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Justice for the Srebrenica Genocide? Law, Theatre and Memory

In November 1996, the first judgement by the International Criminal Tribunal for the former Yugoslavia (ICTY) confirmed the guilt of the accused Dražen Erdemović for partaking in the execution of Bosniak men and boys who had fled from the town of Srebrenica in eastern Bosnia and Herzegovina (*Prosecutor v. Erdemović*, IT-96-22). The case had to evaluate what a just response to the Srebrenica genocide comprises, considering the circumstances of the accused. This raised the question: who was responsible for the genocide? Journalist Kitty Felde followed the legal proceedings in The Hague. Her play entitled *A Patch of Earth* (2008 [1999]) closely follows this ICTY case, portraying events in the courtroom and outside it. At the beginning of the play, Erdemović pleads guilty for a crime against humanity and asserts that he cannot stay silent anymore (Felde 2008, 132). The play explores how the accused's behaviour after atrocities shapes a perception of just punishment. Should cooperation and remorse have impact on the length of a prison sentence? In this chapter, I will examine how these two legal and theatrical narratives mediate memory of the Srebrenica genocide and interact in negotiating questions about a just response to it.

The Srebrenica genocide took place in July 1995 when Bosnian Serb Army killed over 8,000 Bosniaks, mostly men and boys (Nettlefield and Wagner 2014, 1–2). The enclave of Srebrenica controlled by Bosniaks had been under siege and surrounded by the Bosnian Serb forces since 1992 (Wagner 2008, 27–30). The lack of food and medical supplies forced the UN to address this humanitarian crisis in 1993. In April, the UN Security Council Resolution 819 established Srebrenica as a “safe area” (1993, 2). However, since the resolution left the term undefined and failed to identify how the town should be protected, it created an expectation of protection that was not supported by any commitment to use military force (Sudetic 1999, 206). When the enclave of Srebrenica fell under the attack of Bosnian Serb forces on July 11, 1995, Dutch peacekeepers based in the area watched the events unfold (Rohde 1997). Bosniaks fled from Srebrenica to the Dutch peacekeepers' base in nearby Potočari, hoping for some protection (Nettlefield and Wagner 2014, 10). Fearing for their lives, most men and boys decided to walk through the forest towards Tuzla to find safety (Petrila and Hasanović 2020, 16). Most women, girls and young children stayed in Potočari until Bosnian Serbs transported

them by bus to the Bosnian government territory (Nettlefield and Wagner 2014, 11–12). The Bosnian Serb troops killed men whom they captured; the journey through the woods became to be known as the death march.

The Srebrenica genocide was the culmination of the sustained Serbian and Bosnian Serb policy of ethnic cleansing (Gow 2003, 118–121). This was part of the Bosnian Serb objective to establish an independent Republika Srpska. The foundation of the Republika in April 1992 responded to the declaration of independence of Bosnia and Herzegovina from the Socialist Federal Republic of Yugoslavia (Ramet 2002, 205–206; Gow 2003, 173). Republika Srpska continues to exist within present-day Bosnia and Herzegovina, but the political deadlock, nationalist politics and genocide denialism have led to concerns over the future of the state (Borger 2021; McGee 2021).¹

Erdemović first confessed his participation in the Srebrenica genocide to reporter Vanessa Vasić-Janeković who taped their discussion for ABC News. After the Serbian police confiscated the tapes, Vasić-Janeković contacted the ICTY, reaching prosecutor Richard Goldstone (Terris 2018, 162–164). The information she gave resulted in the ICTY's public and formal request to question and charge Erdemović. Aged just 24, Erdemović, who had trained as a locksmith before the war, pleaded guilty to crimes against humanity for killing Bosniaks at a farm near Pilica (*Prosecutor v. Erdemović*, May 22, 1996; Nov 20, 308–310). He was sentenced to ten years' imprisonment (*Prosecutor v. Erdemović*, Nov 29, 1996, 359).² Erdemović appealed this judgement, asking the appeals chamber either to excuse him from serving the sentence or to uphold the appeal based on inconsistent acceptance of testimony, lack of evidence regarding events at a second killing site, a failure to consider duress, and the tribunal's inability to establish the accused's psychological condition at the time of the crime (*Prosecutor v. Erdemović*, Oct 7, 1997, 10–11). The appeals chamber decided to remit the case to a new ICTY chamber, and there Erdemović pleaded guilty to violations of the laws or customs of war and was sentenced to five years' imprisonment in March 1998 (*Prosecutor v. Erdemović*, Mar 5, 1998, 23).

By pleading guilty, Erdemović lost his right to a trial, during which the prosecutor must prove his crimes. He was only entitled to hearings to allow for the determination of an

¹ The high representative for Bosnia and Herzegovina, Christian Schmidt, raised concerns of the future viability of Bosnia and Herzegovina in November 2021 (Borger 2021; McGee 2021).

