

## REVIEW ESSAY

*GENDER, SHAME AND SEXUAL VIOLENCE: THE VOICES OF WITNESSES AND COURT MEMBERS AT WAR CRIMES TRIBUNALS* BY SARA SHARRATT (FARNHAM, UK: ASHGATE, 2011) 196 PAGES. PRICE £55.00 (HARDCOVER) ISBN 9781409419990.

Although the concept of the rule of law is inextricably tied to the promotion of human rights, there remain serious questions about the law's ability to give or bring about justice after mass atrocity. Successive generations of women both domestically and internationally have highlighted the problems they face when they encounter the justice system as victims and witnesses. Although equality before the law is an integral component of the rule of law,<sup>1</sup> it is not clear that those within the justice sector have given sufficient thought to this fundamental precept or the effect it should have on the manner in which criminal trials are conducted or the rules of evidence and procedure that govern their operation.<sup>2</sup> Articles by academics and materials compiled by non-governmental organisations have documented both the failure of the international legal system to deal adequately with crimes committed against women<sup>3</sup> and the barriers women face when they are in fact asked to participate in criminal proceedings that include charges of sexual violence.<sup>4</sup>

Further complicating this issue is the ever present tension between the law and justice. Justice is an intangible idea and the meanings attributed to it are delineated by speakers in accordance with their background. When a lawyer speaks of justice he or she is often referring to accountability through the legal system. When a victim or a human rights advocate refers to justice, the meaning they associate with the term is broader. It encompasses:

the restoration of [the victim's] dignity ... reaffirmation of [the survivor's] value as [a] human [being], obtaining assurances that the larger community understands the impact [the crimes] have had on [the survivor's life], and knowing that the

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<sup>1</sup> *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General*, UN SCOR, 59<sup>th</sup> sess, UN Doc S/2004/616 (23 August 2004) 4 [6].

<sup>2</sup> Laura Turquet et al, *Progress of the World's Women 2011–2012: In Pursuit of Justice* (UN Women, 2011); Committee on the Elimination of Discrimination against Women, *Views: Communication No 18/2008*, 46<sup>th</sup> sess, UN Doc CEDAW/C/46/D/18/2008 (22 September 2010) (*'Vertido v Philippines'*).

<sup>3</sup> See, eg, Fionnuala Ní Aoláin, 'Political Violence and Gender during Times of Transitional Justice' (2006) 15 *Columbia Journal of Gender and Law* 829, 838–9; Jocelyn Campanaro, 'Women, War, and International Law: The Historical Treatment of Gender-Based War Crimes' (2001) 89 *Georgetown Law Journal* 2557; Patricia Viseur Sellers, 'Individual(s) Liability for Collective Sexual Violence' in Karen Knop (ed), *Gender and Human Rights* (Oxford University Press, 2004) 153.

<sup>4</sup> The Women's Initiatives for Gender Justice has produced a number of reports on this issue: see Women's Initiatives for Gender Justice, *Gender Report Card, Publications and Reports* <<http://www.iccwomen.org/publications/index.php>>.

perpetrators have been punished. It is also about being part of a process that empowers rather than dehumanises [the survivor].<sup>5</sup>

The experiences of women who have testified before the International Criminal Tribunal for the Former Yugoslavia ('ICTY') and the War Crimes Chamber of the Court of Bosnia-Herzegovina ('WCC') demonstrate the disjuncture that exists between the victim's perception of whether or not they have received justice and the understanding of court personnel as to whether or not they are delivering a form of justice. Sara Sharratt in her book *Gender, Shame and Sexual Violence: The Voices of Witnesses and Court Members at War Crimes Tribunals* documents the views and experiences of witnesses, investigators, prosecutors, judges, mental health experts, members of non-governmental organisations working with survivors of sexual assault and journalists. The book is based on a study the author conducted from 2006 to 2009. Members of each group were asked to complete 'semi-structured questionnaires' and some individuals were interviewed.<sup>6</sup>

