alternatives to international criminal legal proceedings still reside in an international, Western neoliberal, perspective of justice. Despite my criticisms, while the reality that international criminal law will continue to exist in its current manifestation remains uncertain, the Western influence over post-conflict justice remains ever present. Therefore, international criminal law, for instance, needs to be held up to task, and simultaneously downgraded as the only satisfactory option after armed conflict.

Knop writes on the relationship between international and domestic law and the tendency by international lawyers to assume that domestic practices and techniques do not measure up.⁶ Knop’s argument focuses on how domestic judges have the ability to interpret and apply international law and that while international law may appear different in the local context, it still retains the elements that make it internationally acceptable.⁷ Due to the diversity in local situations and the wide range of governmental and political mechanisms that differ between States, international law cannot function the same way in each instance. Knop recognises that in many cases local courts are required to apply international law when they themselves had no part in its creation on the international level.⁸

The idea that international law is translated into local understanding is useful, as international law cannot be assumed to be planted into the local without undergoing a transformation.⁹ To this end it can be also inferred that while certain concepts in international law lay at its core, international law as a system, prevents the understanding of nuances in domestic law. Knop writes, “the traditional model

⁴ Millar, ‘Local Evaluations of Justice through Truth Telling in Sierra Leone: Postwar Needs and Transitional Justice’ (2011) 530.

⁵ Moyo, ‘Feminism, Postcolonial Legal Theory and Transitional Justice: A Critique of Current Trends’ (2012) 273.

⁶ Knop (n 3) 502.

⁷ *ibid* 534, 535.

⁸ *ibid* 504.

⁹ *ibid* 506.

simplifies how these courts actually use international law and therefore neglects the potential of domestic interpretation as a practice for recognising difference in international law.”¹⁰ There is an presumption of neutrality in international law and universality; however as Knop suggest this idea is typically based on a white Western male, though it can be argued sometimes white Western female, point of view.¹¹ International law is said to exist somewhere above culture; however, through the domestic this notion can be challenged and used to show how international law should be transformed and informed though local interpretations.

The work in this thesis unpacks the nuances of female defendants and the way their actions are framed. In the discussion of the ICTY, Plavšić’s case displayed a different story than the mainstream account of women’s experiences during the conflict in the FYR, but also unearthed the way gender is interpreted and reaffirmed through a biased media analysis. In Plavšić’s case gender was used as an affirmation of her humanity, with Plavšić being reported as cooking and baking during her spare time in prison.¹² Yet in the media she was characterised as sexually deviant as well as being a female monster.¹³ In contrast, the multiple women tried within the domestic courts in the Former Yugoslavian provinces, detailed in Chapter 4, have not entered mainstream international consciousness and certainly not Western feminist analysis of gender and conflict.

When confronted with this perception of the relationship between the female defendants of Rwanda and Western understandings of the genocide, there is the tendency to deny that fascination on the presumed higher levels of Rwandan women participating in the genocide exists. I argue that this understanding stems from the stereotype that Crenshaw discusses, which positions Black men, or as I would suggest all people of colour, as ‘uncontrollably violent’.¹⁴ What Crenshaw dissects in her work is the relationship women of colour have to the law regarding sexual violence. She highlights the tendency for the US legal system to perpetuate serotypes that

¹⁰ *ibid* 518.

¹¹ *ibid* 527.

¹² Subotić, ‘The Cruelty of False Remorse: Biljana Plavšić at The Hague’ (2012) 49.

¹³ Sjoberg and Gentry, *Mothers, Monsters, Whores: Women’s Violence in Global Politics* (2007) 156.

¹⁴ Crenshaw, ‘Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color’ (1993) 1253.

identify both Black men and women as over sexual and sexually deviant.¹⁵ I would argue it is this attitude towards Rwandans, predominately the reaction by white Western women and men, that allowed women in Rwanda to become more widely represented as violent. This may seem like an argument that is attempting to draw a tenuous connection to the female defendants of the Rwandan genocide from the stereotypes prevalent in the US legal system. However, the international response to the Rwandan genocide both in international media coverage and in the literature on the Rwandan genocide often originates in the West,¹⁶ and is reflective of colonial and racial stereotypes. These stereotypes are illuminated by Crenshaw, amongst others,¹⁷ and are therefore the basis by which women in Rwanda are more readily accepted to have committed acts of violence.