² Erdemović was charged with two alternative counts: 1) murder as a crime against humanity, Article 5(a); 2) murder as violations of the laws or customs of war, Article 3(1). *Prosecutor v. Erdemović*. Indictment. IT-96-22. May 22, 1996.

appropriate sentence. The trial chamber assessed the blameworthiness of the accused's actions by considering mitigating and aggravating circumstances, in other words, the context in which the crime took place (*Prosecutor v. Erdemović*, May 31, 1996, 24). Since Erdemović was an ordinary soldier, the legal case focused on the extent to which he could be seen as responsible for following orders. The *Prosecutor v. Erdemović* case was the first time the ICTY considered questions surrounding duress and the first time the institution addressed violence that followed the fall of Srebrenica. The case thus offers a unique narrative site for reflecting on the justness of the ICTY response to the Srebrenica genocide and the construction of legal and collective memory about the genocide.

Felde's *A Patch of Earth* focuses on the first part of the legal case in The Hague and the immediate local aftermath of the genocide. The play is based on the author's observations of the legal proceedings. Felde had worked as a journalist in radio and newspapers, including National Public Radio (NPR) and *The Los Angeles Times* (Silver 2003). She has been credited for spending more time at the ICTY hearings than any of her fellow American court reporters ("Transcript of Proceedings" 2007, 225). Mirroring the real circumstances, the protagonist of the play was enlisted to the Tenth Sabotage Detachment of the Bosnian Serb Army that participated in the Srebrenica genocide. Although the character lives in a community of Bosnian Serbs and his wife is a Serb, he is identified as a Bosnian Croat (Felde 2008, 132, 135, 143, 160; *Prosecutor v. Erdemović*, May 22, 1996, 2). While Felde recounts the legal case largely faithfully in the courtroom scenes that frequently follow the legal case word for word, her play also imagines moments outside the courtroom, such as those concerning Erdemović's family life. The play combines verbatim theatre, documentary theatre and more traditional story-telling drama, which allows Felde to imagine and intersect Erdemović's memories and dreams that convey his haunting guilt with the present-day courtroom events.

The play, first performed in 1999, has been staged by a number of amateur theatre groups, mostly in the USA (Felde n.d.). In 2008, it was published in Robert Skloot's collection of plays, *The Theatre of Genocide: Four Plays about Mass Murder in Rwanda, Bosnia, Cambodia, and Armenia*. Scholarly engagement with the play, which mediates the memory of the Srebrenica genocide, inscribing it in transnational cultural memory, is limited to generally positive reviews. For example, Robin Stone suggests that Felde combines fact and fiction to "create a sense of universality in identifying the human anguish" (2009, 176). This aligns with Jean Graham-Jones's proposition that Felde directs the play to be performed without accents and an intermission to erase barriers between the audience and the events of the play (2008,

809). Felde appears to construct the play in a way that capitalises the audience's receptiveness and emotional involvement.

Bringing Felde's play and the *Erdemović* case side by side in this chapter allows me to identify how these narratives mediate memory about the Srebrenica genocide and its aftermath, reinforcing and questioning one another. My exploration of the two texts builds on methods frequently used in the interdisciplinary field of "law and literature". Since its institutionalisation in the 1970s, the field that is sometimes viewed as an "interdiscipline" has reflected on the opportunities and challenges of bringing law and literature side by side (Peters 2005, 441; Anker and Meyler 2017, 1). Two traditional approaches are "law in literature" and "law as literature" (Ward 1995, 3–25), in the first of which legal methods and concerns are examined in a literary text. The latter concept designates research in which literary insights are applied to legal primary materials. As Elizabeth Anker and Bernadette Meyler observe, the value of "law and literature" was seen to derive from its ability to humanize law by returning it to its "humanistic, ethically minded origins" and to establish "a much-needed real-world, practical focus" in literature (2017, 1–2). These views are problematic since they suggest that one discipline could function as a corrective of another, which undermines the critical complexity of both law and literature. To avoid creating a hierarchy between the disciplines, my reading moves flexibly between the two modes of analysis, which allows for holistic exploration of the relationship between the two narratives.

Since the field of "law and literature" seeks to unearth how the two disciplines may enrich one another, its insights can help navigate the question of how to work across myriad research objects and disciplinary conventions. Opportunities and limitations of interdisciplinary approaches and methods identified by "law and literature" research may benefit other fields that cross disciplinary boundaries, such as memory studies. While the methods of analysis that I use in this chapter, qualitative discourse analysis and close textual analysis, are used in memory studies, bringing them together offers an example of analysis that is grounded in the practises and critical potential of two disciplines. Memory studies could benefit from methodological interdisciplinarity in evaluating relationships between different mnemonic narratives across institutions and societal sectors. Tracing connections between law, literature and memory studies, this chapter demonstrates that Felde's play and the *Erdemović* case mediate and remediate memory about the Srebrenica genocide that foregrounds ambiguity and moral complexity of justice. First, I will discuss discourses that participate in constructing the collective memory of the Srebrenica genocide among the Anglophone public, unpacking

characteristics of legal and theatrical narrative forms. Then, my analysis of the primary sources will focus on two related concerns: who should be held accountable and how. My examination of duress the impact of mitigating circumstances and remorse on just punishment will highlight that memories mediated by the play and legal case communicate the impossibility of just justice and a neat closure.

