

**War and Its Witnesses: International Criminal Justice
and the Legal Recognition of Civilian Victims**

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Abstract

This thesis examines how international criminal justice mechanisms construct legal recognition, protection and redress of the civilian victims of armed conflict. Using the International Criminal Tribunal for the former Yugoslavia ('ICTY') as a case-study, it explores how the rules and practices of humanitarian law address and redress acts of civilian victimisation. Since the early 1990s, the United Nations has identified international criminal justice mechanisms as central to the prosecution of perpetrators of civilian victimisation. It has also increasingly understood that such mechanisms are important for their provision of 'restorative' justice to victims, including their recognition, participation and redress. This thesis examines the factors that enable or constrain the process of legally recognising civilian victims in light of this changing role of legal mechanisms. Chapters one and two outline the theoretical and methodological frameworks of the thesis. Chapters three and four analyse the protective rules of humanitarian law and the ICTY's prosecutions of civilian victimisation. A central principle of humanitarian law is that all parties to a conflict must distinguish between civilians and combatants. Civilians are all persons who are not combatants. However, this thesis argues that social categories of group membership are drawn upon and evoked during the processes of legally recognising civilian victims. It shows how the legal category of 'civilian' has been historically imbued with particular notions of nation, ethnicity and gender that can act as exclusionary categorisations. This thesis then examines how the ICTY designates 'civilian' status to individuals and collectivities by focusing on trial proceedings. Drawing on fieldwork at the ICTY, chapters five and six show that civilian victim-witnesses rarely conceive of conflict as a solitary experience, but instead view their victimisation in terms of structural and relational harms to themselves and others. However, this thesis argues that the ICTY's current form of legal practices do not establish recognition of all civilian victims nor adequately capture their collective and harmful experiences of victimisation in conflict situations.

I confirm that this thesis is the work of Claire Joyce Garbett

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Date. 12 June 2009

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Introduction

The Protection of Civilians in War and Law

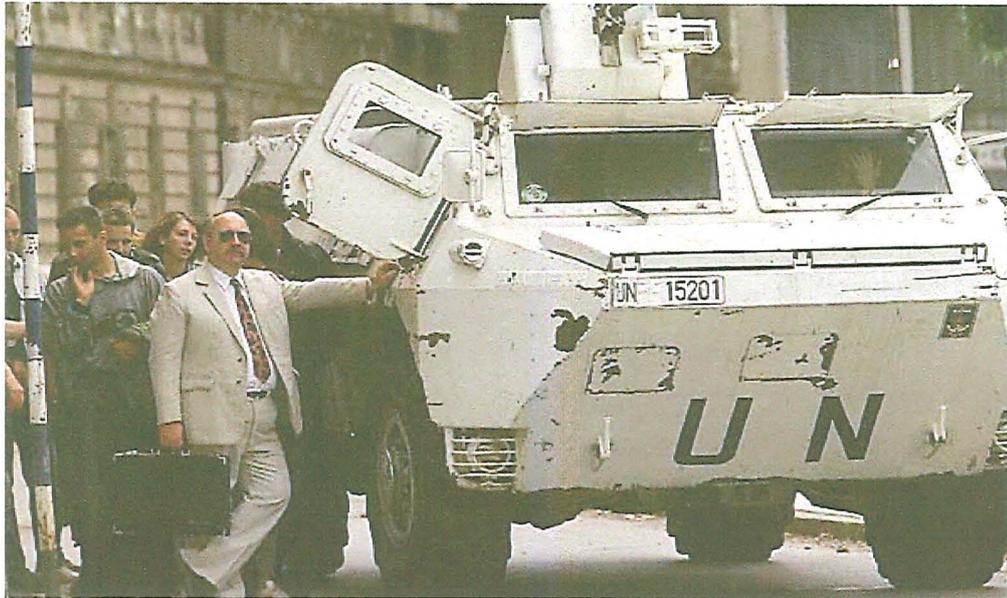


Figure 1¹

Since the early 1990s, the United Nations ('UN') has increasingly focused on the protection of civilians as a central concern. The increasing importance of the protection of civilians can be seen in a number of UN Resolutions and Reports, as well as the emerging norm of a 'responsibility to protect' (Panyarachun, 2004).² In this new conception of an international responsibility to protect, the UN describes the safety and security of civilians as resting on the parties to a conflict complying with the protective rules of international humanitarian law. It condemns breaches of these protective rules and

¹ Photographer unknown. Source: www.sarajevo-x.com.

² United Nations Security Council, Report of the Secretary-General on the Protection of Civilians in Armed Conflict, 28 October 2007 (S/2007/643) ('Report of the Secretary-General, 2007'); United Nations Security Council Resolution 1738 (2006), 23 December 2006 (S/RES/1738 (2006)) ('Resolution 1738').

contends that such acts of civilian victimisation may constitute war crimes, crimes against humanity or genocide.³

The United Nations has also increasingly characterised international criminal justice institutions as key mechanisms for the regulation, enforcement and prevention of acts of civilian victimisation that breach the protective rules of humanitarian law.⁴ Following the growing emphasis on the provision of forms of retributive and restorative justice by legal institutions, it considers that 'such mechanisms can promote not only individual responsibility for serious crimes, but also peace, truth, reconciliation and the rights of the victims'.⁵ The UN has increasingly claimed that legal institutions should function to render justice to the civilian victims of crimes of war. In this formulation, international criminal justice mechanisms will designate civilian status to persons that were the targets of intentional victimisation through the practices of prosecution, trial adjudication and judgement. In this model, the function of international criminal justice is to legally recognise the civilian victims of acts of intentional victimisation, condemn its perpetration and provide redress for their sustaining of harm.⁶

This thesis examines the international legal recognition, protection and redress of civilians in armed conflict. It explores the institutions, rules and practices that address and redress acts of civilian victimisation. In particular, as will be set out, it employs a case-study of the International Criminal Tribunal for the former Yugoslavia ('ICTY') to analyse its legal recognition, protection and redress of the civilian victims of the Yugoslavian conflict. The UN has developed a broad framework of international

³ Report of the Secretary-General, 2007; United Nations General Assembly, 2005 World Summit Outcome, 24 October 2005, paras. 138-9 (A/RES/60/1) ('World Summit Report').

⁴ United Nations Security Council Resolution 1674 (2006), 28 April 2006 (S/RES/1674 (2006)) ('Resolution 1674'). See also Panyarachun (2004).

⁵ Resolution 1674. See also United Nations General Assembly, 'In Larger Freedom: Towards Development, Security and Human Rights for All' Report of the Secretary-General, 21 March 2005, para. 138 (A/59/2005) ('In Larger Freedom').

⁶ United Nations General Assembly, 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law', 21 March 2006 (A/RES/60/147) ('United Nations, Principles on the Right to a Remedy').

obligations, responsibilities and legal institutions for the promotion and enforcement of their safety and security (Bruderlein, 2001; Chesterman, 2001). However, there are significant legal, sociological and conceptual difficulties in ascribing civilian status to persons in situations of conflict, as this thesis will show (Carpenter, 2006a; Slim, 2007). In contemporary conflicts it appears unclear how the rules and practices of international criminal justice mechanisms such as the ICTY work to construct legal recognition of the civilian victims of armed conflict and redress the harms of their victimisation.

For these reasons, this thesis seeks to develop a more comprehensive account of the presence and participation of civilians as both individuals and collectivities within war and law. It attempts to explore and explain contemporary issues and questions of social and legal importance that are central to the regulation and enforcement of the conduct of armed conflict and the legal address and redress to civilian victims of such hostilities. How, then, do international criminal justice mechanisms recognise the civilian victims of armed conflict? What forms of legal protection does this category of persons hold during hostilities and do criminal justice mechanisms adequately enforce instances of their breach? Do the criminal prosecutions of civilian harms evidence a selective approach in recognising certain 'types' of civilian victims? How, or does, the ICTY enable the participation of civilian victims within its legal practices, for example, during its prosecutorial processes and trial proceedings? And how, or does, the ICTY provide redress to civilian victims of the former Yugoslavia for their sustaining of harm?

The United Nations and the Protection of Civilians in Conflict

The UN has recognised that civilians account for the vast majority of casualties in situations of conflict.⁷ It has also recognised that civilians are increasingly the subject of

⁷ United Nations Security Council Resolution 1265 (1999), 17 September 1999 (S/RES/1265 (1999)) ('Resolution 1265').

intentional attacks by combatants and other armed elements.⁸ The new notion of a ‘responsibility to protect’ exemplifies the UN’s increasing concern with the protection of civilians from such attacks. *All Member States of the UN General Assembly at the World Summit of 2005 recently recognised that:*

[e]ach individual state has the responsibility to protect its population from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means . . . The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VII of the Charter, to help protect populations . . . we are prepared to take collective action, in a timely and precise manner . . . should peaceful means be inadequate and national authorities are manifestly failing to protect their populations.⁹

This ‘significant, even revolutionary, commitment’ by the Member States sets out a renewed focus upon the protection of populations in armed conflict and situations of mass violence (Arbour, 2006; 2008).¹⁰ It builds upon previous UN Resolutions focusing specifically on civilians to establish an international collective responsibility to protect civilians and develop the frameworks and strategies that afford this protection. Most importantly, this concept of a ‘responsibility to protect’ sets out firstly, a new recognition of the civilian victims and populations of armed conflict, secondly, the framework of obligations to ensure their protection and thirdly, that ‘justice mechanisms’ should be established for the redress of breaches of these protections.

Firstly, the UN’s construction of a ‘responsibility to protect’ recognises civilians and civilian populations as ‘present’ within the practices of armed conflict and situations of mass violence. Conventionally, the focus of the laws of war and the wider reporting of armed violence has understood the combatant as the central participant and casualty of war’s conduct (Gardam, 1993a). The concept of the responsibility to protect shifts this recognition of the participants of war from the combatant to an express acknowledgement

⁸ Resolution 1265.

⁹ World Summit Report, paras. 138-139. See also Report of the Secretary-General, 2007 for a more recent affirmation of this principle of a responsibility to protect civilians.

¹⁰ It should be noted that despite the widespread support and endorsement of the ‘responsibility to protect’ by world leaders, it is an emerging and contested legal norm (McClean, 2008: 138).

of civilians as participants and intentional casualties of armed conflict. Importantly, the UN narratives do not describe civilians as being simply 'caught up' in war's conduct as part of unfortunate but inevitable collateral damage or the unintentional victims of the actions of combatants. Instead, there is an express recognition that civilians are subject to intentional, direct targeting and other forms of unlawful conduct that contravene the (minimum) protections of international humanitarian law (Panyarachun, 2004: 231-2).

The increasing concern with the protection of civilians also narrates new obligations to construct and implement this protection to civilian populations. The recognition at the World Summit of the responsibility to protect was the first explicit acceptance by all Member States of this obligation to both their own and other civilian populations (Arbour, 2006). In their acceptance of this responsibility, the Member States agreed to protect their own civilian populations from being the target of international crimes such as war crimes, crimes against humanity or genocide. More significantly, the World Summit Resolution also describes that the responsibility to protect lies with the international community as a whole, working through the UN, to take 'collective action' when national authorities are manifestly failing to protect their populations.¹¹ The obligation to protect civilian populations has therefore become both the responsibility of individual states and the international community. This new international obligation to protect marks a shift from the older framework of state 'privileges' over the treatment of its citizens, to an encompassing model of an international protection of all civilian populations (Jones and Cater, 2001). In this way, there is now an international recognition that *all* civilian populations are necessarily the subject of protection from the violence and victimisation of warfare.¹² Whether the civilian population is of the same nationality as the state or of a different state, the UN describes that their protection is based upon their status as a civilian. For those civilians at risk from the violence of armed conflict,

¹¹ World Summit Resolution, para. 139.

¹² See Report of the Secretary-General, 2007.

protection is not founded by national ties or any other social characteristic, but encompasses ‘all populations, everywhere’ (Arbour, 2006).

Thirdly, the UN considers that ‘justice mechanisms’ applying the rules of international humanitarian law are a key means to enforcing this responsibility to protect civilian populations.¹³ For example, the UN has drawn attention to the importance of the work of the *ad hoc* tribunals for the former Yugoslavia and Rwanda in their contribution to prosecuting those individuals responsible for breaches of this protection.¹⁴ It has emphasised the role of humanitarian law in regulating the protection of civilians and the (national and international) criminal justice mechanisms enforcing these legal rules.¹⁵ However, as indicated above, the UN does not simply consider that these criminal justice mechanisms will enact retributive justice through the punishment of the perpetrators of crimes against civilians. Instead, the UN’s Resolutions evidence a shift in the role of these legal mechanisms for their establishment and provision of redress to the civilian victims who have sustained harm from breaches of the protective rules of humanitarian law.¹⁶ In this new recognition of the relationship between the legal enforcement of IHL and the civilian victims of armed conflict, the UN reflects a move toward the provision of forms of ‘restorative justice’ for the victims (Ashworth, 2002). This shift toward ‘restorative justice’ characterises the victims of violations of humanitarian law (and human rights abuses) as having the right to access ‘justice’, for ‘justice mechanisms’ to symbolically or substantively recognise their status as a victim of violence and provide reparations for their harms (Bassiouni, 2006: 205).¹⁷ In this way, international criminal justice mechanisms are now understood to establish justice for civilian victims through the legal recognition of their status as victims and their harms, the punishment of their perpetrators and the provision of forms of redress to them.

¹³ Resolution 1674.

¹⁴ Resolution 1265. In *Larger Freedom*, para. 138.

¹⁵ Resolution 1738.

¹⁶ Resolution 1738; In *Larger Freedom*, para. 138.

¹⁷ United Nations, *Principles on the Right to a Remedy*, para. 11.

The Legal Recognition of Civilian Victims

This thesis will employ a case-study of the International Criminal Tribunal for the former Yugoslavia ('ICTY' / 'Tribunal') for this analysis of the construction of the legal recognition of civilian victims and the provision of their redress. The ICTY was established by the United Nations Security Council in May 1993. After a series of Resolutions condemning the deliberate attacks upon civilians in the former Yugoslavia,¹⁸ the UN Security Council established a Commission of Experts to investigate reports of violations of humanitarian law in the region.¹⁹ The Commission found that such violations had been committed in a particularly brutal and ferocious manner and that the civilian population had been the deliberate target of attacks.²⁰ Following these findings and international condemnation of the armed violence, the Security Council in Resolution 827 (1993) described that the situation in the former Yugoslavia constituted a threat to international peace and security.²¹ Arising from this determination, the Security Council, acting through Chapter VII of its Charter, established the ICTY as a measure to contribute to the restoration and maintenance of peace.²² The ICTY was to aid the restoration and maintenance of peace through its legal contribution to 'ensuring that such violations are halted and effectively redressed'.²³ This task was to be undertaken through 'prosecuting the persons responsible for serious violations of international humanitarian law'.²⁴

¹⁸ See for example, United Nations Security Council Resolution 769 (1992), 7 August 1992 (S/RES/769 (1992)) and United Nations Security Council Resolution 771 (1992), 13 August 1992 (S/RES/771 (1992)).

¹⁹ The Commission of Experts was established by United Nations Security Council Resolution 780 (1992), 6 October 1992 (S/RES/780 (1992)).

²⁰ Bassiouni, M. Cherif, 'Commission of Experts' Final Report', 24 May 1994 (S/1994/674), Part V; Annex IV (1) ('COE Report').

²¹ United Nations Security Council Resolution 827 (1993), 25 May 1993 (S/RES/827 (1993)) ('Resolution 827').

²² Resolution 827.

²³ Resolution 827.

²⁴ Resolution 827.

Situated in The Hague, The Netherlands, the ICTY is a subsidiary organ of the UN, whilst functioning as an independent judicial institution.²⁵ This legal mechanism holds subject-matter jurisdiction over the offences of Grave Breaches of the 1949 Geneva Conventions, violations of the laws or customs of war, crimes against humanity and genocide.²⁶ It holds jurisdiction over natural persons who are alleged to have committed such offences on the territory of the former Yugoslavia since 1991.²⁷ Due to significant problems with funding and co-operation with nation-states of the region, the early prosecutions of the ICTY were largely focused upon ‘low-level’ individuals (Schabas, 2006), most often with crimes committed against civilians. In contrast, later cases from approximately 2003 onwards have typically charged senior leaders with the ‘most serious’ crimes committed during the conflict. This shift in the types of perpetrators and crimes brought to trial is the consequence of prosecutorial and administrative changes in the Tribunal’s work as part of a ‘completion strategy’ to enable its closure by 2010 (Schabas, 2006).

The ICTY is considered a key mechanism set up by the UN to enforce breaches of the protective rules of humanitarian law against civilians in the Yugoslavian conflict. It provides an institutional example of a ‘justice mechanism’ that the UN describes is central to the enforcement of breaches of civilian protection and promoting the emerging norms of a ‘responsibility to protect’.²⁸ Through its legal practices, the ICTY metes out retributive justice to the perpetrators of civilian victimisation through their prosecution and punishment. In accordance with the notions of ‘restorative’ justice set out above, the Tribunal also claims that it can ‘render justice to the victims’.²⁹ The Tribunal describes

²⁵ Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), 3 May 1993, para. 28 (S/25704) (‘Report of the Secretary-General, 1993’).

²⁶ <http://www.un.org/icty/glance-e/index.htm>.

²⁷ <http://www.un.org/icty/glance-e/index.htm>.

²⁸ In Larger Freedom, para. 138.

²⁹ <http://www.un.org/icty/glance-e/index.htm>.

that it can bring justice to the thousands of victims across the region by acknowledging their suffering and ‘giving them a voice’ during trial proceedings.³⁰

The ICTY is used as a case-study for this research due to its significant role in the enforcement of humanitarian law and for crimes committed against civilians more specifically. The ICTY was the first international tribunal established by the United Nations to prosecute perpetrators of violations of the protective rules of humanitarian law.³¹ While the Nuremberg trials over fifty years ago made an unprecedented contribution to the prosecution of war criminals and their crimes, the ICTY is significant for bringing the first prosecutions against individuals for acts of civilian (and combatant) victimisation by a truly international war crimes tribunal.³² More specifically, the ICTY is an important legal institution for the particular issues and questions of this research due to its specific contribution to the expansion of civilian protection law (Slaughter and Burke-White, 2002: 68). The ICTY has included charges of civilian victimisation as elements of war crimes or crimes against humanity within the final indictments of the accused in all its completed cases to date.³³ It has also made considerable advancements in the development of the jurisprudence of crimes committed against civilians. For example, the ICTY has provided the first definitions of enslavement and persecution as crimes against humanity. Moreover, in recent jurisprudence the ICTY has broadened the scope of applying the protective rules of humanitarian law so that in instances of the adjudication of war crimes ‘no distinction is made between international and non-international armed conflict’ (Slaughter and Burke-White, 2002: 68). As such, ‘the same high level of protection is afforded civilians in both types of war’ (Slaughter and Burke-White, 2002: 68).

³⁰ International Criminal Tribunal for the former Yugoslavia ‘1994-2004 a UNique Decade’ Published by the ICTY Registry, 2004, page 34 (‘1994-2004 a UNique Decade’).

³¹ <http://www.un.org/icty/glance-e/index.htm>.

³² <http://www.un.org/icty/glance-e/index.htm>.

³³ As of 15 October 2007.

The Absence of the Civilian

Despite the changing and increasingly important recognition of the participants of war and law, there is little sociological work on the legal protection of civilians in armed conflict. As Martin Shaw points out, the legal category and concept of ‘civilian’ has ‘never been properly investigated, even in the context of war, in *sociological theory*’ (2007: 113).³⁴ Nor is there a substantive body of sociological work analysing the construction of legal recognition of civilians by international criminal justice mechanisms. Existing sociological work that has taken civilians and conflict as the subject of analysis has not adequately explored the protection of civilians (Kaldor, 2001; Shaw, 2005). Where the protection of civilians has figured as the subject of analysis it has been through legal commentaries identifying the rules of humanitarian law that constitute the framework of civilian protection in armed conflict (Cassese, 2003; Gardam, 1993b; Henckaerts and Doswald-Beck, 2005). There are also important analyses of the historical development of the regulation of armed conflict in regard to the protection of civilians (Best, 1994; Nabulsi, 2001) and the breaches of these regulations by armed forces throughout the centuries (Slim, 2007; Newman, 2004). However, where the concept of the civilian has been the express subject of examination, this has largely focused upon the gendered construction of the civilian (Carpenter, 2006a; Kinsella, 2005) or civilian-military interactions and consequent humanitarian issues in specific situations of conflict (Lamb, 2001; Roberts, 2001). There is a distinct lack of sociological analyses of the international criminal justice mechanisms of the ICTY, International Criminal Tribunal for Rwanda (‘ICTR’) or the International Criminal Court (‘ICC’) for their contemporary construction of legal recognition of civilian victims or the enforcement of breaches of their protection (Ewald, 2006).

³⁴ Emphasis original.

In order to address this gap, this thesis draws upon literature and debates within the growing field of transitional justice scholarship to analyse the construction of legal recognition of civilian victims, the enforcement of breaches of their protections and the provision of redress by justice mechanisms. Transitional justice scholarship examines the establishment and function of forms of ‘retributive and restorative justice with respect to human depredations that occur during violent conflicts’ (Bassiouni, 2002: xv). This body of scholarship is particularly useful for providing a framework to this thesis due to its increasing (although not fully developed) examination of the role of mechanisms of international criminal justice for their recognition and redress of both victims and perpetrators (Kritz, 2002; Mani, 2002; Teitel, 2000).

As noted above, this thesis undertakes a case-study of the rules and practices of the ICTY in order to examine the formation of legal recognition of civilian victims. The ICTY applies the customary rules of international humanitarian law in its criminal prosecutions of the victimisation and violence of civilians (and combatants).³⁵ This body of law is also variously defined as the ‘laws of war’ (Detter, 2000) or the ‘laws of armed conflict’ (Dinstein, 2004). However, this thesis situates the examination of civilian recognition through Jean Pictet’s defining of humanitarian law as that part of international law ‘centred on the protection of the individual in war’ (1985: 1). This framing of humanitarian law considers its application and enforcement as centred upon, and central to, the protection of persons from the suffering of war. Pictet’s characterisation of the protective qualities of this body of law therefore provides an appropriate framework for analysis of both the development of the rules of humanitarian law for the protection of civilians and the broader role of the ICTY for its recognition of breaches of this protection and provision of justice in their aftermath. However, this exploration of the ICTY does not simply examine the current rules of IHL and their framework of protection and recognition of civilians. Rather, this thesis employs a sociological analysis

³⁵ Report of the Secretary-General, 1993, paras 33-35.

of the rules and practices that work to recognise the civilian victims of armed conflict and provide for their redress. This approach enables an exploration of law as a mechanism of regulation of social life through its institutions and practices (Cotterrell, 1992: vii), in this instance as the regulation of particular forms of conduct during armed conflict. Moreover, a sociological approach shows how the law's rules and practices conceptualises the persons central to the social relations of armed conflict, namely combatants and civilians.

The central argument of this thesis is that the legal construction of persons and communities as 'civilian' does not figure as a fixed concept, process or designation. In particular, this thesis contends that there is no stable form of the recognition of civilians through the UN's framework or the differential sites of the international criminal justice mechanisms set up to provide justice to the victims and perpetrators of armed conflict. A foundational precept of IHL is the 'principle of distinction' which describes that the parties to a conflict must at all times distinguish between civilians and combatants. The rules of humanitarian law categorise persons as being either civilians or combatants (Henckaerts and Doswald-Beck, 2005: 3). This framework designates persons as holding 'civilian' status through the nature of their participation in the conflict (i.e. as non-combatants), irrespective of any other social characteristics or distinctions (Sassòli and Bouvier, 2006). However, this thesis shows that there have been, and continue to be, significant historical and contemporary changes in the construction of the legal recognition of civilian victims and the parameters of their protection. Moreover, it illustrates that characteristics such as age, gender, ethnicity or nationality frequently become influential or even determinative in the legal practices that recognise persons as civilian victims. For this reason, it appears that there are significant complexities in the legal ascription of civilian status and, in turn, the possibility for civilian victims to find legal recognition of their harms.

Chapter one examines the legal notion of 'civilian' as defined by the protective rules and principles of humanitarian law. It argues that this body of rules and literatures focus on combatants, rather than civilians as a category of persons. This chapter then turns to sociological and transitional justice literatures, where greater emphasis is given to civilians as a category of persons, their protection and redress. In so doing, it first sets out the main literatures and debates framing these areas of analysis and highlights their definitional and analytical difficulties. This chapter argues that these existing bodies of work do not adequately account for the current focus on the victimisation of civilians in situations of conflict, the legal parameters of their protection or the enforcement of breaches of this protection by international criminal justice mechanisms. For this reason, this chapter then examines and defines the key concepts of this thesis, 'civilian', 'protection' and 'redress'. It draws on a range of disciplinary approaches and bodies of work in order to develop a broader theoretical and conceptual framework through which to define these key concepts and analyse the complex issues of this research.

Chapter two sets out the methodological approach of this thesis and the methods used to undertake the research. This chapter draws on the work of Pierre Bourdieu (1987) and commentators on his work to argue that it is necessary to understand the ICTY as a 'juridical field', that is, as a site of social practices comprising of inter-related rules, practices and procedures. It then argues that a case-study approach is the most useful methodological technique for understanding and analysing the rules and practices of the ICTY for their construction of legal recognition, protection and redress of civilian victims. This chapter sets out the particular social research methods that are used to undertake this case-study analysis, namely documentary analysis, courtroom observation and interviews. For example, this thesis employs documentary analysis of a wide variety of legal and political texts such as the ICTY Statute and UN Resolutions and Reports, as well as legal judgements, decisions and trial transcripts. It also employs courtroom observation of trial adjudications as an integral aspect of this research for enabling an in-

depth analysis of the role, participation and inclusion of civilian victim-witnesses for their understanding of the violence of armed conflict and the Tribunal's redress to its perpetration. This chapter argues that this social research approach provides a distinct perspective of the myriad rules and practices of the ICTY that cannot be found through a purely legal analysis.

Chapter three traces the increasing international legal recognition and protection of civilian victims and their victimisation in armed conflict through the unprecedented establishment of the Tribunal and its prosecutions of Yugoslavia's war criminals. The first section of this chapter examines *The Prosecutor v. Duško Tadić* ('*Tadić*'),³⁶ the first judgement of the Tribunal, in order to explore the changing framework and subjects of international law. This section argues that this body of law is shifting from a system of sovereign states holding exclusive power over the prosecution of the perpetrators of war crimes to a body of law which increasingly recognises individual subjects and promotes the protection of civilians as a central matter of its concern. The second section traces the historical development of the rules of humanitarian law for their recognition and protection of civilians. Through an analysis of these rules, this section argues that this body of law has, and continues to, prioritise the rights and protection of combatants rather than civilians as participants of conflict. Drawing on this analysis, the third section returns to the *Tadić* case to explore the contemporary terms of the construction of the legal recognition of civilian victims through the enforcement of the rules of humanitarian law. This chapter ultimately argues that the protective rules of humanitarian law do not enact safety and security for all civilians in a situation of conflict. Instead, as the *Tadić* case exemplifies, the legal recognition and protection of civilians remains dependent on ties of group membership, of social categorisations of nation and ethnicity that may exclude certain civilians from finding legal recognition of their status and harms.

³⁶ Case No. IT-94-1.

Focusing on the UN's increasing emphasis on the role of transitional justice mechanisms for establishing the legal recognition of civilians, chapter four explores the Tribunal's narrative and record of the civilian victims of the Yugoslavian conflict. This chapter first examines the different models of 'justice mechanisms' that have been established in the aftermath of conflict situations, namely, truth and reconciliation commissions and institutions of international criminal justice such as the Tribunal. It considers how these different mechanisms include civilian victims within their practices and argues that the Tribunal does not adequately enable civilian victims to participate within its practices of narrating the victims and victimisation central to the Yugoslavian conflict. The second section of this chapter explores the Tribunal's narrative and record of the civilian victims of these hostilities through an analysis of the criminal prosecutions brought to trial. It analyses the prosecutions of crimes against humanity for their legal record and representation of different categories of civilian victims. This chapter argues that the Tribunal does not adequately recognise or record all the categories of civilian victims subject to victimisation in this conflict, in particular female civilian victims, and instead constructs a differential record of the Yugoslavian conflict's victims and collective memory of its conduct.

Chapter five examines the complexities of defining individual persons as civilian victims of armed conflict and, in their role as witnesses at the Tribunal, as civilian victim-witnesses. This chapter argues that the Tribunal's definition of a victim as a 'person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed' does not adequately capture their experience of conflict. It determines that it is necessary to conceptualise a civilian victim in terms of their sustaining of harm, as well as understanding the relational qualities of this harm to recognise the broader spectrum of victims of violence, including family and friends. This chapter then examines *The*

Prosecutor v. Dragomir Milošević ('*D. Milošević*')³⁷ to explore how the differential parties to the legal process of trial adjudication, that is, the civilian victim-witnesses themselves, the Prosecution, Defence and Trial Chamber, recognise *individual* civilian victims and their status as such. It analyses how social characteristics such as age, gender and ethnicity can have an impact upon this ascription of civilian victim status and may act as exclusionary categorisations. This chapter then examines how civilian victim-witnesses understand their role and participation in trial adjudications. In so doing, this section explores how the trial process enables civilian victim-witnesses to narrate their experiences of harm. Drawing on fieldwork undertaken at the Tribunal, this chapter argues that civilian victim-witnesses understand their testimonies as an evidential source that contributes to the prosecution of the (alleged) perpetrator, but also as a process that constructs a relationship with the Tribunal enabling the *founding* as well as the *finding* of the truth of their experience of conflict, a relationship and practice that cannot be fully realised within current legal practices.

Chapter six examines the legal recognition of civilians as a collective. It undertakes a case-study of two important cases heard by the Tribunal that adjudicated acts of civilian victimisation perpetrated during the siege of Sarajevo, *The Prosecutor v. Stanislav Galić* ('*Galić*')³⁸ and *D. Milošević*. This chapter examines the construction of the legal recognition of an ethnically-mixed civilian population, that is, a *collectivity* of civilians. This chapter first explores the difficulties of defining civilians as collectivities, as civilian populations, and the forms of victimisation perpetrated against them. It then examines how civilian victim-witnesses during these trials understand the victims of the siege of Sarajevo and identifies two key assertions. Firstly, that there remains a narrative from a small number of civilian victims that the status of being a 'victim' of the violence is dependent upon ethnically-founded lines and secondly, that there is a broad

³⁷ Case No. IT-98-29/1.

³⁸ Case No. IT-98-29.

understanding that all civilians of this city, irrespective of social characteristics, were the deliberate target of military actions. This chapter then explores how the trial proceedings and judgement of these cases founds legal recognition of the civilian population as a victim of 'terror' in comparison to the assertions of the victims themselves. It argues that the judgements re-assert the ethnically-based depictions of the warring parties, a narrative that fails to recognise all civilians as victims of the violence. Most importantly, this chapter argues that the reassertion of ethnic ties fails to recognise the 'positive' social relations and allegiances between civilians that were understood by the civilian victims to construct the civilian population of the city of Sarajevo before, during and after the siege.

Chapter One

The Legal Recognition of Civilian Victims: War, Law and Post-Conflict Justice

In armed conflicts in countries as varied as Afghanistan, Bosnia-Herzegovina or Colombia, a culture of war has emerged which places civilians at the centre of conflict. The great majority of present-day wars are waged across populated areas, sometimes in cities and villages. Combatants seek to displace, “cleanse” or exterminate whole ethnic or national groups; they seek the demoralization or control of people or territories. In many of these conflicts, simply put, war is a war on civilians.³⁹

Within the fields of sociological, legal and transitional justice scholarship, the protection of civilians in situations of armed conflict has increasingly begun to figure as a subject of research and analysis. The new focus on the protection of civilians has led to debates over the applicability of the protective rules of international humanitarian law and their enforcement by legal mechanisms. However, there is a distinct absence of scholarship that engages with the *production* of the category of civilians in law, rather than just their *protection* (Kinsella, 2006). Whether through sociological analysis or other disciplinary approaches, the social and legal construction of the participants of war, that is, ‘the *difference* of combatant and civilian, the *difference* of protector and protected – remains unexplored and undisturbed’ (Kinsella, 2006: 255).⁴⁰ As such, within this inadequate theoretical and conceptual framework the very notions of ‘civilian’, ‘protection’ and ‘redress’ are themselves concepts that continue to evoke both definitional difficulties and analytical contestation. How then, can we begin to develop a better account and conception of civilian victims and their role and participation within the context of the pervasive violence of armed conflict? And how, without an existing body of sociological scholarship to draw upon, should we approach an analysis of the ICTY for its construction of legal models of recognition, protection and redress of civilian victims?

³⁹ International Committee of the Red Cross (1999).

⁴⁰ Emphasis original. It should be noted that Kinsella’s focus is upon the gendered production of the category and concept of civilians in legal discourse.

In order to develop a framework for this analysis and so address the absence of a body of theoretical and conceptual work within this research area, this chapter first examines three key areas of scholarship that have taken, whether directly or more often indirectly, the concepts of 'civilian', 'protection' or 'redress' as the subject of analysis. Firstly, this chapter identifies the legal category of 'civilian' as defined by the rules of humanitarian law and the parameters of the legal protections afforded to these participants of armed conflict. Secondly, it examines debates within sociology which can contribute to the development of an analytic framework for exploration of the recognition, protection and redress of civilians within the legal field. In particular, this chapter draws on sociology of law and sociology of human rights to understand law as a body of rules and practices, regulating the interactions between persons and shaping the identities of individuals and groups. Thirdly, this chapter then explores the field of transitional justice scholarship for its critical engagement with the appropriate role of mechanisms and measures set up to establish post-conflict justice. In particular, this body of scholarship provides a useful framework for this research for its specific analysis of these institutions and their function in constructing and providing 'peace', 'truth' and 'justice' for the victims of violence in the aftermath of hostilities.

Drawing on these fields of scholarship as well as other bodies of conceptual or empirical work, this chapter then examines four key areas of enquiry that are central to further developing an analysis of the legal recognition, protection and redress of civilian victims, but are still subject to conceptual problems or definitional contestation. The first section explores the structures of victimisation in situations of armed conflict. The second section identifies the participants of armed conflict, as civilians and combatants, and explores the historical and contemporary victimisation of civilians during hostilities. The third section identifies the current mechanisms of international protection. The fourth section analyses the function of post-conflict justice mechanisms and the particular role and practices of

the ICTY for its provision of international criminal justice and redress to the civilian victims of the Yugoslavia conflict. For each area of conceptual difficulty or 'problematic', this chapter explores the typical approach to the subject of analysis, identifies where such an analysis does not provide an adequate framework for the specific research questions of this thesis and then draws on different conceptual or theoretical approaches to develop a more nuanced or appropriate account. Drawing on various disciplinary fields, literatures and debates, this chapter outlines the main theoretical debates framing these areas of analysis, as well as drawing out conceptual and definitional difficulties within existing empirical and theoretical work. It employs this inter-disciplinary approach to both complement sociological debates and develop a broader theoretical and conceptual framework for analysis of the complex processes and procedures which work to legally recognise the civilian victims of conflict and provide for their protection and redress.

International Humanitarian Law: The Concept of the Civilian in Law and War

International humanitarian law ('IHL') constitutes the body of law 'centred on the protection of the individual in war' (Pictet, 1985: 1). The legal framework of customary humanitarian law sets out the categories of crimes that constitute this body of law (Henckaerts and Doswald-Beck, 2005; Cassese, 2003).⁴¹ It also establishes the principles that guide institutions such as the ICTY in their adjudication of crimes against civilians (and combatants) such as the 'principle of distinction' (those rules establishing the distinction between civilians and combatants) and the 'principle of proportionality' (those rules balancing military conduct in terms of civilian casualties) (Henckaerts and Doswald-Beck, 2005). These rules and principles therefore provide the legal framework

⁴¹ Customary international law 'represents the law binding upon all member states' (Henckaerts and Doswald-Beck, 2005: xxx). The existence of a rule of customary international law requires two elements: the presence of state practice and a belief that such practice is required, prohibited or allowed, depending on the nature of the rule, as a matter of law (Henckaerts and Doswald-Beck, 2005: xxxii).

for the identification of civilians as a category of persons both ‘present’ within, and as a protected participant of, armed conflict.

The principle of distinction provides the legal framework for the designation of persons as civilians. The authoritative exposition of the current customary rules of humanitarian law by the International Committee of the Red Cross (‘ICRC’) describes that this principle holds that ‘[t]he parties to a conflict must at all times distinguish between civilians and combatants. Attacks must only be directed against combatants. Attacks must not be directed against civilians’ (Henckaerts and Doswald-Beck, 2005: 3).⁴² However, the customary rules of IHL do not establish a ‘positive’ definition of a civilian. They do not set out a definition of a civilian through determination of specific characteristics or actions. Instead, these rules provide a ‘positive’ definition of a combatant and determine that civilians are all persons who are *not* combatants. The ICRC study describes that combatants are ‘[p]ersons taking a direct part in hostilities’ with the exception of medical and religious personnel (Henckaerts and Doswald-Beck, 2005: 12-13).⁴³ From this definition of combatants, civilians are persons ‘who do not take a direct part in hostilities’ (Henckaerts and Doswald-Beck, 2005: 6). During the practice of war, ‘members of the armed forces must first ascertain whether a person is a combatant or a civilian’ (Gasser, 1999: 210) and in the ‘case of doubt whether a person is a civilian, that person shall be considered to be a civilian’.⁴⁴ As an expert witness testifying at the Tribunal in relation to sniping describes, if you do not know whether the person before you is a civilian or a combatant, ‘you don’t shoot’.⁴⁵

⁴² 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict, para. 48. (‘Additional Protocol I’ / ‘API’). It should be noted that certain aspects of the ICRC study on the customary rules of IHL are contentious. For example, Turns points out that the study identifies customary rules applicable to internal armed conflicts without the necessary evidence of state practice to substantiate its claims (2006).