Sharratt's methodology included the quantification of data as well as the use of qualitative interviews. The latter allowed for a more nuanced understanding of the perceptions of members of each group.<sup>7</sup> In addition trial monitors followed some of the cases in which crimes of sexual violence had been charged. They were to note the use of protective measures, determine the witnesses understanding of such measures, record their views about the behaviour of the various courtroom 'actors' and make an assessment about the protection given to the rights of the victims including information about reparations.<sup>8</sup>

The strength of the book lies in its reportage of the comments, opinions and ideas expressed by the respondents to the questionnaires and the interviewees. This material offers an important insight into the attitudes and beliefs of the various 'actors' and the extracts from the interviews demonstrate that much remains to be done if we are to improve the 'policies and procedures for survivors, court members, and those engaged in the quest for justice for [crimes of sexual violence]'.<sup>9</sup>

Although the author highlights 'critical post-modernism' as the theoretical underpinning of the work, there is not a lengthy discussion of this philosophical approach. Nor is there an ongoing discussion of how this approach relates to the material uncovered in her interviews. Chapter 3, entitled 'Theoretical Perspectives', does contain some discussion of ideas such as hypervisibility,<sup>10</sup> the ongoing conceptualisation of women as 'weaker' and therefore as eternal

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<sup>5</sup> Ustina Dolgopol, 'Redressing Partial Justice: A Possible Role for Civil Society' in Ustina Dolgopol and Judith Gardam (eds), *The Challenge of Conflict: International Law Responds* (Martinus Nijhoff, 2006) 475, 481.

<sup>6</sup> Sara Sharratt, *Gender, Shame and Sexual Violence: The Voices of Witnesses and Court Members at War Crimes Tribunals* (Ashgate, 2011) 43.

<sup>7</sup> See *ibid* ch 4 (entitled 'Methods of Investigation').

<sup>8</sup> *Ibid* 50–1.

<sup>9</sup> *Ibid* 3.

<sup>10</sup> Although not fully examined, the concept is tied to the idea of focussing on the characteristics that influence a person being encompassed within a victimised group, but this 'essentialist' characterisation obscures the individual's experiences and concerns: *ibid* 26–9.

victims<sup>11</sup> and the ‘homogenization’ of raped women,<sup>12</sup> however much of the chapter is devoted to a literature review.

The questionnaires distributed to court personnel were designed to elicit information both about the respondent’s actual experiences in handling cases of sexual violence as well as their perception of the challenges such cases posed for them. In addition it sought to identify whether or not the respondent had recognised the need for additional information or training as well as their understanding of the impact that appearing in court might have on survivors.<sup>13</sup> Similar issues were pursued in the interviews; however these also were structured to gauge the interviewee’s perception of how cases of sexual violence were handled by the ICTY and WCC, their own feelings about being involved in such cases, their attitudes towards witnesses and their views about how their colleagues handled these types of cases.<sup>14</sup>

What is immediately apparent in the description of the view of judges and prosecutors is their belief in their ability to decide and work on cases ‘fairly’, whilst at the same time espousing attitudes that display either an acceptance of unfounded myths about the psychology of rape victims or views about victims that the Committee on the Elimination of Discrimination against Women (‘CEDAW’) has found to be a form of discrimination in the context of domestic legal systems. The following quote from a male WCC prosecutor is an example of the notion of professionalism and the belief that being a ‘professional’ is sufficient:

I don’t think there is a difference between male and female judges. Do you know why? Because it’s all about the skill. All occupations are the same, whether you are a dentist, gynaecologist, baker, butcher, or a bus driver, you have to know the essence, the core of that profession.<sup>15</sup>

In contrast, one of the senior female ICTY judges had this to say:

I often found myself tutoring my male colleagues on what it means to a woman to be raped. You have to be insistent that this was a serious crime and they could not have consented under the situation that they were in [captivity].<sup>16</sup>

In exercising judgment professionals often believe that they act without bias — but the day-to-day experience of women is to the contrary.<sup>17</sup> Male professionals (and some female professionals) who have not been willing to access literature on gender or to receive training on gender may not fully

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<sup>11</sup> Ibid 29–31.