Approaching memory of the Srebrenica genocide

Legal and creative narratives about the Srebrenica genocide exist alongside the media discourse. The international news media reported the fall of Srebrenica as events unfolded (Fox 1995, 12; Bellamy 1995a, 10). Eyewitness accounts of atrocities started to emerge when Bosniak women, whom the Bosnian Serb army deported, testified about rapes and killings (Radosavljevic 1995, 11; Borger 1995, 1; Bellamy 1995b, 17). They raised concerns about the fate of the men who fled through the forest by foot (Sullivan 1995, 1). When the few surviving men began to arrive in Tuzla, they testified about systematic violence, producing a fuller picture of the atrocities (Bellamy 1995c, 8; Brown 1995, 10). Extensive media attention framed initial public discourse about the fall of Srebrenica. The narrative evolved from one of surprise about the advance of Bosnian Serb troops, to horror and fears about the fate of tens of thousands of Bosniak men. Weeks later, the identification of mass grave sites confirmed that large-scale atrocities had taken place (Black 1995, 16; Bone and Prentice 1995, 13; Toomey and Hadzic 1995, 13). This media narrative made the events of the Srebrenica genocide public among the outside audiences.

The *Erdemović* case, which stemmed from Vasić-Janeković's journalistic work, opened up legal discourse about the Srebrenica genocide. Erdemović helped the prosecution investigations by giving witness statements about high-ranking officers, such as Radovan Karadžić and Ratko Mladić, before appearing as the accused (*Prosecutor v. Erdemović*, Nov 20, 1996, 317). Since the *Erdemović* case, the ICTY chambers have heard a number of cases that included events relating to the fall of Srebrenica. Among these cases are *Prosecutor v. Karadžić* (IT-95-5/18), *Prosecutor v. Popović et al.* (IT-05-88), *Prosecutor v. Mladić* (IT-09-92) and *Prosecutor v. Milošević* (IT-02-54). Widely covered by local and international media, the legal cases have revealed details about the Srebrenica genocide, contributing to a public record of the events and their aftermath.

A legal record of an event shapes and is shaped by memory and history in different ways. Lucy Bond contends that legal processes are “both *framed by*, and *frames of*, memory” (2015, 130). Addressing ways in which law is framed by memory, Maurice Halbwachs (1980), who writes about law as a social space, notes that the legitimacy of law builds upon collective memory (1980, 141–143). Within common law tradition, reliance on (sometimes binding) precedents to inform a similar present case constructs and consolidates legal history, which can also be viewed as institutional remembering (Sarat and Kearns 1999, 4–6). However, since the ICTY combines common law and civil law traditions, a precedent does not legitimise a legal decision in the same way as in common law systems, even though sometimes earlier cases or cases from various jurisdictions are discussed as examples that show how a specific legal problem can be solved. Austin Sarat and Thomas Kearns propose that legitimising a decision by a precedent hides acts of interpretation and reinterpretation that produce new departures and directions in case law (1999, 6). In contrast, the decisions, judgements and transcripts of the ICTY bring forth and draw attention to challenges and opportunities of legal interpretation as a subjective practice, because the institution, particularly in the early cases, such as *Prosecutor v. Erdemović*, was self-consciously engaged in the creation of new legal practices. Examining the relationship between law and memory from the perspective of the ICTY thus holds potential to complement existing scholarship based on common law jurisdiction.

Trials frame memory by offering a platform for witness testimony and by establishing a record of harm and redress. Susanne Karstedt (2009) argues that legal institutions function as “*enabling structures*” for constructing memories for individuals and groups, for negotiating them and, eventually, for establishing shared meanings (2009, 5). Karstedt emphasises that legal institutions facilitate memory by offering a platform for making individual memories public and connecting them to memories of others (2009, 5). However, since the sole purpose of a legal case is to determine the accused’s guilt beyond reasonable doubt, memories that a legal narrative facilitates are limited to those about the accused’s actions and specific events that relate to an indictment, outside of which remain other actors, actions and inaction. While the partiality and selectiveness of memories that enter a legal narrative reflect the legal priority of determining guilt, witnesses’ memories are also in themselves fragmented, partial and fallible. As a result, a legal record builds on and mediates memories but the public narrative and collective memory it produces is shaped by the purpose of the institution.

Even though the process of (legal) negotiation of memories results in an outcome, a judgement, it may or may not become accepted and shared outside the institution. For Joachim

Savelsberg and Ryan King, collective memory that is established by the narrative that a trial communicates “may counteract violence directly, by delegitimizing grave human rights violations, or indirectly, by evoking new control responses”, such as new laws (2011, 8). While guilty verdicts send a message of disapproval of human rights violations, their ability to deter future violations cannot be assumed. The ICTY existed outside the post-conflict Balkans, and its work has consistently been undermined by nationalist politicians who condone war crimes and celebrate war criminals as heroes (Nettlefield and Wagner 2014, 267–269). However, this political (re)mediation of legal narrative is unlikely to influence how the outside audiences perceive the ICTY. Ways in which a judgement is collectively remembered can thus vary according to the position of the audience.