⁴³ This thesis uses the term ‘combatant’ in its generic sense to mean those persons who are directly participating and thus ‘fighting’ in hostilities, rather than the technical sense which differs in relation to the context of the conflict (Henckaerts and Doswald-Beck, 2005: 12-13).

⁴⁴ API, para. 43(1). It should be noted that there is debate as to whether this is yet a customary rule of humanitarian law (Henckaerts and Doswald-Beck, 2005: 23-24).

⁴⁵ Fieldwork, *The Prosecutor v. Momčilo Perišić*. Case No. IT-04-81. 2 February 2009 (‘Fieldwork, Perišić’). See also Henckaerts and Doswald-Beck (2005: 24).

In this dichotomous framing, a combatant is a person who takes a direct part in hostilities and as a result of this participation, is 'liable to attack' (Henckaerts and Doswald-Beck, 2005: 15). For this reason, combatants are 'obliged to distinguish themselves from the civilian population'; they must do so by 'wearing military clothing and equipment or at the very least by carrying their weapons openly' (Rogers, 2004: 9). In contrast, civilians 'may not be attacked nor directly participate in hostilities' (Sassòli and Bouvier, 2006: 143). In this sense, they are legally 'excluded' from hostilities; they are not participants as perpetrators of violence, or legitimate targets of the actions of others. For these reasons, civilians and combatants can be seen as legally counter-posed to each other. Each group of persons must maintain their status as such in order to either have the right to fight in the case of combatants, or the right to protection in the case of civilians. However, it is important to note that the right to protection for civilians under IHL does not apply to *all* civilians in *all* situations. Instead, as Sassòli and Bouvier point out, 'some of those protections are prescribed for all civilians; most of them only for the benefit of "protected civilians"' (2006: 173-4). As will be the subject of further analysis in chapter three, this notion of 'protected civilian' has been a shifting concept of legal designation in the jurisprudence of contemporary war crimes trials.

From this classification of persons, as Ingrid Detter (2000) points out, the principle of distinction then shapes the applicability and parameters of legal protections. The legal rendering of civilian status thus confers the applicability of a particular framework of protective rules for such persons. For example, the ICTY holds subject-matter jurisdiction over four categories of criminal offences: grave breaches of the Geneva Conventions of 1949, violations of the laws or customs of war, genocide and crimes against humanity. These categories of crimes act as protective rules for civilians (and combatants) as they set out legal prohibitions on particular types of conduct and actions during armed conflict.

There are now a number of authoritative legal commentators on the principle of distinction and the legal protection of civilians under these rules. Legal commentators such as Henckaerts and Doswald-Beck (2005) and Cassese (2003) set out the customary rules of humanitarian law and provide detailed analyses of their application by international (and national) courts and tribunals. More specifically, Gardam (1993b), employing the notion of ‘non-combatant immunity’ sets out a comprehensive exploration of these rules for their norms of protection and provision of safety from the effects of warfare. Central to these norms is the determination that, unlike combatants, civilians ‘must not form the object of attack’, and ‘cannot be subjected to murder or mass execution’ (Detter, 2000: 319). Various commentators have also undertaken examinations of IHL’s ‘principle of proportionality’, that is, of the ‘legal norm that requires a balance to be struck between the [conduct of military operations,] the achievement of a particular military goal and the cost in terms of civilian lives’ (Gardam, 2004: 3; see also Rogers, 2004).

However, it is important to note that legal analyses predominantly focus upon the legal rules governing the *protection* of civilians. Despite there being considerable debate and analysis of the legal definition and recognition of combatants, there are few legal texts that provide a similarly detailed examination of the definition and legal recognition of civilians. For example, Sassòli and Bouvier’s text on legal protection in war contains separate chapters on the legal recognition and designation of persons as combatants. It does not, however, contain similar chapters in relation to the recognition of civilians, but instead focuses on their protection (Sassòli and Bouvier, 2006). Where these legal analyses do examine the recognition of civilians, they typically take the concept of the protected civilian as a legally constituted ‘given’, as an already present ‘type’ of person or population that then requires identification as such by combatants (or legal mechanisms in instances of civilian victimisation). This body of scholarship does not sufficiently explore how social characteristics such as gender, age, nationality or ethnicity

become influential or even determinative in the processes of legally recognising particular individuals or groups *as* civilians. However, as the following chapters will identify and explore, it appears that certain civilians are less likely to find legal recognition of their status as such should an act of violence perpetrated against them come before the courts. In particular, several ‘non-legal’ commentators point out that discourses of gender can be seen to produce and influence the construction of social and legal recognition of civilians and combatants. For example, Carpenter (2006a) argues that young males are typically given nexus to having combatant and thus ‘perpetrator’ status, whilst as Kinsella notes, women are seen as ‘the paradigmatic “victims” of armed conflict (in particular, of its sexual violence) and not its agents’ (2005: 255). However, legal analyses do not examine whether certain ‘types’ of civilians are more likely to have their harms brought to trial at an international court or tribunal. Nor do they explore in sufficient detail how, or whether, the current structure of legal processes such as prosecutorial choices or trial proceedings may contribute to the attribution of civilian victim status to particular victims in particular cases or judgements.

Beyond the Law: Sociology and Transitional Justice Scholarship

The Legal Making of Social Rules

To understand the construction of legal recognition and protection for civilians requires an analysis of the regulatory role and function of law and legal processes and the legal constitution and shaping of social identities. This in turn requires an analysis of law as a regulatory mechanism of social relations. Sociology of law provides an important analytic framework for understanding law in this way. Through theoretical or empirical research, this field of study typically identifies and explores how law structures social relations and social life and how, or whether, its rules and procedures can act as a useful vehicle for social change (Sarat, 2006; Cotterrell, 2006). While sociology of law is a broad field, this

thesis will primarily draw upon two key approaches concerning the regulatory function of law and its formation of identity.

The influential social theorist of law, Roger Cotterrell, draws upon and develops the work of Durkheim to describe that social processes form the field of law that works as an 'apparatus of regulation of social relations' (1992: 5). As Cotterrell points out, this regulation of social relations works through legal institutions (such as courts) and particular bodies of law (such as criminal law) (2002: 638). These regulatory mechanisms and rules function to structure 'routine' social relations, that is, to 'repress disorder and to process disputes' (Cotterrell, 2002: 638). However, they also act as a response 'to social breakdown' by regulating and shaping social life when there is a collapse or cessation in the typical ordering of social relations (Cotterrell, 2002: 639; 1998). In this way, law can be understood to act as a regulatory (and enforcement) mechanism during and after situations of armed conflict, when interactions between individuals and groups contravene the usual (and lawful) structures of social relations and conduct. Employing this description of law as a regulatory mechanism, therefore, draws attention to the importance of identifying the protective rules of the Statute of the ICTY for their designation and structuring of particular social relations and actions between persons as lawful, and others as unlawful. It frames an exploration of the role and function of these laws for their condemnation of certain types of social relations and their defining of the nature of 'rightful' relationships between individuals and groups.

However, it is important to note that this approach does not understand law solely 'as a policy-instrument acting on society', that is, of a field or instrument of legal doctrine external to social life, as older socio-legal approaches have suggested (Cotterrell, 2002). Rather, as Cotterrell points out, it is necessary to consider law's existence and operation in terms of 'normative ideas embedded in social practices' (2002: 640). Drawing on Foucault's framing of the ubiquity of power in society, Cotterrell emphasises the

centrality of law's 'presence' as a body of regulatory ideas and action *within* and as an aspect of social life that works to define and shape social relations (2002: 640). Building on this wider role and presence of law within social life, it therefore becomes important to consider broader forms of legal regulation other than that of 'black-letter' law, such as governmental agencies, organizations and administrative bodies for their role in structuring social relations (Cotterrell, 2002: 639). In this way, as will be set out below (and in chapter two), it is important to understand the legal protection of civilians in conflict in terms of a body of mechanisms, rules and practices. This sociological framework is therefore useful for understanding law as a regulatory mechanism, both in terms of the 'rules' but also of those mechanisms, practices and procedures that guide their application and consequent structuring (and enforcement) of particular types of social relations.

Equally important to an analysis of the legal constitution of the 'civilian' as a juridical subject is the increasing understanding that law can be constitutive of the subjects and the social identities of the persons that it seeks to regulate. For example, Nicola Lacey argues that law functions as a social site for the construction and enactment of particular identities (in her analysis, of gendered identities) (2006: 472; see also Cotterrell, 2006; Kinsella, 2006). However, as Lacey (2006) points out, in order to adequately explore law's constitutive role in shaping identities it is necessary to analyse how this process operates through law's 'categories, rules, institutional arrangements, modes of reasoning and analysis' (2006: 473). Providing a more nuanced approach than Cotterrell, and focusing more specifically on the processes of legal adjudication, commentators such as Bourdieu (1987), Lacey (2006) and Campbell (2007) describe that the 'law' functions as a site of social practices comprising of related structures, rules and procedures.⁴⁶ It is the totality of these legal rules and practices, such as prosecutorial decisions, trial practices

⁴⁶ Chapter two sets out how Bourdieu's notion of a 'juridical field' is used as a methodological framework for this thesis.

and evidential procedures that work to shape the formation of social identities and regulate social relations (see Campbell, 2007). The legal field constitutes persons as legal subjects through these legal processes. For this reason, this research will explore law's constitutive role in the making of legal subjects and shaping of social identities through the mechanisms and practices of international criminal justice institutions.⁴⁷ It will set out how these diverse legal practices and procedures work together to construct recognition of individual and collectivities of civilians within the legal field. In particular, as later chapters will illustrate, a central aspect of this research will be to emphasise and analyse how social characteristics and relations problematise the seemingly consolidated legal designation of this status. Social relations and identities complicate the dichotomous framing of civilian and combatant and, as such, the enforcement of protective rules for each of these categories of persons in armed conflict.

However, as commentators such as Hirsch (2005) and Cotterrell (2002) point out, there is a distinct lack of analyses of international law or its rules, institutions and practices in the field of sociology of law. More specifically, as Ewald notes, there is little literature focusing upon the role and function of international criminal justice or the *ad hoc* tribunals and ICC apart from legal literatures on international law and international criminal law (2006: 175). Instead, as Sarat points out, traditional sociology of law approaches hold an 'association of law with the boundaries of nation-states' (2006: 1). They centre on national institutions and their practices for their legal regulation of social relations within that particular state. In this way, this body of work typically 'presuppose[s] the political society of the modern nation-state as its overall conception of the social' (Cotterrell, 2006: 25). In this literature, it is the society of the nation-state and

⁴⁷ The question of law's constitutive role in constructing legal subjects has been taken up in other academic areas, most obviously in legal theory. For example, Costas Douzinas provides a detailed tracing of the emergence of human rights and their role in constituting persons as legal subjects, that in fact, '[h]uman rights construct humans. I am human because the other recognises me as a human which, in institutional terms, means as a bearer of human rights' (2000: 371).

the social relations within this territorial space that require regulation and protection through national rules, institutions and norms.

The increasing international concern with the protection of *all* civilians, as well as many other international or trans-national legal obligations, complicates this state-centric approach to the regulation of social relations. As this focus on protecting civilians, as well as humanitarian law more broadly shows, international legal obligations are now in place for the regulation of a 'society' and social relations that transcend national boundaries. These international legal obligations are indicative of the growth of 'transnational regulatory forms', as well as international rules and principles for the protection of persons beyond a specific state or region (Cotterrell, 2006: 26). They evidence that the 'state monopoly of the making, interpreting, and enforcing the law is slowly ending' (Cotterrell, 2002: 641). Significantly, these laws also show the 'changing character of the social in transnational and international contexts' (Cotterrell, 2002: 641). For example, the international protection of civilians is not based upon a solely state-centric conception of obligations to this group of persons. Rather, these obligations understand all 'civilians everywhere' as a group of persons that require protection from the international community (Arbour, 2008: 453). In this way, civilians are understood as a group of persons that are members of the international community and subject to the international protections of customary humanitarian law. However, as Cotterrell argues, despite clear examples of transnational social relations and regulatory forms, much sociology of law scholarship 'still implies that nation state law and traditional international law, focused on relations between states, define the essential nature of the legal' (2002: 641). This body of work has yet to develop a body of literatures or debates that analyse international laws and institutions for their regulation or construction of relations between persons beyond the parameters of the nation-state.

In contrast, sociology of human rights has increasingly taken international laws and regimes for the protection of persons as the subject of analysis. Such analyses of international human rights typically set out the importance of such rights for the protection of persons from acts of violence. For example, Turner (1993), Levy and Sznajder (2006) and Sjoberg *et al* (2001) all argue that the development of human rights at a supra-national level provides new forms of protection for persons beyond the traditional level of the nation-state. They refer to institutions such as the United Nations, the ICTY and ICC, and human rights regimes (whether 'hard' or 'soft law') such as the Universal Declaration of Human Rights, as indicative of an emerging international framework of protective rules and the possibility for their enforcement. In these accounts, the increasing proliferation of these 'human rights' mechanisms in the post-Cold War era exemplifies a social and legal change for the advancement of the international regulation of the conduct of persons (and states) and the protection of individuals and groups.⁴⁸

However, while sociological work on human rights provides an important framework for recognising the empirical existence and substantive value of international forms of protection, it is clear that this is an under-developed field of analysis (see Pearce, 2001). This under-development is most obviously seen through the absence of particularity or distinction over the context of violence under consideration, the applicable framework of protective rules or the 'types' of victims and perpetrators under their jurisdiction. For example, Turner (1993) points out that the abuse of human rights occurs within 'peaceful' nation-states as well as within situations of armed conflict. However, within a situation of armed conflict the regulation of hostilities comes under the purview of humanitarian law (Henckaerts and Doswald-Beck, 2005). In this and other analyses, there is a lack of

⁴⁸ See Pearce (2001) for sociological analysis of the debates around universal values and cultural relativism in regard to human rights claims and obligations.

distinction between these differential contexts of violence for the applicable frameworks of protective rights and rules. As such, these sociological literatures do not clearly articulate whether the object of analysis is human rights and institutions, or the rules and enforcement mechanisms of international humanitarian law that are specific to situations of armed conflict or mass violations falling within its jurisdiction (see Campbell, 2009).

This lack of specificity over the body of protective rules and crimes subject to examination, in turn, prevents an adequate exploration of the categories and conceptions of victims and perpetrators of such violations. For example, it is often unclear whether these analyses are referring to particular forms of criminal conduct such as crimes against humanity, in which case the victims are necessarily civilians, or if the crimes concerned could include combatant victims (in the case of war crimes or genocide for example) (see Levy and Sznajder, 2006). Similarly, there is often a lack of identification of the perpetrators, as to whether they are state officials accused of human rights abuses, or individuals (whether civilian or military) being charged or held criminally accountable for violations of humanitarian law. In this way, sociological analyses of human rights do not provide an adequate framework for analysis of international humanitarian law as a distinct body of law or the institutions that enforce its protective rules. This body of work largely fails to recognise or address the particularity of *civilian* victims within the context of violent armed conflict. In turn, it does not adequately consider the specific protective rules or forms of redress available to them.

Transitional Justice Scholarship

While sociological work on the international legal recognition, protection and redress of civilian victims remains under-developed, transitional justice is a growing body of scholarship that examines 'the conception of justice associated with periods of political change' (Teitel, 2003: 69). In particular, as Weinstein and Stover describe, transitional

justice scholarship explores how ‘societies torn apart by war and mass atrocity pursue justice for past crimes and, at the same time, rebuild their shattered communities’ (2004: 3). This body of literatures and debates significantly contributes to some of the gaps in sociological and legal analyses of international institutions and their practices. In particular, this field of analysis raises important conceptual and analytic questions over the role of these legal (and non-legal) mechanisms in the aftermath of conflict that will guide explorations of the ICTY’s practices and procedures in later chapters (analysis of the institutional practices of transitional justice mechanisms, and the ICTY in particular, is set out in a later section of this chapter). Most importantly for this research, transitional justice has drawn attention to the ‘audience’ of these institutions and practices, notably, the victims, perpetrators, societies and the international community as a whole (Kritz, 1995; 2002).

Transitional justice scholarship raises and examines three key issues and practices that are commonly put forward as contributing to the objectives of peace, truth and justice and, as such, will be the subject of exploration throughout the following chapters. The first key issue as Kritz points out, is the necessity of considering the practices of bringing perpetrators to account for their crimes (1995: xxiii). For example, it is important to examine which persons are tried for their crimes, which crimes are brought to trial and which persons were the victims of these crimes.⁴⁹ The second issue is whether these legal and non-legal mechanisms can establish ‘an enduring historical account of an evil past’ (Teitel, 2000: 105).⁵⁰ For example, this body of work explores whether criminal prosecutions and trials can contribute to such a record or whether the inevitable selectivity of such adjudications is actually divisive of this process. The third key issue is the exploration of the role and function of these institutions, practices and programmes for their construction and orientation of forms of justice for the *victims* of the harms of

⁴⁹ As will be the subject of analysis in chapter four.

⁵⁰ As will be the subject of analysis in chapter four.

armed conflict (see Weinstein and Stover, 2004; Bassiouni, 2006).⁵¹ This victim-led approach has contributed to analyses of various aspects of transitional justice processes, such as the role of victim-witnesses at trial (Dembour and Haslam, 2004; Stover, 2005) and programmes of reparation or compensation (Roht-Arriaza, 2004).

However, it is important to note that this body of scholarship primarily consists of analyses of forms of retributive justice, that is, of mostly legal approaches that work on the principle that ‘wrongdoing must be punished simply because the wrongful act merits condemnation and punishment’ (Mani, 2002: 33). As Kieran McEvoy argues, through its predominant focus on prosecutorial styles of justice, ‘transitional justice has become overdominated by a narrow legalistic lens which impedes both scholarship and praxis’ (2007: 412-413; see also Teitel, 2000). While there is a move toward examination of forms of restoration and redress for victims of violations of humanitarian law (see for example, Bell and O’Rourke, 2007; Weinstein and Stover, 2004), at present transitional justice focuses more upon the appropriate action *against* perpetrators, rather than measures *for* victims (Rubio-Marin, 2006).⁵² Moreover, where victims are the subject of analysis within this body of scholarship, there is often a lack of identification of civilians as a specific ‘type’ of victim within armed conflict. Empirical and theoretical examinations either implicitly conflate the identification of ‘victims’ with ‘civilians’, or do not adequately identify where issues of legal rules, protection or redress are being understood or promoted for the sake of civilian or combatant victims. For example, Lundy and McGovern (2008) argue that transitional justice mechanisms need to adopt a ‘bottom-up participatory approach’ that enables a greater recognition of victims and their role in ‘truth-telling’ practices for the promotion of social change. However, similarly to sociology of human rights studies, they do not take the civilian victim as the specific

⁵¹ A victim-centred approach will both frame and be the subject of analysis throughout the chapters.

⁵² Emphasis original.

object of analysis, or consider the specificity of forms of legal (or non-legal) protection and redress applicable to them.

The First Conceptual Problematic: Defining Victimisation in Armed Conflict

How, then, do we define violence against civilians in situations of conflict? Much sociological work on violence focuses on the causation or presence of violence within a nation-state or by state officials. For example, a central premise is Max Weber's thesis that 'a State is a human community that (successfully) claims the *monopoly of the legitimate use of physical force* within a given territory' (1948: 78).⁵³ For Weber, the use of violence is not only an action that is undertaken or perpetrated *by* the State. Rather, 'as the sole source of the "right" to use violence', the monopoly over such use is that which defines the state as a political association (Gerth and Wright Mills, 1948: 78). Anthropological approaches can also be seen to engage similarly bounded ties in their studies of the use of violence. Whether within a conflict situation or not, anthropological studies typically comprise of case-study analyses of a community or social setting. For example, the work of anthropologists such as Carolyn Nordstrom (2004) and Paul Farmer (2004) explore the presence of particular types of violence and victimisation within specific social settings through ethnographic research methodologies. However, they do not examine patterns of victimisation across social settings or the particularity of civilians as the subjects of these violent social contexts.⁵⁴

From these sociological and anthropological analyses it is clear, as Heitmeyer and Hagan point out, that at present '[t]oo much research still takes place in *national* contexts', that there is 'no such thing as *international violence research*' (2003: 11).⁵⁵ These narrow

⁵³ Emphasis original.

⁵⁴ The conventional anthropological understanding of the importance of the ethnographic method explains why such analyses focus on particular community or society settings. However, new anthropological work focusing upon and employing multi-cited ethnographies may come to challenge this (see Marcus, 1995).

⁵⁵ Emphasis original.

state or community-centric approaches either do not consider violence within armed conflict, or do not explore such a situation beyond the confines of a specific act of hostilities within particular states or communities. For these reasons, these studies are unable to provide detailed accounts of the presence of specific structures, features or trends of harm in conflict across state or community boundaries. Accordingly, they cannot frame an exploration into the presence of targeted civilian victimisation within past and present conflicts, nor provide an account of which acts of civilian victimisation require international, as opposed to national, legal regulation and condemnation.

Compounding this absence of international research is a developing body of work that constructs a counter-conceptualisation to understanding the violence of armed conflict as a distinct category through aligning its acts and forms with the violences of 'everyday life'. Prominent amongst such a framing is Scheper-Hughes and Bourgois' anthology, *The Violence of War and Peace*, which aims to negate the dichotomy between these contexts and forms of violence through purposively organising the text 'around a cluster of readings that constantly juxtapose the routine, ordinary, and normative . . . with sudden eruptions of extraordinary, pathological, excessive, or "gratuitous" violence' (2004: 5). For example, within this anthology Paul Farmer points to the similarity of "'event" assaults', such as murder, torture and rape to demonstrate linkage between those violences seen in war and peace (2004: 281). Moreover, in order to portray the widespread nature of violence in both contexts, commentators such as Kleinman (2000) and Farmer (2004) develop analyses of unequally distributed structural violences such as illness, poverty and racial discrimination. These structural violences are put forward as examples of systematic suffering through large-scale social forces that hold similar characteristics to the societal encompassing of the violence of armed conflict. In this account, the structural nature of suffering supersedes any distinction between the context of its perpetration or sustaining, that is, between war and peace.

However, there are four difficulties with this conceptual alignment of the violences of war and peace. Firstly, this approach cannot depict those acts of violence that only occur within armed conflict, or because of this context of pervasive harm (Kiza *et al*, 2006). As with the state or community approach to analysis, it cannot frame a distinct enquiry into the particular features of violence within armed conflict or inform analysis of trends within this context across the divides of particular societies or communities, in this case, the impact of violence upon civilian populations. As such, the second problematic with this approach is that it does not allow for the recognition of persons and relationships that are particular to a situation of armed conflict. Most obviously, it does not figure the presence of civilians and combatants as participants in armed conflict, or provide a framework for analysis into the interactions, whether criminal or not, between them.

Thirdly, the alignment of these contexts conceptually constructs the violence of armed conflict as a 'normalised' situation through its conflation with everyday violence. As Heitmeyer and Hagan point out, this conceptual conflation produces an 'inflation trap' where commentators expand 'the discourse of violence in everyday affairs, creating the impression that there are virtually no remaining areas where violence is insignificant or absent' (2003: 8). For example, there is a notion put forward that the existence of 'peacetime crimes' conceptually re-figures war crimes as 'merely ordinary, everyday crimes of public consent applied systematically' (Scheper-Hughes and Bourgois, 2004: 20). However, this conceptual framing does not adequately explain the intentional perpetration or motivations behind the presence of structural violence within armed conflict or the forms that it takes. Nor does it allow for analysis of the qualitative or quantitative impact that such systematic violence or crimes has upon individuals, communities and societies.

Most significantly, as Heitmeyer and Hagan point out, this conceptual alignment between the violences of war and peace appears to perceive and interpret 'the violence of

particular groups or places as a “normal” transient stage of development or even as “natural” (2003: 8). By characterising certain acts of violence as a ‘normalised’ situation of social relations, this approach both ignores the potential criminality of their perpetration and does not adequately recognise the harms of their victimisation and violence upon the victims. It overlooks or relegates certain acts of violence against populations as being purely ‘state’ or ‘community’ problems and so does not acknowledge that they should come under the purview of international legal regulation and enforcement. However, as set out in the previous chapter, the increasing international focus on the protection of civilians designates that irrespective of geographical location, there are acts of violence, most often in a situation of armed conflict, that obligate international address and redress (Arbour, 2006; 2008; Breau, 2006). As a significant proportion of civilians are the subject of attack by state officials (Panyarachun, 2004), a perception that their victimisation can be either understood as ‘normal’, or left solely to state regulation, rejects the very notion that international rules should regulate conduct and protect these ‘potential or actual victims of massive atrocities’.⁵⁶ For these reasons, it is necessary to develop an understanding of the patterns of violence during armed conflict and the effects of perpetration during and after hostilities. Without such an understanding it is not possible to assess the implementation of the protective norms of IHL or their enforcement by international criminal justice mechanisms.

The Violence and Victimisation of Armed Conflict

In order to develop an analytic framework to explore the violence of armed conflict, Ernesto Kiza’s victim-centred methodological approach provides a useful means for beginning such an analysis (2006: 73). For Kiza, a ‘bottom up’ or ‘victim-centred’ methodological approach enables the identification and exploration of the experience of structural victimisation and, in particular, its impact on civilian populations (2006: 73, 80;

⁵⁶ In Larger Freedom, para. 132.

see also Nikolić-Ristanović, 2000a).⁵⁷ Employing this analytic framework prioritises the views and concerns of the (civilian) victims of hostilities and, as such, aligns to the work of transitional justice scholarship which sets out the necessity of focusing upon the participants or ‘audience’ of conflict (Kiza, 2006; Weinstein and Stover, 2004). Rather than simply identifying the legal rules regulating hostilities, Kiza’s work provides a framework through which to understand and explore the way structural victimisation is experienced by civilian populations and its consequences on individuals, communities and states.

This conceptual and methodological approach to analysing the structural victimisation and violence of conflict is useful for two reasons. Firstly, this conceptual framework centres on identifying the patterns of victimisation evident during armed conflict, rather than just acts of violence (Kiza, 2006). Employing this analytic approach does not begin with determining the criminal conduct or actions of the perpetrators, those actions that may come before a court of law. Rather, the focus on civilian *victimisation* emphasises the centrality of the victims as those who experience harm from the perpetration of violence against them. It understands an act of violence as a ‘victimizing event’ and so provides an analytic frame in which to identify persons and groups as victims, as well as exploring the classification of different types of victims (for example, direct and indirect victims) (Kiza, 2006: 82). In this way, there is a conceptual shift from a prioritisation of the ‘perspective [of the conduct of violence] from combatants to civilians’ (Kiza, 2006: 75). This conceptual focus follows the victim-centred approach to consider that it is the victims themselves, as those who experience harm, that are the privileged source of information on the conduct and violence of armed conflict. For these reasons, this conceptual framework will be used in later chapters to examine the structural

⁵⁷ As will be set out in chapter two, this thesis employs a ‘bottom-up’ or ‘view from below’ methodological approach in alignment with Kiza’s framework that stems from the premise that civilian victims themselves are in the privileged position of providing the most accurate understanding of civilian victimisation in conflict.

victimisation of the Yugoslavian conflict and the experiences of both individual and collectivities of civilian victims.

Secondly, this framework employs this victim-centred approach to consider the structural manner of civilian victimisation in armed conflict. This conception of armed conflict contends that there are particular structures and patterns to the violence perpetrated against civilians that are not evident in peacetime. For example, Kiza points out that there is a particular organisational structure and involvement of combatants in their behaviour toward civilians (2006: 73). Following the UN's descriptions of war's conduct, there is a specific recognition of the 'systematic, structural and persistent victimizations' against civilians by combatants and other armed elements (Ewald and Oppeln, 2002: 44; also Kiza, 2006). This identification of war victimisation emphasises that its perpetration does not consist of sporadic or unintentional acts of violence, but instead is undertaken through deliberate, widespread and systematic attacks against civilians.⁵⁸ As will be explored further in the next section and in chapters four and six, it is therefore important to examine both the patterns of civilian victimisation and the relational context of these victimisations, that is, the interactions between civilians and combatants. Employing this framework of a victim-centred exploration of structural victimisation thus enables analysis into the broad structures and patterns of violence in armed conflict without 'losing' civilian victims as the target of its forms of structural victimisation or the source of information of its perpetration.

Utilising this framework of a 'victim-centred approach' thus enables the development of a conceptualisation of structural victimisation within the context of armed conflict, in effect, the way in which victimisation is felt and experienced. As most commentators suggest and witnesses at the ICTY testify,⁵⁹ a central element for recognising and

⁵⁸ Resolution 1265.

⁵⁹ As will be further discussed in chapter five.

defining an act of violence or victimisation is the experience of harm or injury (Jaukovic, 2002; Kiza, 2006). Such harm may encompass physical injuries or psychological or emotional harms. For example, Jaukovic points out that in the former Yugoslavia physical victimisation was experienced through the ‘massacres of a large number of people, killing, wounding, rapes, tortures, taking people by force and executions’ (2002: 113). However, in the context of the structural victimisation of war, it is evident that it is also necessary to understand psychological or emotional harms as the consequence of both direct and indirect violences. Accordingly, it is important to draw attention to forms of indirect victimisation such as the widespread exposure to intimidating propaganda seen in the former Yugoslavia and Rwanda as well as many other conflicts (Jaukovic, 2002: 113). From this account of structural victimisation it is therefore appropriate to understand the context of war as a harmful environment of pervasive and overlapping forms of victimisation. Unlike a peaceful society, the way in which conflict is experienced creates a ‘situation of almost total vulnerability’ for its civilian population (Ewald, 2002: 97).

From this recognition of the structural harms of the violence of armed conflict, it is then also important to emphasise its *consequences*. As Jaukovic points out, war victimisation generally consists of ‘diverse and long lasting’ experiences of harm (2002: 109). As such, the victimisation and violence of civilians is rarely a transient moment of harm as the drawn out Yugoslavian conflict exemplifies. Moreover, it is important to emphasise that structural victimisation is a harmful situation both during and after a state of conflict. The widespread and systematic victimisation of civilians and the context of encompassing violence ‘deeply disturb[s] the functioning of individuals, social processes, institutions, groups and relations’ long after the cessation of hostilities (Jaukovic, 2002: 109). For example, Nikolić-Ristanović points out that the harms of conflict during its perpetration and after, ranges from each individual’s experience of death and injury to ‘the widespread destruction of property, homes, families and economic stability’ (2000a: 21). For these

reasons, it is appropriate to contend that the consequences of pervasive structural victimisation for its participants is that their “future” becomes a war casualty’ (Nordstrom, 2004: 69).

The Second Conceptual Problematic: Identifying the Participants of Conflict: Civilians and Combatants

How, then, should we identify the victims of structural victimisation within armed conflict? And are there patterns of such victimisation across the innumerable conflicts that have been fought over the centuries? As set out above, the rules of IHL construct the framework for the legal identification of civilians. However, they cannot provide an account of how civilians are ‘present’ within the *practice* of conflict or the manner of their victimisation. In order to explore those persons present in situations of conflict, it is useful to draw upon the ‘new wars’ thesis, a key body of work that focuses upon the methods and goals of warfare and their consequential impact upon civilian populations. This theorisation of contemporary conflicts provides a useful non-legal framework for this research, both in its specificity of recognising civilians as ‘present’ within armed conflict but also for its assessment of the structural qualities of military-civilian interactions and how they function to construct and sustain a situation of pervasive civilian victimisation (Kaldor, 2001; Newman, 2004).

Mary Kaldor, the most prominent of the new wars theorists, argues that we are witnessing a period of ‘new wars’, that there has been a change in the conduct of hostilities that implicates new participants, both perpetrators and victims, within their violence (2001: 5). As Kaldor’s work, as well as that of other of the new wars theorists shows, this thesis begins with a proposition that there has been a shift in the types of wars being fought in the post-Cold War era (Drake, 2007; Münkler, 2005). This argument draws upon data that points to an increasing cessation of inter-state wars, whilst other forms of conflict,

namely internal, civil and intra-state hostilities are becoming ever-more frequent (Kaldor, 2001; Münkler, 2005). For this reason, the new wars theorists contend that the traditional model of 'Clausewitzian' war, of war as acts of violence between states, no longer figures as representative of the entities or military organisations that engage in such violence (Kaldor, 2001; Münkler, 2005).⁶⁰ In Kaldor's framing, the period of these 'old wars' is coming to an end (1997; 2001). Instead, recent conflicts such as those of former Yugoslavia and Rwanda are argued to reflect the emergence of 'new wars' through their differential 'goals, the methods of warfare and how they are financed' (Kaldor, 2001: 6). They are contrasted with the older model of inter-state wars to depict a shift in the 'type of organized violence' seen in the contemporary period, both in terms of the victims of such violence and the nature of their victimisation (Kaldor, 2001: 1).

This theorisation of 'new wars' identifies new participants of war as a key aspect of this change in their types of violence. In particular, this area of scholarship illustrates the presence of civilians and new 'types' of combatants as a new phenomenon of armed conflict (Kaldor, 2001: 98-100). It utilises the legal definition of a 'civilian' to examine how such persons are subject to particular patterns of victimisation in the contemporary era. However, the new wars conception of civilians and their victimisation does not begin with, or accept, that military-civilian interactions follow the protective rules of IHL in the conduct of war (see Münkler, 2005: 14-15). Rather, the new wars model provides an account of the practice of contemporary conflicts that articulates 'who' the persons present in conflict are, as well as how they actually participate in hostilities as either victims or perpetrators. For this reason, this body of scholarship enables an identification of military-civilian interactions between these groups of persons. It provides a framework for analysis of the 'social dynamics' of conflict, in this case, of how war is lived and felt by its differential participants (Newman, 2004: 186).

⁶⁰ Clausewitz defines war as 'an act of violence intended to compel our opponent to fulfil our will' (1968: 101). In this defining, the opponents of this violence are states; war arises from their 'relations to each other' and is characterised by a 'duel on an extensive scale' (Clausewitz, 1968: 102, 101).

Firstly, the new wars scholarship emphasises the participation of non-state actors as combatants as a key feature of contemporary conflicts. For example, Kaldor points out that these situations of violence are ‘increasingly privatized both as a result of growing organized crime and the emergence of paramilitary groups’ (2001: 5). From this growing de-statization of war, there is now ‘a bewildering array of military and paramilitary forces’, often ‘augmented by criminals, volunteers and foreign mercenaries’ (Kaldor, 2001: 45). However, unlike the state armies of the Clausewitzian era, these armed forces are not necessarily easily identifiable as combatants through the legal principle of distinction. The de-statization of armed forces has led to debate over the legal recognition of these perpetrators and, if committed, their crimes. As Easton points out, actors in conflict such as private military personnel are ‘[n]ot quite civilians nor soldiers[,] they fall under a legal grey area’ in terms of the principle of distinction (2006). Such difficulties in the legal ascription of combatant status is particularly problematic where discipline amongst armed groups either breaks down or regulatory structures were not apparent to begin with. If, as Münkler argues, ‘soldiers become looters for whom the laws of war or any kind of military code of punishment no longer enter[s] the picture’, the legal protection of civilians (or other combatants) becomes obsolete in practical terms (2005: 14).

Secondly, the new wars scholarship contends that civilians are *now* (and so by implication not previously) the primary victims of war’s violence and so central to the structure and practice of its social relations (Gilbert, 2003; Kaldor, 2001; Münkler, 2005). This new recognition of civilians as victimized participants within conflict has arisen from two key empirical observations. Firstly, the new wars literature contends that there has been a quantitative shift in the casualties of conflict. For example, Münkler argues that in the wars of the early twentieth century, that is the ‘old’ wars, roughly 90 percent of the killed and wounded were combatants as defined by international law (2005: 14).

However, in the new wars of the 1990s it is held that this figure has almost reversed so that the ratio of military to civilian casualties is approximately 1:8 (Kaldor, 2001; Münkler, 2005). The siege of Sarajevo provides an empirical example of this proposition; a number of witnesses (both expert and victim-witnesses) describing that civilians, rather than combatants, were the primary and overwhelming victims of the violence.⁶¹ This transformation in the casualties of war enforces the notion that civilians are no longer marginal to the conduct of the military or their actions. In this account, civilians must be understood as the majority victims of conflict and so central to its harmful conduct.