<sup>12</sup> Ibid 32–3. Sharratt questions the utility of diagnoses such as post-traumatic stress disorder for the trauma women experience after rape, suggesting that the diagnosis is too broad and does not account for the complex reactions women experience. In addition, we too often assume that rape may be the worst crime that a woman can experience, whereas women may identify other issues as even more problematic in terms of their everyday lives: *ibid* 29, 33. We are cautioned not to assume that women’s lives are destroyed by the sexual assaults they have experienced, for to do so deprives women of agency.

<sup>13</sup> Ibid 44–5.

<sup>14</sup> Ibid 45–6.

<sup>15</sup> Ibid 54.

<sup>16</sup> Ibid 57.

<sup>17</sup> In the context of domestic courts, see, eg, Ninth Circuit Gender Bias Task Force, ‘The Effects of Gender in the Federal Courts’ (Executive Summary, Final Report, United States Court of Appeals for the Ninth Circuit, 1993).

appreciate the seriousness of crimes committed against women or the way in which a woman's willingness to testify may be influenced by the hierarchical structures present in her society. In addition, the manner in which women are interviewed and the effort taken to explain the court process can have a profound influence on a woman's willingness to engage with the work of an international tribunal.<sup>18</sup>

Despite the parallels between Sharratt's conclusions and the views expressed by CEDAW with respect to the gendered nature of the trial process and its effect on women, there is no discussion of this jurisprudence in the book. Some of the mythology she cites has been criticised by CEDAW as being a violation of a woman's right to equality.<sup>19</sup> Although the *Convention on the Elimination of All Forms of Discrimination against Women*<sup>20</sup> is not applicable to international tribunals, one might argue that as an emanation of the international community's desire to achieve 'justice' for victims of mass atrocities the jurisprudence of the various human rights bodies should be taken into account by court personnel.<sup>21</sup> The utilisation of gendered stereotypes in judicial decision-making was found to be a violation of women's human rights in *Vertido v Philippines*.<sup>22</sup> The recommendations made to the government of the Philippines are relevant to the issues raised by Sharratt, in particular the need to

[e]nsure that all legal procedures in cases involving crimes of rape and other sexual offences are impartial and fair, and not affected by prejudices or stereotypical gender notions ... [and to provide] [a]ppropriate training for judges, lawyers, law enforcement officers and medical personnel in understanding crimes of rape and other sexual offences in a gender-sensitive manner so as to avoid revictimization of women having reported rape cases and to ensure that personal mores and values do not affect decision-making.<sup>23</sup>

The statistics compiled by Sharratt indicate that significant numbers of court personnel have not undergone 'capacity building in gender crimes' either before or during their tenure on the ICTY or the WCC.<sup>24</sup> Despite their acknowledged lack of training in gender issues '[j]udges ... were among the least willing to recommend more capacity building'.<sup>25</sup> Although investigators and prosecutors had the greatest interest in accessing training programmes, gender issues were not viewed as a priority for such training.<sup>26</sup>

The interviews with the survivors/witnesses were arranged through organisations working with the women. The information sought from them

<sup>18</sup> See Patricia Viseur-Sellers, 'The Other Voices: Interpreters and Investigators of Sexual Violence in International Criminal Prosecutions' in Helen Durham and Tracey Gurd (eds), *Listening to the Silences: Women and War* (Martinus Nijhoff, 2005) 155.

<sup>19</sup> See, eg, *Vertido v Philippines*, UN Doc CEDAW/C/46/D/18/2008.

<sup>20</sup> *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

<sup>21</sup> The International Criminal Court ('ICC') is obliged to act in accordance with human rights principles: *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 21(3) ('*Rome Statute*').

<sup>22</sup> *Vertido v Philippines*, UN Doc CEDAW/C/46/D/18/2008.

<sup>23</sup> *Ibid* [8.9].

<sup>24</sup> Sharratt, above n 6, 80–6.

<sup>25</sup> *Ibid* 86.