Marriage in Cambodia has historically offered women in Cambodia a form of access to the public realm as well as respect within the community.¹⁸ However, the cultural elements that are unique to Cambodia, for instance, elevate women to positions of power and enable them with the ability to transfer between the public and private; at the same time, they are viewed by the international community as not conforming to the concepts of gender equality. The majority of examples of women who were in leadership positions and committed or were suspected to have committed crimes during the reign of the Khmer Rouge, were the wives of the men who were in high political positions.

The international community has argued that practices of marriage, inheritance, and divorce have prevented women from gaining greater autonomy especially since they are often embedded in cultural practices.¹⁹ It is also unhelpful when governments blame culture and tradition as reasons why they have not adjusted practice to meet international conventions on gender equality.²⁰ This perspective embeds cultural

¹⁵ *ibid* 1280.

¹⁶ See Norridge, "Writing Against Genocide: Genres of Opposition in Narratives from and about Rwanda" in Hiddleston and Crowley (Eds.) *Postcolonial Poetics* (2011).

¹⁷ See Harris, 'Race and Essentialism in Feminist Legal Theory' (1990).

¹⁸ See Jacobsen, *Lost Goddesses: The Denial of Female Power in Cambodian History* (2008); This does not diminish the ways in which marriage can be limiting and disproportionately harmful for women.

¹⁹ Engle Merry, *Human Rights and Gender Violence* (2006) 91, 92.

²⁰ *ibid*.

practices as ultimately harmful towards women, and at the same time positions them as backwards and impossible to reconcile with present day international standards. Certain institutions, like marriage, are engrained within society as a practice that upholds the hegemonic and heteronormative values of the State, albeit there are historical, cultural, religious, gendered, and other understandings that shape and give meaning to the institution of marriage. Marriage is also viewed by those of the Global North as a contested space for women in the Global South. Due to this, when women are observed as gaining positions in society or actively taking part in hostilities during armed conflict because of their marriage, international law has a difficult time comprehending female agency outside of the marriage.

Any institution, marriage or otherwise, will have differences depending on its surroundings and problems there in, this is not dismissing this reality. However, by only seeing marriage in the domestic as a site of cultural limitations and gender inequality, stops analysis of the situation of female defendants in the Cambodian context. It is important to look at all of the aspects that surround female defendants in order to understand their situation and within the context of the armed conflict, this can then filter back to the international informing the perception of gender and women's roles in armed conflicts.

This discussion is one of the core reasons for choosing to highlight the Cambodian genocide and court: as it allows an argument to be broached that addresses the continued gap between local and international understandings, an element that is essential to cover if trying to effectively reach any form of post-conflict justice. Furthermore, the presence of female defendants complicates the situation, as the presence of female defendants in the ECCC indicates a higher percentage of indictments than other tribunals and suggests that it is possibly due to the local nature of the court. If local processes are able to indicate and potentially prosecute female defendants, then maybe the Western notions that seek to build women up, make them more present, facilitate justice for female victims and so on, are actually extremely limiting for women and constrict the perceivable range of actions in armed conflict.

The existence of female defendants complicates the understanding of women in international law. International law predominately views women as victims, whether

it be as victims of sexual violence or through the denial of rights. As stated in previous chapters, Charlesworth notes that women most often come into the purview of international law when they are harmed.²¹ Women who commit crimes act against the presumed behaviour their gender typically denotes, which is a denial of violence and a tendency to choose 'the good'. When women enter international law as defendants their actions are contrary to the way international law interacts with women, especially within international criminal law. The general and universal nature of international law takes the assumption that women are predominately viewed through their gender and that this plays out as the primary way their experiences are identified. Post-colonial and critical race scholars would counter this claim with ethnicity, culture, class, and race as other equally important ways women's identity is shaped.²²