The second key observation of the new wars thesis is a qualitative change in the nature of violence through the *deliberate* targeting of civilians (Gilbert, 2003; Kaldor, 2001). Using the Bosnia-Herzegovina conflict as a case-study, Kaldor argues that this intentional targeting of civilians is indicative of a 'revolution in the social relations of warfare' in terms of its military-civilian interactions (2001: 3, 91). These new social relations are formed of the pervasive and explicit use of military actions against civilians that defies the protective proscriptions of IHL (Kaldor, 2001: 8). Substantiating the quantitative changes in the casualties of war, this recognition of the deliberate targeting of civilians reverses the image of the 'old' wars that 'theoretically affected combatants alone' (Münkler, 2005: 39). It understands that intentional civilian victimisation is now the *function* of contemporary conflicts (Newman, 2004: 178),⁶² that its combatants 'mainly employ long-term violence against large parts of the civilian population' (Münkler, 2005: 75). The new wars, therefore, have a profound human and social impact on the civilian population. For example, Münkler argues that the involvement of non-state regulated combatants contributes to a trend of military indiscipline and lack of professionalism (2005: 76). This military indiscipline is evident through the greater frequency and pattern of criminal conduct, often motivated by financial or commodity gains. It is seen through

⁶¹ Fieldwork, *Perišić*, 4 February 2009; *The Prosecutor v. Dragomir Milošević*. Case No. IT-98-29/1. Transcript of Trial Proceedings, para. 571-2 ('*D. Milošević*, Transcript').

⁶² Emphasis added.

the pursuit and sharing out of 'prizes of victory', including the plunder of natural and economic resources as well as 'human' prizes such as the rape and enslavement of women (Münkler, 2005).

A particular explanatory argument is put forward to underpin these quantitative and qualitative shifts in the impact of war upon civilians, namely that the new (mostly internal) wars are predicated upon, or constructive of, ethnic or religious oppositions (Duffield, 2001; Kaldor, 2001). In these wars, 'ethnic and religious divisions [turn] into faultlines of a friend-enemy definition', shaping the perpetration of mass violence between and against particular groups of persons (Münkler, 2005: 6). For this reason, Duffield argues that 'within the new wars, *people are social beings rather than juridical subjects*' (2001: 191).⁶³ This argument considers that the perpetrators of violence within these wars do not recognise the legal distinction between civilian and combatant, nor distinguish between the protected and the legitimate targets of conflict. Instead, it is the status of a person or a collectivity along ethnic or religious lines, or the perception of such social characteristics by others, that becomes determinative or influential in their potential to become the subject of victimisation. For this reason, Kaldor (2001) and Münkler (2005) hold that in the new wars, there is a breakdown of the civilian / combatant divide altogether. Within these particular conflicts, the definitional status of 'civilian' is itself held to be redundant in designating a distinct group of persons. Such classification is no longer meaningful as it does not enact any measure of protection or safety for civilians from the perpetration of violent conduct.

However, as commentators such as Cairns (1997) and Newman (2004) point out, the intentional perpetration of civilian victimisation and the consequential breaching of the protective rules of IHL has been part of war's conduct throughout recorded history. In his critique of the new wars thesis, Edward Newman argues that it is necessary to see

⁶³ Emphasis original.

patterns of civilian victimisation as a reflection of (historically) contextual rather than just temporal variables (2004: 181). This historically contextual analytic approach does not deny that deliberate civilian victimisation is a feature of contemporary conflicts. In fact, Newman argues that the new wars literature 'provides a great service in explaining patterns of contemporary conflict', including its human and social impact (2004: 179). Instead, this historically contextual approach broadens the enquiry of conflict through its incorporation and attention to historical narrative and so provides a framework in which to recognise the civilian victims of conflicts past and present (Newman, 2004: 186). It therefore overcomes the reliance on a comparative method seen in the new wars' approach of employing a dichotomous temporal framing of 'old' and 'new' conflicts. The historically contextual approach allows for a more comprehensive exploration of the similarities between their patterns of civilian victimisation and their forms and functions of violence, which the 'new wars' theorisation does not attend to.

First, employing this historically-contextual framework enables identification of civilian victimisation as a function of those 'old' conflicts perpetrated by the regulated, uniformed state soldier of the twentieth century and before. For example, the deliberate targeting of civilians was central to conflict situations such as the Armenian genocide and the Second World War, amongst many others (Beevor, 2002; Slim, 2007). It is also important to note the indirect causes of civilian deaths over the centuries, such as siege conditions, famine and disease (see Eckhardt, 1989: 94). Second, these conflicts evidence that ethnic, religious or nationalist antagonisms were a significant or even decisive dimension of 'old' wars. Indeed, as Wimmer and Schetter point out, typical techniques of 'ethnic expulsion' such as mass shootings, rape, pillage and plunder can be traced back to conflicts of the fifteenth century (2003: 250). These conflicts provide important clarification that civilian victimisation is not limited to internal conflicts as the new wars thesis suggests. Rather, this pattern of military-civilian interactions and its destructive consequences for

individual and collectivities of civilians is also a distinct feature of international conflicts, of wars between states (Newman, 2004).

Following this recognition of historical civilian victimisation in conflict, it is important to examine why such victimisation has been put forward as a new phenomenon, of a new mode of social relations in conflict. There are two key reasons for such a proposition. Firstly, as the *Human Security Report* (2005) points out, the data underpinning the perception of an increase in civilian casualties has been the subject of confusion and somewhat misconstrued in its interpretation. In particular, the often-cited figure of 90% of the victims of the new wars being civilians arose from a preliminary statement that referred to both civilian refugees and the dead as victims. However, later translations of this contention did not emphasise that this figure included refugees and displaced persons and instead ‘wrongly equated “victim” with “fatality”’ (Human Security Report, 2005: 75). From this mis-interpretation numerous commentators have gone onto state that 90% of those killed in contemporary conflicts are civilians, using only secondary sources to substantiate their claims (see for example Chesterman, 2001; Smyth, 2001).

Secondly, this ‘new’ recognition of civilian casualties may be the result of the greater *visibility* of these victims and their experience of atrocities (Newman, 2004: 182). As Newman argues, the ‘advances in communications and the media’ brings these casualties to public attention in a way that they had not before (2004: 179). This greater visibility of the victims of conflict can also be attributed to the UN’s increasing engagement throughout the 1990s with humanitarian crises and civilian victims, as discussed in the previous chapter (Golberg and Hubert, 2001). It is also important to note the growing involvement of organisations such as the ICRC, NGOs, women’s groups and many other institutions and charities in raising awareness of civilian casualties and providing assistance and protection during conflict situations (Hagan and Levi, 2006: 593). However, this increased media attention does not necessarily mean that prior to the early

1990s civilian victimisation was absent in situations of conflict. Instead, as the Human Security Report points out, ‘prior to 1989 information was too poor to be able to make estimates of the global civilian death toll’ (2005: 75). Drawing on the empirical observations of commentators mentioned above, however, it is reasonable to argue that the harmful social relations between the military and civilians seen in the new wars, was also a structural feature of the old wars. As Jones and Cater point out, the ‘practice’ of war throughout history has shown us that it ‘is often between soldiers and civilians’ (2001: 250). For these reasons, this research approaches analysis of armed conflict through an understanding that civilian victims are ‘present’ as the intentional targets of harm in contemporary conflicts, as well as those hostilities that have been fought throughout history. It frames the presence and participation of civilians as individuals and groups subject to pervasive victimisation due to the harmful (and unlawful) conduct and interactions between these persons and combatants.

The Third Conceptual Problematic: Identifying Mechanisms of International Protection

The protection of civilians has increasingly become a national and international obligation. It is therefore important to identify the mechanisms that are in place to both define and enforce such protection. The ICRC defines the concept of protection, in particular for civilians in armed conflict, as encompassing:

all activities aimed at ensuring full respect for the rights of the individual in accordance with the letter and the spirit of the relevant bodies of law, i.e. human rights law, international humanitarian law and refugee law. Human rights and humanitarian organizations must conduct these activities in an impartial manner (not on the basis of race, national or ethnic origin, language or gender).⁶⁴

This definition follows the UN’s description of protection for civilians that emphasises the role of humanitarian law in providing the protective rules for the legitimate conduct of

⁶⁴ Caverzasio (2001: 19).

armed conflict. It defines the individual (rather than a national of a particular state) as the subject of this legal protection. In this account, all civilian persons, irrespective of their social characteristics, require and hold the right to protection in armed conflict.

The duty to protect civilians in armed conflict 'traditionally belongs first and foremost to the States' (Caverzasio, 2001: 9). As UN Resolutions and Reports emphasise, states have the primary responsibility to protect civilians.⁶⁵ This framework of protection follows the traditional legal relationship between a sovereign state and its people: states 'enjoy supreme authority over all subjects and objects within a given territory' (Held, 2002: 4). They are 'independent in all matters of internal politics and should in principle be free to determine their own fate within this framework' (Held, 2002: 3). In this conception, the state holds the overriding authority and obligation to regulate the conduct of its subjects (i.e. combatants) and protect its civilian population within a situation of conflict. Traditionally, in instances of the breach of national (or international) rules, the state prosecutes and punishes the individuals concerned (Cassese, 2003: 37). However, as Bruderlein and Leaning point out, this state-centred framework of civilian protection has been, and continues to be, frequently overlooked or deliberately violated in the practice of conflict (1999). Either states do not adhere to their responsibility to protect civilians, are functionally unable to provide security for this group of persons, or their armies are in fact the perpetrators of victimisation (Bruderlein and Leaning, 1999; Jones and Cater, 2001). Moreover, as indicated earlier, the proliferation of non-state military personnel highlights groups of combatants that are not necessarily under the control of the state.

Recognition of this failure of states to protect its civilians is evident in recent UN descriptions of the increasing *international* concern with this issue. It is also evident in the role of international criminal justice mechanisms such as the ICTY, ICTR and ICC for their prosecutions of acts of civilian victimisation. As outlined in the previous chapter,

⁶⁵ Report of the Secretary-General, 2007, para. 3.

this focus on civilian protection shifts from a state-centric responsibility to protect to an obligation upon the international community to protect civilian victims when a state is unable or unwilling to do so (Arbour, 2008; Panyarachun, 2004). In this framework of protection, the international community has a responsibility to all civilian victims, irrespective of their national ties or any other characteristic. For this reason, as Arbour points out, it ‘squarely embraces the victims’ point of view and interests, rather than questionable State-centred motivations’ (2008: 448). Significantly, this international responsibility to civilian victims does not rest on a singular ‘moment’ of protection, as either prevention or redress. Rather, as Arbour argues, it is necessary to conceptualise a ‘web of protection’ that encompasses ‘a continuum of prevention, reaction, and commitment to rebuild, spanning from early warning, to diplomatic pressure, to coercive measures, to accountability for perpetrators and international aid’ (2008: 448).⁶⁶ This ‘web of protection’, as the UN’s Resolutions describe, ranges from the condemnation of civilian victimisation to the enforcement of the protective rules of IHL and redress to its victims.⁶⁷

In this model of civilian protection, the UN considers that international humanitarian law is central to the international community’s construction and implementation of the responsibility to protect all civilians. David Held’s conception of ‘cosmopolitan law’ provides a useful framework for analytic enquiry into this shift in the legal protection of persons from the state to the international community (2002). Providing a more developed account of legal frameworks than those commonly offered within sociology of law, Held argues that changes in IHL, human rights law and other legal domains ‘have placed individuals, governments, and nongovernmental organizations under new systems of legal regulation – regulation that, in principle, is indifferent to state boundaries’ (2002: 11). For Held, the emergence of these new ‘sets of norms and legal frameworks’

⁶⁶ See also Panyarachun (2004) for a similar conceptualisation of the obligations of the international community in respects to the norm of a responsibility to protect civilians.

⁶⁷ See Resolution 1738.

represents the shift from a state-law system to a regime of 'cosmopolitan law' (2002: 23-24). In particular, the laws of war (i.e. IHL), the laws governing war crimes and crimes against humanity and human rights are given as key elements in the development of international criminal justice frameworks that transcend the traditional state system of legal regulation and protection (Held *et al*, 1999; Held, 2002). These systems and mechanisms of international legal rules and norms, such as IHL, create new forms of authority which delimits a state's authority over its peoples (Held, 2002: 17). In this account of a largely 'top-down' system of global regulation, states are no longer entirely free to determine their own standards or forms of behaviour towards their citizens. Instead, states are now subject to new forms of surveillance and monitoring in the form of international regimes, international courts and supranational authorities (Held, 2002: 17).

Held argues that cosmopolitan law comprises two key principles. These concern the subjects of regulation and protection and the (international) mechanisms that enforce these regulatory and protective ideals. First, this framework of law takes individual human beings as its central concern (Held, 2002: 23). It defines and 'protect[s] basic humanitarian values' for the interests of individuals 'which no political agent, whether a representative of a government or state, should in principle, be able to cross' (Held *et al*, 1999: 70). Similarly to the encompassing figuration of those persons that come under the increasingly international obligation to protect civilians, these basic values determine that the treatment of individuals must be 'based upon the equal care and consideration of their agency irrespective of the community in which they were born or brought up' (Held, 2002: 23). In this account, cosmopolitan law does not privilege the sovereign state or prioritise a nexus between a state and its nationals. Rather, it is a 'law of the peoples', for there is a 'universal recognition' of all persons as subjects of its regulatory and protective rules and norms (Held, 2002: 1, 29).

Secondly, cosmopolitan law is comprised of an international framework of ‘rule systems and institutions’ for the enforcement of these regulations and protections for individuals (Held, 2002: 24). These systems and institutions characterise the existence of ‘forms and layers of accountability and governance’ at a global level and therefore ‘have already transformed state sovereignty’ (Held, 2002; 2005). International criminal justice institutions and regimes such as the UN, ICTY, ICTR and ICC (as well as the Nuremberg trials before them) are given as concrete examples of this cosmopolitan framework of law (Held, 2002: 23). In the case of the ICTY, for example, this international institution prosecutes individuals for breaches of customary IHL and so enforces the protective rules of this body of law (in particular, as will be set out for civilian victims). For this reason, it is important to emphasise that this transformation of legal regulation and protection from the state to the international domain is not, to employ Held’s framing, ‘a remote utopia’ (2002: 23). Rather, as David Hirsh notes and these examples attest, cosmopolitan *criminal* law has a ‘limited but real institutional existence’ (2003: 16). There is in place, despite its limited framework, international criminal justice mechanisms and institutions that found regulation, accountability and protection both during and after conflict. It is this international criminal justice framework and its institutions that the UN prioritises as underpinning the construction and implementation of the norm of a responsibility to protect civilians (Arbour, 2008; Panyarachun, 2004).

However, Held’s account does not provide a detailed account of the terms of establishment or functioning of those mechanisms and international criminal justice institutions that both enforce legal protections and provide redress for civilian victims. Instead, as Dahbour notes, the ‘hierarchies and asymmetries of power that have always existed in international relations are largely abstracted out of cosmopolitan democratic theory’ (2005: 213). For example, while Held points to the ICTY as a key institution of ‘cosmopolitan law’ (similarly to other scholars of cosmopolitan law, see Kaldor, 2001: 116), it is notable that he does not provide a detailed analysis of its establishment, or

more particularly, the role of particular (powerful) states as integral to this process. As set out in the previous chapter, the ICTY was established through the Security Council's adoption of Resolution 827 (1993). However, it is important to note that the adoption of this Resolution was a complex process of political negotiations among the five permanent members of the Security Council, with particular reticence on the part of China and the USA at different stages of the process (Hazan, 2004: 35-37). Without the support of the five states who hold the powerful political tool of 'veto', unlike other Member states,⁶⁸ it is uncertain how or whether this international institution would be functioning in the present day.

Despite these analytic absences, Held's model of cosmopolitan law is useful for its recognition of the shift from a state model of legal obligations and protections of persons, to that of an international 'law of the peoples' (2002). It enables identification of the existence of differential institutions and mechanisms that enforce and redress breaches of the protective rules of IHL for civilians. However, in order to broaden Held's account, it is also necessary to examine the differential methods of their formation. Anne-Marie Slaughter provides a useful model of a 'new world order' in order to analyse the emergence and existence of a system of global governance and its institutions and mechanisms (2004: 15). Rather than conceiving of a system of global governance through a network of institutions and rules that exist 'above' states, Slaughter argues that we also need to think 'about a world of governments . . . interacting both with each other domestically and also with their foreign and supranational counterparts' (2004: 5). These interactions between states occur through regulatory, judicial and legislative channels (Slaughter, 2004: 5). Providing a more nuanced account than Held's, therefore, Slaughter's conception of global governance recognises the integral role of the state and interactions between states at divergent levels for the formation of international criminal justice institutions and rules. It understands states as 'crucial actors' in the construction of

⁶⁸ See Fasulo (2004) for an overview of the United Nations and its composition.

these mechanisms, as well as being subject to their regulatory rules and authority (Slaughter, 2004: 5). For Slaughter, envisioning this ‘new world order’ and the actuality of its contemporary instantiation requires an appreciation of existing government networks at both a vertical and horizontal level (2004: 15). In this account, vertical networks refer to situations where states ‘choose to delegate their individual governing authority to a “higher” organization – a “supranational” organization that does exist, at least conceptually, above the state’ (Slaughter, 2004: 20). Alternatively, horizontal networks refer to those networks between high-level officials of national states through differential areas such as law enforcement and human rights (Slaughter, 2004: 19). They are then, ‘national to national’ networks (Slaughter, 2004: 132).

From this framing of vertical and horizontal networks, it is possible to examine the means of establishment of those differential mechanisms and institutions that narrate and enforce the growing norm of an international responsibility to protect civilians. There are three key mechanisms central to the contemporary enforcement of civilian protection: the norm of an international responsibility to protect, the notion of international peace and security and international criminal courts and tribunals. First, the development of an international norm of a responsibility to protect exemplifies the construction of a ‘horizontal’ network of protection for civilians. As set out in the previous chapter, there is now an acceptance by all states of their responsibility to protect persons from genocide, war crimes, ethnic cleansing and crimes against humanity.⁶⁹ Moreover, these states determine that they are prepared to take *collective* action to help protect persons from these crimes.⁷⁰ Employing Slaughter’s framing, this construction of protection of persons figures as a horizontal network of collective action and interactions between all Member States of the General Assembly (notably not just the members of the Security Council). These interactions *between* states and their formation of an international responsibility to protect figures, in

⁶⁹ World Summit Report, para. 138.

⁷⁰ World Summit Report, para. 139. Emphasis added.

Arbour's framing, as a 'web of protection' through the commitment to prevent violations and help states 'build capacity' to protect their populations from such crimes.⁷¹

Secondly, the growing concern for the protection of civilians can be seen through the changing notion of international peace and security. Golberg and Hubert point out that there has been a 'more holistic definition of "threats to international peace and security" evolving throughout the 1990s' (2001: 223). This holistic framing increasingly conceives of acts of violence between persons, and in particular, the victimisation of civilians in armed conflicts such as that of the former Yugoslavia, as constituting such a threat (Golberg and Hubert, 2001; Knoops, 2004). For example, the UN Security Council in 1992 cited the abuses being committed against civilians in Bosnia-Herzegovina as a threat to international peace and security.⁷² However, it is notable that the response to such threats has largely been undertaken by the Security Council through, for example, condemnation of the targeting of children, humanitarian personnel and civilians in conflict and authorization of peace-keeping operations (Golberg and Hubert, 2001). Furthermore, the Security Council's establishment of the ICTY as 'a means to maintain and restore international peace' evidences a new institutional legal response to threats to international peace and security (Knoops, 2004: 531). This institution's establishment through Chapter VII of the UN Charter as an enforcement measure mandates that all states, including the warring parties, have 'to cooperate with the Tribunal in all aspects of its operations and proceedings' (Cassese, 1994: 56). In this way, as Morris and Scharf argue, the members of the Security Council 'acted not as individual States on their own behalf, but rather as the Security Council exercising its responsibility for the maintenance of international peace and security on behalf of the Member States of the United Nations' (1995: 45). The ICTY therefore evidences the construction of a 'vertical' network of

⁷¹ World Summit Report, paras. 138-139.

⁷² See for example, United Nations Security Council Resolution 757 (1992), 30 May 1992 (S/RES/757 (1992)) and United Nations Security Council Resolution 770 (1992), 13 August 1992 (S/RES/770 (1992)) ('Resolution 770').

protection for civilians. It is a vertical network of enforcement through its creation by particular states of the Security Council, rather than all states. This international criminal justice institution evidences that vertical networks are increasingly responding to violations against civilians and establishing new forms of mechanisms to enforce those protective rules of international law that are in place to regulate actions toward this group of persons.

Thirdly, as set out in the previous chapter, the establishment of criminal justice mechanisms such as the ICTY and ICC are seen as key mechanisms for the enforcement of the responsibility to protect civilians. For example, the ICTY has taken the enforcement of civilian protections as a central aspect of its criminal prosecutions (as will be the subject of analysis in chapter four). Through the processes of trial adjudication and judgement of these criminal prosecutions, it has greatly contributed to the expansion of civilian protection law (Slaughter and Burke-White, 2002: 68). Slaughter also refers to the ICC as an example of a vertical network of global governance (2004: 149-150). This vertical structure can be seen, for example, in elements of its jurisdiction such as the Security Council's ability to refer states to the Court, even if they are not state parties to the Rome Statute.⁷³ It is through this form of referral that the situation in Darfur, Sudan has become the subject of investigation and prosecution by the ICC.⁷⁴ However, it is important to note several 'horizontal' elements to the ICC. Most obviously, the ICC's entry into force on 1 July 2002 was the result of the requisite sixty ratifications of the Rome Statute (Schabas, 2004: 18). Without the impetus of these states (and those that have since ratified the Statute) to submit themselves to this 'higher' governance structure, this jurisdiction would not have come into being. Hirsch points out that treaties (such as that creating the ICC) seek to 'embody the *common* subjective expectations of the

⁷³ ICC Statute, Article 13(b).

⁷⁴ See <http://www.icc-cpi.int/cases/Darfur.html>.

contracting parties' (2005: 924).⁷⁵ Upon ratification, therefore, these treaties also *reflect* a common acceptance of a particular jurisdiction, its rules and practices. In this instance, the ratifying states agree to be bound by the jurisdictional rules of the ICC. Moreover, as Schabas points out, states may also have to 'undertake significant legislative changes in order to comply with the obligations of the Statute [such as] enacting the offences of genocide, crimes against humanity and war crimes as defined in the Statute' into their national jurisdictions (2004: 20). These states will therefore broaden the protective rules for civilians within their own national jurisdictions.

From these examples, it is possible to identify and analyse an international framework for the enforcement of civilian protection. This international framework figures as both international treaties and obligations setting out the terms of civilian protection (e.g. the responsibility to protect and the developing notion of international peace and security) as well as institutions to enforce these protections. As set out in the previous chapter, the UN places increasing significance upon international criminal justice institutions such as the ICTY, ICTR and ICC for the development of the enforcement of civilian protection. However, these institutions apply the protective rules of IHL, rather than human rights or any other national rules or standards. While other fields of law such as human rights undoubtedly contribute to civilian protection in an international frame, they do not hold sufficient particularity in their address to the civilian victimisation of armed conflict.

For this reason, this research will examine the functioning of the ICTY as an institutional measure for the enforcement of civilian protection through the protective rules of IHL. The ICTY illustrates the shift from a state-centric framework of authority over persons, to communal actions for the legal enforcement of civilian protections through this particular body of law. However, it is also important to emphasise that courts and tribunals such as the ICTY, ICTR and ICC do not act solely as regulative and protective mechanisms in

⁷⁵ Emphasis original.

relation to civilian victimisation. Instead, as the UN sets out, ‘justice mechanisms’, such as the ICTY (as well as truth and reconciliation commissions) are now seen as central to the provision of redress to the civilian victims of armed conflict.⁷⁶ In this account, these mechanisms contribute to the ‘web of protection’ necessary to respond to the structural victimisation of civilians within a conflict situation, both through acknowledgement of the victims and the provision of forms of redress for their harms. For this reason, it is important to analyse the differential practices and procedures of these transitional justice mechanisms for their construction of this second objective, that is, for how they construct redress for those persons that have been subject to the civilian victimisation inherent in armed conflict.

The Fourth Conceptual Problematic: Identifying Forms of Post-Conflict Justice and Redress

Ruti Teitel argues that the origins of transitional justice lay in debates and activism centred around legal and non-legal responses to the ‘wave of democratic transitions’ from prior authoritarian or repressive regimes in the post-1989 period (2003: 70). However, as Teitel points out through a genealogical tracing of transitional justice, in recent years there has been an expansion and ‘normalisation’ of such discourses and the substantive establishment of mechanisms and measures (2003: 90). The ICTY and ICC are key examples of the increasing establishment of institutions of post-conflict accountability through their enforcement of IHL. Mirroring the development of civilian protection indicated previously, forms of transitional justice, both through academic literatures *and* their practical application (through UN policies for example), are increasingly called upon to guide, enforce and redress an array of different conflict situations and attend to a variety of persons, communities and societies (Sriram, 2007: 583). However, transitional justice literatures rarely analyse these mechanisms of post-conflict justice in terms of

⁷⁶ Resolution 1738; In Larger Freedom, para. 138.

their specific address and redress to civilian victims. How, then, might we understand how TRCs and legal mechanisms redress ‘victims’ as a broader group of persons?⁷⁷

In institutional terms, transitional justice literatures and practices centre on two key mechanisms, legal institutions (see Bassiouni, 2002; Teitel, 2000) and truth and reconciliation commissions (‘TRCs’) (see Hayner, 2002; Minow, 1998). As indicated in the previous chapter, the UN’s recent Resolutions and Reports show a shift from the role of these institutions being solely for the founding of accountability of the *perpetrators*, to the provision of redress to the *victims* of harm. Rama Mani argues that this first form of justice, of apportioning accountability to the perpetrator, figures as ‘retributive justice’ (2002: 33-36). This form of justice centres upon the condemnation of the perpetrator and the meting out of punishment for his or her crimes. The retributive model of justice is most associated with legal mechanisms through their framework of criminal prosecutions, judgement and punishment (Mani, 2002; Aldana, 2006). In this framework, criminal prosecutions transfer the ‘responsibility for apportioning blame and punishment from victims to a court that acts according to the rule of law’ (Weinstein and Stover, 2004: 14). The retributive framework thus recognises the victim(s) of the crime and founds accountability of the perpetrators on their behalf. However, victims rarely figure as participants within retributive processes. If they are ‘present’ within legal mechanisms, it is only as witnesses to the crime under adjudication (Van Boven, 1999).⁷⁸

In contrast, Mani argues that a model of ‘reparative’ justice (often also termed ‘restorative’ justice) goes beyond traditional notions of punishment central to the retributive approach. Although Mani’s conception of reparative justice figures as a new proposal of justice for post-conflict societies rather than an instantiated framework

⁷⁷ Later chapters will focus on civilian victims in their specificity as a social and legal group within processes of justice mechanisms.

⁷⁸ It is important to note, as Mani points out, that the ICC has incorporated a number of ‘victim-friendly’ practices and procedures within its functioning that can be seen as ‘reparative’ (2002: 175). For example, the ICC has a Victims Trust Fund and enables (certain) victims to act as participants in the legal proceedings. The ICC’s practices will be the subject of examination in the conclusion of this thesis.

already in existence, its main tenets follow those principles of victim's redress set out by the UN.⁷⁹ This form of justice comprises two key principles that stem from the notion of 'reparation', that is, either moral or material practices that 'aim to recompense for loss and . . . reintegrate the marginalized and isolated into society' (Roht-Arriaza, 2004: 122). Firstly, for Mani, this reparative justice seeks to redress the 'legal injustice, such as injury, loss of life, employment or property' (2002: 174). Secondly, reparation is given for 'the moral, or psychological injustice, that is, victimization, trauma, and loss of dignity' (Mani, 2002: 174). In this expansive notion of justice, reparative justice constitutes a variety of forms of redress including material remedies (such as monetary compensation and restitution of property), but also non-material reparations (such as official acknowledgement of the injustice, commemorations and education) (Mani, 2002: 174). Through this framework, reparation is given for the crime, as a breach of the law. However, it is also an 'explicitly "survivor-orientated"' conception of reparation, as redress is also given for the social injury, namely the victim's experience of victimisation and their sustaining of enduring harms through material or symbolic reparations (Mani, 2002: 174). This framework of reparative justice for injustice thus follows Kiza's framing of civilian victimisation as a 'victimising event' that has significant implications for the present and future of the victim. However, as most commentators point out, this expansive notion of justice is typically only associated with TRCs models of justice, and does not figure within legal prosecutorial frameworks (Aldana, 2006; Hayner, 2002).

Recent UN Resolutions, however, do not designate the retributive model of justice to legal institutions, and the reparative model to TRCs. Rather, both of these institutions are now seen as central mechanisms for constructing these forms of justice through their practices and procedures.⁸⁰ Moreover, these retributive and reparative models inform the overall objectives of transitional justice mechanisms, of founding peace, truth and justice

⁷⁹ United Nations, Principles on the Right to Remedy. See also Bassiouni (2006).

⁸⁰ See Resolutions 1674; 1738.

(Mani, 2002: 176). For this reason, it is important to note that these mechanisms are not simply tasked with righting wrongs and redressing victims, whether in a legal frame or not. Instead, as Vikki Bell and Kirsten Campbell point out, transitional justice, as the term itself describes, 'implies a present movement from the past to the future', of a shift from one social situation to another (2004: 303). Most often, this shift is from a prior violent past, such as a conflict situation, to a peaceful future. For this reason, the task of these institutions must be understood as 'reconstructive', as assisting the re-founding of new societies and the composition of their social relations (Bell and Campbell, 2004: 299; see also Hamber and Wilson, 2002). In this way, as most commentators and the mandates of the institutions themselves consider, these transitional justice institutions have the complex and expansive tasks of restoring 'normalcy to societies torn apart by conflicts' (Bassiouni, 2002: xv), condemning and / or holding the perpetrators accountable for their crimes (see Kritz, 1995) and the promotion of 'reconciliation by forcing societies . . . to "come to terms" with the past, achieve "closure" and stability' (Weinstein and Stover, 2004: 13). How then do these two divergent forms of transitional justice seek to both enforce civilian protections and provide redress to this group of victims? What forms of 'justice' and redress do they attempt to construct for victims in the aftermath of conflict?

Truth and Reconciliation Commissions

While taking different forms, truth and reconciliation commissions typically work on the premise that the process of revealing and confirming past wrongs can facilitate a shared memory and in so doing, create a sense of unity and reconciliation (Hamber and Wilson, 2002: 35). Priscilla Hayner, a leading commentator of TRCs points out that these mechanisms generally take the 'approach of collecting thousands of testimonies and publishing the results of their findings in a public and officially sanctioned report [which] represents for many victims the first sign of acknowledgement by any state body that their claims are credible and that the atrocities were wrong' (2002: 16). In this way, the

TRCs have a particular ‘narrative-making’ focus, both in terms of its *process* and *product* (Hayner, 2002: 225).⁸¹ These aspects of the TRCs functioning are understood to recognise the victims of conflict, the broader context of atrocities and construct an authoritative account of its crimes and criminality.

Firstly, the TRC process prioritises the victim by hearing the ‘truth’ of the violent act from the victims themselves. This process serves to recognise the victim as such, and their experience of victimisation within conflict and its resultant harms. By placing the victim at the centre of the process of founding and narrating the official ‘truth’ of the armed conflict or prior regime, they become both visible and included in the process of founding its historical record. Secondly, the TRC model founds a broader historical record of the previous conflict situation as the product of its functioning. Most often taking the form of a ‘Final Report’, such as in the case of South Africa, this narrative of the crimes make these violent acts known to the national state in which they took place, the victims themselves and the international community (Hamber and Wilson, 2002; Hayner, 2001). Forming a narrative of the conflict through the articulations of the victims themselves provides an official record of its perpetration and an authoritative means ‘to resist predictable attempts to rewrite history’ (Neier, 1999: 39).

For these reasons, TRCs are seen to largely reflect the provisions of victim’s rights set out by the United Nations (Garkawe, 2003: 351). This form of justice is seen as ‘restorative’ or providing redress in the sense that it provides victims with a ‘greater decision-making power’ in their access to these mechanisms and an inclusive role within their proceedings and the construction of their ‘product’ (Garkawe, 2003). Unlike a legal trial, as will be discussed, TRCs are understood to provide an ‘open and receptive environment’ in which victims can narrate their victimisation and harms sustained (Aldana, 2006). Moreover, depending upon the particular TRC, victims can also seek reparations for the harms of the

⁸¹ Emphasis original.

crime and request the return of seized property, following the UN's conceptualisation of the appropriate forms of 'remedy' for crimes sustained (Hayner, 2001).

However, it is also important to note two key difficulties with the TRC process and product that may complicate its form of redress for post-conflict societies and their persons. Firstly, while TRCs undoubtedly prioritise the needs of victims in terms of their narrative-making function, Hayner points out that they 'do not offer long-term therapy; they offer survivors a one-time opportunity to tell their story, usually to a stranger they will never see again' (2002: 135). TRCs do not necessarily provide a therapeutic environment, as some victims may envisage. This framework of reparative justice does not establish a long-lasting therapeutic relationship for victims of conflict through which they can address psychological or emotional trauma. Secondly, Fiona Ross, through a case-study of the South African TRC, points out that although approximately equal proportions of men and women made statements, 'for the most part women described the suffering of men whereas men testified about their own experiences of violations' (2003: 17). As Ross illustrates, this pattern of prioritising the experiences of men led to a narrative of the violence as being primarily related to the deaths of men, rather encompassing the range of violations perpetrated to women including sexual violence, structural and symbolic violence (2003: 18). For these reasons, any understanding or exploration of the construction of the 'truth' of the prior conflict by TRCs requires a consideration of which persons testify to their harms or those of others and which forms of violence and victimisation become part of the national (or international) narrative of the conflict. As Ross points out, the testimonial procedures of TRCs may have the effect of silencing and eliding the recognition and thus redress of certain victims (for example women) and certain violences (2003).

In contrast to the general structure of TRCs, it is widely understood that legal models of transitional justice are largely perpetrator-driven and thus not ‘victim-friendly’ in either their processes (for example the trial) or their product (typically the legal judgement) (see Aldana, 2006; Weinstein and Stover, 2004). International legal models of transitional justice consist of various forms in the contemporary period. Alongside the ‘international’ models of the ICTY, ICTR and ICC, the international community has also established various other legal institutions such as the ‘mixed judicial model’ or ‘hybrid model’ such as that of Sierra Leone (Sriram, 2006). However, similarly to all these legal courts and tribunals is their primarily retributive approach, that is, to charge, adjudicate and punish the war criminals that come before them. This analysis of the construction of forms of justice within criminal justice mechanisms, both in terms of this chapter and the thesis more generally will use the ICTY as a representative case-study for the inclusion of (civilian) victims within its legal practices.

The ICTY largely mirrors Mani’s model of retributive justice through its criminal prosecutions and punishments of violations of customary humanitarian law. The UN Security Council established the Tribunal for ‘the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law’.⁸² This retributive model of justice charges Yugoslavia’s war criminals with their breaches of IHL (mainly against civilian victims), adjudicates and judges their perpetration and punishes those found guilty. For the Tribunal, this founding of accountability and consequent punishment expresses ‘the outrage of the international community at these crimes’.⁸³ Its legal practices attempt to dismantle ‘the tradition of impunity for war crimes and other

⁸² Resolution 827 (1993).

⁸³ *The Prosecutor v. Zlatko Aleksovski*. Case No. IT-95-14/1-A. Appeals Judgement, 24 March 2000, para. 185.

serious violations of international law'.⁸⁴ The Tribunal considers that this process of trial adjudication and judgement constructs a 'legal awareness of the accused, the surviving victims, their relatives, the witnesses and . . . convey[s] the message that globally accepted laws and rules have to be obeyed by everybody'.⁸⁵ This retributive process thus recognises the perpetrators and their victims and condemns the interactions between them as breaching the protective rules of humanitarian law.

However, despite the UN's conceptualisation of a series of rights for victims to access justice mechanisms, civilian victims of the Yugoslavian conflict cannot initiate or demand investigation or criminal proceedings be brought against an alleged war criminal. Civilian victims do not have 'rights' within the legal process in the sense of their being able to request that the ICTY hears charges of the acts that caused their sustaining of harm. This failure of the Tribunal to adopt the UN guidelines (or an earlier, similar declaration)⁸⁶ has been the focus of substantial critique and concern by legal commentators on, and researchers of, transitional justice mechanisms (see Chifflet, 2003; Jorda and Hemptinne, 2002). The detrimental effect to the efficiency and speed of the proceedings, particularly due to the terms of the completion strategy, have been given as key reasons for the lack of provision of these victims rights (Tolbert and Swinnen, 2006: 195). Correspondence with staff members of the ICTY indicate that there is unlikely to be any substantive change in their policies or practices in terms of victims' rights or participation.⁸⁷

For these reasons, it is necessary to approach an analysis of the ICTY with an understanding that it does not follow the latest 'trends' in contemporary international criminal justice which prioritise the participation of victims at trial and provision of

⁸⁴ <http://www.un.org/icty/glance-e/index.htm>.

⁸⁵ *The Prosecutor v. Miroslav Deronjić*. Case No. IT-02-61-S. Sentencing Judgement, 30 March 2004, para. 149.