<sup>26</sup> *Ibid* 87.

included their motivation for testifying, the type of support they received during and after testifying and their views about justice.<sup>27</sup> One of the themes of the book is that we too readily assume that survivors of sexual violence will feel shame and guilt and will find the experience of testifying difficult. This assumption has affected the work of investigators and the willingness of prosecutors to include charges of sexual violence. Sharratt argues that some women want to testify and view their ability to tell their story as part of their reassertion of control over their lives. This view was confirmed in the following statement from a senior female legal officer at the ICTY:

We must ensure that ignorance of gender issues and outdated attitudes among staff do not present a barrier to dealing with sexual violence issues in a progressive, informed and sensitive manner ... It seems that in the early days both at ICTY and ICTR [International Criminal Tribunal for Rwanda] myths about the refusal of women to come forward to testify about sexual violence for cultural reasons were used as justifications for not making an effort to seek out women and hear their stories. The lesson from the ad hoc tribunals is that, notwithstanding cultural difficulties, women will come forward, provided they are treated in sensitive and appropriate ways.<sup>28</sup>

However, Sharratt did find that women from rural areas were more likely to be reluctant to engage in the legal process as they believed this would draw attention to their situation.<sup>29</sup> This is a crucial point and highlights the difference between the law and practice. Despite the utilisation of protective measures, it is difficult to keep a witness's identity secret. This will influence the willingness of other witnesses to come forward, and can have a profound effect on the life of the witness, as she may face harassment, ostracisation or other consequences as a result of her willingness to testify.

This is not to suggest that even in the face of such obstacles women will not come forward. Despite the emotional hardship of discussing events, it is also true that many victims and witnesses find that telling their stories assists them to recover from their trauma.<sup>30</sup> They can develop a sense of empowerment and a feeling of control over their lives.<sup>31</sup> Many women want to tell their stories in the hope that it will prevent atrocities from occurring in the future.<sup>32</sup> The issue for the international community is how to offer more meaningful support to witnesses. Some of those interviewed by Sharratt expressed 'disappointment' that they were abandoned after their testimony.<sup>33</sup> Whether ongoing contact is a role for an outreach unit of an international tribunal such as that associated with

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<sup>27</sup> Ibid 46–8.

<sup>28</sup> Ibid 58–9.

<sup>29</sup> Ibid 47.

<sup>30</sup> It is worrying, however, that the percentage of those who felt 'very happy' about having testified decreased after they returned home, and seemingly continued to decrease over time. The figures Sharratt cites are 56.8 per cent for those who testified recently, 43.2 per cent once they returned home and 32.4 per cent after 10 years: *ibid* 115.

<sup>31</sup> See, eg, Ustina Dolgopol and Snehal Paranjape, *Comfort Women: An Unfinished Ordeal: Report of a Mission* (International Commission of Jurists, 1994); Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Beacon Press, 1998) 6; Viseur-Sellers, 'The Other Voices', above n 18, 162.

<sup>32</sup> Sharratt, above n 6, 117. See also Dolgopol, above n 5, 475; Dolgopol and Paranjape, above n 31.

<sup>33</sup> Sharratt, above n 6, 116.

the International Criminal Court ('ICC') or a victims and witnesses unit is unclear, but based on Sharratt's work it is obvious that more must be done both to inform victims/survivors about the nature of court proceedings and to maintain contact with victims and witnesses at least for some period after their trials have concluded.

Thought should be given to how principles elaborated by the United Nations could be incorporated into the working methods of the ICC and any future international tribunals. Although as noted above, these principles are often developed with states in mind, art 21 of the *Rome Statute* allows the ICC to incorporate both principles of international law<sup>34</sup> and general principles of law from national legal systems.<sup>35</sup> Article 6 of the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* states:

The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:

- (a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information.<sup>36</sup>

In addition, the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*,<sup>37</sup> refers to the importance of informing the public as well as victims of their rights. It assumes communication between the victim and those responsible for assisting the victim to access justice.

When reading through the recommendations made by the witnesses interviewed for the study, it is clear that they do not feel they are being given information either at the start of the investigation or by prosecutors in the lead up to trials. They specifically suggest that investigators and prosecutors should give full explanations to people about their rights and obligations. Furthermore, prosecutors should 'take the time to prepare witnesses well, explaining procedures, protective measures ... as well as likely defence strategies designed to undermine the witness' credibility'.<sup>38</sup> Another useful suggestion is that

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<sup>34</sup> *Rome Statute* art 21(1)(b).