While a legal record, including a judgement, assesses and determines some facts, which may contribute towards understanding the history of an event, the relationship between historical and legal narrative remains contested. As Richard Ashby Wilson identifies, there are two broad legal schools of thought which agree that “courts are inappropriate venues to delineate” histories of atrocity (2011, 2). For scholars of law and society, even when law tries to contribute to historical inquiry, it necessarily fails because of the characteristics of a legal process, such as focus on the accused’s actions and standards of evidence, and their incompatibility with historical methods (Wilson, 2011, 6–12). Those supporting the doctrine of liberal legalism argue that historical interpretation may undermine fairness and due process by deviating attention away from the sole purpose of a legal case to determine the accused’s guilt (Wilson, 2011, 3–5). These two positions argue against propositions that law provides a historical account that participates in constructing a shared understanding and memory of an event.

Creative narratives complement legal and media accounts of the Srebrenica genocide. First performed in 1999, Felde’s play is one of the very early creative works available for Anglophone audiences.³ Since then, a number of texts about the Srebrenica genocide have entered cultural circulation outside the former Yugoslavia. For example, testimony collections *Surviving the Bosnian Genocide: The Women of Srebrenica Speak* (2011) by Selma Leydesdorff and more recent *Voices from Srebrenica: Survivor Narratives of the Bosnian Genocide* (2021) by Ann Petrilá and Hasan Hasanović foreground the human experience of the genocide and its aftermath. Single-author testimonies, such as Emir Suljagić’s *Postcards from*

³ Demiragić and Hodžić (2013) offer a succinct overview of the local creative responses in Bosnian.

the Grave (2005) and Hasan Nuhanović's *The Last Refuge: A True Story of War, Survival and Life Under Siege in Srebrenica* (2019), make personal testimony widely accessible. Podcast *Untold Killing* (2020), which marked the 25th anniversary of the Srebrenica genocide, attracted a wide audience in the UK and reminded the listeners of the ongoing impact of the genocide on survivors' lives (Remembering Srebrenica n.d.). Fictional works, including Lesleyanne Ryan's *Braco: A Novel* (2012) and director Jasmila Žbanić's award-winning *Quo Vadis, Aida?* (2020), use imagination to try to understand the experiences the survivors live with.

Creative texts mediate memories about the Srebrenica genocide, constructing a shared "cultural memory". Drawing on Aby Warburg (1999) and Jan and Aleida Assmann (2011 [1992]; 1996), Astrid Erll and Ann Rigney maintain that cultural memory "is itself premised on the idea that memory can only become collective as part of a continuous process whereby memories are shared with the help of symbolic artefacts that mediate between individuals and, in the process, create communality across both space and time" (2009, 1). The communality created by symbolic artefacts, creative texts, can reach beyond those who have a first-hand memory of the event. The creative narratives thus communicate an understanding of the past, in this case, of the Srebrenica genocide, which has potential to become shared among the audiences as a part of cultural memory.

Felde's choice to write a play about the aftermath of the Srebrenica genocide benefits from particular characteristics of theatre as a narrative form. A play is primarily constructed as a performance in which actors and an audience come together in a physical space in order to share an experience. A narrative and its reception are embodied, which distinguishes theatre from other creative narrative genres and forms, such as a novel, memoir or film, that mediate between individuals, constructing cultural memory. Robert Skloot argues that this "presentness" opens up a space for sharing "stories of human responses", such as fear, resistance, grief or confusion (2008, 23). For him, this means that theatre has a particular capacity to evoke empathy and contribute towards understanding of historical, political and social conditions that enable genocidal violence (Skloot 2008, 19). Felde's *A Patch of Earth* offers an example of a play that through embodied narration invites the audience to recognise survivors and perpetrators' humanity. The play deconstructs the two positionalities by rehumanising people targeted by the genocide and by resisting the reduction of perpetrators to monsters to shape the audience's perception of the Srebrenica genocide.

Theatre and law share underlying structural similarities (Peters 2008, 180). Most concretely, participants have clear, pre-defined roles in legal and theatrical performances. Julie Stone Peters, a scholar of law and literature, argues that law and performance are “forms of conflict resolution through aesthetic and ritual means” that serve as “vehicles for social catharsis” (2008, 180–181). For her, both law and theatre incorporate aesthetic qualities and ritual components which allow legal cases and plays to become sites that release emotions and establish social meaning. The idea of a shared catharsis highlights the moral involvement in following a legal case and watching a play. This catharsis is not necessarily tied with successful resolution of a conflict by a play or a legal case but the powerful potential of social rituals to produce meaning. The common function of collective meaning making in law and theatre grounds my exploration of points of convergence and divergence in the narratives about the Srebrenica genocide.

Who should be held accountable?