⁸⁶ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN Doc. 29 November 1985 (A/RES/40/34).

⁸⁷ Correspondence with a staff member of the VWS, December 2008.

reparations for their harms (see Jorda and Hemptinne, 2002). In this retributive model, therefore, it appears that the ICTY has a narrow framework of measures and means of providing justice and redress to civilian victims. Unlike the TRC model, victims are not central to the narrative-making process or the focus of forms of redress such as reparations or compensation. Rather, as Theo van Boven argues, victims are only present at the Tribunal to provide evidence against the perpetrators and so 'serve the interests of criminal justice' (1999: 81). For these reasons, the following chapters identify the key 'sites' of the ICTY's judicial processes which work to legally construct recognition, protection and redress to the civilian victims of the Yugoslavian conflict. Through exploration of the prosecutorial, evidential and adjudicatory processes, the chapters consider how civilian victims are included in these legal practices and whether the current structure of such practices ultimately work to exclude certain civilian victims from finding legal recognition or redress for their harms.

Conclusion

Uwe Ewald argues that an underlying rationale of international criminal justice is the process of 'constructing "victims"' (2006: 173). As Ewald points out, international criminal justice mechanisms, and the ICTY in particular, are key legal mechanisms for constructing the identities of individual and collective victims through their prosecutions of large-scale victimisation (2006). However, as has been set out above, there is a distinct absence of research identifying or exploring how international criminal justice mechanisms construct legal recognition of civilian victims, enforce their protections or provide for their redress. In particular, there does not yet exist a detailed body of sociological literatures or debates that take these key concepts and practices as the subject of enquiry. For these reasons, this thesis employs the conceptual, methodological and theoretical frameworks set out above that provide a more comprehensive and adequate means for approaching these complex issues. It utilises these approaches to undertake a

case-study of the ICTY and examine the various practices and processes of this international criminal justice mechanism for its construction of legal recognition of civilian victims. As such, this thesis seeks to contribute to the evident gaps in current literatures and debates by developing a better and more complete account of the 'presence' of civilians within armed conflict and, more importantly, how such legal mechanisms recognise, protect and redress such victims in the aftermath of hostilities.

The next chapter sets out the methodological approach of this thesis. It draws on Bourdieu's notion of the 'juridical field' to understand the ICTY as a site of rules and practices that work together to construct legal recognition of civilians, their protection and redress. This chapter then sets out the social research methods employed to undertake an exploration of the juridical field of the ICTY. It describes that this research uses a case-study approach which incorporates documentary analysis, courtroom observation and interviews.

Chapter Two

The Juridical Field of the ICTY: Researching Legal Rules and Practices

To evaluate the ICTY's construction of legal recognition, protection and redress of civilian victims requires an analysis of the protective rules of humanitarian law and the legal practices that enable their enforcement. In order to develop a methodological framework for this analysis, this chapter draws on Pierre Bourdieu's thesis of 'a sociology of the juridical field' (1987). It uses Bourdieu's notion of a juridical field to study the ICTY as a system of rules and practices. The chapter shows the usefulness of using a case-study approach to this field. The chapter then describes the social research methods utilised for the fieldwork of this thesis, namely documentary analysis, courtroom observation and interviews. The juridical field is analysed in terms of a 'view from below' or 'victim-centred' approach. This approach considers the role of the ICTY as it functions, or should function, for the recognition and redress of victims rather than just the prosecution of perpetrators (Kiza, 2006; Weinstein and Stover, 2004).

Analysing the Juridical Field of the ICTY

How, then, should we analyse the ICTY as an institution that regulates and places judgement upon acts of social conflict and violent relations between individuals and groups? Through which practices does the ICTY construct legal recognition, protection and redress of civilian victims? Drawing on Bourdieu's work, this research understands the ICTY as a juridical field of rules and practices, in which the enactment and re-enactment of these practices can hold a transformative potential for the adjudication of social conflict.

As discussed in the previous chapter, the ICTY functions as a retributive mechanism of international criminal justice through its prosecutions, trials and punishment of Yugoslavia's war criminals. Its address to, and redress of, the crimes of civilian victimisation during this conflict works through the enforcement of breaches of the protective rules of humanitarian law. In this way, the ICTY can be understood as functioning as a 'juridical field' in Bourdieu's sense of 'a social space [that is] organized around the conversion of conflict between directly concerned parties into juridically regulated debate' (1987: 831). For Bourdieu, the social space of the juridical field hears incidences of social conflict and constructs legal judgment of its lawful or unlawful nature (1987: 827). Through the interpretive practices of the trial process, the juridical field is understood to found a legal 'solution' and 'resolution' to the act of conflict or violence (Bourdieu, 1987: 816, 831). In this model, the ICTY can be understood as a juridical field that functions to try acts of civilian victimisation and renders judgement as to whether these harmful social interactions breach the rules of humanitarian law. This framing of the ICTY understands its practices as regulating social conflicts and enforcing their breach.

Bourdieu describes that the functioning of the juridical field encompasses two key factors, which provide a useful means for identifying and exploring the central concepts of this research. Firstly, Bourdieu points out that it is necessary to understand the juridical field as comprising of an inter-related system of rules and practices (1987: 831). Such practices encompass 'not only the written record (in the law, for example, legislation, judicial decisions, briefs and commentaries), but also the structured behaviours and customary procedures characteristic of the field' (Terdiman, 1987: 809). For example, Hagan and Levi draw on Bourdieu's work to point out that the 'substantive and procedural norms' of the ICTY are framed 'by a mixture of common and civil law custom, along with treaties, conventions and resolutions of the UN Security Council and General Assembly' (2005: 1503). As will be further discussed in later chapters, Hagan

and Levi's work shows how these rules and practices shape aspects of the Tribunal's functioning such as its prosecutorial regimes and their discretion over the enforcement of IHL (2005). Focusing more specifically on the adjudicatory process, Campbell employs Bourdieu's framing of the juridical field to analyse the ICTY as a case-study of international prosecutions of sexual violence (2007). Such analysis, as Campbell sets out, requires identification of the international legal rules defining sexual violence offences, as well as the legal practices (such as prosecutions and trial proceedings) that represent particular forms of adjudicating conflict (2007: 412-413). These Bourdieuan analyses of the ICTY show how a comprehensive and adequate exploration of the ICTY's functioning cannot simply focus on its rules *or* practices. Rather, both these factors require identification and examination to understand the complex juridical functioning of this institution.

From these analyses, it can be seen that this exploration of the ICTY's construction of legal recognition, protection and redress of civilian victims requires analysis of both its rules and practices. It is the entirety of these legal practices that function to adjudicate social conflicts such as that of the former Yugoslavia and ultimately found judgement upon the interactions between persons during these hostilities. Utilising this approach, the chapters that follow all identify the relevant rules of the ICTY Statute that set out protections for civilians in armed conflict and then examine the legal practices specific to this institution for their enforcement of breaches of these rules. In particular, they explore the ICTY's construction of legal recognition of civilian victims through the application of the protective rules comprising its Statute (chapter three), the prosecutions of crimes against civilians (chapter four), trial processes (chapter five) and its judgements (chapter six).

Bourdieu argues that the structuring of legal practices and ‘logic’ of juridical functioning work to establish the ‘force of law’ (1987). In Bourdieu’s framing, ‘[e]ntry into the juridical field implies the tacit acceptance of the field’s fundamental law, . . . [and] the rules and conventions of the field itself’ (1987: 831). The acceptance of the jurisdiction of the court by its legal actors necessitates conforming to its legal practices and agreeing that they will shape and organise juridical debate (Terdiman, 1987). For example, the Prosecution and Defence agree to the structure of trial proceedings within the specific juridical field in which they adjudicate alleged criminal (or civil) conduct. In the case of the ICTY, the parties conform to the largely adversarial system of trial procedures, as will be further discussed, and structure their bringing of evidence in alignment with these rules and conventions.

However, Bourdieu does not only claim that these legal practices shape the juridical process. Rather, this model of the juridical field considers that the *force* of law arises from its ‘reproduction and continuation’, that is, through the repetition of legal practices (Terdiman, 1987: 809). It is through law’s continual ‘enactment and practice’ (Hagan and Levi, 2005: 1502) that its legal practices hold a particular influential power, namely to ‘determine in part *what* and *how* the law will decide in any specific instance, case, or conflict’ (Terdiman, 1987: 807).⁸⁸ For example, while the ICTY does not follow the system of ‘precedent’ found in many jurisdictions, during the trials of violations of IHL and their judgement, the Trial Chamber’s frequently refer to decisions in previous, similar cases. During the case of *D. Milošević*, for example, the judges frequently referred to the prior interpretation of the charge of ‘terror against a civilian population’ by the Trial

⁸⁸ Emphasis original.

Chamber of the *Galić* case.⁸⁹ The prior interpretation of legal rules, or the enactment of aspects of proceedings such as evidentiary principles in similar cases are thus influential in shaping the adjudicatory processes of later cases and substantiating the force of the authoritative judgement of the Trial Chamber.

The practices of the law, however, do not necessarily figure as 'static' forms of re-enactment and continuation. As noted above, Bourdieu argues that the structure of the juridical field arises from the 'structurally organised competition between the actors' (1987: 818). Such competitive struggles as Hagan and Levi illustrate through their analysis of the ICTY, can be seen through 'clash[es] on the courtroom playing field' over aspects of the enactment of law such as the interpretation of legal rules and the appropriate parameters of evidentiary and procedural processes (2005: 1520). As chapter three will analyse in more detail, a particular example of such competitive struggles arose during the adjudication of the *Tadić* case. In the first judgement of this case, certain charges through the grave breeches category of crimes were held not to encompass some of the civilian victims due to their having the same nationality as the accused, a situation that was contrary to the legal elements of the charge. However, after appeals by the Prosecution over the judge's interpretation of the jurisdictional aspects of this charge, the decision was reversed. Unlike the first judgement, *Tadić* was found guilty of crimes against these civilians. In Hagan and Levi's terms, this decision was a consequence of the competitive struggles between the legal actors of the ICTY, such struggles working ultimately to construct 'new law with new force' (2005: 1520).

For this reason, it is necessary to recognise that the legal practices of the juridical field are not rigid or static in their functioning, but can 'develop and change' (Dezalay and Garth, 1996: 15). More particularly, as Hagan *et al* contend, the competitive struggles

⁸⁹ Fieldwork, *The Prosecutor v. Dragomir Milošević*. Case No. IT-98-29/1. April and June 2007 ('Fieldwork, *D. Milošević*').

over the ICTY's enactment and re-enactment of legal practices can have a 'transformative potential' in relation to the interpretation of rules or procedural frameworks (2006: 587). For this reason, exploration of the ICTY's legal practices must be attentive to changing aspects of their form and functioning, such as developments in its case-law and procedural innovations. The ICTY, for example, describes its accomplishments as including having made pivotal determinations with regard to crimes against humanity committed against civilians and significant advances in the legal treatment and *punishment* of sexual violence in wartime.⁹⁰ As these examples illustrate, since its inception, the legal practices of this institution have enforced the customary rules of humanitarian law that protect civilians during armed conflict. It has also had, and continues to have, a transformative potential for recognising and enforcing the protection of civilian victims through the enactment and re-enactment of its legal practices.

Case-Study Research

In order to examine the juridical field of the ICTY, this thesis employs a case-study research approach. As Campbell (2007) points out, case-study research involves the study of a complex social phenomenon or set of social practices that can be identified as a 'case' through their spatially and / or temporally bounded existence (see also Gerring, 2004; Yin, 2003). It concerns the in-depth and systematic study of a single 'case' for examination of the specificity of its structure and functioning (Berg, 1998; Gerring, 2004). As this definition sets out, a case-study approach provides a useful means for researching the ICTY as a juridical field in alignment with Bourdieu's framing. Employing a case-study approach enables identification of the juridical field of the ICTY as the 'case' under examination and the enactment and re-enactment of its rules and practices as comprising its structure and functioning. Case-study research consists of two key techniques that will establish the focus of this analysis. Firstly, it involves

⁹⁰ <http://www.un.org/icty/cases-e/factsheets/achieve-e.htm>. Emphasis original.

identification of a social phenomenon as a 'case', in this instance the ICTY, and secondly, the use of a 'mixed-method' approach for researching its practices, in this instance the legal rules and practices of this institution (Berg, 1998; Yin, 2003).

Identification of the Case

Case-study research begins with the identification of a social phenomenon or set of social practices as a 'case' or 'unit of analysis' (Stake, 2000; Yin, 2003). Such social phenomenon may be individuals, events or communities, or as in this analysis, an institution or organisation (David and Sutton, 2004: 111). From this initial identification of a 'case', it is then necessary as Stake points out, to recognise that a 'case' is typically 'an integrated system', a social phenomenon or practice that comprises a number of functioning 'parts' (2000: 436). For this reason, where an organisation is the object of analysis, it is necessary to gain a thorough understanding of its establishment and functioning, including the sub-units, parts, relationships, motivations and stressors within it (Berg, 1998: 219; Stake, 2000). In this way, as Berg points out, understanding the case as an integrated system requires analysis into 'how each sub-unit fits together and serves the overall objectives of the organisation', that is, how the organisation operates as a whole (1998: 219). However, the sub-units of a case may not necessarily be 'aligned' or consistently work together as part of a whole. Rather, as Bourdieu's figuration of the juridical field illustrates, there may be aspects of the case, such as its activities or practices that are in tension or are seen as competing entities (1987; see also Hagan and Levi, 2005). For this reason, thorough and effective analysis cannot be undertaken through exploration of a singular 'part' or 'section' of a case. Instead, it is necessary to consider the 'holistic' characteristics of a case and research its overall composition and functioning (Stake, 2000; Yin, 2003).

This research defines the ICTY as the ‘case’ under examination. The ICTY is a spatially bounded ‘case’ in its institutional form, and temporally bounded in terms of the limited time of its institutional existence and temporal jurisdiction over violations of IHL in the former Yugoslavia.⁹¹ Following the case-study approach, this examination of the ICTY understands this institution as a case that consists of a system of ‘parts’ and ‘sub-units’ that work together to constitute its overall functioning. As noted above, this analysis of the ICTY follows Bourdieu’s conception of the functioning of the juridical field to examine both its legal rules and practices (see Bourdieu, 1987: 831; Terdiman, 1987: 806-807). However, as well as the legal rules and practices that figure as part of the prosecutorial process, the juridical field of the ICTY also encompasses various ‘sub-units’ and procedures. For example, for the purposes of this research it is important to examine the mandates and practices of the Victims and Witnesses Section (‘VWS’) and the Outreach program for their protection of, and assistance to, civilian victims and witnesses. As chapter five sets out, it is also necessary to explore how the ICTY figures civilian victim-witnesses within the evidential procedures of the trial process and understand how, or whether, these practices enable their inclusion and facilitate their testimonies of the experience of the conflict.

Case-Study Research: Employing a Mixed-Method Approach

Case-study research also establishes a useful framework for analysis of the ‘case’, in this instance the ICTY. A case-study approach employs a range or mix of research methods to facilitate the collection of in-depth information and data of the case (Hammersley and Gomm, 2000; Yin, 2003). This analytic approach adheres to the defining of the case as a complex but holistic system (in similarity to Bourdieu’s framing of the juridical field) by

⁹¹ The ICTY has jurisdiction over crimes committed on the territory of the former Yugoslavia since 1 January 1991 (ICTY Statute, Article 8). At its establishment, this temporal jurisdiction was not given a date of cessation as ‘there was no indication of when the serious violations of international humanitarian law would cease’ (Morris and Scharf, 1995: 119). However, United Nations Security Council Resolution 827 indicates that this temporal jurisdiction will cease upon the ‘restoration of peace’, a situation yet to occur.

utilising a range of methods that enable examination of its various structures and practices. It also mirrors the sociological research technique of ‘triangulation’ that prioritises the use of a number of differential methods. The ‘triangulation’ approach, as Denzin points out, considers that ‘no single method can ever completely capture all the relevant features of [a] reality’, as the use of different ‘method[s] leads to different features of empirical reality’ (1989: 13). For this reason, it is necessary ‘to employ multiple methods in the analysis of the same empirical events’ (Denzin, 1989: 13). This mixed-method approach enables the drawing out of the complexities of the case and an understanding of the overall functioning of its practices and procedures, whether they are aligned or in tension with each other.

Following the case-study approach, this research utilises three sociological research methods that are seen as central to an in-depth examination of a case and form the basis of the fieldwork undertaken for this research: documentary analysis, direct (courtroom) observations and qualitative interviews (see Yin, 2003). Utilising these different methods enables a broad perspective of the legal practices of the ICTY, ranging from the protective rules of IHL set out in its Statute, to the legal procedures of the trial and judgement. However, while this multiple method approach facilitates analysis of the totality of the ICTY, it is equally important to emphasise that *particular* aspects of its functioning can only be understood through a specific research method. For example, chapter five analyses the role and positioning of victim-witnesses during the trial process. Identification of the protective measures in place for these witnesses was undertaken through documentary analysis of the ICTY’s Statute and Rules of Procedure and Evidence. However, while these documents set out the rules that structure the adjudication process, it is not possible to understand how this aspect of legal proceedings or the role of victim-witnesses within them works in *practice* through a purely textual analysis. For this reason, it was necessary to undertake direct observation of trials for exploration of the role and positioning of victim-witnesses within the adjudicatory

processes of the ICTY. This utilisation of courtroom observation as a research method, as will be set out below, enables first-hand analysis of trial proceedings in relation to the role and experiences of victim-witnesses themselves.

Despite the beneficial attributes of case-study research for this analysis of the ICTY, it is important to note the main critiques of this approach. The most significant and often-cited critique of case-study research is that its focus upon a specific 'case' does not easily allow for generalisations to be made from the data and information found through the research process (see Stake, 2000). However, there are two key reasons for undertaking a case-study approach for this research and more generally as a social research technique. Firstly, this approach provides the most appropriate research technique for 'understanding the case itself' (Stake, 2000: 439). In its specific focus upon a 'case' through a multiple method approach, case-study research enables an exploration of the specificity of its existence and functioning. Such focused exploration is particularly useful and important for 'unique' cases such as the ICTY that do not have any equivalent in their existence or functioning. As has been noted previously, the ICTY was the first international tribunal to enforce violations of humanitarian law and has substantive differences from the Nuremberg trials, ICTR or ICC, despite their similarities in certain aspects of their functioning. For this reason, case-study research enables an in-depth and systematic exploration of the ICTY and the specificity of its rules and practices that analysis of any other institution would not facilitate.

Secondly, as a number of commentators point out, a case-study methodological approach *can* afford a degree of generalizability in its findings. For example, Berg argues that case studies can 'generally provide understanding about *similar* individuals, groups, and events' (1998: 218).⁹² While it is important to be attentive to the particularities of a specific case, this proposition indicates that it is reasonable to argue that exploration of the

⁹² Emphasis added.

ICTY's legal recognition of civilians may inform analysis of similar institutions such as the ICC. For this reason, although this case-study of the ICTY explores the rules and practices and the specificity of their enactment and re-enactment at this institution, it also recognises that there are similarities with other institutions, for example, through the enforcement of the customary rules of IHL, the notion of prosecutorial discretion and, in large-part, the largely adversarial system of trial adjudication. It is therefore reasonable to consider that analysis of the ICTY's legal practices, both in terms of its 'successes' and deficiencies, can inform debate and perhaps practical recommendations for developing the legal practices of these and other enforcement mechanisms. In this way, as the conclusion of this thesis will set out in more detail, exploration of the ICTY may provide an understanding of better and more comprehensive practices and procedures for recognising, protecting and redressing the civilian victims of conflicts yet to come.

Fieldwork and the Use of Social Research Methods

This research takes the Tribunal as the object of analysis in accordance with the case-study approach set out above and utilises a range of qualitative research methods for its examination. In accordance with Bourdieu's framing of the functioning of the juridical field, this research employs documentary analysis of the ICTY's legal *texts* such as its Statute, trial transcripts and judgements. For in-depth examination of its legal *practices*, it employs courtroom observation of trials, as well as in-depth interviews with staff members of the ICTY. To understand these practices, the thesis also employs quantitative research for an analysis of the criminal prosecutions brought by the OTP (see chapter four). In order to explore the criminal prosecutions of crimes that involve acts of civilian victimisation, this section of the research analyses the charges of crimes against humanity brought in the final indictments against accused in completed cases. It 'counts' the number of charges brought for each act within the category of crimes against humanity and through that process identifies notable patterns or trends within the criminal

prosecutions. In accordance with the overall focus of the thesis, this quantitative analysis of criminal prosecutions is employed to explore whether any particular categories of civilian victims are more likely to find legal recognition of their status as such and their sustaining of harm during the conflict.

Documentary Analysis

This research draws on documentary analysis of the Tribunal's key texts as a central method for examination of its legal rules and practices. As with most public institutions, the Tribunal produces a vast number of documents that detail its role and practices.⁹³ These include the two key 'legal texts' that determine and structure the Tribunal's rules and practices, that is, the Statute that sets out the terms of its jurisdiction over crimes committed in the former Yugoslavia and its Rules of Procedure and Evidence that establish the principles of the enactment of its legal practices (see Oosthuizen, 2001). Moreover, the Tribunal produces and publicises important aspects of its work through its official website. For example, the Tribunal's Annual Reports detail the judicial activity of the previous year, while the indictments, trial transcripts and judgements set out the decisions taken at differential stages of the prosecutorial process for each of the indicted accused.⁹⁴

These documents act as a form of representation through their account of the Tribunal's role and structures of its functioning. As Atkinson and Coffey point out, documents are a key resource for an organisation's representation of itself and for enabling the external and public consumption of its practices and processes (2004: 45-46). For the purposes of this research, the Tribunal's public documents are used for two key reasons. Firstly,

⁹³ See Macdonald and Tipton (1993) for discussion of the various types of documents that are available to social researchers, from 'public' records (such as those accessible on the ICTY website), to private documents such as papers and diaries.

⁹⁴ <http://www.un.org/icty>.

documents are used as a resource for their description of substantive aspects of the Tribunal's functioning, namely its jurisdiction, prosecutions, judgements, trial proceedings and procedural and evidential rules. For example, it is important to identify the categories of crimes that the ICTY has jurisdiction over in order to analyse the charges brought against individual accused for acts of civilian victimisation (as was necessary for the analysis carried out in all the chapters). It is also necessary to understand the rules that guide trial proceedings for exploration of their framing of the legal practices of the courtroom, such as confidentiality measures for victim-witnesses or the structuring of testimonies (see in particular, chapter five).

Secondly, as will be evident in later chapters, documents are used as a research resource for analysis of the 'sequence' of the Tribunal's legal practices and activities. Atkinson and Coffey point out that documents are rarely 'free-standing' (2004: 57). Rather, there is often a dimension of '*intertextuality*' between documents that can be seen in their reference to other documents (whether explicitly or implicitly), and / or the sequences or links between them (Atkinson and Coffey, 2004: 56-57).⁹⁵ This recognition of the relationships between texts provided an important framework for analysis of a key argument of this thesis, that is, that there is not a fixed norm of the legal construction of persons as 'civilian' through the differential sites of the Tribunal. As noted previously, the Tribunal produces legal texts throughout the stages of judicial activity, from the initial indictment of an accused to the transcript of their trial and the judgement of their acts of civilian victimisation. Examination of these documents, and the narrative relationships between them, should therefore, show how civilians are 'recognised' and understood as victims of the crimes of war in the different stages of the legal process. It should help illuminate, along with first-hand observation of trial adjudications, whether this form of recognition is enacted as a consolidated norm or an unstable category of definition. As Bourdieu's framing of the juridical field and the principles of case-study research

⁹⁵ Emphasis original.

emphasise, it is important to examine rules and practices as they function in relation to each other, rather than as isolated aspects of legal practice.

In undertaking this aspect of the research, as well as the recognition, protection and redress of civilian victim-witnesses more generally, trial transcripts are a particularly useful and key source of information. Sarat points out that 'the essential narrative elements of the trial are recorded and encoded in the transcript' (1999: 355). This comprehensive document, unlike the final judgement, details all aspects of the trial process that are heard in public session, from the testimonies of the witnesses to the verdict and sentencing of the judges. It acts as form of 'memorialization' of the trial process, that is, of a 'history of the "truth" of what was said, what was decided' (Sarat, 1999: 358). However, as Sarat argues, the trial transcript not only invites a reading of what was said by the various legal actors and witnesses, but also those aspects that are 'denied, repressed, or excluded' (1999: 360). As chapter's five and six will illustrate, trial transcripts are an important source of information for this research for understanding the role and positioning of victim-witnesses at trial, as well as their views of the Yugoslavian conflict and interactions between civilians and combatants. They act as a key resource for identification of these aspects of civilian testimonies and their victimisation, but also as chapter six will describe in more detail, for understanding the 'denial' or exclusion of particular civilians as victims of the acts of victimisation under adjudication or their experiences of the pervasive violence of the conflict.

For this reason, this research utilises narrative analysis to examine both trial transcripts and judgements rendered by the Tribunal. Narrative analysis is a useful sociological technique for exploration of legal texts as it enables examination 'not only [into] how the law is found but how it is made' (Gewirtz, 1996: 3; see also Ewick and Sibley, 1995). This research method has 'the capacity to reveal truths about the social world that are flattened or silenced by an insistence on more traditional methods of social science and

legal scholarship' (Ewick and Sibley, 1995: 1999). For example, narrative analysis of the trial transcript can move beyond recognition of the legal charges of a case to illuminate the legal practices of adjudications such as the use of evidential procedures or the role of judges in guiding (or preventing) testimonies being heard. More significantly for the purposes of this research, it can frame examination and 'awareness of the particular human lives that are the subjects or objects of the law' (Gewirtz, 1996: 3). For example, the use of narrative analysis of trial transcripts alongside the judgement of the case, following the approach of intertextuality, can illustrate how and where the testimonies of civilian victim-witnesses figure in legal processes. This approach enables a focus upon the victims of the acts of victimisation under adjudication, as well as the legal practices that exclude such testimonies from being heard.

However, while documentary analysis of the Tribunal's legal texts provides a significant account of its practices and procedures, this research technique cannot enable a comprehensive examination of their actual enactment and practice. As Atkinson and Coffey argue, we 'should not use documentary sources as surrogates for other kinds of data. We cannot, for instance, learn through records alone how an organization actually *operates* day-by-day' (2004: 47).⁹⁶ For this reason, it is necessary to use a research method that provides first-hand examination of legal practices as part of the case-study approach to this study. This research uses courtroom observation of trials of civilian victimisation at the Tribunal for an in-depth examination of the legal practices of adjudication.

Courtroom Observation

In order to examine the legal *practices* of the ICTY, a key research method for this thesis is courtroom observation of trial proceedings. Courtroom observation, as Weis Bentzon *et*

⁹⁶ Emphasis added.

al argue, allows for ‘a more effective interrogation of the legal system’ than employing a singular methodological approach such as documentary analysis of judicial decisions (1998: 143; see also Mack and Roach Anleu, 2007: 346). For this reason, courtroom observation at the ICTY was undertaken as part of the case-study approach of this thesis to facilitate a broad collection of data and information relating to this specific legal system. In particular, courtroom observation was used as a research method to move beyond a restrictive analysis of the Tribunal’s official ‘texts’, such as its Statute or judgements, to a more expansive exploration of its legal practices, in particular of trial proceedings and the role and participation of the differential subjects present in the Trial Chambers during this process.

Courtroom observation has not, however, been utilised extensively as a research method by either sociologists or legal researchers.⁹⁷ As Baldwin points out, few researchers have spent much time in courts [either national or international] engaged in the observation of legal hearings (2000: 244). However, it is important to note those studies of legal trials which have undertaken courtroom observation as part of their methodological approach. For example, there are influential analyses of rape and sexual violence cases within national jurisdictions that examine the structure of the adjudicatory process, both in terms of the ‘legal’ actors within it, and the positioning of the victim-witness in relation to these actors and their standing in the trial process (see for example, Lees, 1996; Taslitz, 1999).⁹⁸ However, these studies of national trials tend to focus upon the legal practices of an adversarial criminal system. As such they do not provide an adequate framework for examination of the specific rules and practices of the ‘increasingly hybrid system of procedure’ at the ICTY or the role and positioning of the legal actors and victim-witnesses within it (Schabas, 2006: 410). For example, these studies cannot frame an

⁹⁷ It is notable, for example, that Starr and Goodale’s edited collection on ethnography and law does not include any discussion of researching trials through courtroom observation (2002).

⁹⁸ It should be noted that the courtroom observation used in these studies was fairly minimal. Instead, these researchers used transcripts or surveys as their data resource more extensively.

analysis, or capture certain aspects of the functioning of the ICTY that do not figure as part of national, adversarial systems, such as the existence and work of the VWS for protecting victim-witnesses or the particularities of the RPE that shape the evidential procedure for the inclusion and examination of victims of sexual violence (see Rule 96).

In terms of international courts, and the ICTY more specifically, Hagan and Levi's study of the juridical field of this institution appears to be the only notable use of courtroom observation for analysis of its legal practices and processes (2005; see also Hagan *et al*, 2006). As set out previously, employing Bourdieu's conception of the juridical field, Hagan and Levi utilise this research method to explore the constitution of the 'force of law' through the competitive 'struggles' between its legal actors (most often the Prosecutors, Defence and the judges) (2005: 1504). In so doing, they focus upon the cases of *The Prosecutor v. Dragoljub Kunarac, Radomir Kovać and Zoran Vuković ('Kunarac et al')*⁹⁹ and *The Prosecutor v. Radislav Krstić ('Krstić')*¹⁰⁰ to analyse the struggles over the interpretation of the rules of IHL, such as the legal elements of sexual violence charges, and the utilisation of certain legal practices, such as the timing of the introduction of evidence (Hagan and Levi, 2005: 1520-1521). However, while Hagan and Levi state the periods of time spent in the courtroom, there is little detail as to how they used this research method as a data collection technique. For example, it is unclear to what extent their theoretical and empirical insights arise from courtroom observations, or whether the predominant source of their data came from the numerous in-depth interviews they conducted.

It is also notable that other studies of the ICTY's practices do not utilise this research method. For example, Dembour and Haslam (2004) explore the role of victim-witnesses in the *Krstić* case, which involves charges of genocide in relation to the crimes committed

⁹⁹ Case No. IT-96-23 & IT-96-23/1.

¹⁰⁰ Case No. IT-98-33.

in Srebrenica. However, they do so through an analysis of trial transcripts, rather than first-hand observation of the trial proceedings. While the length of the trial (fifteen months) acts as a significant practical limitation for observing the entirety of its adjudication, a more direct perspective of its legal practices would provide a more nuanced account of the positioning of victim-witnesses within this landmark trial.¹⁰¹ Similarly, Mertus (2004) uses the case of *Kunarac et al* as a case-study to explore whether survivors of rape in armed conflict are afforded any agency in the trial process to enable their experience of violence to be heard and documented by a court of law. However, it is unclear whether Mertus undertook any periods of courtroom observation during this case, or whether transcript analysis was the primary or sole source of data.

In order to address the absence of detailed research of the ICTY practices, in particular for its victims and witnesses, courtroom observation was undertaken for this research for two key reasons. These concern the structure of the trial itself and the positioning of the subjects within it. Firstly, as Blanck argues, '[e]ach courtroom has a different culture', a different system of procedures and processes or style of trial adjudication (1987: 347). It is therefore necessary to understand the distinct attributes of a particular legal institution in order to begin an examination into its trial practices and procedures. Exploration of the ICTY's adjudicatory practices is particularly necessary, for while this institution adopts a 'largely adversarial approach to its procedures', there are also elements of the civil or inquisitorial approach (Cassese, 1994: 71-74; see also Orie, 2002). For example, as Cassese points out, there are divergences from the typical adversarial system such as there being 'no technical rules for the admissibility of evidence', the Tribunal being able to 'order the production of additional or new evidence' alongside that brought by the Prosecution or Defence and the rule that there is to be no granting of immunity or plea-bargaining (1994: 72-74). Moreover, the Rules of Procedure and Evidence were

¹⁰¹ The *Krstić* case was the first successful conviction of a charge of genocide at the ICTY (Jorda, 2002: 97). This conviction was later upheld on appeal and the accused sentenced to thirty-five years imprisonment for this and the other crimes with which he was convicted (Schabas, 2006: 163).

'purpose-made' in relation to the pervasive civilian victimisation of the Yugoslavian conflict and so, for example, incorporate a range of rules that address the need for witness protection and security at trial (Cassese, 1994: 75; Lobwein, 2006). These legal practices, as well as others discussed further in chapter five, shape the procedures of trial adjudication in its particularity at the ICTY. For this reason, courtroom observation was undertaken to provide first-hand knowledge and data of this institution's criminal proceedings. This strategy adopts, in Hagan and Levi's framing, an 'inside-out' methodological approach to researching this institution (2005: 1506). It prioritises examination and analysis of legal processes by observing their 'enactment and practice' inside the courtroom, rather than through documentary sources or secondary commentaries (Hagan and Levi, 2005: 1502).

Secondly, courtroom observation was undertaken to observe the role and participation of civilian victim-witnesses during trial proceedings, following the victim-orientated 'view from below' approach that will be set out below. It is during trial adjudication and no other aspect of the legal proceedings that the victim-witness has a 'substantial role' in the retributive processes of the ICTY (Tolbert and Swinnen, 2006: 194). For this reason, courtroom observation was utilised as a research method for analysis of the role and participation of victim-witnesses for four reasons. Firstly, it enables identification of the physical environment of the courtroom. For example, it allows for an understanding of where civilian victim-witnesses are placed within the courtroom when they testify, such as their proximity to the accused or the judges (see Stover, 2005: 82-84). Secondly, this research method allows for examination of the process of adjudication, of the practice of testifying for victim-witnesses, such as their giving of evidence and the subsequent cross-examination by the Prosecution and Defence (and the Chambers if they so require). Thirdly, as Weis Bentzon *et al* point out, courtroom observation provides a means to observe the 'behaviour of the officials [which] gives insights into how responsive the courts are to the needs of individuals' (1998: 143). It enables exploration into the legal

practices of the ICTY's trial processes to analyse their compliance or adherence to the principles set out in the UN's guidelines for victims and their determination of the centrality of criminal trials for the provision of truth and redress for civilian victims. Fourthly, courtroom observation allows for the documentation of particular narratives of civilian victimisation that arise during testimonies, but do not appear in the official judgement of the case. For example, as will be set out in chapter six, a significant insight into the social relations of the civilians and soldiers of Sarajevo was gained from first-hand observation of the trial adjudication of the *D. Milošević* case, information that is not readily apparent in the judgement of the charges against him.

The Observation of Trial Adjudications

In order to examine the legal practices of trial proceedings, and in particular the role and positioning of civilian victim-witnesses, courtroom observation was undertaken at the ICTY in The Hague, The Netherlands during May 2005, April 2006, June 2006, April 2007, June 2007¹⁰² and February 2009.¹⁰³ During these periods of fieldwork, courtroom observation was undertaken during public sessions of trial proceedings at different stages of the judicial process, including initial appearances of indicted accused,¹⁰⁴ 'status conferences',¹⁰⁵ prosecution and defence stages of trial adjudication¹⁰⁶ and hearings where closing statements were being given.¹⁰⁷ These cases involved the adjudication of alleged acts of civilian victimisation (as well as alleged crimes against combatants)

¹⁰² Fieldwork during June 2007 was specifically focused upon the role of civilian victim-witnesses during the trial process and is the subject of analysis of chapter five. This period of fieldwork was funded by a Central Research Fund Grant awarded by the University of London in May 2007.

¹⁰³ Although a small period of time during fieldwork in February 2009 was spent undertaking courtroom observation at the Tribunal and an interview with a staff member of the Victims and Witnesses Section, this fieldwork was more specifically focused on courtroom observation during *The Prosecutor v. Thomas Lubanga Dyilo*. Case No. ICC-01/04-01/06 ('*Lubanga*') at the International Criminal Court which is the first trial to be adjudicated by this institution. The fieldwork undertaken at *Lubanga* is referred to in the conclusion of this thesis.

¹⁰⁴ For example, *The Prosecutor v. Vlastimir Djordjević*. Case No. IT-05-87/1. 19 June 2007.

¹⁰⁵ For example, *The Prosecutor v. Radoslav Brđjanin*. Case No. IT-99-36. 28 June 2006.

¹⁰⁶ The majority of trial sessions that I attended were at this stage of proceedings. For example, *The Prosecutor v. Slobodan Milošević*. Case No. IT-02-54. 25 May 2005; *The Prosecutor v. Dragomir Milošević*. Case No. IT-98-29/1. 18-22 June 2007; *The Prosecutor v. Momčilo Perišić*. Case No. IT-04-81. 2-5 February 2009.

¹⁰⁷ For example, *The Prosecutor v. Naser Orić*. Case No. IT-03-68. 4 April and 6 April 2006.

brought through the categories of crimes comprising of the subject-matter jurisdiction of the Tribunal, including war crimes, crimes against humanity, grave breaches of the Geneva Conventions, 1949 and genocide. In particular, courtroom observation was undertaken during trial proceedings of *The Prosecutor v. Dragomir Milošević* during April and June 2007, a case charging the accused with the war crime of ‘terror against a civilian population’, as well as other crimes against civilians, for his actions (and those of his subordinates) during the siege of Sarajevo. Courtroom observation of the *D. Milošević* case provides the basis of chapters five and six, both in terms of the data used but also the development of their research questions, which arose from the trial narratives themselves.