<sup>35</sup> *Ibid* art 21(1)(c). See also International Federation for Human Rights, *Victims' Rights before the International Criminal Court: A Guide for Victims, Their Legal Representatives and NGOs* (4 May 2010) <<http://www.fidh.org/Victims-Rights-Before-the->>.

<sup>36</sup> *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res 40/34, UN GAOR, 3<sup>rd</sup> Comm, 40<sup>th</sup> sess, 96<sup>th</sup> plen mtg, Agenda Item 98, Supp No 49, UN Doc A/RES/40/34 (29 November 1985) annex. Although at the time of its adoption the *Declaration's* focus was the domestic legal systems of member states of the United Nations, the focus on the rights of victims in the *Rome Statute* and the ability of the ICC to give effect to human rights norms pursuant to art 21 of the *Rome Statute* makes the *Declaration* relevant to the activities of the Office of the Prosecutor: see the discussion of this issue in *Prosecutor v Lubanga (Decision on Victims' Participation)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 18 January 2008).

<sup>37</sup> *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res 60/147, UN GAOR, 3<sup>rd</sup> Comm, 60<sup>th</sup> sess, 64<sup>th</sup> plen mtg, Agenda Item 71(a), UN Doc A/RES/60/147 (21 March 2006).

<sup>38</sup> Sharratt, above n 6, 132.

witnesses be shown courtrooms and be allowed to watch other proceedings in order to gain a better sense of the trial process.<sup>39</sup>

A wide range of experts were contacted for the study, including legal experts from the UN and other international agencies, philanthropic organisations, non-governmental organisations and mental health experts working directly with survivors and journalists. The questionnaires and interviews were designed to elicit the views of 'experts' about the court process, the effectiveness of protective measures, the particular challenges posed by crimes of sexual violence and their recommendations for reform.<sup>40</sup>

An issue not often discussed in the literature is the unease that some investigators and prosecutors may feel about dealing with crimes involving intimate sexual details. This problem was highlighted by one of the psychiatrists interviewed for the study.

Due to the efforts of investigators, many women agreed to come and testify as witnesses ... But prosecutors exaggerate the unwillingness of women to testify partly because of their own difficulties in dealing with the cases, discomfort with the intimacy of sexual details, and attributions to women as sexual beings (honor, virtuosity, virginity) that they have to ask about and partly because rape is not considered as serious as murder.<sup>41</sup>

Sharratt could usefully have made a connection here to her comments about hypervisibility, in particular the assumptions we make about women from particular ethnic and religious groups that affect our ability to appreciate the sense of autonomy and authority that an individual woman may feel. It is important that our interactions with survivors assist in encouraging them to understand their own power and agency. During the period that non-governmental organisations in the Asia-Pacific region were bringing the situation of the 'comfort women' to the attention of the international community, a considerable amount of time and effort was put into assisting women to see themselves as actors who could influence not only their own lives but also our understanding of the effect of war on women and the content of international legal principles.<sup>42</sup>

In order to give some context to her study Sharratt considers the work of the Commission of Experts ('Commission') created by the UN Security Council to 'examine Crimes against Humanity and war crimes committed in the territory of the former Yugoslavia'<sup>43</sup> and the international debates that influenced the creation of the ICTY. As she notes the Commission was not given the full

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<sup>39</sup> Ibid.

<sup>40</sup> Ibid 49–50.

<sup>41</sup> Ibid 60.

<sup>42</sup> For a description of the Tokyo Tribunal and the work of non-governmental organisations, see Christine Chinkin, 'Women's International Tribunal on Japanese Military Sexual Slavery (2001) 95 *American Journal of International Law* 335; *Prosecutor v Showa (Judgment on the Common Indictment and the Application for Restitution and Reparation)* (Women's International War Crimes Tribunal for the Trial of Japan's Military Sexual Slavery, Case No PT-2000-I-T, 4 December 2001); Dolgopol, above n 5.