Echoed in Knop's work is the thought that international law is predominantly from the perspective of white Western men, which does not allow for a neutral reading or the creation of international law without bias. If this is taken as the starting point from which international law develops, then its product is embedded within a system that does not recognise difference. Female defendants are then outside of what women 'do' in armed conflict and when they do exist they are seen as an aberration of typical behaviour. In Cambodia women appeared before the ECCC or within its court documents more often, yet their presence has not filtered to the international in the sense that it has not influenced the way women are thought of during armed conflict. The flow of knowledge between the international to the domestic is increasingly acknowledged and informs one of the mechanisms through which international law is given operative effect, but the flow from the domestic to the international is not as widely encouraged. The conversations on the relationship between international and domestic law usually centres on, how can international laws be integrated more fully into domestic law and policy. As Knops states, it is international law and international lawyers that presume local judges are not up to the challenge of incorporating and interpreting international law correctly.²³

²¹ Charlesworth, 'International Law: A Discipline of Crisis' (2002) 377-381.

²² Kapur, 'Erotic Justice: Law and the New Politics of Postcolonialism' (2005) 15.

²³ Knop (n 3) 502, 503.

Each State takes a different approach to the integration of international law into their domestic legal system, which typically falls into the category of monism or dualism, or a combination of the two. Monism views international law as a part of domestic law, while dualism underlines the need for international law to be explicitly incorporated into the domestic legal system.²⁴ Yet, amongst mainstream approaches to international law there is a sense that domestic law needs to ‘catch up’ to international legal concepts and that domestic policies on the whole are in many ways detrimental to the understanding agreed upon in international spaces. Knop highlights the focus on the traditional model of international law, where the relationship to the domestic is focused on how domestic law will enact international law.²⁵ This is evident in the need for domestic legal system to identify their relationship to international law as either monist or dualist. Knop argues that with the focus on binding quality of international law in domestic law, lawyers ignore the “persuasive value of international law and its function as a signifier of community”, which is highlighted in her transjudicial model.²⁶

Within international legal scholarship, there remains insufficient discussion around domestic concepts or understandings and their ability to help shape international legal spaces. Some may argue that due to the presence of different State parties, international law is by its very nature influenced by local ideals. However, international law often removes the particular and unique aspects brought in by local culture and creates a so-called neutral law. The general principles of international law do stem from domestic practice and there is an acceptance that once principles are common amongst different domestic systems they are then incorporated into the international.²⁷ This is excellent in theory, although in practise general principles are still a subsidiary source of international law and traditionally speaking were restricted to ‘civilised nations’, or common law systems, as the creators of general principles.²⁸ This example does not offer much hope in the way of domestic law filtering up to the international.

²⁴ Roughan, *Authorities: Conflicts, Cooperation, and Transnational Legal Theory*, 189

²⁵ Knop (n 3) 516.

²⁶ *ibid* 520.

²⁷ United Nations, ‘Statute of the International Court of Justice’ (18 April 194) Article 38.

²⁸ *ibid*.

Due to the placement of the domestic as a system outside, separate from the international, or below the international, the knowledge, interpretations, and development in the domestic system does not move to the international level. Speaking specifically about international criminal law, it is evident that its practices encourage the idea of complementarity, evident in the Rome Statute,²⁹ and the ECCC is a hybrid court, which combines both systems of law allowing a sense of partnership. The hybrid model offers a hope that international criminal law can work between two systems of governance and incorporate local ideals. However, as many scholars have argued, the ECCC is one example of this partnership, which has achieved much less than was hoped for at its outset. A hybrid court is embedded within the local legal system, a system that has gone under dramatic shifts during and after armed conflict. Although the ECCC was created decades after the conflict itself it is still influenced by politics and corruption, which signal for many, issues with the concept and structure of hybrid courts.³⁰ While politics and corruption can be seen within international law as well, domestic law's contribution to international law is not valued in the same way as international law and even when it is incorporated into international legal systems it is only seen as able to handle the overflow of Tribunals.

The situation of female defendants relates to this discussion on domestic and international courts generally, as gender norms formed in international law are reproduced in the domestic as well as in international courts designed to deal with local situations, like the ICTY and ICTR. These norms are related to women in the position of victims whether it be sexual violence or the aftermath of armed conflict. Women in positions of power within the conflict and women who use that power to harm others are not a part of the understanding of gender within international courts. Even when women are evident as defendants during the conflict and within hybrid tribunals the understanding of the nuances of their situation does not move back to the international plane in order to transform gender norms more broadly.

