Film evidence in war crimes trials: Two case studies

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Abstract

The use of atrocity film evidence within international war crimes trials has been a controversial issue, in part, due to its conflict with the conventional common law rule against admitting hearsay evidence into trials and relative to "fair trial" norms. Such controversies are particularly evident in relation to the dramatic use of *Nazi Concentration Camp* at Nuremberg, which has been subjected to varied debate. To this end, much of this debate is centred on whether the screening of the atrocity film had a “prejudicial impact” or whether it was justified on the basis of “serving the interests of justice” and contributing towards a “fair trial.” This area merits a study to compare the problematic use of *Nazi Concentration Camp* at Nuremberg, with the use of atrocity film evidence at The Hague, within the *Popovic et al* trial, to identify whether any valid lessons have been learned and incorporated. By adopting a comparative approach between the atrocity films deployed, both within the world’s first and second war crimes tribunal, the learning experience of the International Criminal Tribunal for the former Yugoslavia is evident. As such, the lack of evidential concerns relating to the utilisation of film at The Hague, coupled with the integrated use of film, suggests the screening of atrocity film evidence can be justified, on the basis of “serving the interests of justice,” and relative to “fair trial” norms, before the contemporary tribunal. This thesis will discuss whether - on the basis of the two case studies - such evidence may now have become "normalised" and if so what are its implications?

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INTRODUCTION

The landscape of international humanitarian law, often referred to as the laws of war, has been irreversibly changed since the establishment of the International Military Tribunal (IMT) resulting from the Nazi war crimes. Furthermore, this change has more recently gained momentum in the shape of the International Criminal Tribunal for the former Yugoslavia (ICTY) which was established resulting from the conflict in the Balkans in the 1990's. This new *international* arena into which the law has ventured demonstrates the emergence of individual accountability for violations of humanitarian law. However, simultaneously it has also led to legal struggle, particularly in terms of determining what evidence may be properly admitted at trial to ensure a fair trial and vindicate standards of strict legality, the presumption of innocence etc.

In this respect, the admissibility and use of atrocity film evidence within war crimes trials has been a controversial issue, partly due to its conflict with the conventional common law rule against admitting hearsay evidence into trials and relative to "fair trial" norms, with some proposed uses rejected altogether (*Zundel* case 1988). Such evidence gives rise to controversy within such war crimes trials, as the general exclusionary rule against hearsay within the English legal system, governed by s.114 of the Criminal Justice Act 2003, operates to prohibit the admissibility of an out-of-court statement, submitted into evidence to prove the truth asserted, whereby such evidence is *prima facie* inadmissible if used to prove the truth of the facts in the statement. The rationale behind such a rule, is based upon the perceived unreliability of hearsay evidence, as it is not delivered on oath, accuracy cannot be tested by cross-examination and accuracy is further lost through repetition.

Consequently, this area results in a conflict of interest, as the screening of graphic footage of horrific atrocities is only possible within war crimes trials by utilising innovative evidential procedures to circumvent any hearsay rule. Accordingly, on occasions, the rules

of criminal evidence have been rewritten and reinterpreted to permit such evidence to be admitted during certain war crimes trials for the prosecution to place reliance upon. However, this in effect has the potential to jeopardise a defendant's "right to a fair trial" by placing tension on the principle of *equality of arms*, which states neither party should, when presenting their case, be procedurally disadvantaged in relation to their opponent. Therefore, the issue arises as to whether utilising film evidence can have a prejudicial effect on the defendants' rights, or whether it can possess sufficient probative value to serve the interests of justice. The "probative value" element raises difficulties of its own as to whether it would be deemed sufficiently probative even if the filmic evidence falls short of establishing a direct evidential link between aspects of the atrocities it portrays (which may be their results rather than original criminal acts) and the defendant on trial. Furthermore, serving the interests of justice includes issues concerning ensuring legal accountability for mass violations of human rights and genocide. In short, this field is characterised by a range of competing policy imperatives.

Nevertheless, despite these concerns, the practice of the International Criminal Court and ad hoc tribunals reveals a somewhat accommodating approach to the admissibility of film evidence within trial proceedings. As such, it is arguable that the deployment of atrocity and other film as evidence within war crimes trial proceedings now appears to be "normalised" before the contemporary international tribunals: a relative transformation and major question that this thesis will address. Consequently, it could be claimed that the admission of film evidence into trial proceedings aids the trial process in various different ways. To take a few examples, video evidence is often used to rebut defendant claims, to provide witness testimony via video link and as a normal documentary film. However, the most controversial use of film evidence is probably the prosecution's reliance on atrocity film evidence, which due to its graphic nature has the potential to have a prejudicial impact

upon those viewing the screening within the courtroom, particularly where there is lack of an evidential link between the defendants and the gruesome scenes the film itself depicts.

Nevertheless, despite the graphic nature of atrocity film, such film evidence is used in various ways to establish what is taken to be the legally identified truth of various events. To this end, atrocity film evidence is sometimes submitted in the form of execution videos, used to illustrate the mistreatment of civilians. On other occasions, video evidence of burial grounds is admitted to illustrate the aftermath of atrocities and provide evidence of unearthing of mass graves. Therefore, it is increasingly apparent that the admissibility of film as evidence has many uses. However, the crucial question one must ask is *can it be justified relative to "fair trial" expectations and standards that belong to the Western liberal tradition of constitutional norms and criteria of "strict legality"*?

Subsequently, this thesis analyses whether, and if so, to what extent and under what particular circumstances, the deployment of video evidence of atrocities by criminal prosecutors in war crimes trials can be justified as legitimate, and whether it has the ability to serve “the interests of justice?” Alternatively, it will examine whether the admissibility of such evidence should be prohibited within a criminal trial to prevent, as some would say, the *inevitable* prejudicial effect it would have on the accused contrary to the standards of strict legality and “due process” including the rationalistic expectation that punishment has to be clearly and expressly based on evidence-based application of rules, rather than the prejudicial emotional impact of images.

This thesis proceeds in two steps: The first section is concerned with the identification of relevant issues and questions and thus reviews existing academic research literature in this area describing the historical context of both the Nazi war crimes and the Srebrenica Massacre. It also identifies and analyses the issues of legality regarding the use of graphic film evidence of atrocities within war crimes trials, as the complexity of the doctrinal

position regulating the admissibility of this type of evidence creates real potential for this type of film to be used as evidence in the future, despite the evidential issues.

The second section of this thesis is more applied in its focus. It involves undertaking two case studies of the utilisation of graphic atrocity film evidence within the international trials of Nazi war crimes and the Srebrenica Massacre. The first case study will critically evaluate the prosecution's use of the *Nazi Concentration Camps* atrocity footage, which was utilised before the International Military Tribunal at Nuremberg (IMT) (1945-1946). Following this, the second case study critically examines portions of the *Srebrenica Trial Video* documenting a small part of the genocide in Srebrenica, and in doing so undertakes a comparative analysis to examine both, how deeply the footage of atrocities cuts and the overall impact it has on the outcome of the respective trials. This will involve discussing the disturbing reality of the atrocity films, the prosecutions intention for utilising such evidence, and the impact the screening of the graphic film of atrocities has upon the defendants, their lawyers and the judges within the individual trials.

The choice of these case studies has been influenced by the desire to compare the IMT's innovative use of atrocity film, within the world's first international war crimes trial, with the use of atrocity film, within the world's second international war crimes tribunal, at The Hague. In adopting a comparative approach and subjecting both case studies to these questions, it is possible to compare the two examples in a systematic way. Such examination assists this thesis to identify what, if any, lessons have been learned since Nuremberg?

CHAPTER 1: NUREMBERG AND THE HAGUE - A HISTORICAL CONTEXT

In order to gain a thorough understanding of the nature and practise of the contemporary ICTY, it is important to begin with the Nuremberg Tribunal, which has come to be regarded as its predecessor. Moreover, references will be made throughout this research, to the statements of chief prosecutor of the Nuremberg Trials, Robert H. Jackson, as well as to statements made within the Srebrenica II Trial, by Madam Prosecutor Carla Del Ponte and Senior Trial Attorney Peter McCloskey. As such a comparison between the statements of the chief prosecutors within these trials will highlight the relevance of the Nuremberg Tribunal to the Yugoslavia war crimes tribunal and illustrate how the established precedent has been followed and to what extent lessons have been learned.

Nazi War Crimes

The first international criminal court to be established in history was the Nuremberg Tribunal in 1945, set up by the victorious Allied Powers of the Second World War (the United States, the United Kingdom, France and the Soviet Union) to prosecute the top level Nazi leaders for the horrific atrocities committed during the Nazi regime. The 22 major war criminals were tried before the IMT, between November 1945 and October 1946, of which 19 were found guilty of a combination of one or more counts of the four-count indictment; conspiracy, crimes against peace, war crimes and crimes against humanity, whilst 3 were acquitted.

The “loud cries for justice” in the wake of the Second World War were heard by the International Military Tribunal, in light of the mounting evidence disclosing the full extent of Nazi atrocities. It is arguable that admitting the video evidence into the judicial proceedings was almost inevitable, since James Donovan, an Assistant Trial Counsel who was

responsible for the supervision of the film evidence, was heavily involved in drafting the rules of evidence and procedure, regulating the trial process. Consequently, any attempts advanced by the defence to object to the disclosure of the *Nazi Concentration Camps* footage would have been futile. As such, Article 19 of the Nuremberg Charter which came into force on August 8 1945, contains the legal authority and procedures by which the Nuremberg Trials were to be conducted; it, provided that "The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and nontechnical procedure, and shall admit any evidence which it deems to be of probative value". This again supported the admissibility of film evidence into the trial, by vesting wide discretionary powers in the court to determine whether the evidence should be admissible or not.

Nevertheless, despite the wide discretion, which appears to be vested in the court, to determine the admissibility of evidence, Article 20 of the Nuremberg Charter attempts to protect the rights of the accused, by asserting that "The Tribunal may require to be informed of the nature of any evidence before it is offered so that it may rule upon the relevance thereof". This provision clearly demonstrates a clear deviation from the traditional rules of evidence which regulate the admissibility of evidence within criminal trials, as the lack of restraints on the admissibility of evidence within the proceedings reveals the court's almost unlimited discretion. In effect everything admissible could be admitted and the tribunal decided what this was. Thus the wording of this provision also insinuates the courts wide discretion, as emphasis is placed upon evidence to be of a 'probative value', the weight of which is determined by the Tribunal.

Furthermore, film evidence as adduced in the Nuremberg proceedings would have been excluded at Nuremberg, had the common law exclusionary rule against hearsay applied, to prohibit the admissibility of a statement not made in oral evidence in the proceedings,

being adduced in court as evidence of the matter stated in the statement (in the UK see s.114(1) Criminal Justice Act 2003). However, the Charter clearly gave way to the authorisation and screening of such horrific graphic evidence, despite its potential conflict with the common law hearsay rule.

Moreover, the admission of graphic footage as evidence within criminal proceedings has precedence prior to the Nuremberg proceedings of November 1945, which demonstrates how graphic material of this type was utilised within court proceedings. This can be seen in the Belsen Trial of Josef Kramer and 44 others, which were held in a British Military Court in Luneberg from 17 September - 17 November 1945 and came to an end just before the Nuremberg Trials. They were tried according to British military law and were charged solely with war crimes. Accordingly graphic scenes of the conditions purported to exist at Belsen Concentration Camp, filmed by the Soviet official photographers was presented to the Court. Furthermore, at a later stage in the trial, the prosecution requested permission to screen an official documentary film of the Soviet Union, of the conditions at the Auschwitz concentration camp as part of their case. However, despite the Defence's inevitable objections to the admissibility of such evidence on the basis of propaganda:

> "The Judge Advocate advised the Court that, provided they were satisfied as to the circumstances and the time of the taking of the film, then it was within the Court's competence to receive it in evidence and to attach such weight to it as they might think fit." (The Belsen Trial: *Trial of Josef Kramer and 44 others:* 134).

Upon admitting the film as evidence, the Belsen Court opted to observe the film as a silent motion picture together with the voice-over of the official translator, as the original soundtrack was in Russian. One can argue that the admissibility of such evidence was justified by the reading of the affidavit on 15 October, of one of the film producers, "certifying that the film was an official documentary film prepared for the Union of Soviet Socialist Republics and published by them, that the filming took place at Auschwitz in Poland and that it was a true representation of the conditions there found." (ibid, p.134).

Whilst the film was undoubtedly evidence of the acts of inhumanity, immorality and sickening violence committed on the helpless victims of the Holocaust, its ability to establish individual responsibility remains a very controversial issue. This is because once adduced in trial this evidence cannot be questioned or cross-examined and whether it establishes a direct evidential link between the heinous acts depicted on the screen and the defendants in the docks is also insufficient. Nevertheless, the images captured of the carnage and slaughter by the graphic footage was, it has been claimed, certainly effective, far more so than the oral evidence provided by testifying witnesses.

For example Twist (2005) amongst other academic scholars presents a good argument regarding the debate revolving around cinematic evidence screened within proceedings:

> "In spite of its apparent record of actual scenes, the film is nevertheless susceptible to distortion and manipulation. The veracity of such material lies entirely within the scrupulousness of its compiler... Once a film is screened it is likely to leave an indelible impression, more graphic and therefore potentially more persuasive than oral testimony of equivalent or greater inherent worth." (Twist, 2005: 271).

This most definitely raises questions as to whether it is possible for the interests of justice to be served, particularly where an audience, viewing potentially prejudicial evidence, in such graphic detail would inevitably feel extremely emotional concerning the fate of the victims.

To this end, the admissibility of this graphic film has raised much academic debate as to whether an appropriate balance has been achieved, or is possible to achieve, between the two competing interests; the films probative value versus its potential prejudicial effect. However, not only has the relaxation of the hearsay rule caused problems for the English criminal bench but it is also currently exercising members of the ICTY bench within its recent trials.

The Srebrenica Massacre

The existence of international humanitarian law requires a war crimes tribunal to hold accountable those individuals responsible for gross violations of the laws of war. Consequently, the establishment of the IMT initially intended to serve as a deterrent to aggressive war. To this end, Scharf correctly notes that, despite the world community declaring "Never again" following the annihilation of six million Jews during World War Two, the reality actually became "again and again" as the world community failed to honour this pledge (Scharf, 1997; introduction). To name a few important examples, the world community was unsuccessful in serving the interests of justice by holding accountable those responsible, for mass murders of the millions of the people in China's Cultural Revolution (1966-1977), Cambodia's killing fields (1975-1979), and for the thousands exterminated during Argentina's Dirty War (1976-1983), and the Iran-Iraq War (1987-1988).

Therefore, with human rights under constant attack in recent years, a calling came once again, almost fifty years after the establishment of the first international criminal tribunal, to assert international humanitarian law and serve the interests of justice. This was sought by the U.N. Security Council in the form of the International Criminal Tribunal for the former Yugoslavia (ICTY), following the atrocities committed within the region in the early 1990's, which paved the way for the world's second international criminal tribunal. The creation of yet another *ad hoc* court clearly suggests that international law is not merely theory nor an abstract concept, as crimes which allegedly shocked the "consciousness of humanity," crimes against all of humankind could not be permitted to go unpunished.

As such, the ICTY, seated in The Hague, The Netherlands, was established on 25 May 1993 under Chapter VII of the U.N. Charter (Security Council Resolution 827) as an *ad hoc* court to deal with war crimes that occurred in the 1990's arising from the conflict in the

territories of the former Yugoslavia (see Art 1 of the ICTY statute). Although conflict within the Balkan region was nothing new, the Srebrenica Massacre, in which around eight thousand Bosnian Muslim men and boys were annihilated by Bosnian Serb forces, was one of the darkest periods of the Balkan's country's brutal three-year war. As such, a conflict stemming from a rise in Serb nationalism beginning in 1991, provoked Bosnian Serbs and Croats and led to this civil war. Although these atrocities were not the first committed since World War Two, it was for the first time since the Nazi war crimes, that the political climate favoured stronger international action and the international community responded to this in protest. The trial of the Bosnian Serb war criminals, which is still taking place at The Hague before the ICTY, is the aftermath of one of the more modern notorious acts of mass killing in the name of ethnic cleansing. One thing very unique about the Srebrenica massacre is the scope of the crimes and the large number of crime scenes with thousands of victims. It is undoubtedly one of the most horrific and controversial events in recent European history and is widely recognised as the worst war crime executed in Europe since the Nazi war crimes.

The procedural framework of the ICTY is laid out in its Statute as well as in the ICTY Rules of Procedure and Evidence. To this end, when adducing evidence into the trial proceedings, the tribunal relies upon these rules, in particular Rule 89(a) "A Chamber... shall not be bound by national rules of evidence," and Rule 89(c), which states "A Chamber may admit any relevant evidence which it deems to have probative value." This clearly echoes Article 19 of the IMT Charter and once again permits the use of film evidence, as the rules provide little guidance specifying how the tribunal is to apply them, expressing a Trial Chamber may, but is not required to, admit any evidence, so long as it has relevance to the case and some probative value. As such, "This rule alone has excluded virtually no evidence and is viewed by some as demonstrating the "true strength" of the entire tribunal structure-its flexibility in light of the evidence presented." (Kristina, 2004: 168). This general standard for

admissibility coupled with the lack of a specific rule on point, again supports the use of film evidence, by vesting wide discretionary powers in the court to determine whether atrocity film evidence should be admissible within international criminal proceedings and thus allows much more evidence in international criminal proceedings than in most common law systems. Therefore, since its establishment, the ICTY has undoubtedly changed the landscape of international humanitarian law irreversibly.