<sup>43</sup> Sharratt, above n 6, 5, citing SC Res 780, UN SCOR, 47<sup>th</sup> sess, 3119<sup>th</sup> mtg, UN Doc S/RES/780 (6 October 1992).

support it needed by the international community.<sup>44</sup> It was chronically short of funds<sup>45</sup> and its mandate was never fully articulated.<sup>46</sup> At the time the Commission was established, the then UN Commission on Human Rights had created a Special Rapporteur on the situation in the former Yugoslavia and it was unclear how the Commission was to relate to his office.<sup>47</sup> In addition there had been calls for the creation of an international tribunal,<sup>48</sup> but the Commission was not given a mandate to conduct criminal investigations.<sup>49</sup>

What has been considered problematic, both with respect to the work of the Commission and the initial prosecutions at the ICTY, was the incorporation of crimes of sexual violence into the crimes associated with 'ethnic cleansing'. Despite the Commission collecting evidence of differing patterns of crimes of sexual violence and its data clearly demonstrating that not all crimes of sexual violence were connected to the ethnic undertones of the conflict, the crime of rape became inextricably connected to ethnic cleansing in the mind of the public due to the manner in which it was presented by the experts and the prosecutors. Doris Buss has observed:

For both the ... [ICTY] and ... [ICTR] the 'ethnic' character of the conflicts is central to the resulting legal judgments. And, in the context of increased visibility of wartime violence against women, the Tribunals' analyses of gendered violence are woven into its determinations on the ethnic dimensions of the conflicts.<sup>50</sup>

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<sup>44</sup> Pierre Hazan, *Justice in a Time of War: The True Story behind the International Criminal Tribunal for the Former Yugoslavia* (James Thomas Snyder trans, Texas A & M University Press, 2004) xii [trans of: *La Justice face à la guerre: de Nuremberg à La Haye* (first published 2000)], quoted in Sharatt, above n 6, 7:

For the real politic [sic] exponents, the Commission of Experts was intended to serve the purpose of appeasing world public opinion. Its existence suggested that something was being done to seek justice, but at the same time, the Commission had to be on a short leash.

<sup>45</sup> M Cherif Bassiouni, 'Appraising UN Justice-Related Fact-Finding Missions' (2001) 5 *Washington University Journal of Law and Policy* 35, 47. For more detailed information about the funding available to the Commission, see Michael P Scharf, 'Cherif Bassiouni and the 780 Commission: The Gateway to the Era of Accountability' (Occasional Paper, Frederick K Cox International Law Center, October 2006) 6–10.

<sup>46</sup> Members of the Commission expressed their concern about the lack of a clearly defined role and mandate: see Commission of Experts Established pursuant to Security Council *Resolution 780, Minutes*, 2<sup>nd</sup> sess, 1<sup>st</sup> mtg (14 December 1992) <<http://library.case.edu/digitalcase/>>.

<sup>47</sup> Commission of Experts Established pursuant to Security Council *Resolution 780, Minutes*, 2<sup>nd</sup> sess, 3<sup>rd</sup> mtg (15 December 1992) 4 <<http://library.case.edu/digitalcase/>>.

<sup>48</sup> See, eg, Scharf above n 45; Commission of Experts Established pursuant to Security Council *Resolution 780, Minutes*, 1<sup>st</sup> sess, 3<sup>rd</sup> mtg (14 December 1992) <<http://library.case.edu/digitalcase/>>.

<sup>49</sup> Commission of Experts Established pursuant to Security Council *Resolution 780, Minutes*, 2<sup>nd</sup> sess, 2<sup>nd</sup> mtg (14 December 1992) <<http://library.case.edu/digitalcase/>>.

<sup>50</sup> Doris E Buss, 'The Curious Visibility of Wartime Rape: Gender and Ethnicity in International Criminal Law' (2007) 25 *Windsor Yearbook of Access to Justice* 3, 5 (citations omitted).