As the ICTY is a public institution, gaining access to the public galleries of the courtrooms did not pose any significant difficulties.¹⁰⁸ Once issued with a visitor ticket (after supplying photographic identification) and two sets of security checks, I was able to attend trials in any of the three courtrooms if they were in public session. In this institutional setting, my role was as a ‘complete observer’ (Gray *et al*, 2007; Ruane, 2005). The public nature of legal trials meant that myself and any other persons in the public gallery, of which there were generally few, were entirely ‘visible in the setting’ (Gray *et al*, 2007: 187).¹⁰⁹ This visibility is a necessary aspect of the high security and in Hagan and Levi’s terms, the ‘secretive’ nature of the Tribunal (2005: 1506), a situation somewhat confirmed by frequent questions from the security guards as to the reasons for my presence in the courtroom, the nature of my research and the content of my field-notes.¹¹⁰ In this way, my ‘observer-role’ contrasted with other sociological research methodologies such as ‘participant observation’ where the researcher becomes ‘part of a group or organization [in order] to understand it’ (May, 1997: 141). The closed, bounded social space of the courtroom, as Bourdieu and Hagan and Levi describe, means that

¹⁰⁸ See ICTY Statute, Article 21(2).

¹⁰⁹ It is interesting to note that I was often the sole person within the courtrooms. While there were several incidences where school groups were present at the Tribunal, there were generally few members of the public or press during trial hearings (other than at sessions involving initial appearances where there would be a few journalists present).

¹¹⁰ Fieldwork, April 2005, May 2007, June 2007.

those external to the social practices of the law have no access to, or participation in, the trial itself. There is no possibility that any researcher focusing on legal processes can 'engage fully in the activities of the group or organization under investigation' in the same manner as is possible for studies of some other aspects of social phenomenon or practices (May, 1997: 140).

However, while the generally 'open' nature of the courtrooms was conducive to this methodological approach, it is also important to note that courtroom observation itself provides 'only the public face of justice' (Baldwin, 2000: 245). For example, I was only able to attend 'public' sessions of trial proceedings. There were many instances where a trial hearing was in 'closed' session, most often due to privacy measures having been put in place for the witnesses that were testifying. Frequently, trial proceedings shifted between being in 'public' and 'closed' session, which on occasion made it difficult to follow proceedings, identify who a new witness was, whether they were testifying for the Prosecution or Defence, or even grasp the nature or context of their testimony. During the closed sessions, there is no admittance to the public gallery (or the sound is muted and the witness is shielded from view), the corresponding tele-visual transmission of the proceedings in the foyer of the Tribunal is switched off and testimonies given are redacted from the trial transcripts that are posted online. Similarly to national proceedings, therefore, there were many instances of testimonies, decisions and cross-examinations during trial adjudications that I was not able to observe, or follow-up through analysis of trial transcripts (see Baldwin, 2000).

Despite these difficulties, courtroom observation provides the only first-hand means to analyse trial adjudications as they function in practice. More specifically, this research method enables examination of the enactment of certain legal practices (such as the admission of particular forms of evidence) that cannot be understood through a purely

textual reading of judgements or trial transcripts.¹¹¹ In undertaking this form of research, I followed the usual sociological research practice of first familiarizing myself with the social setting of the research and the people within it, and then focusing my research and observations in line with my specific theoretical and conceptual interests (see May, 1997: 144). For this reason, I conducted a preliminary field-work trip to the Tribunal (in May 2005) to acquaint myself with the structure of the trial process and the functioning of this institution more generally. During this period of courtroom observation I focused upon the layout of the courtroom, the process of trial adjudication (such as the structure of examination and cross-examination by the Prosecution and Defence) and the participation of the judges, both in terms of their influence over the testimony process and their interactions with other actors in the courtroom such as the interpreters, court officials and the parties themselves.¹¹² As the trials I attended were all necessarily public sessions, I took extensive field-notes during the sessions themselves. The taking of field-notes during the trial sessions did not pose any difficulties; other members of the public and journalists were often doing likewise. In this way, as Hammersley and Atkinson describe, taking field-notes was 'broadly congruent with the social setting under scrutiny' (1995: 177). In instances of incomplete notes, or of particularly noticeable testimonies or behaviours that I could not record adequately at the time, I followed the usual technique of writing-up observations in as much detail and as promptly as possible after their observation, which was most often during session breaks of the trial proceedings (see Fielding, 1993: 161-162).¹¹³

¹¹¹ For example, evidence in the form of photographs, maps or videos cannot be 'seen' through analysis of judgements or transcripts. These forms of evidence were frequently admitted into evidence during the periods of courtroom observation I undertook of *D. Milošević* (Fieldwork, April and June 2007).

¹¹² It is important to note that due to the number of different languages being spoken by the various legal counsel and the witnesses, and the resulting interpretation of the testimonies, there is often difficulty in recognising who is speaking and to whom that person is addressing their comments or questions. It was often the case that this difficulty held for both the public observer and the legal counsel themselves, who repeatedly asked for clarification of certain information or details of testimony (Fieldwork).

¹¹³ Recording devices are not permitted in the Tribunal.

Subsequent fieldwork trips to the Tribunal were more precisely focused upon the role and positioning of civilian victim-witnesses within the trial process and the narratives arising within the content of their testimonies. For this reason, I attended trials that were centred upon or included charges of civilian victimisation through the various categories of crimes that comprise the subject-matter jurisdiction of this institution (in particular, *D. Milošević*). During this phase of courtroom observation, my specific focus upon the role and participation of civilian victim-witnesses led to a consequent focus upon taking notes in relation to legal practices either orientated toward these witnesses (such as the provision of protective measures) or those that implicated them (such as the form of cross-examination or, as will be discussed further in chapter five, the structuring of testimony to prove (or disprove) their very identity as *civilian* victim-witnesses). For this reason, I paid particular attention to detailing the role and positioning of civilian victim-witnesses in the trial process. As argued earlier, this is the only aspect of legal proceedings where civilian victims are ‘present’ in the legal process. As chapter five will set out in more detail, analysis of the inclusion of civilian victim-witnesses was important for this research, both due to the general focus of this thesis upon civilian victims, but also as the role and participation of victim-witnesses at the Tribunal and its procedural rules in relation to these witnesses has been the subject of significant debate and contention (see Kirk McDonald, 2000).

Interviews

As part of the fieldwork undertaken at the Tribunal, I participated in interviews with staff holding a range of different roles within the functioning of this institution.¹¹⁴ Interviews were held with eleven members of staff, consisting of eight members of the Office of the Prosecutor (‘OTP’), a member of staff of the Victims and Witnesses Section (‘VWS’), a

¹¹⁴ I participated in these interviews while a research assistant to the “Codification of Trauma” project, with Dr Kirsten Campbell and Dr Sari Wastell as principle investigators (2006).

member of staff of the Outreach Programme and a member of staff of the Military Analysis Team. The member of staff of the Outreach Programme was interviewed twice and I also spoke with her on an informal basis at a conference held in London in June 2007. Several of the interviews were the result of recommendations by other interviewees, following the 'snowball' technique of selecting persons to interview (see Arber, 1993: 73-74). These interviews were all carried out as part of fieldwork trips to the Tribunal in April and June 2006. In February 2009, I also carried out a follow-up interview with a member of staff of the Victims and Witnesses Section which was focused upon the role of the VWS and victim-witness testimonies during the 'higher-level' cases that are now being heard at the Tribunal (as will be discussed in chapter's four and five). These interviews all took place in The Hague, most often at the Tribunal itself, although a few were carried out in locations in close proximity to it. I am in continuing correspondence with several staff members of the Tribunal, in particular with VWS staff.

Following the case-study methodology set out earlier, these interviews were used as a further research method for gaining information and a broader knowledge of the Tribunal, its various sub-units and legal practices. In this way, the interviews were used as a 'resource', as a method of gaining information and an 'account of [a] social situation' (Seale, 1998: 204, 209). The interviews all followed a semi-structured format. Semi-structured interviews generally follow a format where 'part of the interview is structured with a set of questions asked sequentially while other parts are unstructured and are designed to explore the views of the interviewee in detail' (Bloch, 2004: 165). As such, semi-structured interviews enable 'the interviewer to have more latitude to probe beyond the answers and thus enter into a dialogue with the interviewee' (May, 1997: 111). In this way, this style of interview can be seen as more 'open' than a structured interview where the adherence to a strict list of questions cannot follow-up on useful or interesting information that the interviewee may raise or address in their answers (see Fielding,

1993). Rather, semi-structured interviews allow greater flexibility for the interviewees to draw attention to particular topics of interest, including topics that the researcher may not even have prior knowledge of.

This interview format was employed to gain ‘general’ information about the Tribunal and confirm data found through previous documentary analysis. It was also employed as a data collection strategy for access to information on aspects of legal practices specific to the staff member and their role within one of the Tribunal’s sub-units. Therefore, prior to the interview, a set of questions was drawn up to guide the interview and the topics covered during it. A set of questions was drawn up that was specific to each ‘category’ of interviewees dependent on their role within the institution. However, this interview guide was not followed rigidly and as the semi-structured approach allows, questions were asked to facilitate both clarification and elaboration on the answers given (see May, 1997: 111). In this way, the interviews were ‘tailored to the unique experiences and perspectives of each individual’ (Gray *et al*, 2007: 161). As well as enabling the ‘probing’ of particularly useful or interesting information, the interviewee was relatively free to speak of any particular aspects of their role or of the Tribunal’s role more broadly as they wished (see May, 1997). Similarly to the approach taken for courtroom observation, notes were taken during the interview, or as soon as possible after their completion.

In terms of the ‘type’ of data sought, this was relatively specific to the role of each staff member. Interviews with the members of staff of the Outreach Programme, Victims and Witnesses Section and Military Analysis Team were carried out to facilitate a fairly preliminary understanding of the role of these sub-units, as little information was available regarding their existence or functioning at that time.¹¹⁵ In particular, the interviews related to the VWS and Outreach Programme were focused upon gaining

¹¹⁵ Prior to December 2008 when the ICTY’s website was significantly updated and a great deal of information was posted online, there was little information on these sub-units. Further information on the VWS can be found in academic texts (see Lobwein, 2006).

knowledge of the role of these units in relation to the broader functions of the Tribunal and their relationship to other units within this institution. More specifically, these interviews focused upon the policies and practices of these units, both in terms of their general functioning and the strengths and difficulties that have arisen in providing protection, information and redress to the victims and witnesses that come before the Trial Chambers. As will be discussed further in chapter five, one particular issue of exploration was the more ‘victim-friendly’ policies and practices of the ICC and whether the adoption of these practices had had an impact upon those of the Tribunal.¹¹⁶

In terms of the Office of the Prosecutor, there has always been a greater degree of information available on the Tribunal’s website. For example, there is detailed information on the indicted accused, the charges brought against them and if brought to trial the finding of their guilt or acquittal by a Trial Chamber. For this reason, the interviews held with the OTP were more precisely focused upon five areas of legal practices. These were the prosecutorial choices over the bringing of charges against different ‘types’ of accused and for different criminal conduct; the role of the Tribunal as a mechanism of transitional justice; the selection and protection of witnesses at trial; the effect of the completion strategy and their perception of any ‘gaps’ in legal practices that had become evident during the conduct of their work. These topics are all consistent with the themes and subjects of analysis of the following chapters. Information from these interviews is used throughout this thesis to frame and analyse the legal practices of the Tribunal.

¹¹⁶ A number of documents supplied by the VWS in relation to the structure of this unit and the ‘types’ of witnesses that have testified at the Tribunal are used extensively as a data source in chapter five.

A 'View from Below'

As indicated previously, this case-study of the ICTY and the fieldwork undertaken for this research employs a 'view from below' or 'from the ground up' approach. Weinstein and Stover's edited collection *'My Neighbor My Enemy'* (2004) provides the framework for this conceptual and methodological approach. Reflecting the central tenets of feminist standpoint theory which describe that the views of oppressed groups provide a 'privileged' perspective and vantage point of experiences and knowledges (see Harding, 2004; Tanesini, 1999), Weinstein and Stover's influential text analysing war crimes trials and notions of justice does not begin with an analysis of legal rules or policies. Nor does it adhere to the proposition that criminal trials (or the practices of TRCs) will be healing or therapeutic, or that they will recognise all victims of conflict. Rather, the various authors all attempt to 'unhinge' discussions of justice or legal redress 'from high-blown assumptions and assertions, and . . . ground it in the everyday life of those who should be most affected by it' (Weinstein and Stover, 2004: 5). In this way, the authors examine various forms of redress through 'the eyes of those most affected by collective violence', in particular from victims of the Yugoslavian and Rwandan conflicts, to critically examine their adequacy and efficacy in light of their experiences of the forms and structures of victimisation (Weinstein and Stover, 2004: 4). Similarly to the standpoint theory approach, the 'view from below' approach makes visible the experiences and opinions of victims as an 'oppressed group', but more importantly, also prioritises their experiences as forms of knowledge on the violences and victimisation of armed conflict.

Following this methodological model, this research adopts a 'view from below' or 'bottom-up' approach to analyse the civilian victimisation of conflict and the construction of legal recognition and redress of its perpetration by the ICTY. In so doing, the following chapters all examine the Tribunal's legal practices for their recognition of civilian victims and the possibility for their construction of forms of redress, rather than

employing a purely doctrinal analysis of rules or jurisprudence for the prosecution of perpetrators. For example, I utilise civilian victim-witness testimonies to understand the civilian victimisation of the siege of Sarajevo and so prioritise their experiences to analyse the Tribunal's recognition of the victims of this context of violence (see chapter six). This methodological approach seeks to represent 'the non-dominant alternative views and experiences of the social world' (Armakolas, 2001: 176). It attempts to address the traditional under-reporting of civilian violence, as well as the lack of academic study of this particular group of persons in armed conflict (Gardam, 1993a; Kinsella, 2006). It also aligns to the earlier descriptions of researching civilian victimisation during conflict from a 'bottom-up' approach set out in chapter one, and as is advocated by Kiza (2006) and Nikolić-Ristanović (2000a).

Ethical Considerations

It is important to note two areas of this research where ethical issues or issues of confidentiality have arisen and the way in which I dealt with them. The first issue is the sensitive and often highly personal nature of testimonies given by victim-witnesses during trial proceedings. Due to the nature of the acts of civilian victimisation that are under adjudication at the Tribunal and the focus of this thesis, there were many occasions during the courtroom observation that I undertook where victims of such crimes were testifying. It was therefore important to recognise that these victim-witnesses may have been, and often were visibly, in an emotionally vulnerable state.¹¹⁷ However, although the trial sessions were necessarily 'public', I did not personally interview any victim-witnesses or have any first-hand or direct contact with them. Where issues of protection or support for victim-witnesses are an issue during trial proceedings, the VWS deals directly with the witnesses, although this situation did not occur during any of the trial proceedings that I attended. In instances of issues of confidentiality for witnesses during

¹¹⁷ See Lee and Renzetti (1993) for discussion of researching sensitive topics.

trial proceedings, the Trial Chamber ordered the session to become a 'closed' session and as such, I did not remain in the public gallery. It was also notable that during trial sessions that I attended, where a witness requested a break in the proceedings or for their testimony to be heard in closed session, their request was always granted by the presiding judge of the Trial Chamber. For these reasons, I did not face any serious ethical issues over the recording of testimonies of a sensitive nature, as they were all held in public session and as such, are available to the public through the transcripts on the Tribunal's website.

The second issue concerns the confidentiality of those members of staff whose interviews I either undertook or participated in during fieldwork trips in 2006 and 2009. While it was notable that only one member of staff requested their anonymity to be upheld, I have not identified any of the staff members by name in this thesis and only referred to the position that they held within the Tribunal. This anonymity was given due to the often personal opinions and views given by the interviewees in regard to the general functioning of the Tribunal or the difficulties of prosecuting the perpetrators and protecting the victims that come before its Trial Chambers. The interviews were not recorded by a digital recording device and my interview notes are kept in a secure place in accordance with the British Sociological Association guidelines.

Conclusion

This chapter has set out the methodological approach to this analysis of the ICTY and the research methods that are used in this thesis. As argued above, Bourdieu's conception of the 'juridical field' provides a useful framework for defining the practices of the ICTY, both as an enforcement mechanism of the protective rules of IHL and a forum for the recognition and redress of civilian victims. This notion of the juridical field sets out the necessity to approach analysis of the practices of the juridical field and their 'force' in the

legal domain through both its legal texts and practices. For this reason, as the following chapters will establish, I will examine the protective rules that come under the jurisdiction of the ICTY for their construction of the legal recognition and protection of civilian victims, as well as undertaking first-hand observation of its legal practices in terms of its trial adjudications. This inter-disciplinary, mixed-method approach is used to facilitate an in-depth and critical examination of the ICTY as it works to prosecute the perpetrators and redress the civilian victims of the Yugoslavian conflict through the complex functioning of its rules, practices and institutional elements.

The next chapter of this thesis draws on the theoretical, conceptual and methodological frameworks set out in this and the preceding chapter to trace the increasing legal recognition and protection of civilian victims by the institutions and rules of international criminal justice. It first examines the changing framework and subjects of international law for the protection of civilian victims of conflict. It then traces the development of the protective rules of humanitarian law and finally, examines the *Tadić* case for its construction of legal recognition of different categories of civilian victims.

Chapter Three

Laws of Protection? The Changing Subjects, Regulations and Protections of Humanitarian Law

One of the fundamental challenges facing the international community today is how to give the world a human face. More than a mere vision, this must be a moral and legal imperative.¹¹⁸

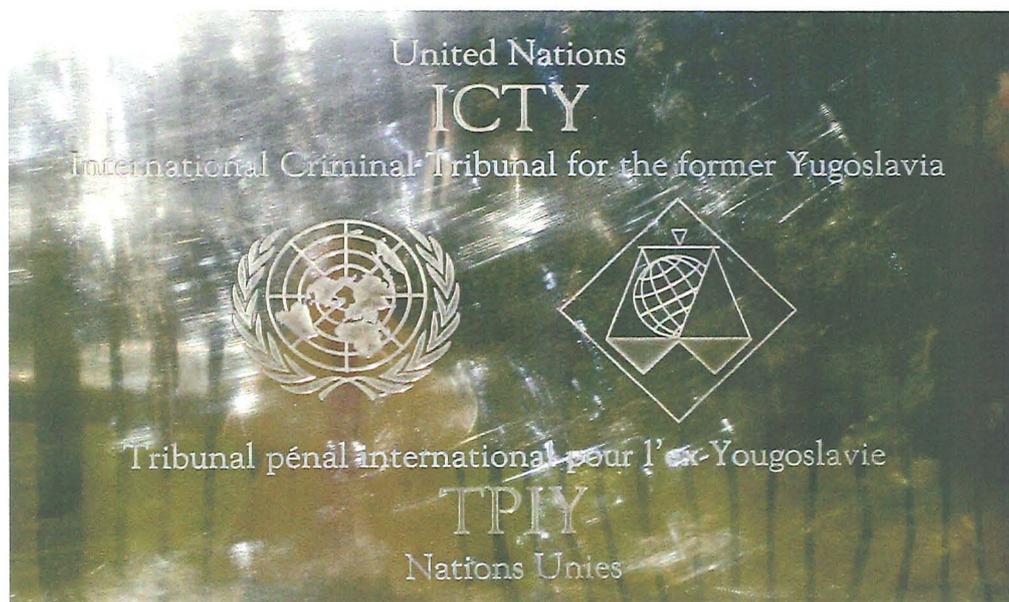


Figure 2¹¹⁹

In February 1995, Duško Tadić a café owner from Kozarac, Bosnia and Herzegovina was indicted for his participation ‘in the attack on, seizure, murder and maltreatment of Bosnian Muslims and Croats in opstina Prijedor’.¹²⁰ For his perpetration of these crimes against civilians during the Yugoslavian conflict, Tadić came before the Tribunal charged with thirty-four counts of violations of the laws or customs of war, grave breaches of the

¹¹⁸ *The Prosecutor v. Zlatko Aleksovski*. Case No. IT-95-14/1-T. Judgement, Dissenting Opinion of Judge Rodrigues, Presiding Judge of the Trial Chamber, Decision of 25 June 1999, para. 50.

¹¹⁹ Photograph taken at the ICTY, April 2006.

¹²⁰ *The Prosecutor v. Duško Tadić*. Case No. IT-94-1-I. Second Amended Indictment, 14 December 1995, para. 1 (*‘Tadić, Second Amended Indictment’*).

Geneva Conventions, 1949 and crimes against humanity.¹²¹ During the adjudication of Tadić's crimes, the Appeals Chamber of the Tribunal argued that international law, whilst 'safeguarding the legitimate interests of States, must gradually turn to the protection of human beings'.¹²² In this innovative decision, the Appeals Chamber cited the necessity to enforce the protection of *all* civilians caught up in armed violence, asserting that a 'State-sovereignty-orientated approach has gradually been supplanted by a human-being-orientated approach. Gradually the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community'.¹²³ How, then, does the Tribunal construct and enforce the parameters of civilian protection in light of this 'human-being-orientated approach'? On what grounds does the Tribunal legally recognise and represent this necessity for all civilians to hold 'protected person' status amid a situation of armed conflict?

This chapter uses *The Prosecutor v. Duško Tadić* ('Tadić') as a case-study to explore the Tribunal's construction of legal recognition of civilian victims. It examines the construction of these models of legal recognition through the Tribunal's application and interpretation of the protective *rules* of humanitarian law (subsequent chapters will focus on legal practices). As noted in chapter one, a central premise of humanitarian law is the principle of distinction, determining that all parties to a conflict must distinguish between combatants and civilians. Civilians are all persons in a situation of armed conflict who are not combatants (Sassòli and Bouvier, 2006). All civilians come under the protections of humanitarian law during a situation of conflict. However, this chapter argues that contrary to the seemingly precise definitional dichotomy of civilians and combatants, the

¹²¹ *Tadić*, Second Amended Indictment.

¹²² *The Prosecutor v. Duško Tadić*. Case No. IT-94-1. Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 97 ('*Tadić*, Interlocutory Appeal on Jurisdiction').

¹²³ *Tadić*, Interlocutory Appeal on Jurisdiction, para. 97. Although a 'human-being-orientated approach' does not constitute a matter of legal doctrine, this framing of humanitarian law has been used by a number of commentators to illuminate the shift from a state-centric body of law to that which encompasses and prioritises the protection of individuals (see for example, Douzinas, 2000; Meron, 2000a).

Tadić case illustrates that when acts of victimisation become the subject of criminal enforcement and sanction, the construction of legal recognition of civilian victims is based upon legally and historically shifting categories that found this particular status of the participants of armed conflict. The complex legal proceedings of this case show that during the legal enforcement of acts of victimisation, the legal recognition of civilian victims as ‘protected persons’ through certain categories of crimes remains dependent upon ties of group membership, of nation and more recently, of ethnicity. As *Tadić* shows, the construction of the protective laws regulating the conduct of armed conflict and, more particularly, their enforcement by legal mechanisms fails to recognise or implement a conceptualisation of the ‘civilian’ as such, that is, as a member of a distinct category of civilian persons irrespective or distinct from ‘legal bonds’ of relations of group membership.

This chapter comprises three sections. The first section of this chapter explores *Tadić* for its representation of the changing configuration of the subjects of international law. It examines the gradual erosion of the state as the sole subject holding ‘the sovereign power to prosecute perpetrators of crimes committed within their respective territories’ and the new and growing recognition of individuals as subjects of humanitarian law (Kittichaisaree, 2001: 10). The second section traces the historical development of the rules of humanitarian law in light of the changing character of armed conflict for the progression of the legal frameworks in place for the protection of civilians. It examines the development of these protective rules for their legal recognition of the category of civilians as participants of armed conflict. Finally, this chapter returns to the *Tadić* case and explores the Tribunal’s construction of the legal recognition and protection of the civilian victims of the crimes under adjudication. In particular, this section examines *Tadić* for its interpretation of the protective rules of customary humanitarian law that constitute the legal recognition of particular civilian victims as ‘protected persons’ through the grave breaches provision. It explores the legal processes that determine

whether criminal sanctions can be brought against the accused for his violent actions against particular groups of civilian victims. This analysis shows how the Tribunal constructs two models of ‘protected persons’ through the grave breaches regime during the *Tadić* case. These are, firstly, a model of ‘nationally’ protected persons and, then following its determination that legal bonds based on national allegiances does not necessarily reflect the complexities of contemporary conflicts, a second model of ‘ethnically’ protected persons (see Bohlander, 2000).

The Subjects of International Humanitarian Law: From State to Human

Tadić was the first trial and judgement rendered by the Tribunal.¹²⁴ In this case, the Tribunal renders its ‘first determination of individual guilt or innocence in connection with serious violations of international humanitarian law’ for crimes committed against civilians in the Yugoslavian conflict.¹²⁵ *Tadić* is a significant case for this exploration of the construction of legal recognition and protection of civilian victims for two reasons. Firstly, following the accused’s challenge to the lawful establishment of the Tribunal and its jurisdiction, the *Tadić* case provides an account of the legitimate terms of the Tribunal’s own creation, role and practices (see Schabas, 2006: 23). In particular, the Trial Chamber describes the shifting role of IHL towards a more comprehensive framework for the protection of civilians and its authority to enforce such breaches. Secondly, *Tadić* concerns the first adjudication of charges of ‘Grave Breaches of the Geneva Conventions of 12 August 1949’ (‘grave breaches’) by the Tribunal (Jones, 2000: 70). In this case, the Tribunal provides the first definition and understanding of the legal construction and thus recognition of civilian victims of this category of crimes (Sassòli and Bouvier, 2006: 115). As will be discussed, while this definition is itself problematic,

¹²⁴ It should be noted that *Tadić* was the first case subject to the adjudication of the Tribunal. There was a prior judgement rendered by the Tribunal in the *Erdemović* case. However, the accused in this case pleaded guilty to the charges and the Tribunal rendered a sentencing judgement rather than adjudicating his guilt or innocence through trial proceedings.

¹²⁵ *The Prosecutor v. Duško Tadić*. Case No. IT-94-1-T. Opinion and Judgement, 7 May 1997, para. 1 (*‘Tadić, Judgement’*).

this interpretation of the protective rules of IHL represents new and progressive jurisprudence for the legal recognition and protection of civilian victims. Now understood as ‘settled jurisprudence’,¹²⁶ the Tribunal has followed the *Tadić* decision on the recognition of civilian victims in its subsequent decisions.¹²⁷

The Tribunal’s account of the changing role of humanitarian law for the protection of civilians and its definition of the civilian victims of the grave breaches category of crimes both rest upon an identification and exploration of the subjects of modern international humanitarian law. Traditionally, the primary and universal subjects of international law have been states (Akehurst, 1997: 91). States ‘possess full legal capacity, that is, the ability to be vested with rights, powers, and obligations’ (Cassese, 2005: 71). For example, states have the right to ‘independence, equality, sovereign territorial jurisdiction, and self-protection’ (Joyner, 2005: 50). They also have the obligation to ‘protect the rights of its people’ (Joyner, 2005: 58). However, as Akehurst points out, ‘while states have remained the predominant actors in international law, the position has changed in the last century’, with individuals increasingly acquiring a degree of international legal personality (1997: 91). For example, as will be further discussed, in a situation of conflict, combatants have an obligation to observe humanitarian law and can be held individually criminally responsible for breaches of these rules (Sassòli and Bouvier, 2006: 144). Whilst vague in its definitional terms, the principle of distinction determines that civilians have the ‘right to be respected’ during a situation of conflict and protected from certain aspects of its conduct (Sassòli and Bouvier, 2006: 144-145).

¹²⁶ *The Prosecutor v. Radoslav Brđjanin*. Case No. IT-99-36-T. Judgement, 1 September 2004, para. 125 (*‘Brđjanin, Judgement’*).

¹²⁷ See for example, *The Prosecutor v. Dario Kordić and Mario Čerkez*. Case No. IT-95-14/2-A. Appeals Judgement, 17 December 2004, para. 331; *Brđjanin, Judgement*, para. 125. In *The Prosecutor v. Radoslav Brđjanin*. Case No. IT-99-36-A. Appeals Judgement, 3 April 2007, the Appeals Chamber upheld a number of the convictions of grave breaches rendered against the accused (for example, of charges of torture as a grave breach (see para. 503)).

How, then, does the Tribunal recognise and understand the subjects of international humanitarian law? In order to explore the Tribunal's recognition of the subjects of humanitarian law and its account of the role of international criminal justice, this section analyses the arguments put forward in *Tadić* by the Prosecution, Defence and the Tribunal (predominantly following those of the Prosecution). In particular, this section examines the Defence's arguments that the Tribunal cannot prosecute the accused for his acts of civilian victimisation, a proposition that relies upon a traditional conception of states being the sole and privileged subjects for enforcing laws within their territory in a situation of armed conflict. It then explores the Tribunal's description of the necessity for humanitarian law to protect all persons from the violence of war, a framing of the role of law and the function of this enforcement mechanism that works to reject the arguments put forward by the Defence. From these differential framings of the role and functioning of the Tribunal, it is possible to understand and examine the shift from a state-centric notion of IHL to that of a body of law that regulates and enforces the protection of individual subjects, in particular of the civilian victims of armed conflict.

The Submissions of the Prosecution

The Prosecution described that after the hostilities broke out in Bosnia-Herzegovina, the accused Tadić had randomly entered camps set up by the Bosnian Serbs 'to carry out assaults, murders, rapes and sexual assaults on the prisoners that he had selected'.¹²⁸ Amongst other acts of violence, the indictment set forth by the Prosecution alleged that Tadić had personally committed and participated in the severe beatings of numerous prisoners in the Omarska camp, forced two prisoners to commit oral sexual acts and sexual mutilation on another prisoner causing his death, had beaten and abused prisoners and wilfully killed persons both within camps under the control of Serb forces and in the

¹²⁸ *The Prosecutor v. Duško Tadić*. Case No. IT-94-1. Transcript of Trial Proceedings. 7 May 1996, para. 34 ('*Tadić*, Transcript').

region of opstina Prijedor in Bosnia-Herzegovina.¹²⁹ Moreover, it was alleged that Tadić had been ‘willingly used by the advancing Serb forces as an important source of intelligence and as a person capable of identifying local Muslims, Croats and other persons disloyal to the Serb nationalist cause’.¹³⁰

For his perpetration of these particular crimes, the Prosecution charged Tadić with nine counts of grave breaches of the Geneva Conventions, 1949. Comprising of Article 2 of the ICTY’s Statute, the ‘grave breaches’ category of crimes is a subcategory of ‘war crimes’ (Cassese, 2003: 54). This category of crimes arises from a provision in each of the four Geneva Conventions of 1949, as well as the Additional Protocols of 1977 (as will be further discussed) and, broadly speaking, constitutes a set of violations such as wilful killing, torture, inhuman treatment and taking civilians as hostages (Cassese, 2003: 55-56). However, it is important to note that charges can only be laid through the grave breaches provision for international, and not internal conflicts. Therefore, ‘it is an element of any prosecution for grave breaches pursuant to article 2 of the ICTY Statute that there be an international armed conflict’ (Schabas, 2006: 242).¹³¹ As such, the characterisation of the conflict as either international or internal in *Tadic* was central to determining whether the accused could be charged with crimes through the grave breaches provision. While it is important to note that Common Article 3 of the Geneva Conventions, 1949 and, in certain circumstances Additional Protocol II applies to internal conflicts (as will be further discussed), this chapter focuses upon the charges of grave breaches brought by the Prosecution in *Tadic* as this case concerns the first adjudication of this category of crimes and thus, the first definition of civilians as ‘protected persons’

¹²⁹ *Tadić*, Second Amended Indictment.

¹³⁰ *Tadić*, Transcript, para. 26.

¹³¹ It should be noted that there has been debate as to whether grave breaches could, or should, apply to internal conflicts. For example, Judge Abi-Saab has argued that ‘a strong case can be made for the application of Article 2, even when the incriminated act takes place in an internal conflict’ (*The Prosecutor v. Dusko Tadić*. Case No. IT-94-1. Separate Opinion of Judge Abi-Saab on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995).

through this provision. Subsequent chapters explore the construction of legal recognition of civilian victims in relation to the other categories of crimes.

The Submissions of the Defence

The duty to regulate combatants and protect civilians in armed conflict traditionally rested, and to a large extent still rests with, the sovereign state (Caverzasio, 2001). As the principle subjects of international law, states held an encompassing range of sovereign privileges and responsibilities over the governance of its citizens and territory (Shaw, 2003: 1). They held the exclusive power to ‘determine [their] own direction and politics without undue interference from other powers’ and so were ‘independent in all matters of internal politics’ (Held, 2002: 3). In this way, the sovereign of the state held the exclusive power to prosecute and punish an individual’s transgression of national or international laws regulating their conduct toward other persons (or objects) in armed conflict (see Cassese, 2003: 37). It was for the state alone to instigate proceedings that would work to legally recognise the civilian victims of any unlawful conduct of its citizens. However, as Ratner and Abrams point out, this sovereign authority also meant that it was for the state to choose to enact impunity for such breaches, as often was the case during or after a situation of conflict (2001: 4-5).

This traditional framing of the state subject and its sovereign power to authorise the regulation and enforcement of breaches of international law underpins Tadić’s submissions of defence against his adjudication by the Tribunal. The central tenet of Tadić’s defence was founded upon a proposition that the Tribunal did not hold jurisdiction, that is, ‘a legal power, hence necessarily a legitimate power, “to state the

law”¹³² Prior to the adjudication of his crimes, Tadić attempted to negate the possibility of his acts of violence coming to trial by alleging:

- a) unlawful establishment of the International Tribunal;
- b) unjustified primacy of the International Tribunal over competent domestic courts;
- c) lack of subject-matter jurisdiction.¹³³

Through these submissions of defence, as will be examined in more detail later, Tadić asserted that the Tribunal could not legitimately or lawfully adjudicate or judge his alleged perpetration of crimes against civilians (see Greenwood, 1996). He argued that the Tribunal could neither enforce violations of law committed within a national jurisdiction, nor establish international justice for the victims of their breach.

For Carl Schmitt, it is the sovereign of a state that holds the authority to declare war and determine the appropriate conduct of these hostilities, as it is to ‘the state as an essentially political entity belongs the *jus belli* . . . [that is] the technical means by which the battle will be waged’ (1996: 45-6). Moreover, Schmitt argues that the ‘extreme case’ of warfare allows the comprehensive authority of the sovereign to determine this situation a ‘state of exception’ (1996: 35). From this pronouncement of a state of exception, Schmitt argues that the mark of the power of the sovereign permits his or her ‘authority to suspend valid law’ (1985: 9). In a situation of war, the ‘state remains, whereas law recedes’ (Schmitt, 1985: 12). The power of the sovereign of a state lies with their authority to decide to apply, or choose not to apply, the regular rules and laws of peacetime to the conduct of a situation of armed conflict. It is for the sovereign of a state and no other entity to make such a decision.

While Tadić’s appeal does not consider that the Yugoslavian conflict allows the states concerned to suspend law, his first line of defence reflects Schmitt’s claim that it is definitively the sovereign of a nation-state who holds ‘the monopoly to decide’ over the

¹³² Tadić, Interlocutory Appeal on Jurisdiction, para. 10.

¹³³ Tadić, Interlocutory Appeal on Jurisdiction, para. 8.

application, or non-application of law during such a state of exception (1985: 13). In Schmitt's view, it is the 'essence of the state's sovereignty' to make such a decision and for no other entity or subject (1985: 13). Mirroring this Schmittian conception of the ties of nation and law in a situation of armed conflict, Tadić argued that the Tribunal was not 'duly established by law', as the 'action of the Security Council in establishing the International Tribunal and in adopting the Statute under which it functions is beyond power'.¹³⁴ The Security Council was, in the Defence's submissions, functioning 'beyond' sovereign power as the Tribunal 'should have been created either by treaty, the consensual act of nations, or by amendment of the Charter of the United Nations'.¹³⁵ As such, the Defence claimed that the creation of a legal enforcement mechanism should be 'undertaken directly by States'.¹³⁶ For Tadić, the Security Council infringed upon the sovereignty of states to decide upon the establishment of legal enforcement mechanisms. In his view, the sovereign nation state alone and no higher authority should authorise, or choose not to authorise, the regulation of the conduct of hostilities in the former Yugoslavia and so the enforcement of breaches of civilian protection.

Schmitt's contention that there exist fundamental ties between states, law and war also frames Tadić's second line of appeal – that the Tribunal's primacy over national courts is 'inherently wrong'.¹³⁷ Tadić contended that this primacy is 'inherently wrong' as the Tribunal's jurisdiction 'invade[s] an area essentially within the domestic jurisdiction of States'.¹³⁸ This argument follows Schmitt's framing, as well as the traditional model of international law, in which states hold 'the sole and exclusive authority and autonomy over [their] territory' and the individual subjects within it (Kittichaisaree, 2001: 5; see

¹³⁴ *The Prosecutor v. Dusko Tadić*. Case No. IT-94-1. Decision on the Defence Motion on Jurisdiction, 10 August 1995, para. 1 ('*Tadić*, Decision on the Defence Motion on Jurisdiction'). A central and contentious aspect of the *Tadić* case was whether the United Nations Security Council was acting outside of its mandate set out in the United Nations Charter by creating a judicial institution, as such an action is not one of its enumerated powers in either Chapter VI or VII (see Alvarez, 1996).