Once again, under the common law rule against hearsay, which was given statutory backing in the Criminal Justice Act 2003 (CJA) as a result of a hearsay reform originating from the Law Commission Report No 245 1997, such filmic evidence as deployed within the ICTY proceedings would generally be excluded. The rationale behind such a rule is based upon the perceived unreliability of hearsay evidence, as it is not delivered on oath, accuracy cannot be tested by cross-examination and accuracy is further lost through repetition.

However, it has been widely acknowledged within the international arena that international courts and tribunals are not bound by general rules of evidence and there is therefore no rule of law within international criminal law which is comparable to the common law rule against hearsay. Therefore, following the Nuremberg legacy, the ICTY's permissive evidentiary rules clearly permit the screening of graphic visual evidence of the atrocities committed during the Srebrenica Massacre. Consequently, although the relaxation of the hearsay rule has permitted more evidence to be adduced within the ICTY proceedings, it has concurrently created difficulties for the ICTY judges in determining how much weight should be given to the admitted evidence. Therefore, despite the permissive evidentiary rules allowing hearsay into evidence within international trials, the common law hearsay rule remains important, as ignorance of such a rule has real potential to create legal issues of the hearsay type.

Now that the historical context of the two case studies has been outlined, the next chapter will undertake a review of the existing literature in this field, in order to map out the deficiencies in the existing literature, which the present study in turn aims to address.

CHAPTER 2: LITERATURE REVIEW

Depending upon how it is used, documentary film and video can be a very powerful source of evidence for lawyers and advocate's seeking to serve the interests of justice and create change. It therefore follows that the deployment of such evidence within war crimes tribunals is without a doubt a crucial part of establishing the perceived reality of horrific events that are often denied by their perpetrators. A small number of legal and other scholars have undertaken research in this field. Hence, a brief but critical outline of this existing literature, which identifies limitations of the approaches adopted and gaps, will help construct an interpretative framework for the current research, as well as identifying opportunities for creatively supplementing what other scholars have already achieved in this field.

The use of film evidence has been addressed from different perspectives by various scholars and whilst some have raised concerns others have applauded its use. There are also those who have simply identified the different ways it has been used and identified both advantages and disadvantages, whilst others have provided a historical outline. To this end, the approaches taken by the scholars vary and contain their own strengths and limitations. Consequently, this chapter aims to identify the approaches taken by both legal and non-legal academics, to the use of film as evidence and highlight the strengths and weaknesses of these approaches.

Use of Film as Evidence – General Use

To begin, on a generic level, Schwartz (2009), provides the first study of film evidence from a historical perspective, within U.S. courts. As such, she outlines the changing role and theoretical implications of the utilisation of video as evidence in courtroom proceedings.

This significant piece of film history traces the use of cinema in U.S. courts, focusing on the use of moving images as evidence within the courtroom and the implications of deploying such evidence. Consequently, she explores the presentation and interpretation of evidentiary films, and traces the courts initial reluctance to use evidentiary film, which has without a doubt transformed into an increasing reliance on film evidence within courtroom proceedings. A similar trend, which will be analysed in a later chapter, can be identified within international courts, where the international tribunals initial reluctance to admit filmic evidence into the proceedings has also developed into a growing acceptance of such evidence.

Nevertheless, although Schwartz's approach to the use of moving images as evidence within court proceedings is strong in analysis, this is not without any drawbacks, in that it contains no reference to the use of film within international courts and tribunals. With an increase of the admissibility of film as evidence within the international field, this omission demonstrates a clear gap in the literature, which the present study intends to fill.

Pillay (2005) takes a different approach to the admissibility of film within courtroom proceedings, as she uses the power of video to raise awareness on human rights abuses, and consequently identifies video as a powerful tool of justice. This writer outlines the guidelines for the admissibility of visual evidence and provides broad and inclusive commentary to demonstrate the ways in which such imagery can be used as a powerful source of evidence in court. To this end, Pillay correctly refers to the legacy of the Rodney King Case, as it appears to have marked history for its breakthrough in public awareness regarding the legal ways video may be used. She comments that although "This footage was only 81 seconds in duration its image was seared into people's minds, and rights groups everywhere demanded justice" (Pillay, 2005: 209). The significance of this case lies in its change of venue out of Los Angeles County Court to East Ventura County Courthouse

in Simi Valley, where the videotape was exhibited before the grand jury. Additionally, following the riots it was also screened before the federal grand jury in the United States District Court for the Central District of California.

Pillay further provides a general outline of factors to be considered when video evidence is submitted within common law judicial settings, placing particular emphasis on the need to ensure the rules of procedure and admissibility are properly followed in relation to the video evidence (ibid: 210). In addition, whilst addressing the different legal categories of evidence and focusing on corroborative evidence Pillay illustrates the uses of such evidence at the ICTY supported with examples, such that the ICTY has previously admitted film as evidence to gain an understanding of the context in which crimes may have occurred *(Kordic and Cerkez, 2001*) and in some instances to show specific damage and assist witnesses with their descriptions (*Kordic and Cerkez, 2001*) (Pillay, 2005: 217). Consequently, Pillay highlights the increased reliance placed upon the use of video footage as an influential source of evidence within criminal trials. This writer also identifies the 'deeper roots' video has, when referring to the work of Lennon on the admissibility of graphic footage in war crimes trials (to be addressed later in the chapter).

However, Pillay's work is limited to only a *hypothetical* case study, in the context of war crimes prosecution, to illustrate the prejudicial nature of utilising filmic evidence depicting dead bodies at the sight of a massacre. A continuation of this approach would result in failure to address important evidential and doctrinal issues, including an analysis of the prejudicial impact of screening graphic atrocity footage and failure to address the associated hearsay issues. The present study aims to fill this gap by adopting a comparative approach between two real, rather than hypothetical, international case studies, in order to determine whether the admissibility of film can be justified within international proceedings.

The work of Michaelis (1953) also emphasises the growing significance of cinematographic film and the vital role it plays within courtroom proceedings. However, Michaelis's approach differs, from that adopted by Schwartz (2009) and Pillay (2005), as he focuses on cinematography (the art of making motion pictures) and addresses different recording techniques and methods of obtaining evidence. Consequently, this study focuses on the contributions of cinematography in law and the use of photographic evidence in court. Taking a comparative approach, Michaelis focuses on the importance of film for both law and science. To this end he continues to distinguish the ease with which forensic scientists may use film without having to follow any rigid procedures, whilst lawyers exhibiting film in court are required to comply with rules of evidence. Consequently, Michaelis appears to appreciate the need for cinematographic evidence to comply with the rules of evidence, and demonstrates an understanding of how evidence may be contested. Nevertheless, this writer identifies the first ever use of motion pictures in a court of Law to be in 1929 in America (*Feather River Co v United States, 1929*), and not until 1938 in England (*Tracking down the criminal*).

In addition, whilst Michaelis's focus is on cinematographic evidence he also makes comparisons between exhibiting cinematographic records and still images in court, and consequently acknowledges that, "The superiority of motion pictures compared with ordinary photographs, to present an accurate record of any events in which movement plays an essential part, is nowadays widely accepted by the legal profession in many different countries" (Michaelis, 1953: 186). In addressing the different techniques for recording cinematographic evidence and the different methods of obtaining video evidence which are accepted for legal purposes, this researcher illustrates the significance of film as a source of evidence as opposed to still images. This is further demonstrated by the frequency with which the courts admit motion pictures within trial proceedings.

However, this writer continues to identify a limitation of the use of film as evidence, “Admittedly all evidence can be falsified, and photography as well as cinematography, is no exception to this rule;” (ibid: 193). Nevertheless he proceeds to justify this, as: “it is certainly illogical to admit the visual representation of a momentary event by means of photography and to exclude the far superior evidence by means of cinematography which can record movement and duration of time accurately to a fraction of a second” (ibid: 193). To this end, the depth and accuracy of the moving images often provides the court with unchallengeable evidence. In effect this reveals the ever-increasing power of film in judicial settings and strongly supports the view that the use of moving images as a source of evidence in court plays a vital role in courtroom proceedings.

Consequently, the approach adopted by Michaelis is strong in analysis, as it justifies the use of film by focusing on recording techniques and methods of obtaining film evidence to illustrate the power of film and the impact it has within trial proceedings. Nevertheless, the scope of his study is limited to U.S. courts only and the narrow perspective adopted, which addresses recording techniques fails to address legal issues including the hearsay rule and issues of prejudice and due process. Consequently, the present study aims to fill this gap by focusing on the legal aspect of film as evidence within international courts and tribunals, including addressing issues of hearsay and a discussion of the potential prejudicial impact the admissibility of film may have.

In addition, the work of Varner and McGee (1999) also contributes to this field by addressing the admissibility of motion pictures, in the form of ‘Day-in-the-life-videos’ to chronicle the day-to-day life of an injured plaintiff, within U.S. personal injury trials and by illustrating how such films take the jury out of the courtroom and into the life of the plaintiff. Consequently, as U.S. courts have demonstrated increasing reliance upon video evidence within personal injury trials, the approach adopted by these writers is to focus on

the safeguards which have as a result been constructed by U.S courts to protect against any abuse.

To this end, Varner and McGee outline both the plaintiff and defendants arguments in relation to the admissibility of such evidence. Consequently the admissibility of film from a plaintiff's perspective may be justified as "these videos serve as irreplaceable demonstrative evidence of pain and suffering and loss of enjoyment of life... [and]... some commentators have contended that day-in-the-life videos are more trustworthy than live witness testimony", (Varner and McGee, 1999: 3). However defence arguments for the films exclusion are that:

> "day-in-the-life films are unnecessary, cumulative and – most importantly – prejudicial. Day-in-the-life films, because they are ex parte, out-of-court evidence, invite fabrication and manipulation... Rather than serving as "evidence" of the plaintiff's injuries, day-in-the-life films instead inflame juror's passions and inflame jury verdicts." (ibid; p3).

Nevertheless, despite these arguments, these writers appear to appreciate the significance of video, as day-in-the-life videos remain highly effective and extremely valuable forms of evidence within the U.S. legal system.

In effect, the strengths of this approach taken by Varner and McGee lie in the analysis of the safeguards. Whilst addressing the safeguards, these writers focus on the importance of the standards for admissibility, which have been set and consequently require the evidence to be relevant, authentic and probative. In addition, Varner and McGee also illustrate the U.S. courts grounds for objection, another safeguard, where the hearsay objection is a frequent objection raised to the admissibility of video evidence. However whilst outlining the practice of the court when dealing with potential hearsay, Varner and McGee highlight four different conclusions formed by the court based on different decisions on hearsay.

Consequently, on a number of occasions videos have been deemed inadmissible hearsay, as the main argument raised is that video forms testimony which cannot be subjected to cross-examination *(Foster v Crawford Shipping Co, 1974)*. On other occasions, videos have been held admissible hearsay where the plaintiff is available for cross-examination, as Varner and McGee suggest that the argument that any prejudice resulting from admission of the hearsay evidence would be weakened by the defendant's ability to cross-examine the plaintiff before the jury. In this way, hearsay objections can be seen to be properly overruled *(Bannister v Town of Noble, 1987)*. On other occasions videos have been held admissible under a hearsay exception, if the court can identify one of the hearsay exceptions in the Federal rules of Evidence. And finally on some occasions it has been held that videos are not hearsay, as it has been identified that the courts argue that such videos are merely "demonstrative evidence" and are not hearsay as they are not offered to prove the truth of the matter asserted *(Strach v St John Hospital Corp, 1986)*.

Furthermore Varner and McGee also identify and analyse other safeguards including objection on grounds of lack of continuity in film unfairly prejudicing the defendant, which is often deemed as a rather weak ground. In addition, these writers also analyse objections on grounds of inaccurate portrayal of the plaintiff's daily activities, as the fear is recordings would be staged for dramatic effect. To this end, it has been held excessive depictions of pain would be excluded if gruesome, as they would be deemed prejudicial. Alternatively brief grimaces of pain would not be excluded as the prejudicial effect would not outweigh the probative value.

Nevertheless, the increased tolerance of such graphic films within the U.S. court system is apparent as:

> "The influence of television and movies has never been stronger or more pervasive than it is today. The court system, like society at large, has grown

> increasingly accustomed to video accounts of hotly-disputed issues… Prejudice is still the strongest argument for exclusion." (Varner and Mcgee, 1999: 19).

Therefore, Varner and McGee adopt a useful approach, by addressing the issues faced by the court when dealing with the admissibility of video evidence, whilst outlining the safeguards created by the court. However the scope of Varner and McGee's study is limited to an analysis of the U.S. legal system, thus narrowed simply to the use of film in personal injury trials, which is only one of a number of different types of film evidence which is admissible within U.S. courts.

Moreover, the work of Munday (1990) also makes a relevant contribution in this field, as it focuses on the admissibility of gruesome photographs into trial proceedings and analyses its potential to cause unfair prejudice to the defendants' trial. Therefore, the approach adopted by Munday is to focus on the prejudicial impact of the screening of photographs and address the evidentiary issues raised by adducing gruesome photographs into trial proceedings. To this end, this scholar adopts a comparative approach to illustrate the position within various common law jurisdictions around the world including the United States, Canada, Australia and New Zealand.

As a result, Munday notes from an evidential point of view the advantages of presenting before a court of law, gruesome images, such that images may convey a far more articulate representation of the matter at hand than any oral account is able to do so. Consequently the approach adopted by this writer attempts to justify the use of shocking images within courtroom settings, with reference to a United States Missouri courts indifference, that "if the photographic views are shocking and horrible, it is because the crime is one of that sort, whether described in words or pictures. Some phases of the oral testimony are as likely to cause agitation as the pictures" (*State v Moore, 1957*).

Consequently the approach adopted by Munday holds many strengths. To this end, he provides strong analysis of the potential prejudicial impact resulting from exhibiting horrific photographic evidence and in doing so he identifies the position of other jurisdictions regarding the admissibility of still images. As a result, Munday addresses the judge's discretion to exclude evidence that is more prejudicial than probative. However he also acknowledges that "with the best will in the world… it seems impossible to exclude all evidence that might stir up prejudice against the accused." (Munday, 1990: 19). In adopting this approach this writer identifies that it appears to boil down to "the court balancing the relevance of the exhibits against their inflammatory tendencies" (ibid: 20).

In addition Munday discusses the concept of repugnance overwhelming reason and how such graphic evidence may have the ability to overwhelm jurors and may also encourage jurors to establish a connection between the accused and the atrocity despite lack of sufficient evidence. This is based on the argument that "human feelings are easily excited by the description of great bodily injury, of ghastly wounds… sympathy or indignation once aroused in the average juror readily becomes enlisted to the prejudice of the person accused as the author of the injury." (*Louiseville* in Munday 1990; p20). Nevertheless, this researcher continues to provide case illustrations which outline the judicial discretion to exclude prejudicial evidence.

Consequently, Munday provides commentary on case law, which on occasion illustrates the admissibility of graphic evidence and the exclusion on others. As a result, Munday's study refers to cases illustrating the exclusion of gruesome photographs in U.S. cases (*People v Marsh*, 1985), and some Canadian cases (*Gallant*, 1966), where the nauseating nature of the photographs rendered the evidence to be inadmissible, due to the evidence potentially disturbing the composure of the jurors in their deliberations. Nevertheless, as noted the onus to prove the relevance of the evidence is placed on the prosecution.

Further strengths of the comparative approach adopted by Munday can be seen in his discussion on the question of prejudice, where he raises the question of whether gruesome images actually prejudice the jurors. To this end, he attempts to answer this question based on an analysis of the minds of jurors, with reference to McFarlane (1974) on the probative value of photographic evidence, who correctly points out, "it presupposes that from the outset the jury assumes the defendant to be guilty and that jurors are rendered incapable of keeping separate their horrors at the offense and the matter of the defendants guilt" (Munday, 1990: 21). In answer to the question of prejudice, Munday identifies that the chances of jurors being prejudiced against the accused upon viewing graphic images are slim. Therefore any objections regarding the admissibility of such evidence tendered by the Defence counsel tend to be met with cynicism.

Consequently, in answering the question of prejudice, the comparative approach adopted by Munday illustrates the position in the United States, Canada, Australia and New Zealand where the courts rarely exclude evidence on the grounds of it being too prejudicial. This can in part be justified by a ruling from a Canadian court, that "Where gruesome evidence is analysed by the practised professional eye there is less risk of irrational prejudice" (*Davis (No.2) 1977*, in Munday, 1990: 22).

Nevertheless, although the approach adopted by this writer is strong in analysis, particularly on the prejudicial impact and evidentiary issues raised by adducing gruesome photographs into trial proceedings, this is not without its drawbacks. Munday's approach is limited in scope to an analysis of still images only, therefore neglecting an important form of evidence, namely film evidence, as courts have recently demonstrated an increasing reliance upon such evidence. Consequently, a continuation of this approach would result in failure to address the evidential and doctrinal issues raised by adducing film as evidence within courtroom proceedings. Therefore, if we are to move with the times, film is a

phenomena which also requires serious analysis. Furthermore, international war crimes trials rarely if ever involve a jury. Consequently, the present study aims to fill this gap by extending the scope of the analysis undertaken by Munday to also include analysis of film evidence within international war crimes trials.