Bringing *Prosecutor v. Erdemović* and Felde’s *A Patch of Earth* side by side reveals similarities and differences in perceptions of just justice. While the term justice can designate different ways of holding perpetrators accountable (Sikkink and Kim 2013, 270), the ICTY sought to achieve this by sentencing those individuals whom the tribunal found guilty to imprisonment. In the legal and theatrical narrative that mediate the memories of the Srebrenica genocide, the question of justness of justice revolves around the appropriate length of a prison sentence. Since Erdemović pleaded guilty, guilt designates a starting point for the narratives rather than an end result, which opens up a space for examining the characteristics of justice and under what circumstances it appears just. The narratives do not imprint into the collective memory the process of proving the accused’s guilt but questions about the justness of justice.

In Felde’s play, Erdemović foregrounds the context of his crime. Borrowing from the legal case word for word, the character highlights that he was threatened and forced to kill: “If I had refused, I would have been killed together with the victims. My comrades told me, ‘If you’re sorry for them, line up with them and we’ll kill you, too’” (Felde 2008, 131; *Prosecutor v. Erdemović*, May 31, 1996, 32). Erdemović asserts that he had two options: to kill or be killed by his comrades. The character suggests that the blame for the killings should not lie with the soldier who killed but with those who threatened him, coercing him into partaking in violence. Erdemović blames his fellow soldiers, who do not stand accused at the ICTY, for his crime.

Since the order to kill came from above, the commanding officer, the fictionalised accused seems to blame the hierarchical military organisation that does not allow for questioning of (illegal) orders. In this scene, Felde distils the courtroom filled with different actors into the presence of three individuals: the judge, defence lawyer and the accused. The stage directions reveal that the judge looks “uncomfortable” during Erdemović’s explanation of the circumstances of his crime (Felde 2008, 131). Here the play raises a question about the moral validity of transposing blame. The fictionalised judge is a woman with whose character Felde departs from the legal case, emphasising the role of Judge Elizabeth Odio Benito over Presiding Judge Claude Jorda (2008, 126, 131). The characters of the judge and the defence lawyer are double-casted as Erdemović’s mother and father respectively, which presents the accused’s responsibility simultaneously as a public, societal and private family matter. This draws attention to the intersection of the two spaces in which memories of the Srebrenica genocide are mediated and shared.

By blaming others for his crime, the fictionalised Erdemović raises the question of whether duress is a defence or a mitigating circumstance. In *Prosecutor v. Erdemović*, during an oral debate about this issue, prosecution representative Mr Akhavan explores various criminal codes to argue that duress is not a defence and does not relieve the accused from criminal responsibility (May 26, 1997, 10–19). He emphasises the “notion that an act committed under duress is involuntary is simply a legal fiction” (*Prosecutor v. Erdemović*, May 26, 1997, 14). Disagreeing, Erdemović’s defence lawyer, Mr Babić, points out that, according to the Yugoslav criminal code, it is possible to admit guilt for a criminal act, as Erdemović did, and yet to avoid imprisonment in cases of self-defence or extreme necessity (*Prosecutor v. Erdemović*, May 26, 1997, 24). The appeals chamber decided with three votes against two that “duress does not afford a complete defence” (*Prosecutor v. Erdemović*, Oct 7, 1997, 147). The narrow margin and the chamber’s decision to readmit the case to a new chamber for re-trial establishes a highly limited example for future debates. The judgement also seems to suggest that, even though duress does not free the accused from legal responsibility, it acts as a mitigating circumstance to an undetermined extent. The decision allocates some guilt for the crime beyond the individual on trial and recognises the accused’s somewhat diminished agency and ability to choose their actions. The legal narrative, which the play echoes, depicts the accused’s blameworthiness as dependent on the guilt and actions of others.

The oral submissions in the *Prosecutor v. Erdemović* case are performative, and the eloquent presentation contributes to persuading the judges. Besides examples and precedents that are offered as evidence of a specific legal position and rationale, rhetoric has a prominent role. When Mr Babić argues that none of the European criminal codes he has examined clearly exclude duress as a defence, he repeats the phrase “not a single” in order to emphasise his observation (*Prosecutor v. Erdemović*, May 26, 1997, 19). Mr Babić’s refined performance draws attention to the similarities between legal and theatrical performance, such as the existence of an audience and defined roles of actors on stage and in the courtroom. Building upon Jacques Derrida’s thinking, Peters suggests that legal professionals’ speech acts in the courtroom, in other words, performances of law, appear to create law instead of just following it (2008, 187). Based on her insight, I suggest that Mr Babić seeks to convince the judges that his speech act does not communicate an interpretation of law but that it exists as law. This legal creation is enabled by the audience who witness and share the speech act. In the exchange between the prosecution and defence, the two legal stands are performed and thus created, but, unlike traditional theatre performances, this one ends without a closure, since the judges do not resolve the juxtaposition before the judgement or even fully in it. The legal narrative that shapes and is shaped by memory thus lays open the ambiguity of law and subsequent necessity to negotiate and re-negotiate complex questions about responsibility and just response to atrocity. This process of negotiation is part of the legal narrative that mediates memory of the Srebrenica genocide.