There is a slight mistake in the chapter entitled 'Legal Background on International Criminal Trials'.<sup>51</sup> Sharratt states that 'rape as a crime was until recently entirely absent from the lists of war crimes'.<sup>52</sup> However, at the close of World War I, there had been some discussion of trying the Kaiser and others for war crimes. The Commission on Responsibilities of the Paris Peace Conference in 1919 drew up a list of such crimes that included: '(5) Rape [and] (6) Abduction of girls and women for the purposes of enforced prostitution'.<sup>53</sup> When it began its work in 1943 the UN War Crimes Commission relied on this list to compile a list of war criminals.<sup>54</sup>

The importance of having women in the various organs of an international tribunal is a recurring theme in the book. Women appearing before the WCC were clear that they were 'more comfortable speaking to women investigators about sexual violence'.<sup>55</sup> In addition, it was due to the efforts of Judges Elizabeth Odio Benito and Gabrielle Kirk McDonald that r 96 of the *Rules of Procedure and Evidence*<sup>56</sup> discarded the requirement for corroboration, limited the use of the defence of consent in situations of duress and prohibited the use of prior sexual conduct to discredit women.<sup>57</sup> During the confirmation hearing for Dragan Nikolić<sup>58</sup> 'several witnesses talked about rape' yet the indictment did not include charges of sexual violence.<sup>59</sup> However, 'Judge Benito made sure that [the witnesses] testimony was heard [and] [i]n its decision to confirm the indictment, the Trial Chamber invited the Prosecutor to amend the indictment ... He did so'.<sup>60</sup>

Somewhat problematically the WCC has not adopted the same rules of evidence and procedure as the ICTY. Although the WCC operates from the assumption that corroboration is not necessary should prosecutors successfully seek protective measures that include a woman testifying in closed session, the Court has adopted the position that 'someone in open session' must corroborate

<sup>51</sup> Sharratt's discussion of the *ICTY Statute* with respect to the difference between war crimes and crimes against humanity is somewhat confusing and does not take account of the jurisprudence of the Court, particularly the judgment in *Prosecutor v Kunarac (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case Nos IT-96-23 and IT-96-23/1-A, 12 June 2002). See also James R McHenry III, 'The Prosecution of Rape under International Law: Justice That is Long Overdue' (2002) 35 *Vanderbilt Journal of Transnational Law* 1269 (which contains an extensive discussion of the case); SC Res 827, UN SCOR, 48<sup>th</sup> sess, 3217<sup>th</sup> mtg, UN Doc S/RES/827 (25 May 1993), as amended by SC Res 1877, UN SCOR, 64<sup>th</sup> sess, 6155<sup>th</sup> mtg, UN Doc S/RES/1877 (7 July 2009) ('*ICTY Statute*').

<sup>52</sup> Sharratt, above n 6, 16.

<sup>53</sup> Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, 'Report Presented to the Preliminary Peace Conference, March 29, 1919' (1920) 14 *American Journal of International Law* 95, 114.

<sup>54</sup> For an overview of the Commission's work, see United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (His Majesty's Stationery Office, 1948).

<sup>55</sup> Sharratt, above n 6, 22.

<sup>56</sup> International Criminal Tribunal for the Former Yugoslavia, *Rules of Procedure and Evidence*, Doc No IT/32/Rev.47 (adopted 28 August 2012) r 96.

<sup>57</sup> *Ibid* 19–20. However she also notes that during the tenure of Carla Del Ponte as Chief Prosecutor, 'charges of rape as a distinct crime have been much rarer': at 21.

<sup>58</sup> *Prosecutor v Nikolić (Indictment)* (International Criminal Tribunal for the Former Yugoslavia, Case No IT-94-2-I, 4 November 1994).

<sup>59</sup> Sharratt, above n 6, 39 (citations omitted).

<sup>60</sup> *Ibid*.

her testimony.<sup>61</sup> This is an important issue as mixed tribunals or a combination of international and national tribunals are likely to be set up in the future. Given the financial realities, the international community is likely to fund these efforts, and it is therefore possible for those working on the rules of evidence and procedure to ensure that such rules are gender sensitive and represent best practice at the time.