Use of Film as Evidence – Specific to War Crimes Trials

To continue on a more specific level, film evidence of war crime atrocities has undeniably had a considerable influence on the course of international humanitarian law, and consequently played a vital role in war crimes trials. The development of international humanitarian law has therefore, to some extent, attended to the cry for justice following the war crimes committed during the twentieth century, by placing the war criminals on trial. It is within the context of such war crimes trials that film evidence of atrocities has on occasion been found to be admissible, however the crucial question that requires to be addressed is can this be justified? Existing literature in this area specific to the Nazi war crimes trials and the Srebrenica Massacre explores and examines the 60 years of legal struggle the courts have faced with the crimes of the Holocaust. Consequently various pieces of literature address a wide range of issues in relation to the admissibility of graphic film evidence.

To this end the scholarly work of Twist (2005) contributes to this field by undertaking an extended case study of the *Nazi Concentration Camp* atrocity film screened before the IMT (on November 29, 1945). Accordingly Twist's approach is to analyse whether the use of graphic film within international war crimes trials is justified, by mainly focusing on the evidential issues related to the admissibility of such evidence. To this end, this researchers approach addresses and attempts to balance two competing interests; that is the

"probative value" of the atrocity film against the prejudicial effect of its screening. Consequently, she raises concerns upon the potentially prejudicial impact of "*Nazi concentration camps*" on the defendants' right to a fair trial. In addressing the legal implications raised by the rhetorical power of atrocity film evidence, Twist argues that such evidence may be more prejudicial than probative and can conflict with the interests of justice. Nevertheless, she illustrates the exercise of the court's discretion to exclude such evidence where the prejudicial impact outweighs its probative value.

Consequently, it appears the approach adopted by Twist is somewhat similar to Munday's (1990) study, which is also centred on prejudicial impact. However, whilst Munday analyses the prejudicial impact of the screening of "gruesome photographs" rather than graphic film, on the minds of the jurors as well as on the defendant's right to a fair trial, Twist, in the absence of a jury analyses the prejudicial impact of graphic atrocity film on the defendant's "right to a fair trial" and on the judges.

In effect, the strengths of this approach adopted by Twist are that in undertaking an extensive case study, this writer provides critical analysis of the evidential issues associated with the screening of the graphic atrocity footage and consequently details a strong discussion on the atrocity films ability to have prejudicial impact upon the courtroom. In addition, she also addresses the doctrinal measures which often prohibit the admissibility of such evidence, as a result of the evidentiary exclusionary rule; widely known as the rule against hearsay. However, when addressing the hearsay rule, Twist demonstrates how it no longer holds much value within international criminal trials, as she highlights how "the previous embargo upon hearsay evidence has now been considerably relaxed" (Twist, 2005: 301) and consequently noting that "no universal checklist can be compiled to ascertain whether evidence should be more probative than prejudicial." (ibid: 301). This illustrates

the ease with which visual evidence of atrocities can be permitted within such trials, despite their potentially prejudicial value.

Furthermore, Twist suggests that the moving images were strategically deployed by the prosecution as a *shock tactic* (ibid: 268). Consequently, this writers approach includes an analysis of the impact of the screening on the defendants, however with less emphasis and detail as Salter's (2007) study (discussed below). She notes a wide range of their reactions:

> "The defendants exhibited a mixture of detachment, purported self-absolution, defiance, abject misery, bewilderment, confusion, depression, arrogance, blatant self-preservation and alleged ignorance of the worst excesses of the Nazi regime" (ibid: 284).

Clearly the display of a mixed array of emotions, would suggest that the defendants appear to be in denial. However she quite rightly recognizes that "once witnessed through the camera's unrelenting eye, the Defendant's no longer had the luxury of pretence; they could not readily discount, as mere fiction or Allied propaganda, appalling images of such realism and intensity" (Twist, 2005; 287). To this end, Twist suggests that the viewing of such horrific images, of the barbaric inhumane acts carried out by the Nazi regime to some extent compelled a few of the defendants to confront the reality of the course of the Holocaust and their involvement in such horrendous and atrocious cold-blooded acts of inhumanity.

In addition, another strength of the approach adopted by this writer is that in analysing whether the admissibility of the film is justified, and as part of the argument that the admissibility of graphic film evidence may be more prejudicial than probative, Twist questions whether the footage effectively established a direct link between the defendants and the gruesome acts of atrocity the film itself exposed. Consequently, from an evidential perspective, she advances a discussion on the probative value element of the atrocity film. In doing so she refers to the views of Rice (1997), who noted that the film did little in the

way of establishing individual guilt, (Rice, 1997: 41) and the diary of Telford Taylor, who also conveyed similar views regarding the perceived lack of "an evidential link." Consequently, Twist agrees with these reservations and states that: "it is perhaps difficult, from a strictly legalistic perspective to justify the admission of the film into the proceedings" (Twist, 2005: 289). Nevertheless, what is most noteworthy is that despite these reservations, Twist identifies that:

> "without the benefit of the filmic material at Nuremberg, the presentation of evidence would have been still more sterile and lack-lustre. Other than by oral testimony, the use of which was largely eschewed by the prosecution, nothing else could have conveyed with the same pain-drenched intensity, the sheer heinousness and unprecedented brutality of a regime in which some of the Defendants were knowingly complicit." (ibid: 294).

This point supports the admissibility of film as evidence within the proceedings, regardless of the lack of a direct evidential link. In addition to the evidential issues raised by the screening of *Nazi Concentration Camps* before the IMT, Twist also highlights the evidential issues the screening of *Nazi Concentration Camps* raised within later *Eichman* (1961) and *Zundel* (1985) trials in relation to the narration and issue of hearsay. Consequently, in doing so she identifies examples from the soundtrack of instances which amount to hearsay.

As such, the work of Twist clearly focuses on the hearsay and evidential aspect of atrocity film and centres on due process, thus exploring the defence case as the focal point. However this is limited to a single case study, that of the Nuremberg trials. Consequently, this writer makes no comparisons with the more recent contemporary tribunals and thus does not ask if any lessons have been learned since Nuremberg. Therefore, the current study aims to fill this gap by adopting a comparative approach and addressing the hearsay and evidential aspect of atrocity film, within Nuremberg and The Hague, however, with less emphasis on the defence arguments, to identify what, if any lessons have been learned.

In comparison the study of Salter (2007) aims to highlight the role of US intelligence (OSS), particularly James Donovan and the OSS Presentation Branch, in the editing and production of "*Nazi Concentration Camp*" atrocity film and to address its rhetorical impact and after-life in later trials. This researcher's main agenda is to assess the impact the atrocity film had both within the Trial of the Major War Criminals as well as its aftermath. In addition, this study also aims to explore whether the OSS had done an effective job in politically staging a trial, by shining spotlights on the faces of the defendants whilst screening the atrocity film before the IMT, to draw out and emphasise the reactions of the major war criminals.

As a result, unlike Twist (2005), it is clear Salter has little interest in the evidential issues arising from the screening of the atrocity film, as he dismisses the hearsay issue on the grounds that the Nuremberg Charter did not prohibit hearsay evidence, suggesting this was "probably because James Donovan was heavily involved in drafting these rules in anticipation of OSS film evidence" (Salter, 2007: 266). Instead, this researcher analyses the rhetorical impact and after-life of the film and consequently focuses on the way the film was used in the denazification regime and the way it was used as propaganda. He also addresses the re-showing of the film in the later *Zundel* (1985) trial and examines the way in which the atrocity film was later used in cinemas. Consequently the work of Salter clearly has an intelligence related and institutional focal point which, in part, addresses the question of whether the production and consequent screening of the atrocity film before the IMT was successful in convicting the defendants as a test of the OSS's effectiveness in this field.

To this end, the strength of this approach adopted by Salter lies in his analysis of the immediate impact of screening the *Nazi Concentration Camps film* on those present in the courtroom during the Nuremberg trials, paying particular attention to the defendants. In

addition this researcher also outlines the impact the screening had on the judges as well as on the media. Consequently, he refers to the accounts of those in attendance during the initial screening of the atrocity film, as well as testimonies of those who were in charge of making a formal record of the defendants' reactions to the graphic atrocity film. Salter's research further offers an analysis of Dr Henry Kellerman's and his colleague Dr Gilbert's striking commentary on the effect the screening of the film has on the defendants. In addition, Salter also highlights that "Telford Taylor, a senior Nuremberg Prosecutor, had also recorded his recollections of the impact of the film, and his account broadly confirms the dramatic and highly incriminating impact of the film" (ibid: 272). It is therefore clear this researcher examines the use of film as a new method of developing a prosecution case, from an intelligence related perspective, rather than analysing the use of the atrocity film from the defence's point of view.

Nevertheless, the approach adopted by Salter is narrow in scope and perspective, as his focus is on how successful the atrocity film and its screening was in representing the OSS's work. However film is only one of a number of contributions made by the OSS to the preparatory stages of the trial, therefore the examination of film was not Salter's main concern. Furthermore, another weakness in this piece is this researcher's dismissal of the potential hearsay issue. Consequently, the problem with a continuation of this approach to the admissibility of film evidence would be the omission of a discussion of evidential issues. To this end Salter fails to address the potential prejudicial impact of the screening upon those in the courtroom from the perspective of criteria of strict legality.

In addition, Douglas (2001) has also published widely in this field. Accordingly, it is clear that Douglas has very little interest in the legal aspect of the atrocity film, nor is he concerned with the doctrinal issues and the intelligence related aspect of the film. Instead, it appears this writer adopts an interpretative post-modern agenda, by addressing the

question of whether the *Nazi Concentration Camp* film could be an accurate depiction of the Holocaust. Consequently rather than addressing whether the trials dispensed justice to the defendants, Douglas's study is devoted to whether the trials did justice to the Holocaust.

To this end, this writers approach carries several strengths, as it provides an alternative perspective to that already considered, in relation to the screening of atrocity film evidence. To take one example, Douglas attempts to justify the admissibility of the atrocity film evidence into the trial proceedings, on the basis of the film securing an accurate depiction of the Holocaust. In effect he suggests "by permitting evidence such as that supplied by *Nazi Concentration Camps*, the tribunal acted in the interest not only of efficiency, but also of securing the most reliable and complete representations of unspeakable atrocities" (Douglas, 2001: 30).

However, Douglas raises an interesting point, whilst disagreeing with Arendt (1963), who argued that the sole purpose of a trial is to render justice and nothing else. On the contrary, Douglas suggests:

> "No one, I believe, would deny that the primary responsibility of a criminal trial is to resolve questions of guilt in a procedurally fair manner. And certainly one must appreciate the potential tension between the core interests of justice and the concerns of didactic legality. To insist, however, as Arendt does, that the sole purpose of a trial is to render justice and nothing else, presents, I will argue, a crabbed and needlessly restrictive vision of the trial as legal form" (ibid: 2).

Questions of justice are open-ended and indeterminate, and may include many diverse factors depending upon whose perspective one adopts. The implications of this are such that serving the interests of justice need not be the sole function of putting the alleged perpetrators on trial as other factors, such as recognising the extent of victim suffering, individual accountability, and deterrence and retribution are also relevant factors. It

consequently follows that the use of film as evidence within the proceedings may not be justified upon the basis of serving the interests of justice alone.

In addition, another strength in the approach adopted by Douglas lies in his analysis of the content of the film, as he attempts to interpret the scenes within the film to determine whether the film could be an accurate depiction of the Holocaust. Furthermore Douglas also provides commentary on snippets of the memoirs of Airey Neave, Telford Taylor, G.M. Gilbert and an account provided by a New York Times journalist, all of whom were present during the initial screening of the atrocity film. Douglas claims that

> "In focusing on the Nazi defendants, the memoirs leave one in the dark about what the tribunal actually saw in Nazi Concentration Camps. This was not accidental, as the authors of the memoirs do not investigate the defendants' legal culpability as much as presuppose it: they ask readers to see the defendants through the reflection of atrocities in their eyes" (ibid: 26).

This adds to this writer's discussion of whether the atrocity film was an accurate depiction of the Holocaust, by analysing the memoirs of the screening of the film. However Douglas draws a clear distinction between the memoirs and the film.

In addition, along with other legal scholars Douglas, in his approach, identifies reservations regarding the role of atrocity film in the attribution to defendants of specific legal responsibilities. Consequently, he questions whether the film actually established individual responsibility of the defendants on trial, as responsibility appeared to be distributed exceedingly broadly. This writer then continues to raise an interesting point:

> "Though the film provides a picture of a crime scene so extreme that its horrors have unsteadied the camera's idiom of representation, it does not translate its images into a conventional vocabulary of wrongdoing. Instead, the very extremity of the atrocity captured on film challenges one to locate terms capable of naming and condemning these crimes. How, then, was the prosecution able to assimilate evidence of unprecedented atrocity into a legal category of criminality?" (ibid: 37).

This indeed was an extremely vital question, one that was pivotal to the whole trial, as the Holocaust threatened to expose the laws limits, as it would clearly be impossible to hold one accountable of a crime that did not exist. To this end, although it is difficult to ascertain individual responsibility explicitly, the efforts to incorporate the evidence of gruesome atrocity into a legal category of criminality can be evidenced by the prosecutions attempt to punish the perpetrators for committing the crime against humanity.

However, Douglas' approach is limited to an assessment of whether the Nuremberg trials did justice to the unprecedented crimes of the Holocaust and whether they depicted an accurate representation of the horrors of the Holocaust. In effect, a continuation of this approach would result in failure to address evidential and doctrinal issues from the defendant's perspective, to include a discussion of whether the admissibility of such evidence can be justified in the face of its potentially prejudicial impact. Therefore, Douglas's approach is narrow in scope as it only refers to the earlier post World War II trials and fails to address the contemporary tribunals. Furthermore it is also somewhat lacking in perspective, as its sole focus is to determine whether the trials depicted an accurate picture of the Holocaust, and consequently fails to address the evidential concerns related to the defendants. Therefore this is a clear gap in the literature which the current study intends to fill.

In comparison, the scholarly work of Lennon (2005) illustrates the use of film evidence, not only within the trials convened immediately after the Holocaust, namely the IMT and the International Military Tribunal for the Far East (IMTFE), but also within the contemporary tribunals; namely the ICTY and International Criminal Tribunal for Rwanda (ICTR). To this end Lennon adopts a comparative approach, between the Nuremberg precedent and the more recent tribunals, tracing the deployment of documentary film within war crimes tribunals back to the Nazi war crimes trials. However, this writer's main

agenda aims to highlight the power of film within legal settings, and outline the issues and omissions raised by film not only in relation to the film as a visual document, but more as a mechanical witness, whilst focusing on the four international criminal tribunals.

To this end, it is clear Lennon has no interest in the intelligence related aspect of the film, nor is she particularly concerned with legal doctrine. However, along with other legal academics, Lennon recognises the importance of film evidence, as she is of the view that 'film proof of wartime atrocities has exercised significant influence on the course of international law' (Lennon, 2005: 65). This writer effectively analyses how the precedent established over fifty years ago during the Nuremberg Trials has helped lay the foundation for the contemporary international war crimes tribunals to utilise film as evidence.

Consequently, a strength of Lennon's approach is that in highlighting some issues of utilising film she questions the future of film evidence, particularly due to political factors and the continuous repetitive screening of atrocities to the public. This is because despite the increasing reliance on such evidence within international courts today, the political and legal consequences of its use and public screening are yet to be seen. Lennon identifies how the use of images as evidence within war crimes trials continuously tests the delicate boundary between *proof* and *propaganda*, as she is of the view that "These images – and the laws they question, affirm, challenge and fortify – traverse the increasingly fragile boundaries between 'proof' and 'propaganda'" (ibid: 66). In effect, it is inevitable that the daily airing of atrocity footage despite proving atrocities, could quite easily risk being labeled propaganda.

In addition, Lennon's work outlines the unprecedented nature of film as evidence of crimes against humanity as proof of war crimes committed by the Nazi perpetrators. That some Germans would deny the entire Holocaust, including the concentration and extermination camps, was feared by many. This effectively impelled the Allied military

photographers to film the results of gruesome atrocities committed by the Nazis during the war. In regards to the screening of the *Nazi Concentration Camps* film, the narrated reading of the filmed affidavits at the beginning of the film confirms the validity of the images which are to follow and attest that none of the images had been fabricated or manipulated in any way. However, this writer correctly identifies that "While this was effective in fortifying the visual evidence of atrocities such as the murder of women and children, soldiers bound and gagged and the existence of mass graves, doubts about who in fact *perpetrated* the crimes persisted…" (ibid: 68). This conveys similar reservations as other legal scholars in this field, concerning the issue of establishing specific individual responsibility and lack of a direct evidential link, a key theme for this thesis.