¹³⁵ *Tadić*, Decision on the Defence Motion on Jurisdiction, para. 2.

¹³⁶ *Tadić*, Interlocutory Appeal on Jurisdiction, para. 35.

¹³⁷ *Tadić*, Decision on the Defence Motion on Jurisdiction, para. 2.

¹³⁸ *Tadić*, Interlocutory Appeal on Jurisdiction, para. 55.

also Held, 2002). It draws upon the state-centric approach of international law (rather than the contemporary framework of humanitarian law, as will be set out), which founds the doctrine of 'non-intervention in the domestic affairs of other recognized states' (Held, 2002: 3). The doctrine of non-intervention holds that only the state itself can regulate the conduct of its subjects or establish protections for its population. Following this model, the Defence contends that the Tribunal cannot 'interfere' in the domestic policies or practices of the states of the former Yugoslavia. It is for these states to regulate and protect its peoples and territory and for no other entity or 'higher' body of law.

The Defence begins with the proposition that the state is the subject of international law and, as such, holds ultimate power and authority to enforce the legal rules regulating armed conflict. This framing of state sovereignty considers that the Tribunal is infringing upon the 'privileges' of states to regulate domestic affairs and prosecute (or not) their nationals for war crimes. The Defence, therefore, contends that the Tribunal cannot act as an international criminal justice mechanism for the enforcement of breaches of civilian protection. This understanding of the Tribunal's institutional functioning considers that it cannot provide legal address or redress to those civilians who have been harmed during the Yugoslavian conflict. Such legal address should be left to the measures considered appropriate by a nation-state. The Defence's understanding of the ties between state, law and war does not consider that the presence or injuries to the individual subjects of the civilian victims can impact upon the sovereign authority of the state. It does not reflect or recognise the increasing trend in international law that figures the individual as a subject of the protective rules of humanitarian law, or that these protections restrict the rights of states to hold exclusive jurisdiction over these individual victims and their perpetrators (see Joyner, 2005: 59; Held, 2002). Instead, for Tadić, the protection of civilians can only come under the purview of a state's jurisdiction and no higher body of law. In this account, the Tribunal cannot enforce breaches of civilian protection nor provide legal recognition or redress for them.

The Tribunal's Judgement

Despite this defence, the Tribunal ultimately refused all Tadić's grounds of appeal and authorised the adjudication and judgement of his crimes. After lengthy and complex judicial proceedings involving numerous judgements and appeals over a period of five years, Tadić was ultimately found guilty of twenty counts of violations of humanitarian law (Bohlander, 2000). The Tribunal, taking into account his 'enthusiastic support for the attack on the non-Serb civilian population' and the nature of his involvement in the crimes against these civilians, sentenced him to twenty years imprisonment.¹³⁹ Tadić was granted early release in July 2008, having served approximately fourteen years of his sentence.¹⁴⁰

During the judicial proceedings in the *Tadić* case, the Tribunal counters the Schmittian model of states, war and law that underpins Tadić's defence that the Tribunal's jurisdiction to try perpetrators of violations of humanitarian law 'constitutes an infringement upon the sovereignty of the States directly affected'.¹⁴¹ Instead, the Tribunal sets out a different account of its role and functioning, articulating a relationship between the protective rules of customary humanitarian law, armed conflict, and its individual perpetrators and civilian victims. In turning to the 'protection of human beings', the *Tadić* case affirms that humanitarian law must establish and develop the parameters of safety, security and protection for persons from the hostilities of war.¹⁴² The Tribunal acts as an enforcement mechanism of this protection, legally recognising civilians as victims and adjudicating the breaches of their protections during the Yugoslavian conflict. As

¹³⁹ *The Prosecutor v. Duško Tadić*. Case No. IT-94-1-T bis-R117. Sentencing Judgement, 11 November 1999, para. 20. See also *The Prosecutor v. Duško Tadić*. Case No. IT-94-1-A and IT-94-1-Abis. Judgement in Sentencing Appeals, 26 January 2000.

¹⁴⁰ *The Prosecutor v. Duško Tadić*, Case Information Sheet (<http://www.un.org/icty/cases-e/cis/tadic/cis-tadic.pdf>).

¹⁴¹ *Tadić*, Interlocutory Appeal on Jurisdiction, para. 50.

¹⁴² *Tadić*, Interlocutory Appeal on Jurisdiction, para. 97.

Antonio Cassese, the first President of the Tribunal argues, this institution's functioning is significant for its unprecedented contribution to the alleviation of the suffering caused by 'unbearable abuses perpetrated in the region [which] have spread terror and deep anguish among the civilian population' (1994: 75).

Through the adjudication of the *Tadić* case, the Tribunal substantiates the United Nations Security Council's authority to establish a judicial organ in the form of an international criminal tribunal as 'a measure contributing to the restoration and maintenance of peace in the former Yugoslavia'.¹⁴³ Although this decision has been the subject of critique (see Alvarez, 1996), the Tribunal rejects the Defence's first line of appeal and held that the Security Council holds this power through Chapter VII of the United Nations Charter and as such, acts as an absolute authority in the course of actions that it deems necessary for the restoration of peace.¹⁴⁴ This position affirms that the Security Council's Resolutions 'are legally binding. It has the authority to decide matters affecting the fate of governments, establish peacekeeping missions, create tribunals to try perpetrators accused of war crimes' (Fasulo, 2004: 39). The Security Council is empowered to enact measures that are both '**coercive** *vis-à-vis* the culprit State or entity [and] **mandatory** *vis-à-vis* the other Member States, who are under an obligation to cooperate with the Organization'.¹⁴⁵ For this reason, the Tribunal does not figure as a juridical organ established by a singular State or treaty of a collective of states. Rather, it is an international institution as all States are 'under a binding obligation to take whatever action is required to carry out a decision taken as an enforcement measure under Chapter VII'.¹⁴⁶ For this reason, the ICTY functions as the first 'truly international tribunal', the Nuremberg trials before it being 'multi-national in nature, representing only part of the world community'.¹⁴⁷

¹⁴³ *Tadić*, Interlocutory Appeal on Jurisdiction, para. 38.

¹⁴⁴ *Tadić*, Interlocutory Appeal on Jurisdiction, para. 40. See also Morris and Scharf (1995: 37-48).

¹⁴⁵ *Tadić*, Interlocutory Appeal on Jurisdiction, para. 31. Emphasis original.

¹⁴⁶ Report of the Secretary-General, 1993, para. 23.

¹⁴⁷ *Tadić*, Judgement, para. 1.

Following its affirmation of the lawful establishment of the Tribunal, the Trial Chamber then counters Tadić's second defence submission and affirms that in accordance with Article 9 of its Statute, the Tribunal holds jurisdictional primacy over domestic courts (Alvarez, 1996). While national courts are 'encouraged to exercise their jurisdiction',¹⁴⁸ this institution holds primacy and as such, 'all states must cooperate with the Tribunal' (Article 29). In this model, the 'relationship between the Tribunal and national jurisdictions is not horizontal, but *vertical*'.¹⁴⁹ This framework negates the Schmittian model of encompassing ties between states and law. It also overcomes a traditional critique of the functioning of international law that contends that there is no enforcement mechanism if 'States wish to break or bend the law' (Best, 1994: 5). The states of the former Yugoslavia cannot assert their 'sovereign will' to override the authority of the Tribunal to prosecute their war criminals and thus potentially institute impunity for breaches of civilian protection.¹⁵⁰ Instead, the Tribunal's model of *international* criminal justice follows the norms of the 'responsibility to protect' and establishes that the traditional 'reservations of "sovereignty", "national honour", etc . . . have receded from the horizon of contemporary international law'.¹⁵¹ As such, the Tribunal maintains its primacy over national courts for it 'would be a travesty of law and a betrayal of the universal need for justice, should the concept of state sovereignty be raised successfully against human rights. Borders should not be considered as a shield against the reach of the law'.¹⁵² Even if the violation is 'domestic in nature, . . . [where offences] trample underfoot the elementary rights of humanity',¹⁵³ the Tribunal is 'properly constituted [for] trying these crimes on behalf of the international community'.¹⁵⁴

¹⁴⁸ Report of the Secretary-General, 1993, para. 64. See also Slaughter (2004).

¹⁴⁹ *The Prosecutor v. Dragan Nikolić*. Case No. IT-94-2-PT. Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, 9 October 2002, para. 76.

¹⁵⁰ Report of the Secretary-General, 1993, para. 19.

¹⁵¹ *Tadić*, Interlocutory Appeal on Jurisdiction, para. 24.

¹⁵² *Tadić*, Interlocutory Appeal on Jurisdiction, para. 58.

¹⁵³ *Tadić*, Interlocutory Appeal on Jurisdiction, para. 58.

¹⁵⁴ *Tadić*, Interlocutory Appeal on Jurisdiction, para. 59.

This recognition of the necessity to protect individuals also serves to counter Tadić's third line of appeal – that the Tribunal lacks subject-matter jurisdiction. Tadić argued that 'there must exist a state of international conflict' for customary international law to apply and that none existed at the time and place of the perpetration of his acts of violence.¹⁵⁵ The Tribunal rejected this ground of appeal and held that the 'laws and customs of war' (Article 3) does encompass non-international armed conflicts, for 'customary rules have developed to govern internal strife' (see Greenwood, 1996).¹⁵⁶ In particular, Common Article 3 of the Geneva Conventions, 1949 applies to internal conflicts. The Tribunal acknowledges that what 'is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife'.¹⁵⁷ It cites that the first customary rules applicable to internal conflicts 'were aimed at protecting the civilian population from hostilities'.¹⁵⁸ For this reason, the Tribunal held that the distinction between international and internal conflicts has 'become more and more blurred, and international legal rules have increasingly emerged or have been agreed upon to regulate internal armed conflict'.¹⁵⁹ While the Tribunal considers that Article 2 of the Statute applies only to international armed conflicts (Greenwood, 1996: 275-276),¹⁶⁰ the *Tadić* case affirms that Article 3 and Article 5 (crimes against humanity) applies to both internal and international conflicts. The Tribunal therefore determines that the 'traditional and artificial' divide between the rules applicable to international and internal conflicts can no longer negate an absence of protective rules for certain categories of civilians (Goldstone, 2000: 124). As Greenwood points out, in addition to those rules regulating international armed conflicts, there 'is likely to be broad agreement that the law of internal conflicts includes principles regarding the protection of the civilian population' (1996: 278).

¹⁵⁵ *Tadić*, Decision on the Defence Motion on Jurisdiction, para. 50.

¹⁵⁶ *Tadić*, Interlocutory Appeal on Jurisdiction, para. 127.

¹⁵⁷ *Tadić*, Interlocutory Appeal on Jurisdiction, para. 119.

¹⁵⁸ *Tadić*, Interlocutory Appeal on Jurisdiction, para. 100.

¹⁵⁹ *Tadić*, Interlocutory Appeal on Jurisdiction, para. 97.

¹⁶⁰ *Tadić*, Interlocutory Appeal on Jurisdiction, para. 84.

Through its dismissal of all of *Tadić*'s grounds of appeal, the Tribunal constructs an account of IHL as a protective regime of law for persons, rather than a state-centric model reflecting the interests or values of states. It describes the role of this institution as central to the enforcement of breaches of civilian protection during the Yugoslavian conflict. Louise Arbour points out that the growing emphasis on the protection of persons is 'fundamentally a recognition of the rights of others' (2006). This recognition of the 'rights of others' necessitates a shift from the action of states alone to the international community's obligation to 'take action to protect populations' (Arbour, 2006; see also Evans, 2008). Reflecting the central tenets of the norm of a 'responsibility to protect', it can be seen that a notion of 'civilian protection' guides the legitimation of the Tribunal's establishment, its terms of jurisdiction and legal practices. This prioritization of the conception and application of legal protections rejects the notion that the regulation or protection of persons should be left to the action (or in-action) of individual states. It also negates the contention that even where international laws are in place, that they are unenforceable and so ineffective (see Best, 1994: 5). Instead, the adjudication of Yugoslavia's war criminals establishes that acts of civilian victimisation and the legal enforcement of their protections in conflict is a matter of concern to the international community.

From this recognition of the development of protective rules for civilians and the Tribunal's role in their enforcement,¹⁶¹ the *Tadić* case can be understood as affirming and broadening the legal recognition of individuals and, in particular, civilians as subjects of humanitarian law. Christopher Joyner argues that individuals now have a recognized status in international law as they have 'international rights, duties, and protections' (2005: 82). In particular, Joyner points to the expansion of protective legal rules that are 'designed expressly to protect the rights of individual persons' from the commitment of a variety of depredations and the international community's acceptance of these protections

¹⁶¹ *Tadić*, Interlocutory Appeal on Jurisdiction, para. 127.

(in similarity to Arbour's conception of 'the rights of others') (2005: 82). Although this recognition of individuals as subjects of humanitarian law does not figure as the comprehensive international legal personality held by states (see Akehurst, 1997), the Tribunal's significant focus and development of civilian protections (and not solely state interests) suggests that civilians are increasingly figuring as subjects within international law.

Following Joyner's argument, the *Tadić* case substantiates this conception that individuals, and civilians in particular, now hold certain international 'rights' and protections and, as such, can be thought of as subjects of humanitarian law. As set out above, this case develops a framing of civilians as having the 'right' to be protected from the criminal conduct of combatants. In particular, as this chapter will go on to describe but also problematise, the Tribunal finds a significant legal recognition that *all* civilians (and civilian objects) come under the protective rules that regulate the conduct of armed conflict, in particular those that prohibit indiscriminate attacks.¹⁶² In this regard, the Tribunal holds that all civilians require the 'same protection [from] armed violence', irrespective of the international or internal character of the armed conflict in which they find themselves or their nationality or other social characteristics.¹⁶³ That framing of civilians suggests that all civilians are equally the subjects of humanitarian law. Whatever the context of their sustaining of victimisation or harm, all civilians are understood to have the right to enforcement of such breaches of protection. However, the *Tadić* case also illustrates that the historical framework of legal protections for civilians serves to both develop, but also constrain, the potential application of such protection through particular categories of crimes. It is therefore necessary to examine why and in what ways these protective rules do not offer an encompassing protection to all civilians present in a situation of armed violence. How, then, has a notion of 'protection' for civilians guided,

¹⁶² *Tadić*, Interlocutory Appeal on Jurisdiction, para. 127.

¹⁶³ *Tadić*, Interlocutory Appeal on Jurisdiction, para. 97.

or failed to guide, the construction of the framework of IHL? And, why have these protective laws, as Jones and Cater (2001: 259) point out, come to function in such a ‘fractured and disparate nature’?

Laws of Protection?

The legal categories of civilian and combatant inherent in the principle of distinction describe that ‘war is to be waged against the enemy’s armed forces, not against its civilian population’ (Rogers, 2004: 7).¹⁶⁴ This protective regime differentiating between these categories of persons has been traced back to the rules applicable to war since the eighteenth century (Best, 1980; Rogers, 2004). However, as commentators such as Geoffrey Best (1980; 1994) and Karma Nabulsi (2001) describe in their detailed tracings of the historical emergence and developments of the laws of war, this ‘protective’ standard underpinning these rules and regulations did not pertain to an expansive recognition of civilians. Nor did these rules prioritise their safety and security from the effects of hostilities. Rather, these rules were a means to sustain the ‘ancient privileges of soldiers’ and safeguard their right to fight (Nabulsi, 2001: 16). In light of this predominant focus upon combatants, therefore, how do civilians come to figure as a legally recognisable category of persons within IHL? Are there selectivities in the historical and contemporary parameters of their protection from the violence and victimisation of armed conflict?

Frits Kalshoven traces the emergence of legal protection back to the 1864 Geneva Convention, ‘for the wounded in armies in the field’ (1987: 40).¹⁶⁵ In this era, most commentators agree that military practice largely reflected the Clausewitzian image of war as violent conduct between state armies (Clausewitz, 1968; Kaldor, 2001). Inter-state

¹⁶⁴ The principle of distinction is discussed further in a later section of this chapter.

¹⁶⁵ 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in the Armies in the Field.

wars, predominated by territorial ‘conquest and occupation’ (Nabulsi, 2001: 18), required an ideological interest to retain war’s character as a conflict between states and its soldiers purely as ‘servants of the state’ (Hirst, 2001: 23). The 1907 Hague Conventions reflect this limited framing of the subjects of war; these regulations ‘were drafted to “professionalize war” and thus pertain to the conduct of standing armies toward each other’ (Jones and Cater, 2001: 250).¹⁶⁶ The legal focus on disciplining military forces conceptualised war’s subjects restrictively; the soldier was the paramount figure of regulation, protection and condemnation of unlawful conduct. The early laws of war did not shape legal recognition of, or prioritise the protection of civilians. Rather, the notion of ‘soldier’s honor’ guided the terms of the appropriate social dynamics of conflict, that is, of the types and form of the conduct and interactions of combatants with civilians (Henckaerts and Doswald-Beck, 2005: xxv). This subjective intention and custom of the soldier shaped the possibility for civilians to remain protected (or not) within and from the hostilities of war.

The consuming violence of World War II brought this Clausewitzian narrative of ‘professional’ war between ‘honourable’ armies on the battlefield to a close. Lord Wright, Chairman of the United Nations War Crimes Commission, relates that the aggressors of both World Wars ‘set up a theory of totalitarian war, totalitarian not merely because all the nations resources of men and material were swept into the war, but also because the war was waged with a total disregard of all humane and moral or legal restraints’ (1948: 9). In particular, the Nazi atrocities brought to social and legal recognition that “‘the people” became, more than ever, both an instrument and a target of combatants’ (Gregorian, 2001: xiii). As argued in chapter one, the civilian population was not marginal or removed from the conduct of the Axis or Allied powers in World War II (see Beevor, 2002). Rather, the intentional perpetration of violence against civilian

¹⁶⁶ See in particular, 1907 Hague Convention IV Respecting the Laws and Customs of War on Land: Annex to the Convention: Regulations Respecting the Laws and Customs of War on Land.

populations revealed their integral placing and victimisation through specific, targeted military strategies. Most significantly, the Axis powers' genocidal practices and techniques of 'ethnic cleansing' produced civilian casualties not through acts of unfortunate 'collateral damage', but through 'the settled policy of extermination and terrorism' (The United Nations War Crimes Commission, 1948: 14).

However, while this experience of 'total war' illustrated the requirement for a fuller legal framework of 'protective' rules and norms, it also raised complexities in designating persons along the civilian / combatant divide. That the war effort requires the 'civilian society [to] be militarized, all labour and resources being subject to state control' (Hirst, 2001: 41), problematises the traditional image of civilians as "those who are passive" (Jones and Cater, 2001: 250). This image of passivity is further complicated by a distinctive feature of internal conflicts, the 'widespread entanglement of civilians as agents and victims', of civilians acting and present in hostilities as both perpetrators and victims (Alley, 2004: 2). As chapter five will examine in more detail through the cases of *Galić* and *D. Milošević*, the difficulties of determining civilian and combatant status and their ensuing protections was, and remains, an issue of practical and legal debate in contemporary conflicts and trials of their hostilities.

Despite the complexities of these legal categorisations, the laws of the early twentieth century were 'preoccupied with what happened to the fighters and the interests of non-combatants [were] tragically neglected' (Best, 1980: 60). Following World War II, the formulation of the 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War ('Geneva Convention IV'), instigated a significant new legal recognition of civilians. Now considered customary law, Geneva Convention IV was the first treaty to designate civilians as a specific category of protected persons in armed

conflict.¹⁶⁷ Although it is notable that this treaty does not establish a specific definition of a civilian (instead they are understood as persons who are not members of the armed forces), this Convention is significant for its designation of protective rules solely for civilians in armed conflict (see Roberts and Guelff, 2005: 299). Broadly put, Geneva Convention IV establishes that protected persons

are entitled, in all circumstances, to respect for their persons, their honour, their family right, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.¹⁶⁸

In this way, the Convention shifts the previous focus of the laws of war ‘which had been directed solely at state’s interests rather than those of the civilian population’ (Nabulsi, 2001: 19). It provides a significant new legal acknowledgement of civilians as individual subjects who have been ‘granted legal rights and protections under international law’ (Nabulsi, 2001: 19). From this legal recognition, this Convention figures civilians as subjects of international law and that this category of persons comes under the safety of a new framework of protective rules and norms for the conduct of armed conflict. As noted above, the *Tadić* case follows this conception of civilians as subjects of international humanitarian law that are both recognised and protected by (certain aspects of) its framework of rules and principles.

However, despite the progressive legal recognition of civilian persons and the provisions for their protection, it is important to note that Geneva Convention IV is applicable only to international armed conflicts (Schabas, 2006: 232). With the exception of the minimum standards set out in Common Article 3, this Convention does not apply to internal armed conflicts. It is for this reason that the ICTR’s jurisdiction over war crimes committed during the Rwandan conflict is confined to Common Article 3 and Additional Protocol II and does not include other aspects of the Geneva Conventions (see Schabas, 2006: 235).

¹⁶⁷ See Report of the Secretary-General, 1993, para. 35. See also Roberts and Guelff (2005: 299).

¹⁶⁸ Geneva Convention IV, Article 27.

Moreover, in terms of the framework of protective rules, this treaty 'is mainly confined to the treatment of civilians in the hands of the adversary, whether in occupied territory or in internment' (Roberts and Guelff, 2005: 299). For example, there are detailed rules setting out satisfactory standards in relation to safety, hygiene, health, sanitation and food. However, with the exception of Common Article 3, this Convention 'deals less extensively with the protection of civilians from the effects of hostilities' (Roberts and Guelff, 2005: 299). Civilians are only protected from attacks when interned or in occupied territory and do not come under a comprehensive framework of legal protection in all circumstances of conflict.

The later supplements to the Geneva Conventions, the 1977 Additional Protocols to the Geneva Conventions of 12 August 1949, provide the most comprehensive recognition of combatants, civilians, civilian populations and their protection during hostilities to date. As set out in chapter one, API defines civilians as all persons who are not members of the armed forces. In both Additional Protocol I, applicable to international armed conflicts and Additional Protocol II ('APII')¹⁶⁹ regulating internal armed conflicts, there are provisions which determine that civilians and civilian populations shall not be the object of attack.¹⁷⁰ In these provisions, 'protection' as a conceptual and legal bar to war's conduct is re-figured to preclude violence itself directed toward civilians. Unlike the Geneva Conventions of 1949, legal norms determine protection not just from treatment by belligerents, but protection from directed violence itself.

However, it is important to note that APII is considerably narrower than API in its prohibitions of conduct. APII does not define a civilian, set out prohibitions on the perpetration of indiscriminate attacks upon this group of persons, or prohibit reprisals against them. Moreover, the customary status of these Protocols is still ambiguous.

¹⁶⁹ 1977 Geneva Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts

¹⁷⁰ Articles 51(2) and Article 13(2) respectively.

Recent commentaries suggest that API ‘has not yet gained universal adherence’ (Henckaerts and Doswald-Beck, 2005: xxviii). Notably, as Greenwood points out, ‘a number of major military powers, including the United States, are not parties to the 1977 First Additional Protocol’ (2003: 790). Henckaerts and Doswald-Beck affirm this observation and further relate that non-international conflicts are taking place in several of the states that have not ratified this Protocol (2005: xxviii). Similarly, APII has a ‘limited scope of application’ and with ‘some important states not being parties it cannot be said to be of universal application’ (Rogers, 2004: 236). It has therefore yet to be understood as declaratory of customary law (Greenwood, 1996: 276). As such, both these frameworks of protective rules remain as treaty, not customary law. State ratification and thus the decision of the nation-state and their sovereign is thus determinative of these protections being afforded to the persons in its jurisdiction. Civilians subject to breaches of the rules of this treaty are only legally recognised by certain states and not others, including a number of the most powerful states in the international community.

From this tracing of the evolution of the rules and treaties of IHL, it is seen that the legal recognition of civilians as subjects of IHL has not figured as a coherent or static judicial concept. Rather, the construction of civilians as a category of persons can be seen as a shifting legal concept emerging through the historical development of the protective rules of IHL. The legal recognition of civilians has been a gradual process related to the changes in the conduct of conflict and the increasing regulation of the actions of combatants (see Best, 1994). In this way, the changes and developments in the legal protections for civilians illustrate a consequent shift in the recognition of civilians as protected persons. From the initial ‘absence’ of civilians in the Hague Conventions of the nineteenth century, there is now a legal recognition in API of civilians as a distinct category of persons (albeit only in relation to combatants, as will be discussed). However, despite these clear developments in the legal recognition of civilians, the above tracing of the development of humanitarian law illustrates that that such recognition of civilians is

itself an unstable category and concept. There is not a consolidated or concrete 'positive' definition of a civilian, either in older treaties of the laws of war or in present-day legal frameworks. There remain significant difficulties in founding legal recognition of civilian victims and determining the parameters of legal protections afforded to them when acts of civilian victimisation come to trial.

The Legal Construction of Civilians as Subjects of Humanitarian Law

Richard Goldstone, former Chief Prosecutor of the Tribunal, argues that the war crimes trial enables not only the prosecution of the perpetrators, but also the constitution of an 'official recognition' of the victims of crime and an "official recognition" of what happened' (2007). However, the Tribunal in *Tadić* constructs shifting models and terms of the legal recognition of civilians as victims of the actions of the accused. As noted above, this section focuses on the charges of grave breaches brought in *Tadić*, as this case illustrates significant legal developments in the enforcement of these crimes and the persons that can be understood as victims of such breaches (see Bohlander, 2000; Greenwood, 1996). The construction of international criminal justice for civilian victims through this category of crimes rests upon the legal recognition of these individuals as 'protected persons' during an international armed conflict (Sassòli and Bouvier, 2006). During the *Tadić* case, the question of whether certain civilian victims could hold this status of 'protected persons' was the subject of contestation and revision during the judicial proceedings (see Bohlander, 2000). As will be set out, the Tribunal first constructs a model of 'nationally' protected persons and then a subsequent model of 'ethnically' protected persons. From these shifting models of recognition of civilians and their ensuing protections, *Tadić* illustrates that there is no fixed form of legally recognising or identifying civilian victims through the categories of the crimes constituting the subject-matter jurisdiction of the Tribunal's Statute. It also illustrates the inherent difficulties for civilians to gain recognition of their status *as* civilian victims

during legal proceedings. It highlights the fragmented nature of the rules of customary humanitarian law and the disparate nature of its protective regime. Ultimately, *Tadić* shows the possibility that the Tribunal may fail to recognise certain civilian victims or bring their perpetrators to account.

The framework of humanitarian law is founded on a legal categorisation of all persons present during the hostilities of a situation of armed conflict. As indicated previously, this legal categorisation demarcates individuals into being either combatants or non-combatants (civilian) (Henckaerts and Doswald-Beck, 2005; Sassòli and Bouvier, 2006). The rules of humanitarian law subsume all persons into this dichotomous framework and describe that all persons hold one or other of these definitional statuses (Sassòli and Bouvier, 2006: 143-144).¹⁷¹ This characterisation of persons leaves no ‘undistributed middle between the categories of combatants (or military objectives) and civilians (or civilian objects)’ (Dinstein, 2004: 114). Of these two distinct groups of persons in armed conflict, humanitarian law determines that civilians, irrespective of gender, age, nationality or ethnicity or other social categorisation constitute a specific homogenous group of persons (McKeogh, 2002; Nabulsi, 2001). In this formulation, *all* persons who are non-combatants are civilians and come under the purview of the protective rules of IHL, notwithstanding any other social characteristics or group memberships.

However, the rules of humanitarian law do ‘not tell us who or what protected persons and objects are’ (Dinstein, 2004: 114). There is no ‘positive’ definition of a civilian or a civilian population. Neither the Additional Protocols nor any other treaties set out attributes or ‘markers’ that would ‘affirm’ civilian status and so establish the measures of their protection in armed conflict. Rather, civilian status is defined in the negative; civilians are understood as those persons who are not combatants (Dinstein, 2004;

¹⁷¹ It should be noted that persons who lose the status of combatant such as prisoners of war, those *hors de combat* and the wounded, sick and shipwrecked also come under specific protections through humanitarian law (see Dinstein, 2004).

Maxwell, 2004). As API sets out, any person who is not a member of the armed forces of a Party to a conflict should be considered a civilian (see Article 50(1)). In this way, designation of civilian status is dependent on the co-existence of an opposing status, the combatant. However, in the case of *Tadić*, the legal address to civilian victims complicates this seemingly precise narrative of all civilians as protected persons and conversely, combatants as legitimate targets. In this case, grounds of group membership are equally determinative of protected person status. Through the *Tadić* case it is seen that through certain categories of crimes, civilians cannot hold ‘protected person’ status solely on account of their non-participation in hostilities and thus ‘civilian’ status. Instead, legal bonds of ‘allegiance’ between victim and perpetrator become constructive of the possibility for the legal recognition of civilian victims and the criminal prosecution of their experience of victimisation and violence.¹⁷²

The Trial Chamber’s Judgement

The Tribunal’s legal recognition of the civilian victims as ‘protected persons’ and their suffering as a justiciable crime within its jurisdictional framework was a contentious issue in the *Tadić* case. As Schabas notes, the interpretation of this category of crimes ‘consumed a great deal of judicial energy’ (2006: 248). The victims of the actions of *Tadić* were all of non-Serb ethnicity; these persons were predominantly Muslim and Croat residents of the region of opstina Prijedor and surrounding areas. In its judgement, the Trial Chamber determined that the imprisonment of these persons in the camps was ‘to facilitate the ethnic cleansing of that area’.¹⁷³ However, neither the Tribunal’s Statute nor its Rules of Procedure and Evidence define a ‘civilian’ or a ‘protected person’. For this reason, the Trial Chamber in its assessment of the grave breaches charges drew upon ‘Article 4 of the Geneva Convention Relative to the Protection of Civilian Persons in

¹⁷² *The Prosecutor v. Duško Tadić*. Case No. IT-94-1-A. Appeals Judgement, 15 July 1999, para. 166 (*Tadić*, Appeals Judgement’).

¹⁷³ *Tadić*, Judgement, para. 578.

Time of War (Geneva Convention IV), which defines those civilians who fall under the protection of that Convention'.¹⁷⁴ This Convention establishes that:

[p]ersons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.¹⁷⁵

For this reason, the Trial Chamber held that the 'central question is thus whether at all relevant times the victims of the accused were in the hands of "a Party to the conflict or Occupying Power" of which they were not national'.¹⁷⁶ The Trial Chamber then drew on three requirements to establish whether the accused could be held to account for the crimes against these civilians. The first and second requirements were, respectively, 'that the victims be "in the hands of" a "Party to the conflict or Occupying Power"'.¹⁷⁷ The third requirement, and the most significant for this particular adjudication, was that 'the civilian victims not be nationals of that Party or Occupying Power'.¹⁷⁸

The model of protected persons set out in Geneva Convention IV can be understood as a model of 'nationally' protected persons. In this formulation, the civilian victim must hold an opposing national status to the party to the conflict or Occupying Power of the territory in which they find themselves. This determination understands a necessity for 'protection' to arise from a de-linkage between the civilians and that of the perpetrator on national grounds. Schmitt characterises war as the fighting between nations, between states that posit themselves as 'friend and enemy' (1985: 28). For Schmitt, the waging of war hinges on a conception of two or more nations grouping themselves as 'friend and enemy', in which the combatants engaged in armed violence comprise a nationally-based 'collectivity of people [which] confronts a similar collectivity' (1985: 28). It is this notion of national 'friend and enemy' that constitutes the legal framework of the grave breaches

¹⁷⁴ *Tadić*, Judgement, para. 578.

¹⁷⁵ *Tadić*, Judgement, para. 578.

¹⁷⁶ *Tadić*, Judgement, para. 578.

¹⁷⁷ *Tadić*, Judgement, para. 578.

¹⁷⁸ *Tadić*, Judgement, para. 578.

crime, for the perpetrator and the victim cannot hold the same national allegiance. The grave breaches category requires that the war is international, fought between nations whose members perceive of other persons of another nation as the ‘enemy’. It is this nation-based framework which underpins the definitional terms of the ‘protected persons’ of the grave breaches category and thus the Tribunal’s ‘requirements’ for the founding of victims as ‘protected persons’ (see Bohlander, 2000). This category of crimes requires that the warring parties, and the actions of the individuals of these parties, comprise of violent inter-State relations. Consequently, for civilians to be understood as ‘protected persons’ through the grave breaches category requires that these civilians are “‘enemies” in the sense of enemy nationals’ to the perpetrators (Sassòli and Bouvier, 2006: 114). In the Schmittian sense, the victims of the violent conduct and victimisation of Tadić must be members of a different national collectivity of persons that he understood as the ‘enemy’.

For this reason, the Trial Chamber considered whether the victims held different ‘legal bonds of nationality’ to the accused.¹⁷⁹ Following the necessity to found the first and second requirements of Article 4 of the Geneva Conventions IV, the Trial Chamber conducted an in-depth tracing and analysis of the armed conflict in the region. The Trial Chamber found that the conflict in Bosnia and Herzegovina consisted of two main parties, ‘the Government of the Republic of Bosnia and Herzegovina and the Bosnian Serb forces, the latter controlling territory under the banner of the *Republika Srpska*’.¹⁸⁰ The Trial Chamber then analysed the precise date of the take-over of the region of opstina Prijedor by ‘forces hostile to the Government of the Republic of Bosnia and Herzegovina’.¹⁸¹ In its determination, the Trial Chamber affirmed that the victims were at the relevant times of the indictment in the hands of a party to the conflict. The civilian victims were either held in camps or resident within territory being occupied by the

¹⁷⁹ *Tadić*, Appeals Judgement, para. 165.

¹⁸⁰ *Tadić*, Judgement, para. 563.

¹⁸¹ *Tadić*, Judgement, para. 580.

armed forces of the *Republika Srpska* ('VRS').¹⁸² As such, the Trial Chamber found that the first and second requirements of the elements of the grave breaches category were reached.

The third issue centred on whether the civilians were not nationals of this party to the conflict. Despite the Tribunal's determination that the distinction between international and internal armed conflicts is becoming 'more blurred', this characterisation of hostilities remains determinative of the applicability of the grave breaches regime. The third requirement of the Trial Chamber's interpretation of 'protected person' status suggests that the armed conflict must be found to be international in character. For this reason, the Trial Chamber assessed whether the acts of the armed forces of the *Republika Srpska* could 'be imputed to the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro)' ('FRY') and therefore the organs or agents of another state.¹⁸³ The Trial Chamber, by Majority decision, found that while 'the military and political objectives of the *Republika Srpska* and of the Federal Republic of Yugoslavia (Serbia and Montenegro) were largely complementary',¹⁸⁴ these armed forces were no 'more than mere allies, albeit heavily dependent allies'.¹⁸⁵ The armed forces of the *Republika Srpska* were not found to be de facto organs or agents of the FRY. This finding implies (although it is not explicitly stated) that the Trial Chamber found that the conflict was internal rather than international in character.¹⁸⁶ It was not, as the Schmittian thesis suggests, a conflict of national enemies who understand the other, national collectivity of persons as 'something different and alien' (1996: 27). For this reason, the Trial Chamber by Majority decision (Judge McDonald dissenting) held that the civilian victims were not in

¹⁸² *Tadić*, Judgement, paras 578-608.

¹⁸³ *Tadić*, Judgement, para. 588.

¹⁸⁴ *Tadić*, Judgement, para. 603.

¹⁸⁵ *Tadić*, Judgement, para. 606.

¹⁸⁶ In the later Appeals Judgement, the Chambers acknowledges that the Trial Chamber did not explicitly state the nature of the armed conflict. The Appeals Chamber considers that the apparent conclusion of the judgement rendered for these particular charges is indicative that the Trial Chamber found that the conflict was internal in nature (See *Tadić*, Appeals Judgement, para. 86).

the hands of a party to the conflict of which they were not nationals (Bohlander, 2000).¹⁸⁷ These civilians were held to be the same nationality as Tadić, that is, nationals of Bosnia and Herzegovina. For this reason, the Trial Chamber held that these civilian victims were *not* 'protected persons' within the meaning of Article 2 of the Statute.¹⁸⁸

In accordance with the Trial Chamber's finding that the victims were not in the hands of a party to the conflict or Occupying Power of which they were not nationals, the first judgement rendered by the Tribunal in the *Tadić* case determined that he must be found not guilty of these charges (see Bohlander, 2000: 221).¹⁸⁹ In this formulation, the Trial Chamber does not dismiss the charges against Tadić on the grounds that he did not commit these crimes. It does not dispute that the civilians were victims. In fact, the Trial Chamber specifically refers to these persons as 'victims at the hands of the accused'.¹⁹⁰ However, the Trial Chamber submits that the accused cannot be held criminally responsible for these crimes, as the victims were the same nationality as the accused. Through this particular category of international humanitarian law, these victims were not legally recognised or protected by their status as civilians alone. They were not 'protected persons' through their status as non-combatants and as such, as persons not taking part in the armed conflict. Rather, for legal recognition of their injuries and Tadić's prosecution of their perpetration, these victims were required to hold a different national status to the Occupying Power.