²⁹ Rome UNGA, 'Rome Statute of the International Criminal Court' A/CONF.183/9 (1998) (Last Amended 2010).

³⁰ See Gee-kin Ip, 'Fulfilling the Mandate of National Reconciliation in the Extraordinary Chambers in the Courts of Cambodia (ECCC) – An Evaluation through the Prism of Victims' Rights' (2013).

One of the reasons for the lack of movement between the two planes is due to the conceptions around the status of women in States where conflict occurs. The relationship international law has with the domestic is similar to the way the international community assumes gender should or should not play out in the local. As Knop suggests the “authority of international law is persuasive rather than binding,”³¹ I would argue this point can be pushed further, highlighting the Canadian court interpretation of international law in the *Baker* case. In *Baker v Canada* the Canadian court ruled that Canada’s signing of *The Convention on the Rights of the Child*, despite the fact it was not considered binding in Canadian law, was evidence of Canadian values and social mores.³² What this indicates is that the way States act internationally, through signing or refusing to sign international conventions, or more broadly the resolutions produced through the United Nations, give evidence towards a State’s values and perceptions. Therefore, on the topic of women in armed conflict due to the hyper visibility of women as victims of sexual violence, the international legal community remains tied to binary understandings of gender, without the inclusion of other identities, such as race, ethnicity, class, sexuality, or ability.

After moving through the FYR domestic courts, the Gacaca Courts, and marriage in Cambodia, found in Chapters Four, Five, and Six, the connection to Knop’s argument becomes lodged within the need for greater communication between international and local spaces in a post-conflict climate. The FYR domestic courts displayed the ability of local criminal justice processes to incorporate female defendants, albeit this is not necessarily indicative of a lack of gender binaries. Likewise, the Gacaca Courts tried more female defendants than the ICTR, and similar to the domestic FYR courts recognised more nuance in women’s roles in armed conflict. The complexity of women’s lives during armed conflict is more apparent in the domestic spaces of the FYR and Rwanda. However, the reliance on gender as the linchpin of women’s involvement in post-conflict justice mechanisms is inaccurate. The preoccupation with gender in the West does not exist to the same extent in the domestic spaces of the FYR and Rwanda, as identities beyond gender influence women’s capabilities in conflict and the way women’s actions are perceived. In Cambodia the institution of

³¹ Knop (n 3) 535.

³² *ibid* 511.

marriage offered some women access to power and privilege, women also appeared within the documents of the hybrid court more frequently than in other armed conflicts. Despite this, the awareness of female defendants in the domestic spaces of the FYR, and Rwanda, and within the hybrid Court of Cambodia have not filtered back to the international.

3. Three Post-conflict Institutions

Chapter Four detailed the way the ICTY, Western feminist intervention, and the international media reaffirmed women as victims and ignored the broader range of women's actions in armed conflict. The discussion highlighted the ICTY as a legal space that remains performative, reaffirming a specific view of women and femininity. The conflict of the FYR resulted in a combination of misinterpretations centered upon ethnicity, the conflict's history, as well as women's roles, predicated by Western feminists, the media, and international criminal law which lead to female defendants remaining in the periphery of the narratives around the FYR. Chapter Four also detailed how macro financial issues leading up to the armed conflict, did not enter into the understanding about the armed conflict, especially when the international community sought to comprehend the situation in the FYR.³³ The media focused on certain crimes being committed, while leaving other experiences of women and men out of its purview.

It was argued that subject of female defendants are not fully realised as subjects in international criminal law. Butler's work was utilised in order to develop the idea that certain people are able to stand before the law and others are not.³⁴ 'Law' was seen to be bound within a heteronormative system of power. Therefore, law that address violence against women are based upon heterosexual notions of what men 'do' to women. Female defendants do not fit into this conception of 'women', as female defendants act against heterosexual versions of women and men in a way that does not uphold the hierarchy between women and men in the law. National identity remained an essential element in the scholarship and media representation of the conflict in the FYR. After analysing Plavšić's case it became clear that, analysis based

³³ Orford, 'Locating the International: Military and Monetary Interventions after the Cold War' (1997) 451.