However, she proceeds to illuminate the stance taken by contemporary trials, including the ICTY in welcoming the admissibility of film as evidence. This suggests that although the admissibility of film at Nuremberg was unprecedented it is now accepted as the norm. Furthermore, Lennon raises an interesting and equally important point by illustrating in great detail the *elision* the official records contain when describing the images admitted to prove the horrific reality of the mass exterminations in Germany and the former Yugoslavia. To this end, this writer appears appalled by the simplicity of the description '[The film was then shown]', which introduced each film exhibit at Nuremberg, regardless of the duration whether this was 90 seconds long or 4 hours. However, what appears even more inexcusable is the comparison highlighted by Lennon of the far more concise description used to describe the images introduced at the Yugoslav tribunal fifty years later, which was reduced to '[videotape played]'. This writer's analysis of this elision is noteworthy as she suggests that "These oversights, be they a lack of legal rules or silences within the transcript …gesture toward the fact that as a form of proof, documentary film confounds conventional categories of evidence" (ibid: 70). Once again this strongly supports the view

that the use of film as evidence within international war crimes trials, despite originally being unprecedented, remains essential to these legal proceedings.

Furthermore, what is perhaps most noteworthy about Lennon's study is that she identifies the limitation that "not a single rule exists that addresses the capacity of non-fiction film as a unique form of proof. Clearly the issue of film as legally binding evidence is a complex one… " (ibid: 66). However, literature addressing the complexities of adducing film as evidence appears to be surprisingly scarce. Therefore, this is a gap in the literature, which the present study intends to fill.

As such, Lennon's approach leaves much to be desired, as she fails to compare crucial aspects of atrocity film evidence, most importantly the doctrinal and evidential issues in relation to the admissibility of film evidence. Similarly, although Lennon addresses the tenuous boundary between proof and propaganda, she fails to address the potential prejudicial impact of the film upon those in the courtroom. Consequently, as the focal point of the approach adopted by this writer is to highlight the power of film, analysis of the evidential and doctrinal issues regarding the admissibility of film and its justification are seriously neglected. In effect, Lennon does not appear to highlight what lessons have been learned since Nuremberg, therefore the approach adopted by this writer is overly narrow in scope and focus.

On the other hand, Bloxham's (2001) study reveals an innovative account of the Allied war crimes trials following the Nazi war crimes, from the perspective of ultimate failure. His research shows the effect the trials had on the memory of the citizens in Germany and Britain, that of feeding propaganda instead of serving the interests of justice. To this end, Bloxham illustrates that the use of legal evidence amongst other things, within the trials of the Germans, generated misleading generalisations and ideologies about the Holocaust and the Nazi regime.

Consequently, this approach adopted by Bloxham focuses on the conceptualisation of Nazi criminality as part of the Holocaust. What is noteworthy about this study is that, it not only addresses, but also provides an in-depth analysis, of a connection which appears to have been omitted in other literature. As such, this writer analyses a connection between the trial establishing a record of Nazi criminality and the victorious Allies perception and depiction of the events during the Nazi regime, a "connection [which] concerns how the practices of those who conducted the trial effected the portrayal of the acts of the tried through the medium of the courtroom" (Bloxham, 2001; preface).

However, Bloxham's approach that the use of legal and historical evidence within the trials generated misleading generalisations, fails to address film when analysing such use of evidence. Although this writer falls short of analysing film evidence and its impact on the courtroom and on the citizens of Germany and Britain, a continuation of this approach to include an analysis of film evidence, would most likely only conclude that the screening of the film as evidence fed propaganda rather than helped to serve the interests of justice. Consequently, a continuation of this approach to include analysis of film would fail to appreciate the significance of the role of film within international criminal proceedings.

In addition, other literature in this area, namely the work of Scharf (1997) analyses how the tribunals have attempted to follow the IMT precedent, whilst recounting, from investigation through to judgment, the first case to be tried before the ICTY, that of a Bosnian Serb, Dusko Tadic. As such, Scharf on a few occasions refers to the admission of video evidence into the trial proceedings to support the witness testimonies. To take a noteworthy example, Scharf outlines how Edward Vulliamy, one of the first journalists allowed inside Omarska camp in August 1992 and then in Trnopolje camp, which he visited next, bought the horrors of the camps alive for the ICTY to see, through videotape (Scharf, 1997: 136). Vulliamy had been invited to Omarska camp by Radovan Karadzic, in order to

disprove media reports alleging that Muslim prisoners were subjected to abuse. However, Vulliamys visit alternatively confirmed such media reports:

> "The video displayed on the court's monitors was startling, revealing men who were so emaciated they looked like walking corpses. Now the judges could see for themselves what Muharem Nezirevic, who had testified two weeks earlier, meant when he described the look of the lost faces of Omarska" (Scharf, 1997: 136).

In effect, by exhibiting the footage of the horrors in the detention camp, within the trial, the prosecution to some extent attempt to corroborate the witness testimony.

Nevertheless, this approach is limited in scope as Scharf's account appears to be based primarily upon witness testimony, hence he presents the trial, including the prosecution and defence case, by providing a detailed account of the witness testimony, with minimal reference to the associated video excerpts. Consequently, and surprisingly there is little reference within his study, to the consequences of utilising the videos of the Omarska death camp and the Trnopolje concentration camp in Bosnia-Herzegovina, as evidence within the trial proceedings. In addition the legal challenges faced by the prosecution relying on such graphic film footage as evidence also appear to have been omitted in this account. Therefore this is a clear gap in the literature which the current study intends to fill.

Accordingly, as outlined above, there is sufficient previous work from different perspectives and disciplinary approaches to show that this general theme merits academic analysis. However, there are still considerable gaps and limitations in this literature, which the present study will address and in part resolve.

Therefore, although Twist (2005) undertakes a thorough analysis of the hearsay and evidential aspect of the atrocity film screened at Nuremberg, the current study intends to build upon this by adopting a comparative approach, comparing the evidential issues at Nuremberg to the evidential aspects before the contemporary tribunals to identify what

lessons have been learned from the Nuremberg precedent. Moreover, as Salter's (2007) approach is narrow in scope and perspective, confined to an analysis of the film purely from an intelligence related perspective, the present study plans to build upon this and address the evidential and doctrinal issues associated with the admissibility of film. Furthermore, the current study aims to rectify Douglas's (2001) narrow approach, where the sole focus is to determine whether the trials depicted an accurate representation of the Holocaust, and consequently intends to address the evidential concerns in relation to the defendants. Finally the present study hopes also to build upon Scharf's (1997) approach, which failed to address the consequences of utilising the videos of the Omarska death camp and the Trnopolje concentration camp in Bosnia-Herzegovina, as evidence within the trial proceedings, by addressing the evidential and doctrinal concerns.

Consequently, given the limitations in the existing academic scholarship already highlighted, this general area merits additional study to include previously neglected more recent trials, with particular emphasis given to the use of such material in relation to cases dealing with the Srebrenica Massacre, and a comparison with the earlier World War Two trials.

CHAPTER 3 - USE OF ATROCITY FILM AT NUREMBERG

This chapter aims to undertake an extensive case study to analyse the use of the *Nazi Concentration Camp* film within the Nuremberg Trials. In turn, it aims to illustrate whether the use of the atrocity film can in any event be justified within the international criminal proceedings. Consequently, in order to determine whether any lessons have been learned since Nuremberg, it is imperative to highlight the issues that were not fully appreciated at Nuremberg, from which lessons could potentially have been learned. However, as the Nuremberg case study has been analysed by a number of legal academics, on a number of occasions, and to some depth in some instances, the current study does not intend to analyse this in much depth. Instead, this thesis aims to outline the evidential issues raised by the depiction of the atrocity film, and address the responses to the use of the film at Nuremberg, shedding light on the views of a well known press reporter which have been neglected by academics in prior literature. Moreover, the present study will in turn focus on the more contemporary tribunal, namely the ICTY, (in a later chapter) in order to draw conclusions, as to what lessons have been learned.

Atrocity Film at Nuremberg

November 20th 1945 marked the beginning of what is generally regarded by most legal scholars as the most important Trial of the 20th Century, the Nuremberg War Crimes Trials, which were held in Germany. Gathered at the Palace of Justice for the long awaited trial, *Trial of the Major War Criminals* before the IMT, the British president of the tribunal Lord Justice Geoffrey Lawrence opened the trial, referring to it as a trial "unique in the history of jurisprudence of the world and of supreme importance to millions of people all over the

globe". (Trial-Transcript: 1). Following his brief remarks, the entire first day of the trial was devoted to the reading of the indictments.

The second day of the International Military Trial commenced with the chief prosecutor of the United States, Robert Jacksons opening statement which stressed the importance of holding the Nazi leaders accountable. At that stage in the trial no-one was prepared for what was to come the following week, where the prosecution presented before the tribunal its most dramatic evidence of Nazi malignancy, in the form of a fifty minute film on the *Nazi Concentration Camps*. Such use of documentary film as evidence in a judicial setting was unique, as prior to the Nuremberg Trials no precedent existed which demonstrated how graphic material of this type was to be utilised, (other than the Belsen Trial: *Trial of Josef Kramer and 44 others (1945)*). Therefore prior to the Nuremberg trials, the use of graphic film of atrocities as proof of criminal wrongdoing was unprecedented. Nevertheless, the prosecution insisted that the nature of the Nazi crimes, committed on such a large scale were unimaginable, and consequently demanded the screening of the film, in order to expose the criminal wrongdoing and in order to represent the dire conditions within the concentration camps.

In relation to the subject of concentration camps executive counsel to the American prosecution team, Thomas Dodd, introduced the film as: "this film which we offer represents in a brief and unforgettable form an explanation of what the words concentration camp imply". (Trial-Transcript: 264). This in itself demonstrates the Tribunals dependency upon moving images to portray abstract concepts of ethnic cleansing and collateral damage to the audience, rather than relying on an oral form of evidence.

Moreover, the film evidence coupled with voiceover provides narration taken from the military photographer's notes, and consequently describes that "this is the first film of Nazi atrocities to be seen by many in the audience and it stuns the courtroom, some weep, one

woman faints" (Trial Documentary: Nuremberg Day 8 Concentration Camp Film; youtube). That some spectators would perceive the graphic film as the most significant and stirring piece of evidence admitted within the trial stands to reason, however, the screening of such graphic evidence also resulted in arousing powerful emotions from the defendants themselves. What follows is a brief outline of some of the *content of the film*, which will lay the foundation, for the issues to be addressed.

Content of the Atrocity Film

Nazi Concentration Camp, almost an hour in length, was first screened within the *Trial of the Major War Criminals* before the IMT. The gruesome scenes depicted within the documentary film were compiled from motion pictures taken by Allied military photographers of the appalling scenes of horrific atrocities awaiting Allied troops as they liberated concentration camps.

Commencing with screened affidavits, attesting to the authenticity of the film, the *NCC* provides a camp-by-camp record of the conditions upon liberation. This film begins with the *Leipzig Concentration Camp*, where the anonymous narrator explains that more than 200 prisoners were burned to death within the camp. Moreover, horrific scenes of dead bodies, with ghastly wounds, are screened, whilst an explanation is provided for another pile of bodies; victims who had been electrocuted by barbed wire fences whilst trying to escape.

Moving on to the *Penig Concentration Camp*, part of the footage depicts victims showing their ghastly scars and wounds, whilst being examined by American doctors. Moreover, further evidence of inhumanity is provided at the *Ohrdruf Concentration Camp*, which depicts a woodshed where huge piles of corpses are visible, whilst the narrator comments "the stench is overpowering." Following this, demonstrations are provided depicting how

former inmates were tortured by the Nazi's, whilst more corpses are visible, scattered around the courtyard. The horrific scenes also reveal the charred remains of victims who were cremated; a horrific sight.

Moreover, the footage of *Hadamar*, an institute referred to as the "house of shudders" exposes the condition of the survivors, whilst being examined by a doctor. The bony skeletal frames of the starved men are clearly visible on the screen. In addition, thousands of bodies are exhumed from the graveyard before the corpses are lined up.

What is more, is that at *Breendonck* the horror exhibits, including blood stained coffins, remain untouched. Further evidence of the horrors is provided via demonstrations, of how the victims were tied up for vicious beatings, with a barbed wire stick, which was used on the backs of the men. Another method of torture demonstrated how men were tied up in chains and tortured with the tourniquet and also how they were tortured with a thumbscrew. Moreover, in this portion of the footage, the victims also show scars from repeated beatings and cigarette burns.

Similar scenes were also recorded at the *Hannover, Arnstadt, Nordhausen, Buchenwald and Belsen Concentration Camps*. The footage of the *Belsen Concentration Camp* depicts a young English soldier using heavy bulldozing equipment, to push piles of bodies into the graves, to speed up the cleaning and burying process.

The admission into a criminal trial, particularly a war crimes trial, of such horror, in the form of cinematic evidence was authentic and a real innovative step taken in the direction of serving the interests of justice and would not have been possible, had the IMT not taken a relaxed approach to the admissibility of evidence. Having said that, critics of the Nuremberg Legacy often advance criticism in relation to whether the interests of justice were truly served at Nuremberg by the screening of the atrocity film, as a number of evidential concerns have often been raised on this point. What follows will now address

these evidential concerns in turn, to determine whether the interests of justice could truly have been served at Nuremberg.

Evidential Concerns

Although the permissive evidentiary rules adopted by the IMT, clearly allowed for the screening of the *NCC* film, this has not been without criticism. As such, evidential concerns have been raised on a number of occasions by legal academics, in relation to the screening of the film failing to establish a direct evidential link, amounting to hearsay and failing to contribute towards a fair trial.

Lack of a Direct Evidential Link

Critics of the Nuremberg trial have on numerous occasions criticised the use of the atrocity film, mainly questioning whether the screening of the *NCC* was justified and whether the interests of justice could have truly been served due to the lack of being able to establish a direct evidential link between the alleged perpetrators and the acts of criminality the screening of the *Nazi Concentration Camp* portrayed. Twist (2005) also expresses similar reservations, as she questions:

> "if material produced to a court is incapable of establishing the culpability of defendants for the specific offence indicted against them, or as a minimal pre-requisite, fails to comprise unassailable affirmation of their character, does it lie beyond the legal definition of 'evidence'?" (Twist, 2005; p289).

However, Twist is not alone and is one amongst many to suggest that the atrocity film does not provide much to establish individual guilt. To this end, Rice (1997) on this point also comments that "although the graphic film maligned the defendants as a group, it established little in the way of individual guilt" (Rice, 1997: 41).

Therefore Twist is clearly of the view that the screening of the film cannot be justified, as she comments that:

> "given this ambivalence regarding the probative value of the filmic material produced to the Tribunal it is perhaps difficult, from a strictly legalistic perspective, to justify the admission of the film into the proceedings. Furthermore, even had any evidential link been irrefutably established between the individual Defendants and the screened atrocities, it is still possible to contend that the images, displayed to the Tribunal, were of such graphic intensity that their prejudicial effect would have outweighed their probative worth." (Twist, 2005: 289).

This argument raised by Twist, is particularly noteworthy, as she suggests that the prejudicial element of the atrocity film could be fatal to its admissibility, even had a direct evidential link between the defendants and the content of the atrocity film been established. However, it is arguable that the graphic nature of the evidence would not necessarily render the atrocity film inadmissible on grounds of prejudice. Consequently, although based on analysis of 'Gruesome Photographs' rather than graphic film, Munday (1990), with reference to the court's position in *US v McRae* (1979), identifies all relevant evidence to be of an inherently prejudicial nature, however it is *unfair* prejudice which *substantially* outweighs probative value that renders relevant evidence inadmissible (Munday, 1990: 20). In the context of the Nuremberg trials, if we apply this principle to the *Nazi Concentration Camp* film, it would be difficult to exclude the atrocity film from the proceedings, as the chances of the atrocity film amounting to 'unfair' prejudice, would be slim. Similarly, so would the chances of this 'substantially' outweighing the films probative value. As such, even Munday identifies courts have rarely shown an inclination to exclude gruesome photographs, which by their very nature are graphic. Therefore a similar argument can be used for graphic film evidence to prevent its exclusion, on the basis of its probative worth outweighing the prejudicial effect.

Furthermore, it appears the screening of *Nazi Concentration Camps* can, and to some extent has, been justified, despite the lack of a direct evidential link between the atrocity

film and the defendants. This was only made possible by the innovative approach taken by the prosecution to introduce the atrocity film, not as evidence as to who committed the crimes, but as a film that demonstrates what is intended by the words concentration camps. To this end, Thomas Dodd, executive counsel to the American prosecutorial team, described the purpose of the screening:

> "The United States, will at this time present to the tribunal, with its permission, a documentary film on concentration camps. This is by no means the entire proof which the prosecution will offer with respect to the subject of concentration camps. But this film which we offer represents, in a brief and unforgettable form, an explanation of what the words concentration camp imply." (Trial-Transcript: 264)

The significance of the wording used by the prosecution is clear, as without such an introduction to the screening of the atrocity film, it would have been extremely difficult to permit the film into the proceedings. Consequently, although the film holds little probative value of specific crimes committed by specific defendants, it was undoubtedly a damning piece of evidence, damning to the Nazi regime. To this end, this approach served the prosecution well, as although it was not primarily presented to prove the guilt of the individual war criminals, it aimed to establish the guilt of the individual defendants through the back-door, as anyone associated with the Nazi leadership was potentially incriminated by the screening of the atrocity film.

Hearsay Issues

However the lack of a direct evidential link is not the only evidential issue raised against the screening of the film, as issues of hearsay have also been raised on a number of occasions. Consequently *Nazi Concentration Camps* has the potential to amount to hearsay and thus should arguably have been inadmissible within the Nuremberg trials.