¹⁸⁷ Judge McDonald contends that the armed conflict was international in character and therefore the civilian victims were 'protected persons' (*The Prosecutor v. Duško Tadić*, Case No. IT-94-1. Separate and Dissenting Opinion of Judge McDonald Regarding the Applicability of Article 2 of the Statute, 11 November 1999, para. 1).

¹⁸⁸ *Tadić*, Judgement, paras. 607-608.

¹⁸⁹ *Tadić*, Judgement, para. 608.

¹⁹⁰ *Tadić*, Judgement, para. 578.

The Appeals Judgement

Following an appeal by the Prosecution two years later, the Appeals Chamber of the Tribunal reversed the prior decision of the Trial Chamber and held that Tadić *could* be found individually criminally responsible for the charges brought through the grave breaches category of crimes (Bohlander, 2000). The reversal of the Trial Chamber's decision can be seen to rest on factual issues in relation to the nature of the conflict. It was not based on legal questions regarding whether Tadić had committed the crimes under adjudication or the nature of the harms sustained by the civilian victims. Rather, in formulating its decision, the Appeals Chamber reversed the Trial Chamber's previous finding that the army of the *Republika Srpska* was not a de facto organ or agent of the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) and instead concluded that this army was 'to be regarded as acting under the control of and on behalf of the FRY'.¹⁹¹ The Appeals Chamber described that this 'control manifested itself not only in financial, logistical and other assistance and support, but also, and more importantly, in terms of participation in the general direction, coordination and supervision of the activities and operations of the VRS'.¹⁹² For these reasons, as Bohlander sets out, the Appeals Chamber 'arrived at the conclusion that the control exerted by Yugoslavia over the Bosnian Serbs was sufficient to qualify the conflict as being international in character at all times' (2000: 224).¹⁹³

Having established that the conflict was international in character, the Appeals Chamber then considered whether the civilian victims named in Tadić's indictment were 'protected persons' at that particular time and place. As noted above, the terms of Geneva Convention IV defines 'protected persons' through grounds of nationality – that such persons must be in the hands of a Party to the conflict or Occupying power of which they

¹⁹¹ *Tadić*, Appeals Judgement, para. 162.

¹⁹² *Tadić*, Appeals Judgement, para. 156.

¹⁹³ See *Tadić*, Appeals Judgement, para. 162. Emphasis original.

are not nationals. Problematically, as Bohlander points out through his assessment of the *Tadić* case, the ‘Bosnian Muslims and Croats were strictly legally speaking of the *same* nationality as the aggressor’s forces’ (2000: 225).¹⁹⁴ The Appeals Chamber, however, considered that the terms of Geneva Convention IV ‘intends to protect those civilians in occupied territory who, while having the nationality of the Party to the conflict in whose hands they find themselves, are refugees and thus no longer owe allegiance to this Party and no longer enjoy its diplomatic protection’.¹⁹⁵ For this reason, the ‘legal bond of nationality’ is ‘not regarded as crucial’.¹⁹⁶ Instead, it is absence of a provision of ‘diplomatic protection by the State’, that is ‘more important than the formal link of nationality’.¹⁹⁷ For the Appeals Chamber, this ‘legal approach, hinging on substantial relations more than on formal bonds, becomes all the more important in present-day international armed conflicts’.¹⁹⁸ This position determines that in armed conflicts such as that of the former Yugoslavia, ‘ethnicity rather than nationality may become the grounds of allegiance’.¹⁹⁹ In this case, the victims of the accused ‘did not owe allegiance to and did not receive the diplomatic protection of the Federal Republic of Yugoslavia on whose behalf the Bosnian Serbs had been fighting’ (Bohlander, 2000: 225). For this reason, the Appeals Chamber held that they *could* be understood as ‘protected persons’ through the requirements of Geneva Convention IV and subsequently found Tadić guilty of certain crimes perpetrated against them.²⁰⁰

In this case, the Appeals Chamber constructs a model of ‘ethnically’ protected persons. The construction of legal recognition of ‘protected persons’ for grave breaches shifts from the terms of nationality seen in the earlier Trial Chamber decision, to the grounds of ethnicity established by the Appeals Chamber. In *Tadić*, there is a new determination that

¹⁹⁴ Emphasis added.

¹⁹⁵ *Tadić*, Appeals Judgement, para. 164.

¹⁹⁶ *Tadić*, Appeals Judgement, para. 165.

¹⁹⁷ *Tadić*, Appeals Judgement, para. 165.

¹⁹⁸ *Tadić*, Appeals Judgement, para. 166.

¹⁹⁹ *Tadić*, Appeals Judgement, para. 166.

²⁰⁰ *Tadić*, Appeals Judgement, para. 171.

grounds of ethnicity are constructive of grounds of allegiance but also constitutive of violent interactions between soldiers and civilians. In this way, the Appeals Chamber does not follow the Schmittian model of inter-state warfare or national collectivities alone as constituting 'friend and enemy'. Instead, the *Tadić* judgement acknowledges the actuality of social dynamics within conflict where 'intergroup hatred takes the form of ethnic cleansing . . . [and] turn[s] friend into foe' (Cassese, 1994: 75). It thus recognises that particular social factors, in this instance ethnicity, found both the grounds for civilian victimisation but also of the necessity for broader rules of civilian protection in a time of war. From this determination, a category of civilian victims (identified through ethnic designations) who were previously excluded from the legal recognition and enforcement of the protective rules of IHL became legally understood as civilian victims of the accused (Bohlander, 2000).

Conclusion

As the *Tadić* case illustrates, the adjudication of a crime constructs legal recognition of both the victims and perpetrators of war crimes. Trials of civilian victimisation at the Tribunal and in other jurisdictions establish authoritative accounts of the persons implicated in such interactions and the nature of the violent conduct that transgresses the protections of IHL (Goldstone, 2007). *Tadić* is particularly notable for rendering the first international judgement that constructs legal recognition of the civilian victims of an individual accused. It is an important case for its provision of (retributive) justice for them by an international rather than a national or multi-national enforcement mechanism. However, despite its progressive case-law, this case also raises two issues that have had, and may continue to have, considerable implications for the construction of legal recognition of civilian victims and the enforcement of breaches of their protection when acts of civilian victimisation come to trial adjudication.

Firstly, *Tadić* illustrates that the legal recognition of this group of persons not only has been, but also continues to be, constructed through shifting categories of protection and notions of legal bonds of allegiance. The terms of allegiance that work to designate 'protected person' status for civilians are the subject of continual progression and revision. As set out above, in *Tadić* these revisions are seen through the development of legal bonds of allegiance to incorporate grounds of ethnicity, alongside the older framework of nationality. However, despite these developments, this case is significant for its illustration that there is no historically fixed framework for founding legal recognition or protection of civilian victims. Such designation remains an unstable category of recognition and conceptualisation. As the revisions in the *Tadić* case indicate, there is an evident lack of a concrete and stable framework for designating civilian victim status to persons in armed conflict or determining the parameters of their protection when the international community (or nation-states) bring alleged war criminals to trial.

Compounding these difficulties, *Tadić* is perhaps more significant for illuminating that in the legal enforcement of the grave breaches provision, civilians do not necessarily hold 'protected person' status through their civilian status alone. As set out above, the rules of humanitarian law designate all persons present in an armed conflict as holding either civilian or combatant status. However, the *Tadić* case shows that when alleged breaches of the appropriate conduct between these groups of persons come to trial, the legal recognition of civilian victims does not solely rest on their absence of participation in hostilities, of their 'non-combatant' status. The civilian status of a victim of a crime does not necessarily mean that they will be legally recognised as a civilian victim of a breach of IHL, even if the conduct of the accused is beyond dispute. Rather, the construction of civilian status as 'protected person' status is equally dependant upon other social markers or factors. Aspects of identity such as nationality or ethnicity, or the context in which the acts of civilian victimisation took place, that is, whether in an international or internal conflict, also shape the possibility for a civilian to be understood as a civilian victim of a

breach of IHL. Civilian victim status is constructed only in relation to, or through ties to, other social factors or contexts. In this way, the legal enforcement of breaches of civilian protection works as an exclusionary framework. It does not necessarily enable the construction of legal recognition of *all* civilians who have been harmed by acts of civilian victimisation, even if their perpetrator is brought to trial. As *Tadić* illustrates, the legal adjudication and judgement of the crimes of war may fail to form legal recognition of the civilian victims of the actions of an accused, enforce protective norms for them or provide redress for their harms.

The next chapter of this thesis develops this exploration of whether the Tribunal does not adequately construct legal recognition of certain categories of civilian victims. The chapter first examines the practices of different forms of transitional justice mechanisms and, in particular, whether the Tribunal adequately enables civilian victims to participate in the legal practices that work to narrate the victims and victimisation of the Yugoslavian conflict. It then explores the Tribunal's construction of a legal record of the civilian victims of the hostilities through an analysis of the criminal prosecutions brought to trial.

Chapter Four

The Criminal Prosecution of Civilian Victimization: Recognising Victims and Narrating Conflict

Since the beginning of the Yugoslavian conflict, there have been numerous narrations of the modes of its conduct from many fields, including legal, sociological and historical analysis. All these accounts unequivocally acknowledge that civilians not only sustained prolific injuries during the conflict, but that systematic and targeted civilian victimisation was central to the conduct of these hostilities (see for example Bassiouni, 1994; Glenny, 1996; Kaldor, 2001). This acknowledgement of the high levels of civilian victimisation in this conflict has begun to shift the focus of legally recognising the victims of war from the traditional prioritisation of combatant casualties, to the unlawful targeting of civilians, those crimes which have 'been consistently unreported and unrecorded' (Gardam, 1993a: 173). As noted previously, a central aspect of the Tribunal's work has been the criminal prosecution of these acts of civilian victimisation. Charges of civilian victimisation as elements of crimes have arisen in all the completed cases heard to date, most often as crimes against humanity (see Schabas, 2006).²⁰¹ The Tribunal claims that the adjudication of the charges of these cases contributes to fulfilling the terms of its mandate, that is, to 'bring the truth to light and justice to the people of the former Yugoslavia'.²⁰² It considers that these criminal prosecutions found 'important elements of a historical record of the conflicts in the former Yugoslavia in the 1990's . . . [as] [f]acts once subject to dispute have been established beyond a reasonable doubt'.²⁰³ How, then, does the Tribunal

²⁰¹ This analysis of the Tribunal's completed cases is correct as of 15 October 2007.

²⁰² *The Prosecutor v. Dragan Nikolić*. Case No. IT-94-2-S. Sentencing Judgement, 18 December 2003, para. 122 ('*Nikolić, D*, Judgement'). See also <http://www.un.org/icty/glance-e/index.htm>.

²⁰³ <http://www.un.org/icty/glance-e/index.htm>.

recognise and represent the civilian victims of these hostilities? And what type of record or narrative of the Yugoslavian conflict does it construct?

This chapter explores the Tribunal's construction of a legal recognition and record of the civilian victims and victimisation of the Yugoslavian conflict. It examines this formation of a legal narrative of the conflict in light of the increasing emphasis and development of forms of restorative justice by legal institutions, as advocated by the UN and numerous commentators (see Bassiouni, 2006; Mani, 2002).²⁰⁴ This chapter first analyses whether the representation, role and positioning of civilian victims at the Tribunal adheres to the terms of these 'victim-centred' procedures. It then examines the Tribunal's legal record and recognition of civilian victims through an analysis of the indictments and criminal prosecutions brought to trial by the Office of the Prosecutor ('OTP'). While there has undoubtedly been a substantial legal focus upon civilian victimisation by the OTP (Slaughter and Burke-White, 2002), this analysis shows that there are important patterns and trends in the bringing of charges for certain crimes committed against particular groups of civilian victims. From these patterns it can be seen that the Tribunal's construction of a legal narrative of the perpetration of specific acts of violence against certain groups of civilians during this conflict significantly contrasts with other authoritative accounts and reports. These divergent accounts thus highlight the considerable complexities that exist in either founding, or finding, a cohesive or consolidated record of the civilian victims and victimisation of this conflict.

Transitional Justice Mechanisms: For Victims and Perpetrators?

In 1992, the United Nations Security Council established an independent Commission of Experts to investigate and collect evidence on the perpetration of violations of

²⁰⁴ See for example, Resolution 1738.

humanitarian law in the Yugoslavian conflict.²⁰⁵ Despite its early disbandment, the Commission's findings were commonly acknowledged to provide a particularly detailed account of the hostilities owing to its 'evidentiary rigour and procedural fairness' (Fenrick, 1995: 63; also Schrag, 1997). In its Final Report, M. Cherif Bassiouni, the Chairman of the Commission, determined that all parties to this conflict had committed violations against civilians, including the killing of civilians, rape, torture, and the deliberate destruction of civilian property.²⁰⁶ After expressing his shock over this high level of victimization and providing a detailed exposition of these crimes, Bassiouni described that it was particularly striking that these victims have 'high expectations that this Commission will establish the truth and that the International Tribunal will provide justice'.²⁰⁷ In this formulation, the COE Report identified the key 'occurrence[s] of large-scale victimisation in the former Yugoslavia' (Bassiouni, 1994: 300). The investigations of the Commission established what 'may well be the only relatively comprehensive, historic record' of the civilian victims and the perpetration of large-scale victimisation against them during these hostilities.²⁰⁸ For Bassiouni, the Tribunal would then act as the central mechanism for the provision of legal address and redress to these civilian victims (1994: 339). Through its criminal prosecutions, the Tribunal's work of *legally* recognising the crimes and its victims would produce a narrative of the Yugoslavian conflict to 'complement' that of the Commission.²⁰⁹

Instituting Restorative Justice

As discussed in chapter one, the formation of recognition and redress to civilian victims in the aftermath of armed conflict 'has centred primarily on the employment of

²⁰⁵ The Commission of Experts was established by the United Nations Security Council through Resolution 780 (1992) (S/RES/780 (1992)). See Fenrick (1995) for discussion of the unprecedented nature of the Commission's work and mandate.

²⁰⁶ Bassiouni, M. Cherif, 'Final Report of the Commission of Experts' (S/1994/674) 24 May 1994, Annex IV, (1) ('COE Report').

²⁰⁷ COE Report, Part V.

²⁰⁸ COE Report, Introduction to the Annexes.

²⁰⁹ COE Report, Introduction to the Annexes.

restorative justice (i.e., truth commissions) and / or retributive justice (i.e., prosecutions)' (Aldana, 2006: 107). In this formulation, as Aldana points out, forms of restorative justice are largely seen as arising from the practices and procedures of truth and reconciliation commissions, while legal mechanisms have long been understood to lack such forms of remedy (2006). This dichotomous framing of the forms of restorative or retributive justice rests in large part upon these institutional forms of post-conflict justice having different persons as their focus: the restorative justice model of truth commissions being more 'victim-friendly', unlike the legal, prosecutorial mechanism which has 'a special focus on the perpetrators' through its retributive structures and practices (Aldana, 2006: 111). However, as recent UN Resolutions and Reports set out, the recognition and incorporation of victims into these mechanisms is no longer the sole purview of the truth and reconciliation commission framework. Instead, these practices are now also seen as a requirement of legal mechanisms, institutions of international criminal justice such as the ICTY, ICTR and the International Criminal Court.²¹⁰

Truth and Reconciliation Commissions

As described in chapter one, the practices of truth and reconciliation commissions are often seen as prioritising the hearing and founding of the 'truth' of violent acts and victimisation from the viewpoint of the victims themselves. This institutional practice therefore recognises the status of the victim as such and the individual harm that they experienced (Hayner, 2002). TRCs also claim to directly involve the victims in constructing a broader narrative of the large-scale victimisation that is under investigation, although this does not always happen in practice (see Ross, 2003). Through the process of recording a considerable number of narratives of the harm sustained and the structures of victimisation of the prior social conflict, the collective memory of both its perpetration and harms arises from the victims themselves (Hamber and Wilson, 2002;

²¹⁰ See for example, Resolution 1738.

Moon, 2006). In this way, truth and reconciliation commissions are understood as providing for the inclusivity and participation of marginalised persons, which in this context occurs through placing the victims at the centre of the process of finding and founding an official narrative of the violence of the prior regime. Through this framework, victims are both visible within its institutional practices and hold an inclusive and participatory role in constructing the historical record that serves as the product of its functioning.

The Tribunal

This central positioning of the victim in the TRC framework is in sharp contrast to the traditionally perpetrator-focused prosecutorial model and the institutional framework of the ICTY in particular. As noted in chapter one, the Tribunal's retributive structure works through the initial indictment of (certain of) Yugoslavia's alleged war criminals, and then, dependant upon the various investigative and pre-trial procedures, the trial of their alleged crimes and, if found guilty, their sentencing by a Trial Chamber and / or Appeals Chamber. Despite the UN's framework of rights for victims of violations of IHL which determines that these victims should have access to justice mechanisms, this prosecutorial process does not include or incorporate the victims of the alleged crimes in its decision-making or prosecutorial practices, other than as witnesses testifying at trial (see Henham, 2008). Civilian (or combatant) victims cannot initiate or demand investigation or adjudication of their harms. As noted previously, the Tribunal does not grant victims (or witnesses) any 'rights' within the prosecutorial process or the trial itself (Stover, 2005). This legal institution does not follow the TRC structure in the sense of encouraging victims to come forward and contribute to the recording and narration of the crimes of the conflict or the specific harms they sustained. It does not prioritise the views (or needs) of

the victims in either the bringing of charges or the narration of their perpetration at trial beyond the necessary 'facts' subject to adjudication.²¹¹

As this relative exclusion of civilian victims suggests, the international legal recognition of their status as victims by the Tribunal primarily rests upon the decisions and choices of the prosecutor.²¹² Mark Osiel points out that in criminal trials, prosecutors act 'as spokesmen for "the people"' (1999: 218). As Osiel suggests, it is their decisions of which persons and which acts of the prior conflict require prosecution that constructs a 'collective representation of that past' and a particular, legal, 'collective memory' of those crimes (1999: 218). The role of legal mechanisms in forming a history of a conflict has been the subject of academic contention and critique (see Stover, 2005; Douglas, 2001). However, this understanding of 'collective memory' does not consider that criminal prosecutions can provide a definitive 'history' or comprehensive account of the hostilities. Rather, by acknowledging that prosecutions hold a role in constructing a 'collective memory' and 'representation' of a prior conflict, as Osiel contends, attention is drawn to the position of the prosecutor in bringing cases and charges that represent or symbolize the pervasive patterns in the crimes of the hostilities. More particularly, as will be set out, this notion of collective representation suggests that the legal record of its victims should generally align to those of other authoritative accounts.

In this way, criminal prosecutions brought by the OTP of the Tribunal will construct an international collective representation of the civilian victims of the Yugoslavian conflict (see Ewald, 2006). As will be further discussed, they will construct international legal recognition of particular collectivities of civilian victims that were subject to certain forms of victimisation and harm. In this way, it can be seen that the civilian victims of the

²¹¹ Fieldwork.

²¹² It should be noted that other factors may influence this construction of legal recognition of civilian victims such as the failure to arrest indicted accused, the redaction of charges of an indictment against an accused or the transfer of cases to national jurisdictions.

conflict are not entirely 'absent' from this institution's functioning as its retributive focus upon the prosecution of the perpetrators may suggest. Instead, the legal recognition and record of civilian victims and the broader creation of a 'collective representation' and narrative of the Yugoslavian conflict primarily rests upon the prosecutorial discretion of the OTP of the Tribunal and the charges brought to trial.

Carla Del Ponte points out that the OTP's prosecutorial discretion is a necessary aspect of its work due to the 'amplitude of these crimes, the number of their victims and their widespread character' (2004: 516). Prosecutions at the Tribunal cannot be brought against all, or even the majority, of Yugoslavia's war criminals. For this reason, there is a 'practical need for a selective, rather than automatic, approach to the institution of criminal proceedings' (Jallow, 2005: 145). As will be discussed further, the OTP has focused on the level of the perpetrator and the seriousness of their crimes as the key criteria for determining which criminals and which crimes have come to trial (Del Ponte, 2006: 542-3).²¹³ In this way, the legal recognition of the civilian victims arises through the OTP's discretion of bringing indictments against (particular) accused, for their alleged perpetration of (particular) crimes against (particular) civilians (see Del Ponte, 2004; Goldstone, 2000). However, the selective nature of the prosecutorial process means that only a minimal number of civilians will find recognition of their status as civilian victims of the Yugoslavian conflict. It also means that there will be inevitable partialities in the 'collective memory' of these hostilities that the Tribunal finds through its legal practices. How, then, do the Tribunal's criminal prosecutions recognise these civilian victims and their victimisation during these hostilities? And what form of legal narrative of the Yugoslavian conflict do these prosecutions construct?

²¹³ Interviews with OTP staff, 28 June 2006 and 29 June 2006.

Rendering Legal Judgement: The Prosecution of Civilian Victimization

Since its establishment in 1993, the Tribunal has rendered judgement in thirty-six completed cases.²¹⁴ However, there is a distinct lack of analysis of the criminal prosecutions brought in these cases, either by commentators or the Tribunal itself.²¹⁵ Within the field of international criminal justice more broadly, there are important analyses of those sexual violence prosecutions brought to trial by the ICTY (Campbell, 2007) and the ICTR (Breton-Le Goff, 2002). There are also analyses of the legal issues arising in particular cases concerning civilian victimisation, most notably the *Galić* case which concerns the siege of Sarajevo (Kravetz, 2004; Kutnjak Ivković and Hagan, 2006). However, there are no in-depth examinations of the charges of civilian victimisation brought in these completed cases for their legal recognition and recording of civilian victims or of their construction of a legal narrative of the broader civilian victimisation inherent in the Yugoslavian conflict.

In order to explore the Tribunal's legal record of civilian victims and victimisation, this analysis focuses upon the criminal prosecutions brought by the OTP in completed cases. While there are a considerable number of charges of civilian victimisation in ongoing cases, or those in the pre-trial stages of proceedings, there are three main substantive and practical reasons to focus upon completed cases. Firstly, non-completed cases may involve a 'sealed' indictment and as such, the name of the accused and the charges against him or her are not available or known to the public. Secondly, during the pre-trial process charges may be dropped due to lack of evidence or, conversely, charges may be added as new evidence comes to light, for example if witnesses come forward prepared to testify for the Prosecution. Thirdly, as part of the completion strategy, indicted cases may

²¹⁴ As noted earlier, this analysis is correct as of 15 October 2007.

²¹⁵ There are no official statistics on the breakdown of charges brought by the Office of the Prosecutor on the ICTY website or through other official ICTY documents.

yet be transferred to a domestic court of the former Yugoslavia and therefore the crimes will not be subject to the adjudicatory processes of the Tribunal.

For these reasons, this examination of criminal prosecutions of civilian victimisation focuses upon the charges of the final indictment of completed cases. The charges in these final indictments of completed cases set out the charges of civilian victimisation brought by the Prosecutor that have been subject to the adjudication of the Chambers and the rendering of a definitive and binding judgement by the Tribunal. They provide a record of the prosecutions brought by the OTP for crimes which relate specifically to civilian victimisation. Analysis of these prosecutions enables a tracing and exploration into whether the Tribunal follows the traditional under-reporting of crimes against civilians as Gardam argues (1993a), or whether this enforcement mechanism constructs an adequate and representative legal narrative of the civilian harms of this conflict.

The Victims of Violations of Humanitarian Law: Civilians and Combatants

The most significant characteristic of the thirty-six completed cases that have been heard by the Tribunal is that *all* these cases include charges against the accused for acts of civilian victimisation. Somewhat surprisingly, there are no cases where the charges do not prosecute one or more acts of civilian victimisation, or where the exclusive focus of the charges is upon acts of violence committed against combatants. These completed cases charge acts of civilian victimisation variously through the four different categories of crimes constituting the Statute of the ICTY; as grave breaches of the Geneva Conventions, 1949 (Article 2), violations of the laws and customs of war (Article 3); genocide (Article 4) or as crimes against humanity (Article 5). All these cases adjudicate acts of civilian victimisation such as murder, detention and rape, those crimes that Bassiouni describes as having been perpetrated in widespread and systematic forms

during the conflict in the COE Report (1994) and the United Nations Security Council expresses its grave alarm over in Resolution 827 (1993).

While the comprehensive inclusion of charges of civilian victimisation in all these completed cases shows that crimes against civilians are a central component of the prosecutions, it is important to emphasise that the Tribunal also hears crimes committed against combatants as numerated charges in these indictments. These prosecutions arise from breaches of the 'detailed rules protecting combatants when wounded, sick, or prisoners of war' (Gardam and Jarvis, 2001: 5). For example, in the case of *The Prosecutor v. Ivica Rajić ('Rajić')*, the Tribunal hears and convicts the accused of committing crimes against both civilians and combatants as Grave Breaches of the Geneva Conventions of 1949.²¹⁶ However, in *Rajić* as in other completed cases heard by the Tribunal, the indictment specifies that the victims of the crimes were of both military and civilian status, but does not establish the particular status of each victim for each numerated charge. Notably, a number of cases, in particular those prosecuting the crimes of Srebrenica such as *The Prosecutor v. Radislav Krstić*, describe the victims as men 'of military-age'.²¹⁷ This lack of definition in relation to their status, as Charli Carpenter points out, implies that men caught up in conflict are being viewed as 'potential combatants' (2006a: 164). The absence of a legal articulation of their status along the civilian / combatant distinction creates an ambiguous identification of these persons and their placement within the protective rules of IHL. It conceptually conflates these persons as having some form of 'military' nexus to the conflict, even when such an assertion may be completely unfounded. Claude Bruderlein points out that a move toward categorising or grouping civilians through social categories (whether explicitly or implicitly) may

²¹⁶ *The Prosecutor v. Ivica Rajić*. Case No. IT-95-12-S. Sentencing Judgement, 8 May 2006.

²¹⁷ *The Prosecutor v. Radislav Krstić*. Case No. IT-98-33-T. Judgement, 2 August 2001. During the trial proceedings of *Djordjević* there was a particularly problematic discussion about the presence of 'military-aged men' during massacres committed in Kosovo in which the Defence appeared to assert that such persons were 'legitimate' targets of attack by Serb forces, despite the victim-witness testifying that none of the men involved in the alleged crime were members of the armed forces or carrying weapons (Fieldwork, *The Prosecutor v. Vlastimir Djordjević*, Case No. IT-05-87/1. 6 February 2009 ('Fieldwork, *Djordjević*')).

create a future tendency ‘to see some civilians as more “innocent” than others and, therefore, more deserving of protection’ (2001: 225). For this reason, this failure to determine the status of these ‘military-aged’ men further reiterates the perception that it is women and children who are unquestionably ‘innocent’ during armed conflict, with male civilians often failing to find a specific recognition of their non-combatant status, by either the United Nations,²¹⁸ transitional justice mechanisms or the Tribunal more specifically (Carpenter, 2006a; 2006b; Moser and Clark, 2001).²¹⁹

However, this absence of a legal articulation of the status of the victim of the alleged crime, whether of male(s) or female(s), is not necessarily a practical oversight or the result of a lack of detail in the OTP’s drafting of the indictment. The categories of grave breaches of the Geneva Conventions, war crimes and genocide set out in the ICTY Statute do not solely apply to either civilians *or* combatants as the persons afforded protection. Rather, these legal categories establish protective rules regulating the conduct of hostilities for both combatants *and* civilians (Best, 1994; Nabulsi, 2001).²²⁰ The category of war crimes (Article 3) emphasises this dual protection of civilians and combatants through its prohibitions on actions that ‘may be perpetrated by *military personnel against enemy servicemen or civilians, or by civilians against either members of the enemy armed forces or enemy civilians*’ (Cassese, 2003: 48).²²¹ These protective rules for example, prohibit the use of certain weapons such as land-mines or poisonous gases that cause superfluous injury or unnecessary suffering against all persons present in armed conflict, that is, civilians *and* combatants (see Cassese, 2003: 56-57). For these reasons, for these categories of crimes, the status of the victim is not necessarily a legal

²¹⁸ See for example, United Nations Security Council Resolution 1296 (2000) expressing concern for ‘the hardships borne by civilians during in armed conflict, . . . especially women and children and other vulnerable groups’ (S/RES/1296 (2000)).

²¹⁹ The recognition of male individuals as civilians is the subject of further analysis in chapter five.

²²⁰ As argued in chapter three, there is persuasive discussion determining that the protective rules of IHL were first established for the protection of combatants and not civilians (Best, 1994; Nabulsi, 2001).

²²¹ Emphasis original.

element of the crime. The victim's status along the principle of distinction does not necessarily figure as an aspect of the adjudication of categories of crime.

In contrast, the category of crimes against humanity is significant for its function as a body of protective rules which apply solely to civilians. This category of crimes legally determines that it is a civilian population as 'a specifically protected group' in armed conflict that finds safety through this 'protective scheme' of rules, and that in their breach, the victim is necessarily and specifically a civilian person (Bassiouni, 1999; Cassese, 2003). First identified and prosecuted as 'positive international criminal law' in the Nuremberg Charter in 1945 (Bassiouni, 1999: 1), the ICTY describes that the category of crimes against humanity establishes prohibitions on the conduct of armed conflict as 'war should be a matter between armed forces or armed groups and that the civilian population cannot be a legitimate target'.²²² Unlike the other categories of crimes constituting the subject-matter jurisdiction of the Tribunal, crimes against humanity do not establish prohibitions against acts carried out against combatants. As the Tribunal affirms, crimes against humanity can never be considered as conduct or practice 'merely of a military sort'.²²³ Rather, as the Tribunal establishes, the prosecution of persons with crimes against humanity arises from a breach of the prohibition of conduct committed with the 'deliberate attempt to target a civilian population'.²²⁴ For this reason, the Tribunal holds that 'to convict an accused of crimes against humanity, it must be proved that the crimes were *related* to the attack on a civilian population (occurring during an armed conflict) and that the accused *knew* that his crimes were so related'.²²⁵

This analysis of criminal prosecutions will focus upon the OTP's charges of crimes against humanity for their distinct and significant articulation of civilians as the sole

²²² *The Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*. Case No. IT-96-23 & IT-96-23/1-T. Judgement, 22 February 2001, para. 416 ('*Kunarac et al*, Judgement').

²²³ *The Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*. Case No. IT-96-23 & IT-96-23/1-A. Appeals Judgement, 12 June 2002, para. 101 ('*Kunarac et al*, Appeals Judgement').

²²⁴ *Tadić*. Judgement, para. 653.

²²⁵ *Tadić*. Appeals Judgement, para. 271. Emphasis original.

victims of this category of crimes. These charges represent an official recognition that civilians were intentionally targeted in a ‘widespread’ or ‘systematic’ manner during the conflict (Schabas, 2006: 191). Crimes against humanity prosecutions are brought for actions against civilians carried out not for singular acts of violence, but for attacks perpetrated as part of ‘a “course of conduct”’ (Bantekas and Nash, 2003: 357).²²⁶ These charges indicate that these acts of civilian victimisation were a significant and pervasive aspect of these hostilities. The criminal prosecutions of civilian violence in crimes against humanity cases can therefore illuminate the ‘pattern of the deliberate war against civilians’ (Bruderlein and Leaning, 1999: 431). These charges can illuminate these patterns as they focus on the intentional and purposeful perpetration of crimes against civilians, which cannot be dismissed or overlooked for simply being ‘collateral damage’ or the recklessness of a soldier’s conduct (see Downes, 2006).

The OTP brings prosecutions of civilian victimisation as crimes against humanity through Article 5 of the Statute, which determines that the Tribunal has:

the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation;
- (e) imprisonment;
- (f) torture;
- (g) rape;
- (h) persecutions on political, racial and religious grounds;
- (i) other inhumane acts.²²⁷

The various acts constituting this category of crimes provide a legal articulation of different modes of civilian victimisation and violence. In particular, they establish which specific acts can be subject to international adjudication and judgement. During the course of the Tribunal’s functioning, the OTP has set important precedents for bringing

²²⁶ It should be noted that the issue of whether singular acts of violence can constitute is contentious (see Cassese, 2003).

²²⁷ The ICTY’s definition of crimes against humanity deviates from the now standard definition within customary law that a nexus to armed conflict is not required as a jurisdictional element (Cryer, 2007: 191).

the first charges of imprisonment, torture and rape to be subject to the adjudication of an international criminal court. These crimes were not included in the Nuremberg Charter as numerated acts within the category of crimes against humanity (Cassese, 2003: 69). As such, the Tribunal has rendered the first judgements of these crimes at an international criminal court. Following these prosecutions, the Tribunal has provided the first definitions for the offences of imprisonment and rape as crimes against humanity (see *Kordić and Čerkez*²²⁸ and *Kunarac et al*, respectively). It has also reviewed the existing definitions of torture found in human rights treaties and conventions and set out the specific elements of this offence as a crime under international humanitarian law (see *Kunarac et al* and the later decision of *Kvočka et al* affirming this definition).²²⁹ These criminal prosecutions thus expand upon those acts of violence against civilians that find legal articulation as crimes against humanity. They also develop the jurisprudence of this category of crimes (see Schabas, 2006: 186).

The Prosecution of Civilian Victimization

Charges of acts of civilian victimisation as crimes against humanity constitute 189 charges out of the total of 529 charges brought to trial by the OTP. As seen below in Figure three, this translates to thirty-six percent of charges being for crimes against humanity, that is, approximately one-third of the total number of charges. More significantly, however, from the first judgement rendered against Dusko Tadić in 1997 to the latest completed case of *Limaj et al*²³⁰ concluded in September 2007, thirty-one out of the thirty-six completed cases to date have included charges of crimes against humanity as either the sole basis of the final indictment, or the partial basis in conjunction with

²²⁸ *The Prosecutor v. Dario Kordić and Mario Čerkez*. Case No. IT-94-14/2.

²²⁹ *The Prosecutor v. Miroslav Kvočka, Dragoljub Prcać, Milojica Kos, Mladjo Radić and Zoran Žigić*. Case No. IT-98-30/1. See Cassese (2003: 74-81) for an overview of the Tribunal's case-law for this category of crimes and the establishment of the definitions of each of the crimes.

²³⁰ *The Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*. Case No. IT-03-66.

charges brought through other categories of crimes.²³¹ As Figure four below illustrates, charges of crimes against humanity have arisen in eighty-six percent of cases, that is, in more than three-quarters of the Tribunal's completed cases:

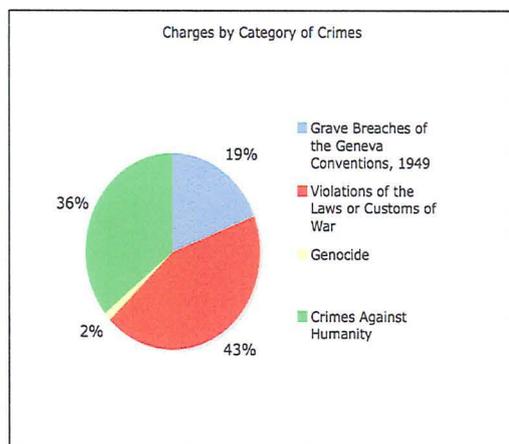


Figure 3

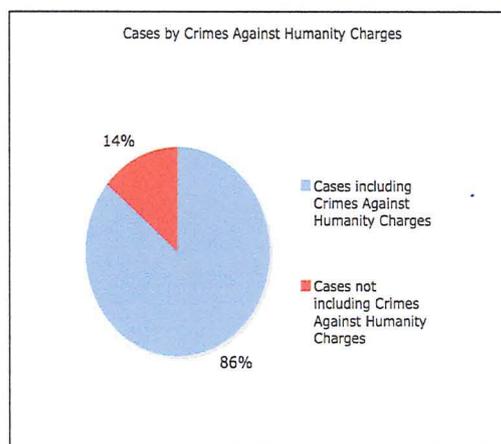


Figure 4

Within these thirty-one cases involving crimes against humanity charges, the most significant trend is that the charges fall into two groupings of charges, those frequently brought to trial and those that rarely arise as criminal prosecutions. As Figure five shows, the majority of the charges involve three offences, those of murder (58 charges in 17 cases), persecution (39 charges in 23 cases) and 'other inhumane acts' (39 charges in 16 cases). In contrast, there are comparatively few charges of the other crimes, with only 6 charges of extermination (in 5 cases), 4 charges of enslavement (in 2 cases), 6 charges of deportation (in 4 cases), 6 charges of imprisonment (in 3 cases), 19 charges of torture (in 8 cases) and 12 charges of rape (in 5 cases). Overall, these charges constitute only 27 percent of crimes against humanity charges, as opposed to the other offences within this category which make up 73 percent of these charges brought by the OTP:

²³¹ Cases including charges of crimes against humanity in the final indictments are: *Tadić* (IT-94-1); *Nikolić, D* (IT-94-2); *Sikirica et al* (IT-95-8); *Simić et al* (IT-95-9); *Todorović* (IT-95-9/1); *Simić* (IT-95-9/2); *Jelisić* (IT-95-10); *Češić* (IT-95-10/1); *Blaškić* (IT-95-14); *Kordić and Čerkez* (IT-95-14/2); *Kupreškić et al* (IT-95-16); *Bralo* (IT-95-17); *Erdemović* (IT-96-22); *Kunarac et al* (IT-96-23 & IT-96-23/1); *Stakić* (IT-97-25); *Krnjelac* (IT-97-25); *Galić* (IT-98-29); *Kvočka et al* (IT-98-30/1); *Vasiljević* (IT-98-32); *Krstić* (IT-98-33); *Naletilić and Martinović* (IT-98-34); *Brdjanin* (IT-99-36); *Plavšić* (IT-00-39 & IT-40/1); *Mrdja* (IT-02-59); *Blagojević and Jokić* (IT-02-60); *Nikolić, M* (IT-02-60/1); *Obrenović* (IT-02-60/2); *Deronjić* (IT-02-61); *Banović* (IT-02-65/1); *Limaj et al* (IT-03-66) and *Babić* (IT-03-72).