In her introduction Sharratt notes that '[n]o studies ... have looked at what women who have testified about their own rape/abuse have to say about their experience, the nature of the justice done, or the long-term effects of their participation'.<sup>62</sup> Whilst this may be true at the international level, domestically women's groups and often government agencies have undertaken some aspects of this work in their attempt to reform the domestic criminal law.<sup>63</sup> Those working at the international level too often overlook the fact that the gender dynamics present in international tribunals are also present in domestic legal systems. One might argue that those working internationally are influenced by the manner in which such crimes are handled within their own legal systems and that there are lessons to be learned from work undertaken in various parts of the world to improve the justice sector's response to crimes of sexual violence.<sup>64</sup>

Returning to the theme of justice, it appears that there is a divergence in the views of the various professions about whether or not the holding of trials assists 'survivors in their quest for justice'.<sup>65</sup> Women professionals interviewed for the study were less convinced of the ability of the court process to bring about the more holistic notion of justice put forward by survivors. The following quotation from a female ICTY judge is a salutary reminder for all of those working in the fields of international criminal law and international humanitarian law about the possibilities and limits of trials:

These are hard topics to evaluate because so many stigmas are attached to rape, yet criminal law principles are hard on victims who come as witnesses. We need a restatement of criminal law in sexual offences. The questionnaire has raised deeper questions on whether or not there can be 'fair' justice of victims for sexual crimes in international law. The elements of rape as a war crime have been adequately dealt with by the ICTY and the ICTR. However, there is a dearth of understanding as far as other issues besides the law.<sup>66</sup>

Although not addressed in the book, as the author remains optimistic about the ability of future bodies to address the deficiencies she has observed, it may be that our overzealous assertions about the potential of war crimes trials to redress the harms committed during conflict, adds to the victims' sense of frustration. The holding of war crimes trials allows the international community to become involved in the transition from conflict to peace and to reassert the importance of a moral and a legal order. However, as Martha Minow has

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<sup>61</sup> Ibid 23.

<sup>62</sup> Ibid 2.

<sup>63</sup> Kathleen Daly, 'Conventional and Innovative Justice Responses to Sexual Violence' (Issues Paper No 12, Australian Centre for the Study of Sexual Assault, September 2011) <<http://www.aifs.gov.au/acssa/pubs/issue/i12/index.html>>.

<sup>64</sup> See Turquet et al, above n 2.

<sup>65</sup> Sharratt, above n 6, 94.

<sup>66</sup> Ibid.

observed, it may be that we claim too much for what we can achieve through such trials and thus create the potential for disappointment.<sup>67</sup> Criminal trials are 'slow, partial, and narrow'.<sup>68</sup> As Sharratt observes prosecutors select the charges and these may not include all of the harms suffered by the victims the prosecutor wishes to call to prove the charges. This may leave a particular witness with a sense that the court neither understands the effect the crimes have had on her life nor the ongoing impact of atrocities on her community.

Sharratt's book, whilst focussed on the ICTY and the WCC, is an important addition to our understanding of the ongoing difficulties faced by women in their search for accountability. As noted by the author, the ICC has not overcome the problematic gender dynamics that were present in earlier tribunals. Utilising information from the work of the Women's Initiatives for Gender Justice she highlights insensitive questioning by prosecutors. Perhaps the most stunning was the following question posed by a prosecutor to a witness who had been gang raped and who had witnessed a massacre in her community:

Were you injured during those rapes?<sup>69</sup>

As Sharratt has observed there is an ongoing inability amongst some court personnel to understand rape as offence of violence and to accept that a rape in and of itself is a serious crime.

'Justice is always a revision of justice and the expectation of a better justice'.<sup>70</sup> With this idea in mind, Sharratt offers the reader recommendations from the witnesses she has interviewed, as well as her personal recommendations. Some of them may be controversial, such as the suggestion that lists of those convicted of rape be made available in public spaces,<sup>71</sup> but they are worth reviewing as they represent the experiences of those who have been part of a major international effort to end impunity. Others, whilst perhaps not controversial, will take time and effort to implement, such as mandatory gender capacity building for all court personnel.

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<sup>67</sup> Minow, above n 31, 49–51.

<sup>68</sup> Ibid 9.

<sup>69</sup> Sharratt, above n 6, 102.

<sup>70</sup> Emmanuel Levinas, *Entre Nous: On Thinking-of-the-Other* (Michael B Smith and Barbara Harshav trans, Columbia University Press, 1998) 196 [trans of: *Entre Nous: Essais sur le penser-à-l'autre* (first published 1991)]. See also Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart Publishing, 2000) 352–3.

<sup>71</sup> Sharratt, above n 6, 133.

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