To this end, evidential concerns relating to the hearsay aspect of the spoken narrative have been identified by several legal scholars, including Twist (2005). In effect, it is

suggested that the narrative amounts to hearsay for several reasons, the most striking being that the evidence was introduced by anonymous narrators, who did not personally attest to the reliability of the film, nor did they provide any indication as to whether they had ever witnessed at firsthand the atrocities portrayed within the film. Instead an anonymous narration of affidavits signed by George C. Stevens and E. R. Kellogg, were provided, whilst Stevens and Kellogg themselves remained silent. Subsequently, issues of whether the affidavits themselves amount to hearsay are also raised, as the atrocity film commences with a self authenticating section to confirm its status as an official documentary report, which is followed by the projection of affidavits onto the screen accompanied with the anonymous narration.

Although it has been questioned many a time, why and how the affidavits came to be a part of the film itself, Twist notes that "According to Douglas 'this gesture of self-authentication supports the novel idea of the use of film as a privileged witness who could swear the truth of its own images'" (Twist, 2005: 278). Nevertheless, it cannot be denied that this unconventional utilisation of the atrocity film was only made possible due to the leniency the courts were permitted under Article 19 of the Nuremberg Charter, which allowed this potentially hearsay evidence to be admissible despite the real evidentiary concerns.

Moreover, a further issue with the already unreliable soundtrack is that "the validity of an already questioned soundtrack was further compromised by details of incidents, either gleaned or recounted, only at second hand" (Twist, 2005: 298). Without Article 19 of the Nuremberg Charter this would clearly amount to hearsay, rendering it inadmissible. However, the innovative approach adopted whilst drafting the rules, were clearly in favour of the prosecution.

One illustrative example of this form of hearsay taken from the soundtrack of the film *Nazi Concentration Camps* is: "At Penig, female detainees are filmed, initially accompanied by silence. The narrator then interjects that: 'the women are able to smile for the first time in years.' " This by no means is the only occasion on which the narrators try to introduce additional information into the trial process that was not borne out of the film itself. To this end, Twist certainly illustrates the hearsay issues in showing the narrative to the atrocity film, which suggests that the screening of the *NCC* film was neither justified, nor could it, serve the interests of justice.

A Fair Trial?

In addition to the various evidential issues raised in relation to the atrocity film, another criticism often advanced by critics of the Nuremberg trials is that the prosecution were not conducting the trial on factual evidence, but were attempting to sway the court on an emotional basis. As such, the atrocity film clearly had an immensely powerful impact upon those present within the courtroom during its initial screening. Moreover as Salter (2007) notes even the judges referred to the atrocity film evidence within their judgment, almost a full year after the initial screening, which suggests *Nazi Concentration Camps* had a colossal impact, particularly as it was only one amongst thousands of pieces of evidence proffered during the proceedings.

Additionally, it could be argued that further attempts were made to sway the trial on an emotional basis by showing the film out of sequence, partly for maximum effect and impact. However, the need to show the film out of sequence was inevitable, as the dry, lengthy, even tedious documentary readings made what was meant to be the trial of the century a very dry and lacklustre trial, consequently losing the attention of the world media. Therefore, it was crucial for the film to be shown out of sequence to re-attract the attention of the world media. However, these tactics adopted to regain the words

attention, would once again suggest that the screening of the *NCC* film was neither justified nor could it serve the interests of justice, particularly as the film itself, could not amount to factual evidence, but rather amounted to emotional and contextual evidence.

The impact of screening the atrocity film

It is possible to gain an understanding of whether the screening of the atrocity film served the interests of justice, by examining the impact the screening had upon those present within the courtroom over fifty years ago.

To this end, it is difficult to imagine the intensity of shock caused by the initial screening of *Nazi Concentration Camp* upon those assembled in the courtroom. Particularly, as Salter notes "contemporary film audiences operate in a different cultural landscape in which movie footage of such horrors has become all too familiar" (Salter, 2007: 269). Nevertheless, firsthand accounts and memoirs of those present during the initial screening, including the records of those responsible for keeping a formal record of the defendants reactions to the film, sheds some light on the atmosphere within the courtroom following the initial screening.

For this purpose, Walter Cronkite, a war correspondent for the United Press during World War II provides an insightful account of the impact of screening the film, whilst covering the Nuremberg trials. In effect, although only a member of the press contingency and not actually an integral part of the trial, Cronkite makes several interesting points, whilst watching the footage taken by American cameramen when the camps were liberated. Whilst examining the defendants' reactions, Cronkite notes:

> "As soon as the defendants saw the pictures, the film of the concentration camps, they began to wither. As a matter of fact several of them cried. They weren't crying, I don't think, for the Jewish people that were lost. They were

> crying because they knew that, when those pictures were seen in the world they had no way to escape execution" (Cronkite, 2006).

Cronkite's belief, that the atrocity film had the potential to determine the guilt of the defendants so early into the trial, to some extent illustrates the profound impact the film had upon those assembled within the courtroom. Furthermore, Cronkite expresses this notion more strongly, in a PBS broadcast, "The shock was all rounding. Some of the defendants put their heads in their hands. Others sobbed openly. Like my colleagues on the press benches I felt that at that moment, nine days into the trial, the fate of these monsters was sealed" (*PBS Legacy Of War: The Nuremberg Trials Excerpt*; youtube).

What is particularly noteworthy is Cronkite's ability to ascertain the fate of the defendants so early into the trial, specifically on day nine, particularly as it took almost ten months to complete the trial process. In effect, this contributes to the belief that the screening of the film had a grave impact upon all those present within the courtroom.

In addition, there is clear evidence to suggest that the screening of the atrocity film had a shocking impact on others within the courtroom. It was reported that members of the judicial panel were left in shock, as "the presiding judges retired without a word and without announcing, as usual, the time set for the next session" (Atrocity Films in Court upset Nazis' Aplomb, *New York Herald Tribune*, November 1945). In addition even the defence lawyers, whose role was clearly to defend the defendants could not bear to sit in the same room, as Gilbert (1948), a prison psychologist at the Nuremberg Trial notes in his diary:

> 'defense attorneys are now muttering, "for god's sake-terrible."... Sauckel shudders at picture of Buchenwald crematorium oven... as human skin lampshade is shown, Streicher says, "I don't believe that" ... Goering coughing ... Attorneys gasping' (Gilbert, 1948: 29).

Clearly, the screening of the film had a profound impact on those present within the courtroom, and not surprisingly similar reactions of shock, horror and disbelief were echoed by the majority present during the initial screening. However, despite the powerful impact of the initial screening within the courtroom, the level of shock created by atrocity film remains immeasurable.

To this end, it is difficult to determine whether the screening of the atrocity film assisted to serve the interests of justice, or whether the prejudicial impact of the screening outweighed its probative worth. If we are to base our answer solely upon an analysis of the impact the screening had upon those within the courtroom, a strong argument can be made that the screening did not serve the interests of justice, nor was it justified. How is it possible for the interests of justice to be served when only nine days into a ten month trial, the fate of the defendants can be sealed, particularly when based solely on one amongst thousands of pieces of evidence? This to some extent indicates that the interests of justice were not truly served at Nuremberg by the screening of the film, nor was the screening of the film justified.

Use of *Nazi Concentration Camps* within Later Trials

Furthermore, it is important to note that the use of *Nazi Concentration Camps* did not end with the Trial of the Major War Criminals at Nuremberg. Instead, it was utilised within later trials, which consequently highlight the legal struggle in relation to the evidential issues. To this end, although the atrocity film footage was screened at Nuremberg within the Trial of the Major War Criminals and within the follow up Nuremberg Military Trials without being contested, objections were raised to its use within the later Israeli trial of

Eichmann (1961) in Jerusalem and within the Canadian trial of *Zundel* (1985). Consequently issues of hearsay were raised in relation to the narrative soundtrack.

As such, the graphic film footage was edited and screened partially in the *Eichmann* (1961) trial, stripped of the soundtrack, with the prosecution intervening on occasion with brief descriptions. This was primarily due to evidential issues, namely the hearsay aspect of the narrative soundtrack. Moreover, in contrast to the *NCC* film, which was screened in one sitting at Nuremberg, the same film was screened over four different occasions within the *Eichmann* (1961) trial.

What is more, is that within the *Zundel* (1985) civil trial, hearsay rules were applied once again, hence the atrocity film was initially screened without the spoken narrative. However, on appeal of the case in (1988) the atrocity film was completely excluded by the rules of evidence. Consequently, although the Nuremberg Charter did not exclude hearsay, instead leaving rules of evidence to the tribunals' discretion, the rules of evidence within the Canadian common law case were applied rigorously to exclude the use of *Nazi Concentration Camps*, as its prejudicial effect was deemed to outweigh its probative value. In effect, this to some extent suggests that the interests of justice were not served at Nuremberg, where the atrocity film was shown, however were served in the later trials of *Eichmann* (1961) and *Zundel* (1985) and (1988) without the prosecutions reliance upon the horrors portrayed in *Nazi Concentration Camps*.

CHAPTER 4: SREBRENICA CASE STUDY – A COMPARATIVE ANALYSIS AND LESSONS LEARNED

This chapter aims to undertake an extensive case study to analyse the use of atrocity film within the Srebrenica Massacre trials. In turn, it aims to illustrate whether the use of the atrocity film can in any event be justified within the international criminal proceedings, following such large scale mass execution. To this end, the present study aims to focus on the contemporary ICTY, in order to draw conclusions, as to whether any lessons have been learned since Nuremberg, in relation to the issues and instances which have been highlighted within the Nuremberg trials.

The Srebrenica case in Legal Context

The atrocities committed within the Balkans, have been executed on such a large scale that it is beyond the scope of this study to address these issues in their entirety. Instead, this study aims to focus on a small part of the atrocities inflicted on the Muslim citizens of Bosnia, who were forcibly removed from the Srebrenica enclave, which was pronounced a United Nations "safehaven." The mass executions that took place are widely known as the Srebrenica Massacre, where approximately eight thousand Bosnian Muslim men and boys were systematically killed. To this end, this study aims to concentrate on the trial of *Vujadin Popovic et al* (often referred to as the *Srebrenica Seven Trial* or the *Srebrenica II Trial)*, where seven men, once officers in the Bosnian Serb forces, had to account for their presence at Srebrenica, a place of cold-blooded killing in July 1995. This thesis aims to look at the use of atrocity film within The *Srebrenica Seven Trial*, the largest group trial in the history of the war crimes tribunal in The Hague to date, and compare it to the use of film

within the Nuremberg trials. However, prior to addressing the film it would be useful to provide an outline of the case and the legal issues therein.

A Case Summary

Commencing in July 2006, the judgement for the case of *Vujadin Popovic et al,* was handed down in June 2010. Of the seven defendants charged with multiple charges of war crimes, genocide and crimes against humanity, within the former Yugoslavia region, one defendant (Ljubomir Borovcanin) was sentenced to 17 years on 10 June 2010. The trial judgement is now pending appeal for the remaining six accused (Vujadin Popovic, Ljubisa Beara, Drago Nikolic, Radivoje Miletic, Milan Gvero and Vinko Pandurevic).

The case of the *Srebrenica Seven*, concerned crimes related to the fall of the United Nations' 'safe areas' of Srebrenica and Zepa in July 1995, which had been declared 'safe areas' in April 1993, supervised by the United Nations Protection Force (UNPROFOR). The *Vujadin Popovic et al* proceedings are of particular significance, to these events, as, although the main culprits of the events, General Ratko Mladic and the political leader Radovan Karadzic managed to evade capture for over a decade, the "men in the dock [*Vujadin Popovic et al*] were part of their inner circle as commanders of army and police forces that overran the safe haven and its peacekeepers." (7 Face Srebrenica Tribunal in Largest Group Trial at The Hague, *The New York Times*, July 2006).

It was on 11 July 1995 that the Srebrenica enclave was taken over by the Bosnian Serb Army (VRS) and the Ministry of Interior (MUP) troops, whilst under the protection of Dutch UN peacekeepers. Within three days, in an atmosphere of utter terror, tens of thousands of citizens, women, children and the elderly were forcibly removed from the enclave by the VRS and Bosnian Serb police forces. This was the implementation of the first (of two) joint criminal enterprises (JCEs) found to have existed during the relevant period. The first was a plan 'of the Bosnian Serb political and military leadership to forcibly remove the Bosnian

Muslim population from Srebrenica and Zepa' (the 'JCE to Forcibly Remove') (*Popovic et al* Judgement; [1087]). The second JCE was to murder the able-bodied Bosnian Muslim men from Srebrenica (the 'JCE to Murder') (ibid; [1050]).

The first JCE, to Forcibly Remove, was in part implemented under 'Supreme Command Directive 7', whereby the VRS restricted the delivery of humanitarian aid to the Bosnian Muslim population in Srebrenica and Zepa. Moreover on 6 July 1995, the VRS launched active combat operations against the Srebrenica enclave and on 9 July 1995, President Karadzic authorised the VRS to capture the town of Srebrenica itself. After two further days of intensive shelling, and an ineffective attempt by UNPROFOR to halt the VRS advance with air strikes, Srebrenica fell to the VRS on the afternoon of 11 July 1995.

Approximately 20,000 Bosnian Muslims from the enclave, including women, children, elderly and some men fled to the UNPROFOR compound at Potocari, five kilometres north of Srebrenica, where they sought the protection of the UN Dutch Battalion (ibid; [191]&[263]-[266]). Overcrowding, heat, fear, poor hygiene and lack of food, water and medical supplies caused the humanitarian situation to deteriorate rapidly (ibid; [309]-[315]). At the same time, approximately 15,000 Bosnian Muslims, primarily men aged 16 to 65, started moving in a single-file column through the woods towards the city of Tuzla; a Bosnian Muslim-held territory.

The second JCE, to murder the able-bodied men was implemented on 12 and 13 July when Bosnian Muslim men in Potocari aged between 15 and 65 were forcibly separated from their families by members of the VRS staff and forcibly transported to detention sites in the nearby town of Bratunac, to be executed. These men and boys, after being separated from their families, were confined in cramped detention facilities under brutal conditions and systematically murdered. Accordingly: "The victims included those separated from

their families in Potocari, as well as thousands of men and boys who either surrendered or were captured as they tried to flee the enclave." (Trial-Transcript: 377).

By late afternoon, on 13 July, approximately 6,000 men from the column fleeing through the woods, had also either surrendered or were captured by, Bosnian Serb forces stationed along two stretches of road, which the column was attempting to cross. The majority of those prisoners were transported to Bratunac or Kravica, where they were temporarily detained in buildings and vehicles, along with the Muslim men who had been separated from the crowds in Potocari. The large-scale systematic murder of Muslim men from Srebrenica began on the morning of 13 July at approximately 11 a.m.

As such, in light of these horrific crimes, the Trial Chamber found the crimes of murder, extermination and cruel and inhumane treatment to be part of the common purpose of the JCE to murder (Judgment; [1073]). In addition, any killings committed through participation in the JCE to Murder were also found to constitute an underlying act of genocide (Judgment; [1175]&[1310]).

For their participation in these acts the defendants were charged with various crimes under the ICTY Statute, some on the basis of only their individual criminal responsibility (Article 7(1)), whilst some were charged for both their individual criminal responsibility, as well as, their superior criminal responsibility (Article 7(3)). As such, they were charged with multiple charges of Genocide and Conspiracy to commit genocide (Article 4); Crimes against Humanity (Article 5), namely extermination, murder, persecutions, forcible transfer and deportation; and Violations of the Laws or Customs of War (Article 3), more specifically murder.

The Evidence

The *Srebrenica Seven* trial proceedings, which lasted over three years, admitted into evidence the testimonies of 315 witnesses and 5,383 exhibits. In contrast to the evidence relied upon at Nuremberg, the prosecution at The Hague, did not rely heavily on documentary evidence, although this was possibly due to the lack of a paper trail. Instead, heavy reliance, at The Hague, was placed on the testimony of victims and eyewitnesses to prove crimes had occurred, as well as expert witnesses to impugn the defendants' acts. However, along with witness testimony, the prosecution for the *Srebrenica II Trial*, also relied upon radio intercepts and video film, to prove the various charges against the defendant's. For the purposes of this paper, analysis and focus is placed on the film evidence aspect.

To this end, Madam Carla Del Ponte, in her opening remarks for the prosecution prepares the Trial Chamber for the screening of a film, as she comments:

> "The separation of the women and children from the men and boys in Potocari and their forcible expulsion while the men and boys were detained awaiting execution took place in front of rolling television cameras...and of course you will see much of this video evidence during the course of the trial." (Trial-Transcript: 376).

This particular portion of the film appears to illustrate the implementation of both the JCE to Forcibly Remove and the JCE to Forcibly Murder. As such, the prosecutions reliance upon film, as evidence, to prove its case against the defendant's, is without a doubt a crucial part of the trial proceedings.

Film at The Hague

What is most noteworthy and should be made clear from the outset is that documentary film equivalent to the *NCC* screened at Nuremberg has not been depicted in a war crimes trial since. Nevertheless, video evidence of graphic atrocities is still presented as evidence

in a slightly different form, in the contemporary trials of the war criminals before the ICTY, ICTR and ICC. This is often in the form of several video sources being used to compile a trial video, which differs from the *NCC*, as that was compiled from motion pictures taken by Allied military photographers upon the liberation of the camps.