³⁴ Butler, *Gender Trouble Feminism and the Subversion of Identity* (2006) 2.

on ethnicity and nationalism was needed to better understand Plavšić's actions as a female perpetrator.

The work of Western feminists as well as the work of local feminists intermixed with national and international perspectives on masculinity, femininity, nationalism, sexuality, and ethnicity. This meant that Western feminists incorporated the work of local feminists on the armed conflict to bolster their support for the ICTY, while using the conflict to highlight the importance of the Western feminist agenda. Binaries based on gender and assumptions about ethnicity were created by the conflict in the FYR and highlighted in the work local feminists, these binaries were then reproduced by Western feminists who intervened after the armed conflict. The Western feminist response into the FYR echoes the Western feminist agenda in the 1990s, which resulted in the women of the FYR being symbolised as the 'other'.³⁵

This discussion is linked to the way Butler has described the term 'woman', which typically refers to a specific identity that does not take into consideration the way gender is connected and influences race, class, ethnic, sexual, and regional identities.³⁶ This ultimately fails to recognise the way gender oppression exists differently in multiple contexts.³⁷ Gender oppression is seen as symptomatic of non-Western barbarism, a perspective highlighted in the Western feminism's relationship to the Third World.³⁸ Furthermore, focusing attention on cases of sexual violence by Western Feminists makes this particular violence during armed conflict seem somehow worse than other forms of violence women experience. This is not explicitly stated by international law, but it is evident in the lack of attention to the sexual violence many women face as a part of their normal lives. This chapter demonstrated that by examining the instances of female defendants the gaps in international criminal law and feminist intervention are illuminated. Looking at the FYR in particular unfolds a situation where female defendants existed, which represents the initial step in this thesis towards a discussion of the greater relationship between female defendants and international law.

³⁵ Batinic, 'Feminism, Nationalism, and War: The 'Yugoslav Case' in Feminist Texts' (2001) 18.

³⁶ Butler (n 34) 3.

³⁷ *Id.*

³⁸ *Id.*

In Chapter Five, the narratives around the Rwandan genocide promoted by the work of the ICTR, international media, and Western feminist intervention, perpetuated a specific type of gender and racial understanding. Amongst these narratives were a few central themes, which included the brutality of the conflict itself, the chaos in Rwanda during and after the genocide, the accountability of the larger population during the violence, and the scale of the violence and number of defendants. Moreover, female defendants have remained in the periphery, concerning stories around the Rwandan genocide and in the ways gender was represented within during conflict. Likewise, when stories do surface female defendants are treated along the same lines as the conflict, brutal in their actions and unlike those women who exist in the West. Looking to Rwanda's colonial history offers a means of understanding the system that has shaped how gender and race are conceptualised by outside influences. Mamdani stated that the narrative of victimhood present in Rwanda's colonial past has been based on continuous violence that had led to a cycle that produces defendants who were also victims.³⁹ Within this cycle the ethnic superiority of the Tutsis was constantly reiterated.

From the promotion of certain understandings of race, ethnicity, and gender in colonialism to the outbreak of the genocide in 1994, Rwanda was often ignored by Western audiences or seen as backwards. Dallaire recalls that once news of 'mass killings' spread reporters began coming in and out of Rwanda.⁴⁰ Media reports then focused on descriptions of excessive violence and brutality, which distance Rwanda from 'civilised' viewers. In April of 1994 *The New York Times* reported that Rwanda's conflict was 'tribal warfare'⁴¹ while the FYR was "everyone's war".⁴² This was further emphasised by the language used by the US media when referring to the genocide, words like 'ethnic', 'slaughter', 'carnage', and 'tribal'.⁴³

³⁹ Mamdani, *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda* (2002) 267.

⁴⁰ Dallaire, 'The Media Dichotomy' in Thompson (Ed.) *The Media and the Rwanda Genocide* (2007) 15.

⁴¹ McFadden, 'Western Troops Arrive in Rwanda to Aid Foreigners' (*The New York Times*, 10 April 1994).

⁴² Kifner, 'The World; Through the Serbian Mind's Eye' (*The New York Times*, 10 April 1994).

⁴³ Myers et al, 'The Inscription of Difference: News Coverage of the Conflicts in Rwanda and Bosnia' (1996) 22.