The understanding of duress as a defence is inseparable from the moral problem of self-sacrifice. The two ICTY appeals chamber judges of the *Erdemović* case Judge Gabrielle Kirk McDonald and Judge Antonio Cassese held opposing opinions. McDonald believed that no one can make a decision to save their own life at the expense of the lives of others, whereas for Cassese no law can expect people to “perform acts of martyrdom” and condemn them for failing to do so (Leebaw 2018, 354). While for McDonald self-sacrifice is a morally sound choice and within the individual’s agency in a given situation, Cassese views agency more narrowly, excluding self-sacrifice. This difference in the perception of agency under duress leads to diverging views of the individual’s legal responsibility and ultimately of what counts as a just punishment for Erdemović’s crime.

Navigating McDonald and Cassese’s opposing positions, scholar Luis Chiesa proposes that, even though duress as an excuse weakens when applied to serious crimes, it should be accepted if the accused’s refusal could not have prevented the crime from taking place (2008,

741). Chiesa's position implies that, in order to save a non-combatant, a soldier should accept a threat to their health, or even sacrifice themselves. However, this act of heroism cannot be expected if victims are going to die anyway, as would have likely occurred in Erdemović's circumstances (Chiesa 2008, 744–754). Problematically, this leads to a suggestion that Erdemović should have been relieved of legal responsibility. While Chiesa's view positions blame firmly onto the superior who ordered Erdemović to kill, it also raises the question of whether committing violence directly is more or less blameworthy than ordering killings. Such a comparison of moral reprehensibility highlights the subjectivity of just justice and the diversity of views embedded in the legal discourse that shapes the collective memory about the ICTY and the Srebrenica genocide.

Felde's *A Patch of Earth* introduces the differing opinions about self-sacrifice to the realm of cultural discourse and memory. While the character of Erdemović rejects death as an alternative because he has a young family, Felde imagines Erdemović's father as a stern man who does not accept that a criminal act could be involuntary or the only option: "Your arguments are those of a child. Grow up, Dražen. You made your own choices. [...] You could have chosen not to shoot your gun" (2008, 172). When Erdemović explains to his father that he had to choose between killing or being killed, his father states his judgement: "Better a dead son than a living piece of shit" (Felde 2008, 172). Reminiscent of Judge McDonald's position, this comment outlines a particular perception of an individual's agency, guilt and superior responsibility. However, since the actor who plays Erdemović's father also plays his defence lawyer, the father's rejection of duress juxtaposes with the lawyer's belief in its acceptability. There is also a further contrast between the father's abandonment of his son and the lawyer's presence in court as a figure of support (Felde 2008, 132, 177). The double-casting complicates the portrayal of duress in the play, but since no fictional judge comments on the matter, the viewer is left to reflect on and navigate the importance of context when determining a just judgement.

Besides questioning the accused's responsibility in the context of his superiors' crimes, Felde's play uses fiction to point towards the role of international actors. The character of prison guard Elsbeth reveals that her brother Willem served in Bosnia and Herzegovina, trying to protect Srebrenica (Felde 2008, 166). When Erdemović bitterly suggests that he must have been proud to have helped the Bosnian Serb army, Elsbeth reacts defensively: "It wasn't his fault! [...] Four hundred to protect twenty-five thousand! It could not be done!" (Felde 2008, 166). She continues to recount how her brother died when cycling home one night soon after

coming home; according to her, some believed that he had committed suicide (Felde 2008, 166). With this brief storyline, Felde portrays a Dutch soldier who might have been so burdened with what happened during his service that he killed himself. Elsbeth's reaction to Erdemović's proposition conveys that she believes her brother was helpless to intervene in order to prevent the genocide. The character directs blame towards the UN or the Netherlands for deciding to send too few soldiers, which shifts blame beyond individuals. Here Felde draws attention to the absence of institutional accountability through symbolic representation that constructs cultural memory to advocate for rethinking whom or what just justice processes should include. The play predates the court cases that confirmed the limited responsibility of the Netherlands and the impunity of the UN.⁴

By exploring duress, the *Erdemović* case and Felde's play unpack the challenges in and the complexity of post-genocide justice. Both narratives, which mediate memories of the Srebrenica genocide, highlight that the context of others' actions and inaction shapes considerations about the gravity of a crime. In the legal narrative, the persistence of disagreements over duress as a defence draw attention to international criminal law as a flexible ground of negotiation that is aware of its own subjectivity and unsettledness, which is reflected in the memory that the institution conveys. By incorporating the opposing views over self-sacrifice through double-casting, Felde's play communicates and (re)mediates these characteristics of the legal narrative. Even though the legal and theatrical narratives about the Srebrenica genocide and its aftermath foreground the ambiguity of (just) justice, the memories mediated by these narratives diverge. The legal narrative revolves around practical considerations of the length of just sentencing, and the play explores the emotional component of just justice, particularly, through reactions of Elsbeth and Erdemović's father.