This thesis will focus on the *Srebrenica Trial Video*, which was tendered into evidence by the prosecution, compiled from a number of different sources. The significance of this video lies in the portion of footage, taken by Serbian journalist Zoran Petrovic, of the events as they unfolded in Srebrenica. Consequently, this study will analyse how this footage was used within the case of *Vujadin Popovic et al* and address the use of several other video exhibits within the trial. However, due to the limited scope of this study, it will not be possible to address and analyse all the video exhibits used within the trial.

Whilst at Nuremberg, the first day of the trial was dedicated to the reading of the indictments and it was not until the second day that Chief Prosecutor Jackson, was able to make his opening statement, the pace was somewhat quicker during the opening stages of the *Popovic et al* trial, at The Hague. As such, Madam Prosecutor Carla Del Ponte made her opening remarks for the prosecution on the first day, (of the trial) before Senior Trial Attorney Peter McCloskey moved on to address the Trial Chamber. To this end, Madam Del Ponte's opening remarks, are of some significance, as similar to Jackson, who in his opening statement referred to film, and more importantly, how the film would be used to show what the term 'concentration camps' imply, Madam Del Ponte, in her opening remarks, also referred to the use of video at the very outset of the trial, and how it would show the separation of the men and women in Potocari (Trial transcript: 376).

Such reference to the use of film at the outset of the trial is particularly noteworthy, as it highlights the significant role film continues to have within an international trial. Moreover, what is of further significance is the way in which film is referred to by the prosecution at

The Hague, compared to the reference made to the use of film at Nuremberg. As such, unlike Thomas Dodd at Nuremberg, the prosecution team for the *Srebrenica Seven Trial* did not attempt to justify the use of the *Srebrenica Trial Video* by suggesting the video would show what a certain term, that is, "concentration camps" implies. Instead, the *Srebrenica Trial Video* was justified on the more empirical basis that it shows the separation of Potocari, and thus the implementation of the JCE to Forcibly Remove. This indicates that the probative value of the trial video before the ICTY clearly outweighs any prejudicial impact it may have, particularly when compared to the use of *NCC* at Nuremberg, which has been criticised for having a prejudicial impact.

However, in order to assess whether the use of film at The Hague is justified, and as such, whether any lessons have been learned since Nuremberg, it is important, firstly, to outline *the content* of the films on which this study is based. As such, the focus of this study will be on several video exhibits which have been used for the successful prosecution of *Popovic et al*, before The Hague.

Content of the films

Srebrenica Trial Video

Introduced into evidence by the prosecution as exhibit P02047, the *Srebrenica Trial Video*, was just over three hours in length, and was screened within the *Vujadin Popovic et al* trial before the ICTY. The gruesome scenes depicted within the trial video, were compiled by the prosecution, from motion pictures mostly taken by news cameras, including Reuters, SRT, Antelope and Nova TV footage, as well as combat cameras, including Muslim civilian footage and Dutch Battalion Soldier footage. Most importantly the trial video was compiled from footage taken by Belgrade journalist Zoran Petrovic, who accompanied the accused

Borovcanin on 13 and 14 July 1995. Having the advantage of being labelled and self-explanatory, the trial video captures appalling scenes of horrific atrocities awaiting the refugees as they were forcibly evacuated from the enclave.

It is notable, that although most of the film is recorded in the Serbian Serbo-Croat language, English translation is provided, for the majority of the footage. Nevertheless, a few segments of the footage appear to omit this vital translation. Moreover, apart from the segments consisting of the edited TV broadcast, the majority of the trial video consists of footage, without a voiceover. This illustrates a crucial difference between the compilation of the *Srebrenica Trial Video* at The Hague, which refuses to include a voiceover, and the *NCC* at Nuremberg, which was screened at Nuremberg with an anonymous third party narrative. As such, although the infringement of the hearsay rule was not considered at Nuremberg, the use of the *NCC* film at Nuremberg has been criticised for amounting to hearsay evidence.

In relation to the content of the film, The *Srebrenica Trial Video* begins with SRT and Reuters footage, labelled 'VRS approaching Srebrenica on 10 or 11 July' and depicts the situation in Potocari, which shows the Serb army shelling Srebrenica, with a number of the VRS staff visible. A conversation between two VRS staff then depicts violence being encouraged, which is followed by shooting into a forest, where victims are hiding for cover and howling in pain.

Following this, the trial video moves on to the 'Muslim Civilian footage of Srebrenica Town on 10 and 11 July', which shows the fall of Srebrenica, from inside the enclave. As such gunshots can be heard in the background, whilst thousands of civilians are seen to be cramped together in the overcrowded UN Srebrenica base.

Some more of the news agency footage (Antelope, Reuters and SRT) reveals Mladic's triumphant walk through Srebrenica, as Mladic and his men, including accused Popovic and

Pandurevic, enter and search buildings, whilst gunshots can be heard in the background. This segment of the footage depicts Mladic's enthusiasm and joy, despite the horrific circumstances, and whilst talking directly to the camera, he declares "Here we are, on 11th July 1995, in Serb Srebrenica. On the eve of yet another great Serb holiday, we give this town to the Serb people as a gift. Finally, after the rebellion against the Dahis, the time has come to take revenge on the Turks in this region."

The *Srebrenica Trial Video* then moves on to the Nova TV and Antelope footage of three meetings which took place at Hotel Fontana on the 11 and 12 July, between General Mladic and Commander of Dutchbat, Colonel Karremans, in the presence of other Dutchbat personnel. It was at these meetings that the evacuation of the civilian population was agreed by Mladic, who guaranteed the survival of the refugees providing they surrendered their weapons and co-operated with the Serb army.

The next segment of the trial video consists of Reuters and SRT footage of the events occurring in Potocari on 12 July, which shows the forced evacuation of the refugees from the camp overseen by General Mladic and his team. In this part of the footage, General Mladic is seen to provide transport to the refugees' and is depicted guaranteeing safety to the civilian population.

The last portion of the *Srebrenica Trial Video* was a crucial piece of evidence to be introduced into the trial, as it screened the events recorded by the journalist Petrovic, and as such, was used by the war crimes tribunal in The Hague to secure the successful prosecution of Borovcanin. The content of the Petrovic footage taken on 13 July, recorded for Independent Television in Belgrade, is incriminating, as key scenes depict that under the watch of Dutchbat soldiers, queues of Muslim men and women are separated by one of General Mladic's men and directed on to different buses. This footage is vital to the court proceedings, as Petrovic provides a narrated account, explaining some of the recorded

scenes. Moreover, the significance of this part of the footage lies in the presence of the accused Borovcanin, who is frequently seen on the scenes. In addition, the presence of Major Van Duijn, a UNPROFOR soldier, and Major Kingori, a UN Military Observer, along with other VRS staff, is also of great significance, as they later testify as prosecution witnesses within the Srebrenica trials.

Some more of the Petrovic footage depicts the events he captures on the road whilst travelling with Borovcanin, which shows Muslim civilians surrendering to the Serbs. Following this a soldier is depicted swapping pistols with Borovcanin, whilst relaxing on the grass. Focus is then placed on a group of civilians sat in a field, being held captive by armed men in camouflage uniforms and upon the image fading out a scene showing crates of ammunition is revealed. This scene depicting the group of civilians sat in the field is repeated again in slow motion.

The remainder of the Petrovic footage is compiled from the Studio B version of the Petrovic footage, which was edited and broadcast in 1995. This part of the video coverage provides some evidence of the atrocities taking place. As such, it focuses on tanks firing into a forest where civilians can be seen fleeing and trying to find shelter. This scene is replayed but with narrative from a news reporter, who comments, “On the way to Bratunac, Kravica, Konjevic Polje, sporadic conflicts with the remains of the Muslim forces that still refuse to surrender.” It is of particular significance that this segment is replayed once again, but in slow motion including subtitles, which read “This task is being done by the special forces of the MUP (the ministry of interior). It is estimated that roughly 5-6 thousand Muslims are still wondering in these forests and mountains.” The scene is then edited from this point and continues to show consistent shooting and firing into the forest, whilst the perpetrators’ are clearly visible in the tanks, shelling the civilians.

The next segment of the Petrovic footage depicts Borovcanin, directing Petrovic to capture on film the civilians surrendering to the Serbs, upon being encouraged. In this particular scene, what appears to be clothing in the field, turn out to be dead bodies lying in the field. Following some edited cuts, the scene reveals the events Petrovic captures on the road whilst travelling in the same vehicle as Borovcanin, and as such captures what appears to be bundles piled on the road side, whilst passing Kravica warehouse.

The final segment of the Petrovic footage played within the trial video is a key scene, as it replays the previous scene depicting the conditions on the road, whilst passing Kravica warehouse, including commentary "Surreal scenes you must admit" whilst gunshots can be heard in the background. Moreover, whilst displaying what appeared to be bundles of clothing in the previous scene, the reporter comments "There are dead Muslim soldiers". A Slow motion segment of the Petrovic Studio B footage then zooms into a pile of bodies in slow motion.

The final part of the *Srebrenica Trial Video* consists of the Antelope footage, showing the survivors of the Column arriving on free territory on the 16 July. The survivors include the able bodied men who were separated from their families, and with emotions running high some are crying, whilst medical aid is being provided to those who have ghastly wounds. However, gunshots can still be heard in the background. At this point the trial video draws to an end.

Video exhumation of Cancari:

Introduced as exhibit P01870, the *Video exhumation of Cancari* included under 20 minutes of footage depicting a recorded exhumation, narrated at first hand, by former Chief of the Srebrenica Investigation Jean-Rene Ruez. As such, the footage portrays archaeologists' uncovering skeletons from the graves, over the different days they work on exhuming the grave (11-14 and 17 May 1998).

Video-Kravica Warehouse:

Video-Kravica Warehouse, recorded in February 1996, was also introduced and admitted as P01575 within the *Srebrenica Seven* trial. This footage, around 17 minutes in length, portrayed the conditions of the warehouse eight months after the atrocities were committed within the warehouse. The narrated footage provides Peter Nicholson's firsthand account of the conditions found in the warehouse, as he filmed and uncovered the scene (whilst working for the office of the prosecutor). The footage begins outside the warehouse and moves to capture the scene inside the warehouse, with Nicholson providing minimum commentary and only describing the damage that is visible. Moreover focus is given to particular scenes, including the burnt walls and ceiling and the huge amount of bullet holes at the entrance and gaping holes and pockmarks in the wall. The final portion of this footage consists of Nicholson zooming into empty shell casings, grenades, grenade handles, and in particular drawing attention to the location of a large number of grenade handles found under a window.

Video-Orahovac area:

Moreover the prosecution also introduced exhibit P01718 *(Video-Orahovac area)* as evidence during the *Popovic et al* trial. This footage just over 5 minutes in length recorded the aerial view of a dump site. Once again Nicholson recounted his firsthand experience of April 1996, whilst uncovering pieces of human remains from a grave site, before moving over to a dump site, from which they uncovered various belongings. These included 25 socks, 27 hats, 102 other pieces of clothing, a grenade box, plus bullets and ammunition and 11 documents as well as assorted photographs.

Having outlined the gruesome content of the various video exhibits, admitted as evidence before the ICTY, it is now crucial to address how the film was used by the prosecution and compare this with the screening of the *NCC* at Nuremberg. In effect, it will

be assessed whether lessons have been learned since Nuremberg, to determine whether the interests of justice could truly have been served at The Hague for the victims of the Srebrenica Massacre.

Use of the film

At Nuremberg, the use of the *NCC* film was exceptional, in particular, due to being shown out of sequence and screened in its entirety in one sitting, only once throughout the entire proceedings. Moreover, it was extraordinary, as it was for the first time that atrocity film had been shown within an international criminal trial. In contrast, the use of film at The Hague, over sixty years later, differs somewhat considerably, as, in every sense the screening of the *NCC* was exceptional, the use of film at The Hague appears to be "normalised". This norm under which atrocity film is utilised at The Hague, illustrates how film is now integrated and screened in a logical sequence, on various occasions throughout the trial, and lacks the shock value that was present at Nuremberg.

As such, the use of the *Srebrenica Trial Video* differs considerably, when compared with the use of the *NCC* at Nuremberg, which was used as primary evidence, screened in its entirety in one sitting to demonstrate what the term 'concentration camp' implies. In contrast, the *Srebrenica Trial Video* was screened, over a number of days, at The Hague, as supplementary evidence, alongside prosecution witness testimony to support the testimony.

Moreover, the use of film before the ICTY, can be seen to be more integrated, in particular due to the manner in which the prosecution chose to screen the trial video. As such, it is noteworthy that the initial screening of the trial video was split between two witness testimonies that of Investigator Jean-Rene Ruez, former chief investigator of the

Srebrenica Investigation, and that of Dutch witness Pieter Boering, who was present during the Hotel Fontana meetings. To this end, the entire trial video, minus the segments containing the three meetings at Hotel Fontana, which contributed over an hour towards the trial video, were screened during the examination of Ruez. As the footage of the meetings was deemed more relevant to the testimonies of the Dutch witnesses, who were present during the meetings, those segments were thus screened during their examination. This clearly illustrates how the film was relied on by the prosecution in a very logical and integrated manner, as supplementary evidence. In contrast to the *NCC*, the *Srebrenica Trial Video*, was not shown out of sequence nor was it screened in one sitting for dramatic impact. Rather, the trial video was screened in parts and occasionally paused, as supplementary evidence to the testimony of two witnesses, one of whom was present within the film itself.

Another significant use of the *Srebrenica Trial Video*, which illustrates how well the trial video was integrated within the trial proceedings, was the manner in which specific clips were replayed during the testimonies of eye-witnesses, present within the footage. Such use of the film is of particular importance, as witnesses present within the footage itself are able to corroborate the film and subsequent events, thus increasing the probative value of the specific clip. In contrast, the *NCC* at Nuremberg, was only screened once during the entire trial and then put of sequence, and therefore not properly integrated into the overall presentation of the prosecution case. However, this was presumably due to the nature and content of the footage, which prevented the integrated use of the film.

Moreover, the timing of the *Srebrenica Trial Video* is also significant, as, whilst at Nuremberg the *NCC* film was shown out of sequence, earlier than scheduled, the trial video used before the ICTY was scheduled to be screened quite early into the trial. More importantly, the trial video was screened following two weeks of witness testimony

provided by three victim-witnesses. As such, it is clear that "victim-witnesses are the soul of war crimes trials at the ICTY" (Wald, 2001: 107), as they provide a summary of the case, by testifying based on their experiences to set the scene. Therefore, as was the case at Nuremberg, where the *NCC* was, in some respects, screened to set the scene, the *Srebrenica Trial Video* was not used to set the scene, as that was done more effectively by the surviving witnesses.

Another noteworthy use of the *Srebrenica Trial Video* is the use of the footage to create a book of stills and interactive CD. This innovative step was not one that was adopted at Nuremberg, as no such book was created, based on the *NCC* film. This once again illustrates the integrated use of film, as even the creator of the book, investigator Tomasz Blaszczyk, was called by the prosecution to testify on the book and CD. This road book, as it was often referred to, was created from stills taken from the Petrovic footage and of the investigator's own pictures, of the area the footage was recorded, for comparison purposes. However, despite the defence's attempts to rule out the admissibility of the book of stills, based on two objections; one that the evidence would be cumulative and thus repetitive of the Petrovic footage; and two that the exhibits lacked the probative value to justify their admissibility, the Trial Chamber reached a unanimous decision to agree with the submission of the prosecution. More specifically, the counter arguments put forward by the prosecution were that the road book was not cumulative, as it provided clearer images than the trial video, whilst on the point regarding probative value, the prosecution argued that weight should be determined after hearing the evidence, and the evidence should not be rejected out of hand at the outset.

However, it is of particular significance that the screening of the *Srebrenica Trial Video*, itself, within this trial, has never been challenged by the defence. This in turn suggests the

defence's acceptance of the trial video, which further illustrates the integrated, accepted and normalised use of film evidence within the trial proceedings.

Having identified the prosecutions reliance on the *Srebrenica Trial Video*, it is crucial now, to address whether the interests of justice were served, or whether (once again) a repeat of the deficiencies of the Nuremberg trials occurred, by screening the film despite evidential concerns. What follows will now address whether the film raises the same or similar evidential concerns as the screening of the *NCC* at Nuremberg. In turn, it will be assessed whether lessons have been learned since Nuremberg, to determine whether the interests of justice could truly have been served at The Hague for the victims of the Srebrenica Massacre.

Evidential Concerns

On this point, the use of the *NCC* film, as was illustrated in the previous chapter, raised several evidential concerns, including criticism for its failure to contribute towards a fair trial, which was not achieved partially due to the *NCC* film being shown out of sequence, for dramatic impact. The screening of the *Srebrenica Trial Video,* within the case of the *Srebrenica Seven,* will be examined and contrasted with the *NCC*, to determine if the evidential concerns raised in relation to the *NCC* at Nuremberg have been rectified before the ICTY, to conclude what, if any, lessons have been learned.