These depictions of Rwanda made the actions of Pauline Nyiramasuhuko all the more intriguing to Western audiences. When Nyiramasuhuko was on trial media outlets commented on her dress, her appearance, and how being a woman made her crimes more appalling.⁴⁴ Nyiramasuhuko countered this by saying she had no power, no capability as a woman and therefore was not guilty. Sperling has noted that either Nyiramasuhuko chose to use gender as a means of casting doubt onto her actions, or she believed that women did not have the capacity to commit criminal acts during the genocide. As discussed above, Nyiramasuhuko's case was not the only example of female defendants in the Rwandan genocide.

Amongst the scholarship on the Rwandan genocide the existence of female defendants features more than in other armed conflicts. I have argued that despite the higher visibility of female defendants, their existence still does not enter into the mainstream conflict narrative. The higher visibility of women who commit crimes in Rwanda is not the result of a need to understand women's roles in conflict. I have stated that this is due to a racialised understanding of Rwanda that extends back to Rwanda's colonial history. Highlighting the actions of female defendants, actions that need less explanation when perpetrated by men, authors contribute to the implied divide around gender roles in conflict. This is not to say authors definitively support the separation of gender roles, or always write on this topic out of shock that women commit crimes. On the contrary, authors seem more comfortable discussing the women who perpetrate crimes in the Rwandan genocide, which confirms that limited notions of gender and race, on an international scale.

Chapter Six analysed the Khmer Rouge regime and the role women played. Some women choose to take part in the regime while others were coerced. In Cambodia, female defendants appear more frequently in the court and court transcripts compared to other international criminal courts or tribunals, but I argued this has not translated a wider acknowledgement of female perpetrator's existence in the Cambodia armed conflict or in armed conflicts generally. Chapter Six also highlighted the history of

⁴⁴ Landesman, 'A Woman's Work' (*The New York Times Magazine*, 15 September 2002); Hazeley, 'Profile: Female Rwandan killer Pauline Nyiramasuhuko' (*BBC*, 24 June 2011).

women in Cambodian culture, as they were an essential part of its history and development. Frieson stated that the presence of women as warriors in Cambodian territory can be traced back to the Angkorean Kingdom (which began around the 9th Century), and that women were political consultants, revolutionaries, protectors of Buddhist temples as well as conduits of peace. Cambodian women have also protected territories and also have been viewed as figures representing the nation state.⁴⁵ Nevertheless, this understanding has not entered in to the Western perception of women's roles in Cambodia.

The Asia Pacific Regional Women's Hearing focused on the failings of both international and domestic institutions as well as sexual violence experienced during the conflict.⁴⁶ By choosing to intervene on behalf of women when they are the victims of sexual violence, the international community is signalling how they believe women's experience of armed conflict are important, this further dictates which gendered harms are deemed important. The importance of discussing the Women's Hearing in Chapter Six was done to draw attention to the ways the international community can shape and uphold gender norms in the international and local through alternative justice mechanisms. Through the processes of the Women's Hearings it is evident that existence of women as defendants of violence do not fit within the purview of the Hearings.

The other harms women experienced during the Cambodian genocide such as starvation, malnutrition and improper medical care, indicate the possibility that these effects of armed conflict may have had a greater influence on women's lives than sexual violence and that crimes were perpetrated by men and by women. Concerning the experiences of female defendants, women have garnered a stronger focus in the ECCC, considering their prevalence in relation to the number of persons brought before the court. While this seems to be a positive development, especially in light of the work done within this thesis, I argued that this has less to do with a nuanced understanding of women's role, but rather the result of the long period of time

⁴⁵ Frieson, 'In the Shadows: Women, Power and Politics in Cambodia' (2001) 1.

⁴⁶ Chapter on file with author, Otto, 'Testimonies of Protest and Survival: People's Tribunals and the Politics of Listening' Forthcoming in Byrnes and Simm (Eds.) Peoples Tribunals and International Law (2017/2018) 10-15.

between the conflict itself and the establishment of the court. Charlesworth's work on the crisis approach was used to understand the higher percentage of female defendants before the ECCC.⁴⁷ This means that it is not due to a broader understanding of women's roles in armed conflict, but rather the distance between the armed conflict and the hybrid court allows for greater understanding of the armed conflict, which included the existence of women as defendants.