Remorse, mitigating circumstances and just justice

Prosecutor v. Erdemović and Felde's play explore different factors that influence what is perceived as a just punishment, bringing these considerations into the transnational collective memory about the Srebrenica genocide. Considering narration of mitigating circumstances, in other words, factors which lessen the severity of deserved punishment, open up detailed discussion about the accused's behaviour, feelings and intentions. The mitigating circumstances are ill-defined in the ICTY case law, which creates space in the legal and

⁴ The first legal decision by The Hague District Court in 2008 (Boon 2020).

theatrical narratives for engaging with moral and emotional components of justice. These same components are central to social catharsis and meaning, which according to Peters is uniquely tied to ways in which law and performance function through aesthetic and ritualistic means that also embody mediation of legal and cultural memory (2008, 180–181).

The accused Erdemović apologises in the courtroom; Felde's play recounts this moment verbatim. The accused states that he feels "sorry for all the victims" who died during the war in Bosnia and Herzegovina "regardless of their nationality" (*Prosecutor v. Erdemović*, Nov 20, 1996, 341; Felde 2008, 176). The accused's public statement laments the impact of war on his home country but can also be interpreted as an indication of remorse and regret. Already before Erdemović's statement, the prosecutor's investigator Mr Ruez confirmed that the accused "expressed his sincere regrets" during their earlier interviews but cautioned that remorse is "difficult really to specifically define" (*Prosecutor v. Erdemović*, Nov 20, 1996, 340; Nov 19, 1996, 211). Despite the acknowledged unprovability of remorse, the prosecution recommended leniency in the sentencing of Erdemović based on mitigating circumstances, including remorse (*Prosecutor v. Erdemović*, Nov 20, 1996, 316).

Although the prosecution demonstrated the existence of remorse, it did not, as Alan Tieger notes, outline why remorse should be considered as a mitigating factor in Erdemović's crime (2003, 784). Discussion about remorse and leniency stem from a moral understanding of a just punishment rather than an established connection between remorse and sentencing practices. While, on the one hand, the transcripts imply that Erdemović's remorse might have aided him in securing a lenient sentencing, on the other hand, this subjective emotion exists as separate from the legal proceedings. The prosecution position draws attention to ways in which individuals' perception of just justice can shape the courtroom discussion and potentially the outcome of a legal process, which construct the institutional memory of remorse. The legal narrative does not respond to the question of whether remorse should be considered a mitigating circumstance or not.

The prosecution team also placed emphasis on the accused's cooperation and willingness to provide evidence against other perpetrators as a factor that the judges should consider when determining an appropriate prison sentence. When Presiding Judge Jorda asks investigator Mr Ruez, who interviewed Erdemović about his superiors' actions, whether "any points" regarding the fall of Srebrenica remain obscure or unclear, Mr Ruez responds that Erdemović "has co-operated fully and comprehensively" (*Prosecutor v. Erdemović*, Nov 19,

1996, 153). However, as the presiding judge notes, this does not respond to the presented question (*Prosecutor v. Erdemović*, Nov 19, 1996, 153). The prosecution also elaborates on the extent of Erdemović's contribution to ongoing investigations in their closing statement, endorsing leniency in sentencing (*Prosecutor v. Erdemović*, Nov 10, 1996, 315–319). The prosecution ties just punishment together with not only the crime itself but also with the accused's value for the effort of the ICTY to hold a number of perpetrators accountable. Such prioritisations underlying legal proceedings draw attention to who has a right to decide what counts as justice and whether the reach of law is more important than the expressive message of a single judgement. The legal discourse about these questions shapes the memory about the ICTY and justice in the aftermath of the Srebrenica genocide.

Felde's play brings the legal discourse about mitigating circumstances and remorse into the realm of cultural memory by imagining fictional exchanges and encounters. In *A Patch of Earth*, Erdemović is haunted by shame, guilt and regret (Felde 2008, 176), feelings of which are connected to remorse (Proeve and Tudor 2016, 54–55). When attempting to soothe his young son, Erdemović imagines that his baby accuses him of being a monster, which leads him to become upset and call himself an ogre (Felde 2008, 148–149). Erdemović's deep sense of guilt changes his self-perception. According to the stage directions, ghosts of dead Bosniak men appear on stage during this scene (Felde 2008, 149). In a performance directed by Susan Franklin Tanner, the ghosts were performed by actors with white, oversized and grotesque masks (Tanner 2015).⁵ The ghosts haunting Erdemović embody his guilt, but, alternatively, they can be seen as a dramatisation of his trauma, particularly when read in the context of Erdemović's frequent and intrusive nightmares. Felde does not comment on whether Erdemović's feeling of guilt is proportionate to his actions or not but rather focuses on the character's emotional recognition of having done wrong and its limited role in the legal process. This poses a question of whether emotional burden can be viewed as a part of punishment.