Lack of a Direct Evidential Link

As was illustrated in the previous chapter, the *NCC* was subject to criticism for failing to establish individual guilt, and thus falling short of serving the interests of justice. Nevertheless, the screening of the *NCC* film was partially justified on the basis of demonstrating what the term 'concentration camps' implies. In comparison, film before the

ICTY, appears to be used for more of a specific purpose, predominantly for identification purposes; identifying people, locations and directions of travel. Such use of film is of particular significance, as eye-witnesses, some of who are depicted within the footage itself, are on numerous occasions, asked to identify the accused, other individuals who may later testify, or individuals who held a significant role during the forcible evacuation process. More importantly, the trial video is also used during the testimony of victim-witnesses and other eye-witnesses to identify locations, in particular some of the execution sites. In this sense film is deployed and frequently paused, strategically, to draw attention to crucial scenes, which either depict the presence of the accused and other individuals in the vicinity of the crime scene or depict the areas in which the crimes occurred. As such, witness testimony, not only corroborates the events, but also provides a contextual background. In any event, as some of the accused are visible within the trial video itself, issues of establishing a direct evidential link and individual guilt are *reduced*, though not *eliminated*.

In addition, attempts to avoid issues relating to lack of a direct evidential link, were made by Chief prosecutor Peter McCloskey, who announced in the prosecution's opening statement:

> "We will begin the Prosecution by bringing into court a few of the amazing men and boys that survived the mass executions... We'll move on to the former chief of the Srebrenica investigation, Jean-Rene Ruez, then to the Dutch Battalion soldiers, experts, Bosnian Serb witnesses, and actual video footage.... It will likely be the most important case we will ever try. But the focus of the Prosecution will not be the events and the crime base... The crimes have never been in serious dispute. We will therefore focus this case on the evidence linking these accused to these crimes." (Trial Transcript: 385).

Although McCloskey does not explicitly refer to the film evidence linking the accused to the crimes, his intention to focus on the linkage evidence, and thus avoid issues regarding lack of a direct evidential link, is clear from the outset. In effect, if compared to the case at Nuremberg, a direct evidential link between the defendants and the content of the film is

easier to establish, as some of the accused are depicted within the footage, committing at least some of the acts of which they are accused.

As such, it is difficult to deny such a direct evidential link between some of the acts depicted in the trial video and the accused Borovcanin, who is visible regularly within the footage, particularly in the portion recorded by Serbian journalist Petrovic. To take one example, Borovcanin and his troops are seen in and around Potocari on 12 and 13 July, taking part in the wholesale separation of men and women, instead of screening and separating armed men, aged 16-60. The significance of this segment of the footage, in establishing a direct evidential link, is highlighted by the Trial Chambers ruling:

> "Later that morning of 12 July, Borovcanin was present in Potocari with his men...The video footage evidences clearly what Borovcanin would have seen in Potocari at that stage—human suffering and a desperate and terrified population of Bosnian Muslims gathered under chaotic conditions...The coercive atmosphere in Potocari would have been tangible to him, the terror on the faces of the population, young and old, men and women, visible and palpable to such an extent that the only reasonable inference is that he knew that the population of Srebrenica had been forced out of their homes by the attack..." (*Popovic et al* Judgment; [1488]-[1489]).

As such, this particular portion of the film was of some significance in establishing Borovcanin's guilt, as the Trial Chamber concluded that the defendant Borovcanin had knowledge that he was witnessing a forcible transfer.

Moreover, in another clip, Borovcanin on the afternoon of 13 July can be seen facing the White House looking at the men on the overcrowded balcony, who were later executed. The significance of this clip in establishing a direct evidential link, is also noted within the trial judgment:

> "Borovcanin's return to Potocari in the afternoon of 13 July is partly captured on the Petrovic video...The overcrowded conditions in the White House where the separated men were detained was specifically drawn to his attention by UNMO member Kingori and he is caught on videotape standing in front of the White House during this conversation..." (Judgment; [1492]).

This clearly illustrates Borovcanin's knowledge of the dire conditions. However, due to the lack of evidence, that Borovcanin saw or took part in any of the abuse, this segment falls short of establishing a direct evidential link and thus fails to establish Borovcanin's individual guilt.

In another portion of the trial video, whilst Borovcanin and Petrovic travel together along the Bratunac-Milici road, where various crimes occurred, a massive pile of bodies is depicted in front of Kravica warehouse. Moreover, the prosecution alleged that from the automatic gunfire that can be heard on the Petrovic video, the executions in the East Room of the warehouse were still in progress when Borovcanin arrived at the warehouse. Although this portion of the film, at first instance appears to be of significance in establishing the guilt of Borovcanin, by placing him there at the time the atrocious events took place, the Trial Chamber rules:

> "The Trial Chamber has studied carefully the Petrovic video passage related to this issue. While gunfire can be heard simultaneously with the footage showing the Kravica Warehouse with the bodies out front, the Trial Chamber cannot conclude where the gunfire was coming from and in particular that there was an ongoing execution at the time. The Trial Chamber notes that the video images do not capture anyone shooting on the grounds of the Warehouse at that time." (Judgment; [1517]).

Therefore, as the Trial Chamber ruled the video fails to establish that executions were ongoing when Borovcanin arrived, it appears the video itself falls short of establishing individual guilt.

In addition, Borovcanin is also depicted at Sandici meadow and at the column, where he is seen with his troops who are encouraging the civilians to surrender. As such, the Trial Chamber rules:

> "What the video footage...illustrates is that there was a single operation that day which resulted in the surrender or capture of many hundreds of Bosnian Muslims from the column. Once captured, the Bosnian Muslim prisoners were escorted to Sandici Meadow...The vast majority were subsequently transported under guard,

> on foot and by bus, to the Kravica Warehouse where they were detained prior to the execution." (Judgment; [1548]).

This particular portion of the film is of some significance in establishing Borovcanin's guilt, as Borovcanin's participation in implementing this single operation, and encouraging Muslim civilians to surrender, clearly establishes individual guilt. As such, the film clearly had a direct evidential link between the defendant Borovcanin and the acts of capturing the Bosnian Muslim civilians.

Moreover, the *Srebrenica Trial Video,* also establishes a direct evidential link between Vinko Pandurevic and some of the scenes depicted in the footage, and as such, is of some significance in establishing Pandurevic's individual guilt. This is clearly evident in the trial video, where Pandurevic can be seen accompanying General Mladic, whilst they march triumphantly through Srebrenica upon the collapse of the Srebrenica enclave. As such, the prosecution explains what can be expected in the film:

> "you'll see Colonel Pandurevic lean over to him [General Mladic] and says something to the effect that, General, the Muslims are -- we have to get the Browning up on the hills, the Browning meaning the Browning machine-gun, in order to help secure the area..." (Trial-Transcript: 478)

This is of particular significance, as it helps the prosecution to prove the Murder charge (Article 3) against Pandurevic. As such, the prosecution were able to use the trial video to highlight Pandurevic's intention, to kill the Muslims who had not at that point been captured. Therefore, this aspect of the film, clearly had a direct evidential link with Pandurevic.

The defendant Popovic is also present during this triumphant walk into Srebrenica on 11 July, which suggests his knowledge of these crimes. Moreover, Popovic is also visible in the footage of the events as they unfold on 12 July in Potocari, which depict the men and women being separated. On this point, the trial judgment noted:

> “Popovic was also physically present in Potocari during the day of 12 July. It is clear from the video footage of this event that Popovic could see the desperate situation of those gathered there and would have experienced the coercive atmosphere that encompassed Potocari on this day, which left the people gathered there without a genuine choice regarding their transfer...The Trial Chamber therefore finds that throughout the day on 12 July, Popovic knew that it was intended that all the Bosnian Muslim women and children then in Potocari were to be forcibly transferred from the Srebrenica enclave.” (Judgment; [1172]).

This clearly provides evidence that Popovic had knowledge of the JCE to forcible remove the population from the enclave. As such, this clip provides a direct evidential link, between Popovic and the acts depicted on the screen.

On the other hand, issues regarding lack of a direct evidential link may arise in relation to the aftermath footage, including the video exhibit recording the exhumation of the mass grave and the exhibit of Kravica Warehouse. As such, potential problems relating to the exhibit's ability to establish individual guilt may arise as the footage does not capture any of the defendants. Nevertheless, the aftermath footage clearly holds significant weight in terms of establishing circumstantial evidence.

Hearsay Issues

Although the hearsay rule is clearly relevant to the perceived legitimacy of a criminal trial, the rules which were applied within the IMT and then replicated for the ICTY, clearly failed to endorse such a rule. Rather, the absence of the rule against hearsay, was in part, justified by the procedural model which was applied at the IMT, as it was undisputed that a panel of judges would preside over the proceedings as opposed to a trial by jury. As such, by “Recognizing the relationship between procedural models and many evidentiary matters, the framers of the Nuremberg Tribunal [were] deliberately determined not to be bound by "technical rules of evidence designed for jury trials"” (Rutledge, 2003: 166). This clearly illustrates the lack of relevance given to the rule against hearsay within international trials, as hearsay evidence, which is usually excluded within common law trials, is evidently

admitted within international trials. Nevertheless, some limitations are placed on the admissibility of hearsay, in the form of the general requirements of probative value and relevance. “As such, the admissibility of hearsay is determined on a case-by-case basis, but is routinely permitted... As long as specific testimony is admitted to bolster the tribunal's findings, hearsay serves merely to assist in obtaining a more complete record and context of the case." (Rutledge, 2003: 170). This suggests hearsay is admissible, as contextual evidence, where it is sometimes necessary, in order to gain appropriate insight into the real context of the crimes.

To this end, the notion of hearsay being admitted as contextual evidence, is evident within the *Popovic et* al trial in relation to Investigator Ruez’s testimony. As such, what is perhaps noteworthy is that although the *Srebrenica Trial Video,* itself, was not subject to issues of hearsay, objections were raised by the defence, in particular by Mr Haynes, to the testimony of Investigator Ruez, who would testify in relation to the film. The Defence arguments put forward were based on the evidence amounting to hearsay, primarily as Ruez was not a witness of fact, who was in Srebrenica at the time of the events, therefore should not be allowed to comment as an investigator on the video.

Nevertheless, despite Mr Haynes objections, it is noteworthy that the Trial Chamber ruled Investigator Ruez’s evidence admissible, with Judge Prost declaring in response to Mr Haynes objection:

> “to take that position is to take the position that the law of hearsay, in its strictest, form would apply...You're saying in a Tribunal where hearsay is in fact admissible, that we would apply an even stricter rule than in national jurisdictions...” (Trial Transcript: 1164).

As such, Ruez’s evidence was deemed admissible by the Trial Chamber, and was further justified on the basis of hearsay being relevant as contextual evidence. Consequently, the evidence provided by Ruez was of particular significance, as he provided an insight into the

context of the crimes, by explaining the crime scenes, covering what he saw and observed, as well as providing information on the context of why he went to particular locations. To this end, the Trial Chamber agreed that some hearsay is relevant as contextual evidence, as it was required to put the places in context.

Moreover, as was illustrated in the previous chapter, hearsay issues have also been raised by a number of legal academics in relation to the screening of the NCC at Nuremberg. As such, arguments were raised against the use of the atrocity film on two grounds, firstly owing to anonymity of the spoken narrative and secondly due to the introduction of new material through the narrative which was not borne out of the film itself.

In contrast, it appears some lessons have been learned by the ICTY, particularly on the issue relating to the spoken narrative, as the *Srebrenica Trial Video* appears to avoid the use of a voiceover. Instead, the majority of the footage is compiled from footage without a voiceover, recorded in the original Serbian Serbo-Croat language, some of which is first hand evidence of Petrovic's recording, some of the Muslim civilian's own recording, some of Dutchbat recording and narration is only present where a TV broadcast is incorporated into the footage. As such, issues of authenticity do not appear to exist with the trial video.

This illustrates one clear step towards fairness, showing some lessons have been learned since Nuremberg, as despite the hearsay rule lacking relevance within an international trial, the compilers of the trial video at The Hague appear to have remained cautious of the potential hearsay issue, by avoiding the use of a voiceover, and thus allowing the video to some extent speak for itself. Nevertheless, although the trial video is not subject to issues of hearsay in relation to the spoken narrative, it fails to truly speak for itself as evidence. Therefore, the very fact the footage is edited and compiled from various sources, suggests it depicts events from a certain perspective that frames them and their implications in a

certain optional and selective way and thus prevents the idea of the footage representing a true reality.

Moreover, in comparison to the *NCC*, which was criticised for being screened including an anonymous narrative of signed affidavits, the *Srebrenica Trial Video,* itself, contains no such affidavits to attest to the reliability of the film and to establish witnessing the events portrayed in the film at firsthand. Instead, the admissibility of affidavits is governed by Rule *92bis*, for the author to attest to the accuracy of the statement. In addition, Serbian journalist Petrovic, whose footage is used within the trial video, is also examined, as a prosecution witness, on the reliability of his segment of the film. This prevents the footage, particularly the segments recorded by Petrovic, from amounting to hearsay, which shows a notable difference compared to the use of the *NCC* film before the IMT.

A fundamental criticism of hearsay evidence is that such evidence is problematic as it is not subjected to cross-examination, and that it may be difficult for trial lawyers to either corroborate or rebut such evidence. This principle was stated by Lord Normand in *Tepper v The Queen* [1952] at para 486, as "It is not the best evidence and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken… by another witness cannot be tested by cross examination, and the light which his demeanor would throw on his testimony is lost."

To this end, the use of the *Srebrenica Trial* Video is of particular significance, as, despite initially being screened as supplementary evidence during former Investigator Ruez's testimony, it was also replayed on numerous occasions, throughout the trial, during the testimony of witnesses who were actually depicted within the footage. The importance of the trial video being screened alongside witness testimony, particularly witnesses who are depicted within the footage itself, is colossal, as such witnesses are able to corroborate the

film evidence and vice-versa, and thus avoid the wider issue of making uncorroborated claims.

Whilst being screened for the first time within the *Popovic et al* trial, during Ruez's testimony, the film was primarily used to identify people (including the accused and on occasion the witnesses themselves), places (including some of the execution sites) and directions of travel. What is of particular significance is that Ruez did not comment upon the evidence unless asked to do so, as the video appeared to be used mainly for identification purposes, and in this manner avoided being subject to issues of hearsay as the defence feared. Moreover, the trial video was also screened during the testimonies of witnesses who were present within the footage, and could thus corroborate the video evidence. The following examples, although illustrative, are by no means exhaustive.

To take one example, the Hotel Fontana meeting segment of the trial video was screened during the testimony of prosecution witness Colonel Boering, a Dutchbat witness representing UNPROFOR, who was present within the footage. Consequently, the witness could personally attest to the events taking place and establish witnessing the events at firsthand thus corroborate the events depicted within the film, preventing it from amounting to hearsay.

Another example of the trial video being screened during the testimony of a witness, who can be seen within the footage, reassuring the civilians, saying "don't be afraid", was during the testimony of Dobrisav Stanojevic, who was part of the PJP Company and claimed to not having taken part in the forced evacuation of civilians. Moreover, the trial video, was also used by the defence, on cross-examination by Mr Stojanovic, who asked the witness to explain why he was reassuring the civilians. The cross-examination revealed that the witness was reassuring the civilians with the best of intention, which demonstrates not only

the prosecution's reliance, but also the defence's reliance, on the film, for the purposes of gaining a better understanding of the circumstances.

The final time the prosecution deployed the *Srebrenica Trial Video*, whilst making their case against the defendants, was during Major Kingori's testimony, who, consequently, identified himself and his location, and was able corroborate the video evidence. Kingori was clearly majorly concerned with the cramped conditions of the men who were in the overcrowded building; "There were too many of them. There was no--no water, no sanitation. There was no food for them, and there didn't seem to be any air, because they were overcrowded..." (Trial-Transcript: 19292). More specifically, whilst pausing the video at two hours, 30 minutes and 46 seconds, which depicted the Studio B segment of the Petrovic footage, of the men cramped together on the balcony and the reason for Kingori's concern, Kingori was asked by Mr Thayer to recall the events in the clip. As such, Kingori was able to corroborate the evidence in the following manner:

> "Your Honour, this is the house we were talking about, the one I said earlier, where all the men were--were herded into. This is the place that, after the men were separated from the women, were all taken to. You can even see the--the overcrowding that I was talking about. There seems to be no space at all in between the individuals. They are in a terrible state inside there, and this is just one part, one of--I think this is the first floor or something. Below, it was the same, and it was quite a mess." (Trial-Transcript: 19294)

As such, the evidence provided by Kingori, not only corroborated the video film evidence, however, simultaneously Kingori introduced new evidence into the trial, which did not amount to hearsay. This is arguably justified as, Kingori was a witness of fact, and witnessed the events first hand, therefore could provide additional evidence which would not amount to hearsay.

Moreover, the aftermath footage, used within the *Popovic et al* trial, also illustrates how the prosecution, once again, avoids issues of hearsay. For example, whilst screening the *Video exhumation of Cancari*, the Trial Chamber, avoids issues of hearsay in relation to the

spoken narrative. As such, despite the video in its original form being recorded with minimum commentary provided by Ruez, whilst screening the footage before the ICTY, the video is played without sound for simplicity. Instead, Ruez is asked to narrate during his testimony, as he himself shoots the video and therefore is able to give firsthand evidence whilst he narrates. Consequently, Ruez provides an outline of what is visible on screen, identifying Professor Richard Wright and other archaeologists, digging up what is a secondary mass grave.