Moreover, there has been limited work done around the contribution of lower level female defendants, who have been left out of the memory and history of the Khmer Rouge reign, until recently. Women were committed to the cause and ideals of the Khmer Rouge regime, as were their male colleagues. Linton's work states it is false to assume that if women were the targets of gender based violence, then they would not also participate in the politics of that regime.⁴⁸ Marriage is an important cultural milestone in Cambodia for both men and women and it was discussed in this chapter due to its ability to link understandings of gender and female defendants. Through marriage women gain a position in society and access to areas that would typically be out of reach for single women, such as politics and economics. The Khmer Rouge regime destroyed many of the traditions common to Cambodian society, kinship responsibilities, religious ceremonies, and private land ownership all suffered; marriage like many of these other arenas was also harmed due to forced marriage ceremonies that did not adhere to previous rigorous matching processes, and the effects of this change in marital relations were felt even after the Khmer Rouge fell. However, the marriages between the ruling class of the Khmer Rouge proved beneficial for women and allowed women such as Ieng Thirith, Khieu Ponnary, and Yun Yat, to become key figures in the regime.

Finally, the material presented in this chapter aided in the progression of the topic of female defendants by offering another perspective of women engaging in armed conflict and the external factors that leave female defendants out of the Western conception of the armed conflict, even though women featured more predominantly in the ECCC. I argued that due to perceptions of women in Cambodia, women are tied to

⁴⁷ Charlesworth (n 21) 384-386.

⁴⁸ Linton, 'Women Accused of International Crimes: A Trans-Disciplinary Inquiry and Methodology' (2016) 171.

assumptions based on marriage, the visibility of women in the hybrid court did not translate to a greater understanding of women's roles in armed conflict. Ignoring this problem only stigmatises women who participated in armed conflict and pushes them outside the conflict's history, further limiting their access to services and care in order to reintegrate former female defendants into society. Highlighting the importance of the relationship between the international and the local adds to the narrative around the armed conflict. Local justice processes offer a perspective on armed conflict which differs from the international and need to be further interrogated in order for further nuances in armed conflict to be revealed.

4. Conclusion

This thesis has analysed the existence and representations of female defendants in order to critique international law, international criminal law, and Western feminist interventions. I have detailed the ways in which international criminal law, as well as international law more broadly, benefits from the study of female defendants. Female defendants have also been discussed as a means for strengthening feminist's engagement with the law. I have argued throughout that the desire for justice after armed conflict will only ever be partial unless women are acknowledged to have the potential to commit crimes. When women do commit acts of violence they must enter into the history and narrative around the conflict as well as international and local justice mechanisms, as more than victims of conflict: as participants, as change-makers and as defendants. As this chapter concludes, I find myself concerned with the future of international law, international criminal law, and Western feminist engagement in international law. Taking into account the relationship between female defendants and the law, which has unfolded in this thesis, I will now detail some of my final thoughts and suggestions for the future.

International law, through the work of Women, Peace, and Security agenda and specific feminist interventions to push conflict-related sexual violence on to the agenda within international criminal law, has been heavily influenced by a binary that positions women as victims and assumes men as defendants. While women have also been identified by international law as peacemakers or potential advocates against the

harms of terrorism,⁴⁹ this still limits women, only capable of displaying stereotypical feminine attributes. Recognising women's potential to commit harm is the first step in disrupting these damaging feminine stereotypes that limit the acceptable female behaviour. Alongside international law's preoccupation with women as victims, it is equally preoccupied with international criminal law's achievements. With the normative value placed upon the performance of international criminal law, international mediated justice is seen as essential post-conflict.

Some of the aims pursued through international criminal law are to punish leaders, end impunity, and provide justice to victims.⁵⁰ However, when female defendants are left outside of the scope of international criminal law, their experience is ignored, their crimes made trivial, and the few women who are charged have their actions represented as a very specific, gendered form of aberration, all the while the victims of FPs are not given full justice because although made out to be monsters female defendants have used sex-stereotypes – from Plavšić's confusion to Nyiramasuhuko's use of her position as mother – to mitigate their culpability. In this chapter, I have examined how alternative forms of transitional justice that are not constrained by the traditional parameters of criminal law may provide a more complete account of the armed conflict as well as greater potential for post-conflict healing. One of the constraints in international criminal law is its reliance on binaries, guilty/not guilty, woman/man, and victim/perpetrator. Local justice processes and soft law instruments then provide a way to disarm these limitations by offering alternative methods for dealing with the complexity of armed conflict.