The ghosts' presence on stage manifests the co-existence of the past and present in Felde's play. The appearance of ghosts in Erdemović's dreams, memories and even in the courtroom erases borders between different temporal and spatial realities (Felde 2008, 144, 146–147, 153–154, 162, 169–170, 177). Felde juxtaposes the presence of the ghosts on stage with the portrayal of the local aftermath of atrocity which is dominated by denial and attempts to hide the crimes (Felde 2008, 147, 153, 155). Later in the courtroom, the ghosts position the

⁵ There is a short video clip from Tanner's staging for Los Angeles County High School for the Arts at Caroline's LOFT theatre (Tanner 2015).

past as tangible in the present. Utilising the form of a play and the physical space of a stage allows Felde to convey how temporally and spatially distinct moments are entangled and merge together. *A Patch of Earth* moves frequently and swiftly between different time layers and locations, which allows Felde to imagine Erdemović's family, friends and past life in Bosnia and Herzegovina. This creates the character not only as the accused but also as a person. In (re)mediating the legal case and constructing fictionalised memory about the aftermath of the Srebrenica genocide, Felde uses the embodied medium of theatre to raise questions about the emotional toll of war and the legal proceedings for the accused Erdemović.

In *A Patch of Earth*, Erdemović faces consequences of his decision to speak to a journalist when failing to reach the ICTY (Felde 2008, 168–169). His decision not to stay silent initiates a series of events that change his life irrevocably: he is shot, his wife leaves him, he is arrested, and his parents abandon him. Through these moments, Felde builds an image of the accused as a desperate, traumatised and lonely young man, who continues to suffer from wounds caused by being shot. Felde's decision to imagine Erdemović's loss of any connection to his family departs from the legal case, highlighting the accused's vulnerability. The emphasis on the protagonist as deserving pity over the condemnation of his crimes is highly problematic but allows Felde to question the justness of the *Erdemović* case and its initial outcome of sentencing him to ten years' imprisonment. The invitation to sympathise with the vulnerable perpetrator forces the audience to assume an active moral position. However, since Felde's play does not include the appeals proceedings or the subsequent re-admission to a second chamber, the play mediates the memory of the legal proceedings partially and selectively, focusing on challenges of just justice particular to the initial legal engagement.

The legal and theatrical narrative consider remorse and its effect on what a just punishment is from two perspectives: personal and institutional. In the *Erdemović* case, the accused's cooperation with the prosecution indicates his desire to right the wrong and manifests remorse. Although it does not have a solid basis in the case law, the *Erdemović* case focuses on constructing a connection between a personal feeling of remorse and an institutional sentencing practice. This highlights the presence of subjective moral views in the legal process. Felde's play asks the audience to encounter the accused's remorse as a source of pain and vulnerability. The play raises the question of whether the accused's suffering can or should function as a mitigating circumstance and be reflected in punishment. The legal and theatrical narrative do not determine a just approach to mitigating circumstances and just justice. Instead, they draw attention to the construction of social meaning of punishment through aesthetic and

ritualistic means. This reflects the ambiguity of justice that the two narratives mediate, inscribing this idea into cultural and legal memory about the aftermath of the Srebrenica genocide. These mediated memories that highlight the complexity of justice continue to exist alongside other mediated memories and memory discourses many of which focus on survivors' lives and overwhelming grief.

Conclusion

The mediation of memories about the Srebrenica genocide and its aftermath in *Prosecutor v. Erdemović* and Felde's play offer an example of ways in which law and theatre can address complex questions about justness of post-genocide justice, resisting simplification. The narratives highlight the circumstances of the crime and the accused's feelings and behaviour. Bringing the two narratives side by side shows that the challenges of justice stem from subjectivity of moral positions and ambiguities in international criminal law. These texts that construct legal and cultural discourse about the Srebrenica genocide mediate the obscurity and moral multifariousness of justice. Despite their similarities, the legal and theatrical narratives also differ from one another. Felde's play calls for state or organisational accountability and presents remorse through vulnerability rather than cooperation, which places it as an independent voice that constructs cultural memory and that engages the audience in questions about a morally sound response to genocide. The analysis of the legal case, in turn, highlights the challenges that the practitioners of international law encounter when navigating international law and its just application. This reveals that memory of law is not one of objectivity and stasis. The memories mediated by law and theatre thus convey to different audiences that justice cannot offer a neat closure for the Srebrenica genocide, drawing attention to the ongoing and lasting legacy of genocide.

Working with the two established methods of "law as literature" and "law in literature" allowed me to examine the points of convergence and divergence in the *Erdemović* case and Felde's play in order to unearth complexities of post-genocide justice. This method of intertwined analysis and the question-driven movement across research objects and methods created a space for crossing disciplinary boundaries without creating a hierarchy between the disciplines. Here the method brought forth the absence of a just closure that underlies the collective memory of the Srebrenica genocide. Survivors' experiences of pain and suffering continue to be heightened by genocide denialism, limited accountability of perpetrators,

missing loved ones, and loss of roots, connection to a place and a sense of community. Interdisciplinary methods can thus identify ways in which mediated or remediated memories draw attention to some questions and issues consolidating their place in the collective memory of an event. This may further enrich memory studies research on interactions between different (re)mediations of memory.

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