Similarly, no issues arise in relation to hearsay with respect to the *Kravica Warehouse* footage, as once again, the film is screened without sound. Instead, Ruez is again asked to narrate, as he was also present with Nicholson during the filming. In effect, this eliminates any potential hearsay issues with the spoken narrative, as Ruez recounts firsthand experience of collecting samples at the mass extermination site.

Finally, the footage evidencing the *video of the Orahovac area*, also appears to avoid any potential hearsay issues, as once again the video is screened without sound and Ruez is asked to narrate. Whilst providing a narrative within his testimony, Ruez identifies Professor Haglund in the video and provides an outline of what can be seen on screen, without any additional commentary. One must acknowledge, that clearly then, the potential for the film evidence used before the ICTY to amount to hearsay, particularly in relation to the spoken narrative, has been eliminated.

Therefore, it appears the courts have learned some lessons since Nuremberg and have thus avoided the use of an anonymous narrative to avoid potential hearsay issues. In turn, the absence of a soundtrack demonstrates further lessons have been learned, as no new evidence is introduced into the proceedings through the film that is not borne out of the film itself. As such, the *Srebrenica Trial Video* does not have the authenticity and reliability issues of the type raised in relation to the *NCC* at Nuremberg. Moreover, what is of

particular significance, is that the trial video at The Hague was strategically deployed during the testimony of witnesses present within the footage, to corroborate the film evidence, and thus avoid the wider issue of making uncorroborated claims. On this basis, the video evidence clearly becomes very strong, authentic and reliable evidence.

A Fair Trial?

As highlighted in the previous chapter, the use of atrocity film within the Nuremberg trials was criticised on the basis of swaying the court on an emotional basis rather than a factual basis, particularly as it was shown out of sequence, for dramatic impact. However, no such arguments can be made of the *Srebrenica Trial Video* used within the Srebrenica Trial, as the use of film before the ICTY most definitely contributes towards a factual trial and therefore promotes a fair trial.

Whilst the prosecution felt the need to show the film out of sequence at Nuremberg, to re-attract the world's attention, the *Srebrenica Trial Video* at The Hague, was neither shown out of sequence, nor shown as a shock tactic. In comparison, the use of film at The Hague appears to be integrated and normalised, with witness testimony now having larger emotional appeal compared to film. Consequently, film is often used following witness testimony to sum up the case, as well as throughout to illustrate points. To this end, the use of film within the *Popovic et al* trial, cannot be analogous to the use of the *NCC* at Nuremberg, which was criticised for being utilised as a 'shock tactic' by Twist (2005). Moreover, unlike the *NCC* at Nuremberg, which was screened to demonstrate what the words, 'concentration camps', imply, the *Srebrenica Trial Video* is used to support witness testimony and prove certain contested facts. To this end, the trial video is unmistakably real factual evidence, clearly contributing towards a fair trial.

Moreover, what is significant in contrast with the *NCC* film at Nuremberg is that the *Srebrenica Trial Video* is not screened in one sitting, without any breaks for dramatic

impact, which was the case for the screening of the *NCC* at Nuremberg. Instead, similar to the screening of the *NCC* within the Eichmann trial, which screened the atrocity film on four different occasions within the trial, the *Srebrenica Trial Video* is screened over a number of days. What is more, is that the trial video is screened in its entirety alongside witness testimony and replayed on a number of occasions throughout the proceedings to supplement witness testimonies, some of who are present within the footage itself. This clearly illustrates the way in which film is deployed at The Hague, as supplementary evidence, to contribute towards a fair trial.

It is apparent that some lessons have been learned since Nuremberg, as the evidential concerns that were raised in relation to the *NCC,* no longer appear to cause concern at The Hague. In effect, issues regarding the trial video within the *Srebrenica Seven* Trial amounting to a fair trial have clearly been reduced, as have issues of the film establishing a direct evidential link and hearsay issues are almost non-existent. What follows will now assess the impact of the *Srebrenica Trial Video* in comparison to the impact of screening the *NCC* at Nuremberg.

The impact of screening the atrocity film

As highlighted in the previous chapter, the *NCC* film clearly had a dramatic impact on the judges, the defendants and the media present during the trial at Nuremberg. However, it appears that video film before the ICTY fails to have the dramatic impact that was created at Nuremberg, possibly, as the use of film appears to have become integrated and "normalised" within the contemporary tribunal. In contrast, the use of *NCC* at Nuremberg, in a historical context far less saturated with stark video imagery of uncensored death, was novel and exceptional. However, the integrated use of film before the ICTY is evident, as

the trial video was screened over a number of days, as supplementary evidence alongside different witness testimony, paused on occasion and replayed frequently to illustrate points. Consequently, video film evidence no longer has the large emotional appeal and impact that the *NCC* film created at Nuremberg, as heavy reliance appears to be placed on witness testimony. In contrast, Jackson at Nuremberg refused to rely heavily on witness testimony, insisting that documentary evidence should comprise the lynchpin of the prosecution presentation. However, witness testimony has clearly proven indispensable for the ICTY. This to some extent justifies, why film no longer has the type of impact it had at Nuremberg, as heavy reliance appears to be placed upon witness testimony, as opposed to documentary evidence, at The Hague.

However, although the footage from the *Srebrenica Trial Video* did not have the same impact as the *NCC*, it can, to some extent, be argued that it had some impact on the media, at the time it was broadcast, days after the events occurred. As such, a news account from Belgrade reporter, Robert Block read “Bodies pile up in horror of Srebrenica”. The Belgrade reporter upon viewing the footage commented “The video camera panned across the ground in front of the anonymous building in Srebrenica for perhaps four or five seconds, but it was time enough to freeze the blood in any television viewer's veins” (Block, 1995). The use of the words ‘horror’ and ‘freeze the blood’, in one sense, suggests that the video footage, broadcast on the Belgrade station, had a shocking impact. However, the journalists’ overall report of the film, despite describing it as ‘gruesome reality’, did not reveal an extreme level of shock, equivalent to that at Nuremberg.

Moreover, although the film does not appear to have had a shocking impact on the media, it does appear to have captivated the media’s attention, to some extent. As such, media coverage of the *Popovic et* al trial, covering the screening of the footage during Tomasz Blaszczyk’s testimony, focuses on the significance of the Studio B footage of

Petrovic's tape and thus outlines some of the content (Following the Video Trail, Sense Tribunal. The Hague, December 2007). In addition, further media coverage of the following day of the trial, which moves on to the journalist Petrovics testimony, is of particular significance, as it was reported "If the OTP ever decided to stage a documentary film festival about the war in BH from 1992 to 1995, Zoran Petrovic's film made on 13 and 14 July 1995 in the Srebrenica area would be a contender for the prize."('LOST TAKES' from Srebrenica film, Sense Tribunal, December 2007). This would suggest that the film did have some impact on the media.

Nevertheless, the screening of the film failed to have a shocking impact on the presiding judges to result in them adjourning the session without announcing the next session, as was the case at Nuremberg. However, in some respects, the *Srebrenica Trial Video* has had a significant impact on the judges, as frequent and specific references to the trial video, were made within the judgment, not only within the text of the judgment, but also in the footnotes. This not only suggests the film had a significant impact, but also further illustrates that the use of film has been normalised, to the extent that references to the film are made in the footnotes.

Furthermore, media coverage of the *Tolimir* trial reveals that whilst the court was reviewing footage taken by Petrovic in detail, a group of tourists entered the room and left within five minutes (Gutman, 2010). It is questionable why a group of tourists would walk out so soon, and whilst it may possibly be due to the gruesome nature of the evidence, it alternatively could be due to the evidence lacking sufficient impact to captivate their attention.

Overall, the *Popovic et al* trial appears to lack the coverage that was given to the Nuremberg trials, particularly of the impact the film had on those present during the screening. There may be some truth in the views of Gutman (2010) who expresses that not

much interest has been paid to the ICTY compared to the Nuremberg trials. Therefore, although treble the length of the *NCC* film, the *Srebrenica Trial Video,* does not appear to have had the same shocking impact, as the *NCC*.

However, the lack of a shocking impact is of some significance to the films ability to have a prejudicial impact, as the films failure to have a shocking impact, insinuates the trial video could not have had a prejudicial impact on those present within the courtroom.

In any event, showing a film can be a powerful tactic, as was documented in respect to the Nuremberg trials by Douglas (1995). However, due to the change in the filmic landscape, where cinema experiences of horror movies have become the norm, it would be almost impossible to shock those viewing contemporary international trials in the same way film was used to shock those present within the courtroom at Nuremberg.

CONCLUSION

The central question for this thesis has been, whether the use of atrocity film can be justified within war crimes trials, and as such whether it serves "the interests of justice", or whether the admissibility of such evidence should be prohibited within international criminal trials, to prevent the inevitable "prejudicial effect". To this end, this thesis has focused on the use of film at The Hague, in particular, the use of film evidence within the *Popovic et al* trial, to determine whether any lessons have been learned since Nuremberg. It is of particular significance that although admissibility may not be central from an evidential point of view, due to the permissive evidentiary rules adopted by both the IMT and ICTY, admissibility is clearly relevant to the wider issue of "fair trial" and "due process".

The first part of this study has illustrated the strengths and weaknesses of previous analysis and literature in this field, relating to the use of film as evidence within international war crimes trials. Consequently, it has identified themes within previously neglected more recent trials, namely the Srebrenica trials, to extend earlier academic analysis. This thesis has examined the varied debates and controversies over the use of atrocity film evidence, initially concentrating on the more famous use of *Nazi Concentration Camp* at Nuremberg and then moving on to the *Srebrenica Trial Video* at The Hague.

In the second part, the evidential concerns associated with the screening of *Nazi Concentration Camp* at Nuremberg, illustrate the basis upon which the use of the atrocity film is arguably not justified, particularly when judged against 21st century human rights standards from a strictly legalistic perspective. As such, issues of the *NCC* contributing towards an *unfair* trial, in part by being screened out of sequence, for dramatic impact, despite falling short of establishing a direct evidential link with the defendants against which it is deployed, are undeniable. Moreover, the permissive evidentiary rules adopted by the IMT, allowing hearsay evidence, also raise concern, such that the interests of justice

could not be served, as the film failed to hold sufficient probative value, to justify its admissibility. In addition, the shocking impact which the screening had on the media, defendants and particularly judges, who were deemed experts, suggests the *NCC* had a prejudicial impact and thus failed to serve the interests of justice. These evidential concerns clearly highlight the *NCC* had a prejudicial impact which could not be outweighed by its probative worth, thus could not serve the interests of justice and as such could not be justified. However, it is arguable that, according to the legal standards in existence in 1945, the screening of the *NCC* perhaps *was* justified, particularly as it was the first time atrocity film was screened within an international trial.

In the final part, whilst analysing the use of the *Srebrenica Trial Video* at The Hague, this thesis has evaluated whether the use of film is justified at The Hague, and whether any lessons have been learned. To this end, whilst comparing the evidential concerns that were raised at Nuremberg, to the use of film at The Hague, it appears some important lessons have been learned and thus the use of film is justified at The Hague. Consequently, the main arguments raised on this point, which suggest that some clear lessons have been learned since Nuremberg, are:

1) **A Fair Trial -** the way, in which film, at The Hague, has been exceptionally well integrated and normalised within trial proceedings, demonstrates how the use of film, before the ICTY, contributes towards a fair trial. The learning experience since Nuremberg illustrates how the use of film at The Hague tribunal is integrated in a number of ways including; being screened over a number of days, replayed on numerous occasions throughout the trial, and being deployed in a logical and integrated manner as supplementary evidence, screened alongside witness testimony. As such, the deployment of film evidence in a supplementary form, further promotes the evidence-based nature of a fair trial, as it allows for the corroboration of the evidence. The

significance of this integrated method of screening the trial video is that the use of film has clearly been normalised throughout the proceedings to assist the judges in reaching their decision. This in turn suggests clear lessons have been learned, in contrast to the use of *NCC* at Nuremberg, which failed to contribute to a fair trial.

2) **Direct Evidential Link** – the way, in which film is deployed before the ICTY, also demonstrates some lessons have been learned in relation to the issue of establishing a direct evidential link between the defendants and the content of the film. To this end, film at The Hague appears to be deployed for a specific purpose, as factual evidence, in order to identify individuals, locations and directions of travels, as opposed to the *NCC* which was screened to demonstrate what certain words, namely "concentration camps", implied. Consequently, film at The Hague appears to be used for a specific purpose, used as linkage evidence, on occasion to link particular defendants to the crimes, however it is mainly used to identify individuals, locations and directions of travel.

3) **Hearsay Aspect -** The use of film at The Hague also demonstrates some clear lessons have been learned from the controversies associated with Nuremberg, in relation to the hearsay aspect of the spoken narrative. As such, the trial video screened before the ICTY avoids the use of a soundtrack with an anonymous narrative, which raised potential hearsay issues for the *NCC* screened at Nuremberg. Instead, the trial video was screened in its original form in the Serbo-Croat language, without a voiceover. Moreover, the absence of a soundtrack also suggests lessons have been learned, as no new evidence is introduced into the proceedings, through the film, that is not borne out of the film itself, as was the case at Nuremberg.

4) **Impact of Film –** the use of film at The Hague failing to have the shocking impact that was created at Nuremberg, also suggests that clear lessons have been learned, in

relation to the question of "prejudicial impact." As such, the lack of a shocking impact suggests the film lacks having a prejudicial impact, and can thus be justified on the basis of serving the interests of justice.

It follows that there are many arguments for the continued use of film within international trials, justifying its use on the basis of the Tribunal's learning experience. Therefore, the way in which film is used in an integrated manner to conduct a fair trial, the way in which the issue of hearsay is avoided and the lack of a prejudicial impact, clearly supports the idea of film at The Hague serving the interests of justice.

However it is important to clarify the nature of the possible causal link between Nuremberg and the learning experience evidenced within the Srebrenica Trial, which is clearly visible on an objective basis. As such, it is arguable that on an institutional level the system appears to have learned, as some of the difficulties that were identified at Nuremberg appear to have been addressed by the Srebrenica case. However, whether this learning curve is a result of the ICTY judges having knowledge of past problems raised by the screening of the film in 1945, and as such, rectifying the approach within the Srebrenica Trial, remains to be determined.

On the other hand, although the learning experience of the Tribunal is evident, some difficulties have been encountered in relation to whether the use of film at The Hague is capable of establishing a direct evidential link with the defendants, as aspects of the film fall short in establishing individual guilt. Nevertheless, arguments advanced against the lack of evidential link between the trial video and the defendants, can to some extent be rebutted, as the trial video clearly goes further than the *NCC* to establish a direct evidential link, as some of the defendants are clearly depicted within the footage, committing at least some of the acts of which they are accused. Moreover, issues with the *Srebrenica Trial Video* may also arise of the hearsay type, in relation to the segments of footage compiled

from the TV Broadcast footage, which include a news reporter's account of the events. As such, arguments may be raised in relation to the hearsay evidence having a prejudicial impact on the proceedings. However, such arguments hold little value, as the images were broadcast by TV stations around the world in the wake of the Srebrenica Massacre, and are therefore already familiar to the world population.

Therefore, in answer to the question upon which this thesis has been based; the use of film is clearly justified at The Hague, under the circumstances of it being used as supplementary evidence, to establish factual evidence when used in a normalised and integrated manner. Moreover, the learning experience is evident, particularly in relation to the hearsay aspect of the spoken narrative, as well in as in relation to the innovative methods adopted for conducting a fair trial. Therefore, the way in which film is now used, by being integrated, normalised, and avoiding some of the evidential issues which caused concern at Nuremberg, clearly suggests that film evidence within war crimes trials is now justified at The Hague. What is more, is that the lack of a prejudicial impact of the trial video, when compared to the use of film at Nuremberg, also supports the notion of film at The Hague being justified, and as such, serving the interests of justice. The implication of this is that the insights contained in previous studies conducted by Twist (2005), Salter (2007) and Douglas (2001) cannot be taken as a generalisable blue print, as they remain empirical studies, based only on atrocity film at Nuremberg, where the use of atrocity film was arguably not justified.

Having outlined the key differences between the use of film at Nuremberg and The Hague, it is clear that they raise interesting questions for follow up research on which others may build. Of the current proceedings underway, it would be interesting to see how this film, particularly the Petrovic footage, will be used in General Mladic's trial, concerning the man widely considered to be the chief planner and organiser of the massacre, and the

wartime Bosnian Serb political leader, Radovan Karadzic's trial. Both individuals evaded capture until recently. Furthermore, as the findings for this thesis have been reached based on only two case studies, a future case study could include the permanent International Criminal Court, as it would be interesting to see whether the "normalised" use of film is confirmed by the ICC.

To conclude, it is imperative to highlight that although the use of film has clearly been normalised, and in turn lacks the 'shock value' that was created at Nuremberg, the use and power of video, on the basis of selective interpretation is unimaginable. Moreover, the progressive development of technology has led to an increasing reliance on moving images and graphic film within courtroom settings, which has in turn, clearly had huge implications for the future of film within legal settings. As such, graphic film undeniably has significant value within international trials, which in particular is highlighted by the integrated use of film, which illustrates how easily film can be used, and is used, within international trials.

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