Western feminist interventions into international criminal law has also often focused on women as victims, especially those who were exposed to sexual violence. My nuanced critique of US radical feminism did not intend to detail the extent of Western intervention, but to highlight the construction of women's experiences post-conflict, which was untimely detrimental to the visibility of female defendants. The construction of the victim in armed conflict, shaped by international criminal law and Western feminist intervention does not allow for the reality of armed conflicts

⁴⁹ UN Security Council Resolution 2242, (2015).

⁵⁰ Damask, 'What is the Point of International Criminal Justice?' (2008) 331.

nuances. Primarily, that many individuals are both victims and violators during armed conflict and that neither category need be sexed or gendered. The binary of victim/violator has featured throughout this thesis, and the reason it is being returned to in this conclusion is due to its importance in the solution to the problems I have posed in international criminal law. The discussion of victims as violators or violators as victims renders itself impossible within the current parameters of international law and international criminal law. The reliance on gendered binaries by international criminal law cannot accept the complexity of armed conflict, as a result gendered binary is reinforced and women remain tied to a victim status. The dichotomy of victim and violator holds specific gender implications: so while the Western feminist intervention into international criminal law emphasised women as victims, the status of victim has the possibility to be held by all people in armed conflict and ignoring this, ignores the gendered experiences of male victims. I have discussed gender throughout this thesis and emphasised that the term is not synonymous with the experiences of women.

At the same time, I have constantly referred to ‘men’ and ‘women’, this is not to suggest I see these categories as self-evident. On the contrary, I see the existence of the terms ‘woman’ and ‘man’ as a social and linguistic construction. I also locate these categories within legal discourse, and have explored how these terms are often used by institutions and movements for their own gains. Follow on research to the thesis might expand interrogation of gender constructions within international criminal law through analysing the instances. I will continue to develop this topic by analysing these instances when individuals who perpetrate crimes do not identify as either man or woman, or when one’s appearance does not conform to idealised standards of gender. Transgender and queer individuals who act during armed conflict highlight the need to learn from the interrogations around female defendants and the laws inability to move away from binary understandings.

I recognise the power in the legal institutions, like the Ad Hoc Tribunals, Hybrid Courts, and International Criminal Court that aim to uphold ideals of justice. However, it seems evident that these institutions remain paralysed by their own constraints due to the difficulty in dealing with the multitude of harms that exist in armed conflict. Feminism is a tool that can facilitate the interrogation of legal topics,

questioning the assumed universal or neutral elements within the law. This thesis has revealed that within Western feminist interventions and international criminal law there exists an uncomfortableness in addressing a topic that confronts presumed gender binaries, which is assumed to question the work done to make the harm against women visible. I have detailed that female defendants do not negate the work on women as victims of sexual violence. Moreover, the lack of research into the defendants of armed conflict, irrespective of gender, does not allow for a more nuanced history of the conflict or an understanding of the actions that took place. The background and motivations of Akayesu, for instance, are impossible to explore, as giving attention to defendants through academic scholarship is often seen as detrimental to the aims of international criminal law or Western feminist pursuits into armed conflict.

There should not be a limit on what legal critique is allowed to be explored, especially when the aim of this critique is to prevent future atrocities or secure justice. By not analysing the way female defendants are shaped and given meaning by feminism and the law, then it is as if we have allowed her actions to remain anecdotal, an aberration. 'She' is an anomaly and becomes almost the exception that proves the rule that men are agents, men are violent, men are defendants, and men are (therefore) leaders in both war and peace times. As a result, the opportunity to prevent future atrocities is impossible, as the only acceptable avenue to learn from past conflicts remains tied to the experience of victims who are feminised and assumed to be predominantly female. In contrast, female defendants need to become a part of research, representations and legal redress in post-conflict climates, if justice and reconciliation are to be achieved.

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