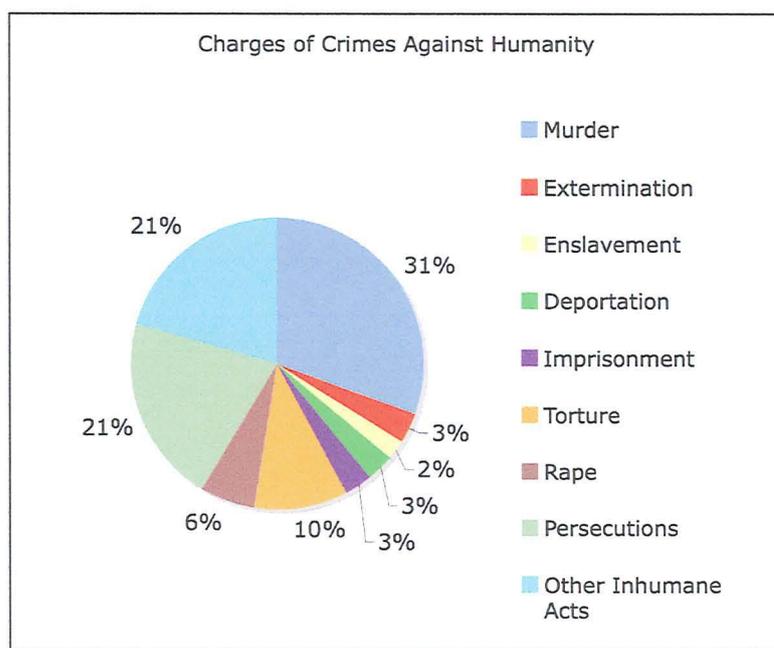


Figure 5

A substantial number of the charges of those lesser-prosecuted offences were brought by the OTP in the case of *Kunarac et al.* This case brings the majority of charges involving sexual violence against women that have been heard by the Tribunal (Campbell, 2007: 423). In its final indictment, *Kunarac et al* brings 3 charges of enslavement (out of a total of 4 overall), 8 charges of rape (out of 12) and 4 charges of torture (out of 19). With *Kunarac et al* taken out of the analysis, there is a further and even more obvious disparity in the acts of civilian victimisation that have been brought to trial, with a reduction in charges of these lesser-prosecuted offences falling to only twenty-one percent of the prosecutions. As seen in Figure six below, charges of rape now constitute only two percent of the total number of charges and enslavement one percent of prosecutions of crime against humanity. With this case excluded from the analysis, it is important to note that the OTP has brought only one other charge of enslavement (in the *Krnjelac* case) and four other charges of rape as a crime against humanity (in *Tadić; Nikolić, D; Češić* and *Kvočka et al*).

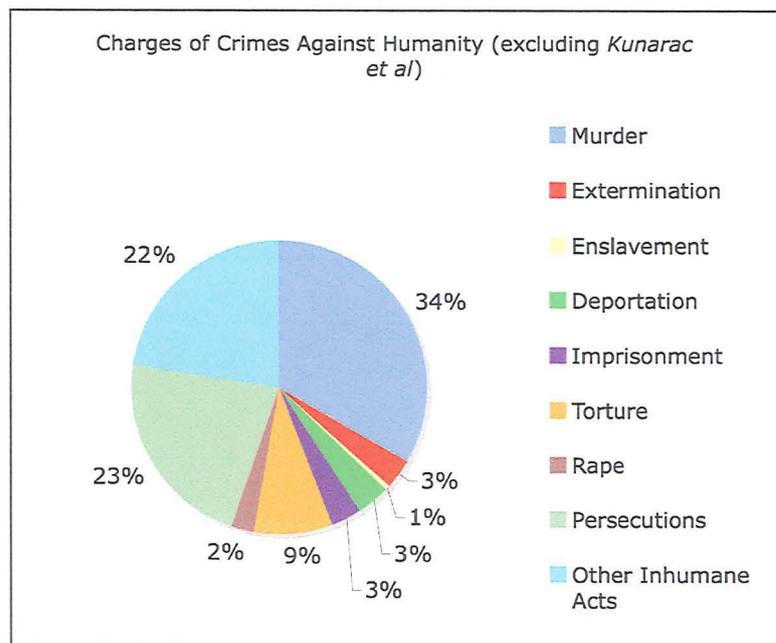


Figure 6

It is unsurprising that there are notable patterns and unequal allocations in the charges of civilian victimisation that the OTP brings to trial. As Carolyn Nordstrom points out, different conflicts are characterised by the perpetration of different modes of violence against civilians (2004: 62-63). However, the particular patterns in these prosecutions were unforeseen as they do not follow the trends in civilian victimisation that authoritative accounts narrate as being central to the Yugoslavian conflict. Instead, they construct an alternative record and narrative of its predominant civilian victims. In order to examine which acts of civilian victimisation the Tribunal has legally ‘acknowledged’ and made ‘transparent’ in accordance with other accounts,²³² this analysis undertakes a comparative exploration using the COE Report as an authoritative non-legal account of the hostilities for the reasons given above. This section first examines the COE’s findings of the perpetration of civilian victimisation and then considers the adequacy of the OTP’s prosecutions in relation to these patterns of criminal conduct. In accordance with the most notable patterns in the charges seen above, this exploration focuses on murder as the most frequently prosecuted crime against humanity and the offences of enslavement, rape and

²³² <http://www.un.org/icty/glance-e/index.htm>.

imprisonment due to their markedly infrequent prosecution. This focus also follows the Security Council's determination in Resolution 827 (1993) that the continued perpetration of these particular crimes constituted a threat to international peace and security.

The COE Report identifies the murder and mass killing of civilians as a central aspect of the conflict, that it was 'one of the hallmarks of attacks by a given group' in their victimisation of another.²³³ This identification of the pervasive perpetration of murder follows the findings of numerous sociologists, historians, legal commentators and other reports on the Yugoslavian conflict (see Glenny, 1996; Kaldor, 2001). The COE Report describes that the murder of civilians was perpetrated within camps (i.e. detention facilities) set up to detain civilian populations that had been forcibly displaced from particular regions.²³⁴ Mass killing of civilians also took place during campaigns of ethnic cleansing, that is, during the removal 'by violent and terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas'.²³⁵ This crime was therefore a feature of both these modes of victimising the civilian population. It was an aspect of the structural victimisation of civilians within all regions of the conflict.²³⁶ Such high fatalities continue to resonate in the present-day, with high numbers of persons remaining unaccounted for and the subject of investigations by organisations tasked with finding missing persons.²³⁷ As one witness testified, even though it was known or widely presumed that particular persons from his region had been killed, 'many of the bodies were never recovered'.²³⁸

In terms of the other lesser-prosecuted crimes, the COE Report describes high numbers of incidences of the perpetration of widespread and systematic rape and other forms of

²³³ COE Report, Part II (H) (2).

²³⁴ COE Report, Part IV (E).

²³⁵ COE Report, Part III (B); Annex IV (1).

²³⁶ COE Report, Part IV (G).

²³⁷ See International Commission on Missing Persons (<http://www.ic-mp.org>). The Commission describes that there are still approximately 13,500 missing persons within Bosnia and Herzegovina and a further 2,020 persons registered as missing in Croatia. There also remains high numbers of missing persons in Kosovo.

²³⁸ Fieldwork, *Djorđević*, 6 February 2009.

sexual assault during the conflict.²³⁹ Such offences are cited as occurring in detention facilities and as part of policies of ethnic cleansing.²⁴⁰ Similarly, the COE Report identifies the prolific use of camps by all the warring factions to detain (thus imprison) civilians and notes that torture, rape and sexual assault were frequently committed within these facilities.²⁴¹ It also refers to multiple occurrences of the enslavement of civilians. In particular, the COE Report identifies the sexual enslavement of women and that the perpetration of this crime occurred in differential regions of the conflict.²⁴² The COE Report, alongside media reports and commentators determines that these particular modes of (female) civilian victimisation were a significant aspect of the hostilities (see Nikolić-Ristanović, 2000b: 46). Although as Valentino *et al* (2006) point out, there are considerable difficulties in accurately measuring intentional civilian fatalities or casualties of this or any other conflict (see also Tabeau and Bijak, 2005), it appears indisputable that the ‘high level of victimization’ of civilians was the consequence of ‘consistent and repeated practices’ rather than isolated or random attacks.²⁴³

However, the charges brought by the OTP do not adequately record the high numbers and prevalent perpetration of all these different acts of civilian victimisation perpetrated against civilian victims. Following the COE Report’s determination of the high level of the murder of civilians, the OTP’s charges *do* similarly record this crime as central to the conduct of the conflict. Charges of murder arise in approximately fifty percent of crimes against humanity cases, this act being the most frequently prosecuted in terms of the number of charges. These charges were brought in cases that concern crimes committed by different levels of perpetrators (as will be further discussed) and in different

²³⁹ COE Report, Part IV (F). See also, Askin (1997); Cockburn (1998) and Cleiren and Tijssen (1994).

²⁴⁰ COE Report, Part IV (F) (3). See also Part III (B).

²⁴¹ COE Report, Part IV (E).

²⁴² COE Report, Annex IX (A) and (C).

²⁴³ COE Report, Part V. It is important to note that civilian victims of ‘collateral damage’ will not find legal recognition of their harms. This ‘legitimate’ mode of violence does not come within the jurisdiction of the ICTY and so its impact upon civilians cannot be undertaken through an analysis of charges (see Best, 1994).

geographical regions of the conflict, for example in Srebrenica and Sarajevo.²⁴⁴ It is therefore reasonable to argue that the high number of charges of murder adequately reflects the pervasive perpetration of this crime. The legal narrative of the prevalence of this act of civilian victimisation aligns with the COE Report (and other accounts) to construct a cohesive and consolidated record of its perpetration. Through these consistent legal and non-legal descriptions of the high numbers of civilian victims murdered during the conflict, there cannot be any dispute over the widespread and systematic perpetration of murder.

In contrast, there are minimal prosecutions for the crimes of enslavement, rape and imprisonment, either in terms of the number of cases in which they have arisen or their prevalence within the overall number of charges (see Figure five above). There have been only five cases including charges of rape, three cases including imprisonment charges and two cases including enslavement charges. More notably, however, when viewed in terms of convictions the legal narrative of the prevalence of the commission of these crimes is even more concerning. Successful convictions have only been rendered for seven charges of rape (two excluding *Kunarac et al*), two charges of imprisonment and two charges of enslavement (nil excluding *Kunarac et al*). With the charges within *Kunarac et al* excluded from the analysis, the convictions for these three crimes totals only six percent of the overall charges of crimes against humanity (11 out of 174 charges). The charging and convicting of these crimes has been minimal and infrequent; the legal record of these modes of civilian victimisation directly conflicting with the COE Report as well as the Security Council Resolutions and commentators.

These disparities in the legal and non-legal accounts of civilian victimisation complicate any understanding of the victims and violence of this conflict. Uwe Ewald points out that

²⁴⁴ For example, charges of murder as a crime against humanity are brought in *Krstić* for crimes committed in Srebrenica and in *Galić* for crimes committed in Sarajevo.

‘constructing “victims”’ is a significant aspect of the processes of international criminal justice and the ICTY more specifically (2006: 173, 180). As noted in chapter three, this construction of legal recognition of civilian victims works through the OTP’s bringing of charges for the acts of the accused. These charges constitute a legal recognition that the individual civilians were the victim of an act of violence. They figure the act as a ‘victimizing event’ that should be the subject of legal adjudication (Kiza, 2006: 82).

However, it is important to note that this legal construction of victims constructs recognition of two ‘types’ of civilian victim. Firstly, the prosecution of an act of victimisation constructs legal recognition of the individual civilian victims that were the subject of the harm under adjudication. In this way, the charges represent the ‘direct interaction (act) between individual perpetrators and victims’ (Ewald, 2006: 184). Secondly, as Ewald points out, through the prosecutorial process ‘victims [can] appear as members of a victimised collective’ (2006: 181). In this way, the individual victims appear within the legal process as representative of the broader collectivity of civilian victims subject to the same forms of harm. The prosecutions can therefore be understood to represent the typical social dynamics in the interactions between particular categories of civilians and combatants during the conflict (Ewald, 2006). From these descriptions of the patterns of the acts of victimisation during the conflict it should, therefore, be possible to analyse how different social groups of civilians experience its violence and harm.

Through their charging of differential acts of civilian victimisation, the prosecutions show significant partialities in their construction of the legal recognition or representation of particular groups of civilian victims. For example, the COE Report, commentators and the *Kunarac et al* case suggest that female civilians were the most prominent victims of enslavement, rape and imprisonment. It is commonly understood that this social category of civilians was specifically targeted through these particular modes of victimisation and that the perpetration of these crimes was widespread and systematic throughout the

conflict (Gardam and Jarvis, 2001; Campbell, 2007; Sharratt, 1999). However, the low numbers of prosecutions do not adequately construct legal recognition of the female civilian victims of this conflict. They do not represent the pervasive victimisation of this category of civilians and their subjection to particular modes of victimisation.

Even where the prosecutions of these crimes do construct legal recognition of this category of civilian victims, these charges only arise in certain types of cases heard by the Tribunal (as will be set out below). Feminist analyses of international law consider that this body of law rests upon and reproduces a distinction between ‘public’ and ‘private’ violences (Charlesworth *et al*, 1991; Engle, 1993). As Hilary Charlesworth *et al* point out, international law regulates ‘matters of international “public” concern’, while domestic jurisdictions govern ‘private’ issues ‘in which the international community has no recognized interest’ (1991: 625). As such, the acts of civilian victimisation brought to prosecution by the OTP are matters of international public concern. They are ‘public’ violences of international concern through their designation as violations of humanitarian law, unlike other ‘private’ violences heard only by national courts. In this way, the prosecutions heard by the Tribunal construct an *international* public recognition and record of the civilian victims of these crimes. International legal recognition of their victimisation makes transparent their status as civilian victims to the international community (Ewald, 2006). It also includes the harms of their victimisation within the Tribunal’s construction of an international legal narrative of this conflict.

However, the OTP’s strategy of further designating cases in terms of their context and their ‘seriousness’ complicates this dichotomous framework of ‘public’ and ‘private’ violences. Carla Del Ponte describes that the investigative and prosecutorial strategy of the OTP has followed a distinct temporal focus in terms of the types of perpetrators and cases that are brought to trial (2003; 2006). The initial indictments typically concerned crimes that were committed in camps, in detention facilities such as those of Omarska,

Keraterm and Foca.²⁴⁵ In contrast, the later stage of indictments, those issued from approximately 1998 onwards focus on crimes that were committed as part of policies or campaigns of ‘ethnic cleansing’.²⁴⁶ These ethnic cleansing cases typically came to judgement from 2003 onwards and constitute the context of the majority of the cases under adjudication at present. It is not, however, only the context of the perpetration of the crimes that distinguishes these two categories of cases and the stages of the indictments and charges. This phasing of indictments also focuses upon the political or military leadership level of the accused and the perceived ‘seriousness’ of their crimes. As Del Ponte notes, the early (camp) cases concern ‘persons holding higher levels of responsibility for physically committing exceptionally brutal or otherwise serious offences’ (2006: 542), while the later (ethnic cleansing) cases focus on ‘very high-level persons suspected of being responsible for the *most serious crimes*’ (Del Ponte, 2003).²⁴⁷

Although this phasing of indictments has been the subject of critique, most often in terms of the initial focus on lower-level accused such as Tadić (Bass, 2000: 207), there are three reasons given by the Tribunal for its ‘pyramid indictment strategy’.²⁴⁸ Firstly, as Del Ponte points out, at its inception there was a need to establish the credibility of the Tribunal through the bringing of an accused to trial, irrespective of his or her ‘level’ of responsibility (2004: 516). Secondly, this initial focus on lower-level accused ‘was intended over time to lead investigators up the chain-of-command to the highest level suspects’ and build up a collection of evidence and resources for their adjudication.²⁴⁹ Thirdly, there were (and still are) political difficulties in arresting high-level officials who it is alleged were (or are) under the protection of state or military officials (Hazan, 2004: 101). This shielding of indicted accused is commonly understood to be the reason for

²⁴⁵ Interviews with OTP staff, 28 June 2006 and 29 June 2006.

²⁴⁶ Interviews with OTP staff, 28 June 2006 and 29 June 2006.

²⁴⁷ Emphasis added. This prosecutorial strategy was endorsed by the Security Council to facilitate the completion of the Tribunal’s investigations, prosecutions and trials (United Nations Security Council Resolution 1503 (2003), 28 August 2003 (S/RES/1503 (2003))).

²⁴⁸ <http://www.un.org/icty/glance-e/index.htm>.

²⁴⁹ <http://www.un.org/icty/glance-e/index.htm>.

Rtako Mladić's continued freedom and the late arrest of Radovan Karadžić. Whether this prosecutorial strategy is either effective or necessary remains the subject of debate by both commentators and the prosecutors themselves.²⁵⁰ However, for the purposes of this research it is important to note that there is a categorisation and gradation of offences dependent upon the perception of their 'seriousness', the context of their perpetration and the character of the accused. Broadly speaking, the 'serious offences' in the early 'camp' cases are understood as different category of cases and crimes to 'the most serious crimes' brought to trial in the later 'ethnic cleansing' cases.

Of the 31 completed cases including charges of crimes against humanity, 55 percent are 'camp' cases and thus 45 percent are 'ethnic cleansing' cases. If charges are analysed in terms of their indictment in either 'camp' or 'ethnic cleansing' cases, it can be seen that prosecutions of murder arise in both these types of cases (see Figure's seven and eight below). There are an approximately equal number of prosecutions within these differential contexts; charges of murder constitute 29 percent of the prosecutions in the camp cases and 33 percent of the prosecutions in the ethnic cleansing cases. Murder as a mode of civilian victimisation arises in cases where offences are understood as both 'serious' and the 'most serious' of crimes, perpetrated by low and high-level accused. This approximately equal charging can also be seen for the crimes of persecution and 'other inhumane acts':

²⁵⁰ Interviews with OTP staff, 26 June 2006 and 29 June 2006.

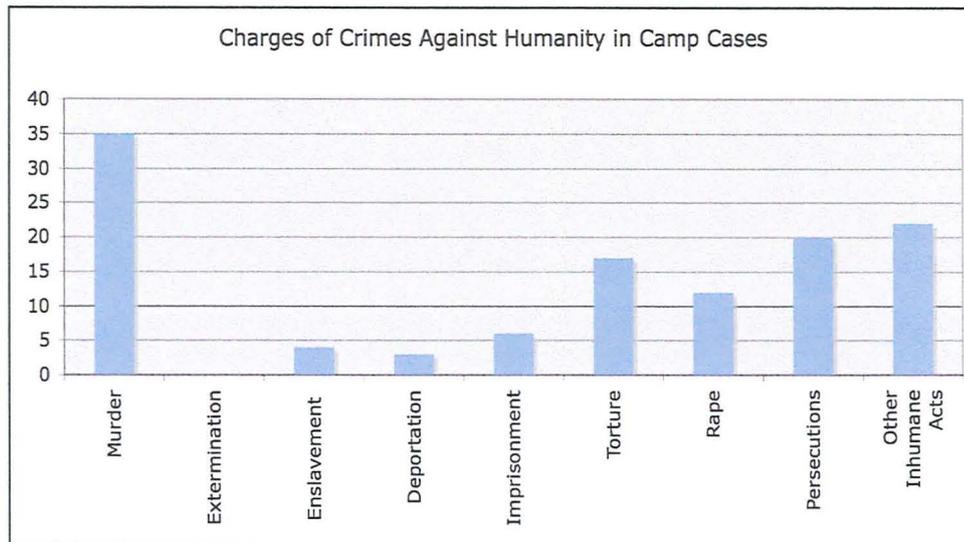


Figure 7

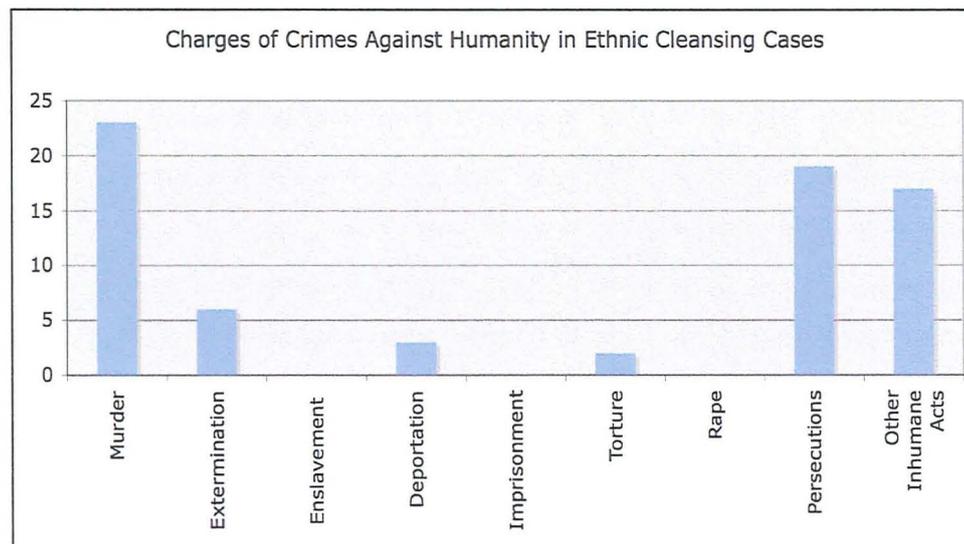


Figure 8

In contrast, there are not comparable numbers of charges for the enslavement, rape and imprisonment of (female) civilians within these two types of case.²⁵¹ Rather, there is a distinct designation of these particular modes of civilian victimisation, with these offences only arising in the ‘camp’ cases (see Figure seven above). While civilian victimisation through the perpetration of these acts may arise in ‘ethnic cleansing’ cases

²⁵¹ As noted above, the COE Report and commentators describe that female civilians were the most prominent victims of these particular crimes. This does not mean to suggest that male civilians (or combatants) have not been subjected to sexual violence during the Yugoslavian conflict, rather that the majority of the victims of these crimes were female (see Campbell, 2007).

as evidence of the crime of persecution, as was the case in *The Prosecutor v. Biljana Plavšić* for example,²⁵² there are no numerated charges brought for acts of enslavement, rape or imprisonment within this category of cases (see Figure eight above). Such a lack of charges is particularly surprising given that the COE Report describes that these crimes were a central aspect of strategies of ethnic cleansing throughout the conflict. It is also surprising given that there were numerous reports describing the perpetration of gender-based violences against women who were displaced, refugees, and that these acts of victimisation took place at border-crossings, in public places or in their own homes (Gardam and Jarvis, 2001: 27-31).

The exclusive prosecution of these crimes against female civilians within ‘camp’ cases can be seen to problematise the seemingly clear distinction between those crimes understood to be of ‘public’ *international* concern as opposed to those of ‘private’ domestic concern. This difficulty of a straightforward ascription of the crimes of imprisonment, rape and enslavement as matters of international ‘public’ concern arises through their designation as ‘less serious’ than other acts of civilian victimisation. In addition to the overall lack of such prosecutions, there are two factors that illustrate the designation of these acts as ‘less serious’. Firstly, the construction of the ‘lesser seriousness’ of these crimes against female civilians emerges through their predominant inclusion in early cases that charge low-level perpetrators for acts of civilian victimisation in detention facilities. Secondly, these crimes do not figure within the ‘more serious’ ‘ethnic cleansing’ cases and as such, there is an impression given that imprisonment, rape and enslavement were only part of certain aspects of the conduct of the conflict, rather than figuring throughout the differential contexts of its perpetration. These patterns in the exclusion of these crimes from the ‘more serious’ cases trying the higher or highest leaders create an impression that they are marginal to the concerns of the *international* Tribunal. The lack of international prosecutions for their perpetration figures the

²⁵² Case No. IT-00-39 & IT-40/1.

victimisation of these (female) civilian victims as a particular type of violence that does not necessitate a comprehensive or full legal response by the Tribunal. In this sense, their harms are not adequately made 'public' to the international community through the processes of international adjudication and judgement.

This exclusion of the construction of international legal recognition of the victimisation of female civilians can also be seen through the notable *inclusion* of charges of rape in cases that the Tribunal has transferred to domestic 'private' jurisdictions of the former Yugoslavia.²⁵³ Charlesworth *et al* argue that the international public sphere fails to legally recognise violence against women and that specific harms against them are typically relegated to the 'private' domain (1991: 625-627). In this sense, it is notable that charges concerning the rape of female civilians are brought in two out of the eight cases that have been transferred to domestic jurisdictions.²⁵⁴ Although these figures may appear minimal, prosecutions for this crime are brought in a quarter of the transfer cases as opposed to approximately an eighth of the cases heard by the Tribunal. Similarly to the distinctions of 'seriousness' seen in the 'camp' and 'ethnic cleansing' cases, the Tribunal assesses 'the gravity of the crimes charged and the level of the responsibility of the accused' in their determination of the applicability of cases to transfer.²⁵⁵ In these two cases, it is determined that the crimes allegedly committed against the female civilians are 'not of such gravity as to demand trial at the Tribunal'.²⁵⁶ For this reason, these 'less serious' acts of female civilian victimisation will be heard within the 'private' sphere of the relevant domestic jurisdictions. The relegation of these cases to domestic jurisdictions means that the Tribunal will not found *international* legal recognition of their particular civilian victims or include their harms within its record of the victims and violence of the conflict.

²⁵³ As part of the completion strategy, the Tribunal has referred a small number of cases to domestic jurisdictions of the former Yugoslavia, mostly to Bosnia and Herzegovina. These cases are transferred pursuant to Rule 11*bis* of the Tribunal's Rules of Procedure and Evidence.

²⁵⁴ Charges of rape are brought in *Janković* (Case No. IT-96-23/2) and *Stanković* (Case No. IT-96-23/2).

²⁵⁵ <http://www.un.org/icty/glance-e/index.htm>.

²⁵⁶ *The Prosecutor v. Radovan Stanković*. Case No. IT-96-23/2-PT. Decision on Referral of Case Under Rule 11 *BIS*, 17 May 2005, para. 15; *The Prosecutor v. Gojko Janković*. Case No. IT-96-23/2-PT. Decision on Referral of Case Under Rule 11 *BIS*, 22 July 2005, para. 20.

Conclusion

The rules and norms of humanitarian law characterise all persons who are not combatants as civilians. This description of the participants of conflict describes that all civilians are equally subject to the protections of this body of law and so have the same rights to safety and security during hostilities. However, as has been set out above, the legal enforcement of breaches of these protections by the Tribunal creates an impression that certain civilians are 'more deserving' of the criminal prosecution of their victimisation than others.

The patterns in the criminal prosecutions show that there has been an unequal construction of international legal recognition and record of different social categories of civilian victims and the crimes perpetrated against them during the Yugoslavian conflict. This analysis shows that particular acts of civilian victimisation are heard at trial as criminal prosecutions in a far greater frequency than others. It also highlights that the hierarchical designation of crimes (and their criminals) as more or less 'serious' and the distinct patterns seen in those crimes falling into these categorisations establishes an impression that particular acts of civilian victimisation are marginal or of lesser concern to the Tribunal. In this regard, the most notable aspect of the OTP's prosecutorial strategy is that acts of civilian victimisation are not viewed as equally 'deserving' of criminal prosecution. Instead, particular crimes against civilians such as rape, imprisonment and enslavement are understood as less serious than other acts and consequently are not subject to the same levels of international prosecution and adjudication by the Trial Chambers.

Drawing on both these aspects of the practices of criminal prosecution, of their frequency and gradation of 'seriousness', the second important pattern seen in the cases and charges

brought to trial is that the Tribunal does not adequately construct international legal recognition of certain collectivities of civilians, and of female civilians in particular. As a consequence of the few charges of certain crimes (imprisonment, rape and enslavement) there is an inadequate legal construction of female civilians as a victimised group during the Yugoslavian hostilities, that this particular category of civilians was the target of structural victimisation and violence. Even when gendered crimes are brought before the Trial Chambers, they are not attributed the same level of 'seriousness' as other acts of civilian victimisation and so, again, are constructed as marginal or of less concern to the processes of criminal prosecution. The transfer of cases to domestic jurisdictions involving crimes against female civilians reinforces this impression that the ICTY's processes of international adjudication are focused on 'more serious' crimes such as murder and persecution. This relative exclusion of female civilian victims and their harms within the prosecutions, in turn, has the consequence that particular categories of civilian victims do not appear within the legal representation of the victims and violence of the Yugoslavian conflict, as other accounts suggest they should. In particular, as this analysis sets out, there is not a comprehensive legal 'collective memory' of female civilians as a victimised group or the particular modes of violence and ensuing harms that they were subjected to during the hostilities.

This inadequate legal recognition of female civilian victims also draws attention to the broader problem of the lack of a consolidated or cohesive collective memory and representation of this conflict. As has been set out above, the criminal prosecutions heard before the Tribunal construct a very different representation and account of the conduct of the hostilities to other authoritative sources, such as the Commission of Experts, but also historians, sociologists and other commentators. In this way, there is not a shared or mutually acknowledged account of the victims and acts of victimisation during the hostilities. Rather, the Tribunal's criminal prosecutions can be seen to inadequately enforce the perpetration of particular crimes, such as rape and enslavement, against

particular civilian victims, such as females, which distinctly contrasts with other accounts of the types of victimisation and victims central to its conduct. In this way, there are not only various narratives of the hostilities and its participants from different sources, but inconsistent and competing representations of its modes of victimisation. Such a situation creates a multiplicity of conflicting ‘memories’ that complicates, or perhaps negates, any commonly acknowledged understanding of its victims and perpetrators. It creates a situation where certain groups of civilian victims may find recognition of their victim status by particular organisations or commentators, but not international *legal* address or redress for their harms.

The next chapter of this thesis explores how victims of acts of victimisation such as those set out above are legally identified as *civilian* victims. Using the case of *D. Milošević* as a case-study, the chapter first examines the complexities of identifying the victims of crimes of war. It then explores how the different parties to the trial attempt to prove (or disprove) the civilian status of individual civilian victims.

Chapter Five

War and Its Witnesses: The Trials and Testimonies of Civilian Harm

Once you have taken the solemn declaration, you are a witness of justice.²⁵⁷

From the first trial of Duško Tadić to the current adjudications in The Hague, a significant area of debate in relation to the Tribunal's legal practices has been the inclusion of victim-witnesses at trial and the provision of protective measures enabling their testimonies to be heard by the Chambers (Chinkin, 1996; Leigh, 1996; Stover, 2005). In *Tadić*, following its recognition that the abuses perpetrated in the Yugoslavian conflict had spread terror among the civilian population, the Trial Chamber held that the Tribunal had an 'affirmative obligation to protect victims and witnesses'.²⁵⁸ This protection is a necessary aspect of the Tribunal's legal practices as a 'fair trial means not only fair treatment to the defendant but also to the prosecution and to the witnesses'.²⁵⁹ How, then, does the Tribunal construct its practices of trial adjudication for the 'fair treatment' of victim-witnesses that come to testify before the Chambers? More specifically, what is the role and positioning of *civilian* victim-witnesses within the Tribunal's legal proceedings? This chapter first considers the complexities of defining witnesses as civilian victim-witnesses in light of the conduct of the Yugoslavian conflict. It then analyses the Tribunal's Rules of Procedure and Evidence and, in particular, its framework of protective mechanisms and measures that enable civilian victim-witnesses to come before the court. Finally, this chapter explores the practices of identifying and

²⁵⁷ Fieldwork at the trial of Jadranko Prlić *et al*, Statement of the Presiding Judge, 26 June 2007.

²⁵⁸ *The Prosecutor v. Dusko Tadić*. Case No. IT-94-1. Decision on the Prosecution's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, paras. 23-26 ('*Tadić*, Protective Measures Decision').

²⁵⁹ *Tadić*, Protective Measures Decision, para. 55. The Tribunal's provision of protective measures has been contentious. In particular, commentators have argued that the use of anonymous witnesses is not consistent with the rights of the accused for a fair trial (see Leigh, 1996).

including civilian victim-witnesses during trial adjudications and the structuring of their testimonies from the differential positions of the civilian victim-witnesses themselves, the Prosecution, Defence and the Trial Chamber.²⁶⁰

In order to explore the Tribunal's recognition of civilian victims as witnesses and the structuring of their testimonies at trial, this chapter uses *The Prosecutor v. Dragomir Milošević* ('*D. Milošević*') as a case-study of the Tribunal's legal practices.²⁶¹ This case charges the accused with the war crimes of 'terror against a civilian population' and 'attacks on civilians' and four counts of crimes against humanity (murder and inhumane acts) for his participation in the shelling and sniping of civilians in the region of Sarajevo. For this reason, a substantial number of the witnesses testifying during the trial proceedings were the civilian victims of these alleged crimes. At trial, the Prosecution brings witnesses before the Trial Chambers to establish 'facts' relating to the case and to provide evidence supporting the charges of the alleged unlawful actions of the accused (Schabas, 2006: 471). However, in *D. Milošević*, the specificity of the charges for acts of violence against civilians brought against the accused did not only require the victim-witnesses being brought by the Prosecution to establish the perpetration of violence by the accused during the siege. Rather, in this case, the victim-witnesses testifying also had to provide proof of *their* status as civilians through their *own* actions at the time of the conflict. These witnesses had to narrate their forms of participation in the conflict as well as the actions of the accused, a matter that was subject to challenge by the Defence. As a consequence, the legal proceedings rested upon an 'adjudication' of the identity of the victim, for without proof of their civilian status, these victims could not be understood as victims or even relevant witnesses to the case.

²⁶⁰ It should be noted that during courtroom observations, there were many instances of persons testifying at the Tribunal who could reasonably be understood to be combatant victim-witnesses. However, this chapter focuses upon civilian victim-witnesses in light of the research questions of the thesis.

²⁶¹ Case No. IT-98-29/1.

Civilian Victims as Victim-Witnesses: The Difficulties of Defining Persons in Conflict

Civilian victims of the Yugoslavian conflict can only come before the Tribunal during trial proceedings. They can only participate in these legal proceedings if summoned upon to give evidence against (or for) the accused for his or her alleged perpetration of criminal conduct (Chifflet, 2003; Van Boven, 1999). Despite the development of forms of restorative justice within international criminal justice mechanisms and the progressive victims' rights set out by the United Nations, as discussed previously, a civilian (or combatant) victim cannot initiate legal proceedings at the Tribunal or claim compensation for the sustaining of harm. Instead, as David Tolbert and Frederick Swinnen point out, the 'only formal category of victims in terms of the Tribunal's proceedings is the victim as witness' (2006: 195). This limited positioning of victims arises from the necessity of the parties of the legal proceedings, that is, the Prosecution and Defence to bring evidence in the form of witness testimony before the Trial Chamber. For example, in *D. Milošević*, the Prosecution presented evidence 'through the testimony of surviving victims and other eyewitnesses' to demonstrate the patterns and scale of the perpetration of terror to the civilian population.²⁶² Acting as witnesses, a limited number of civilian victims narrated their experience of victimisation, providing evidence that worked to illustrate the broader patterns of acts of civilian victimisation during the siege of Sarajevo.

The Tribunal does recognise that many of the witnesses that come before the Trial Chambers will be victims of the Yugoslavian conflict. This recognition is seen, for example, through the Tribunal's establishment of a Victims and Witnesses Section ('VWS') to assist and protect such persons during their time in The Hague. It can also be seen through the terms of the early *Tadić* decision on the protective measures for victims

²⁶² *D. Milošević*, Transcript, 6 May 2003, para. 21671.

and witness,²⁶³ and the ongoing provision of protective measures for victim-witnesses testifying in cases currently under adjudication.²⁶⁴ However, the Tribunal does not provide a definition of a victim-witness or a civilian victim-witness more specifically in either its Statute or Rules of Procedure and Evidence. While the concept of a victim-witness *is* employed by ICTY prosecutors and staff members of the VWS to describe witnesses who have suffered harm from the conflict (see Lobwein, 2006; Tolbert and Swinnen, 2006),²⁶⁵ it is important to note that the Tribunal as an institution does not keep or provide official statistics on the number or ‘type’ of victim-witnesses that have come before the Chambers.²⁶⁶

Commentators also often employ the concept of ‘victim-witness’ in analyses of war crimes trials. For example, Marie-Bénédicte Dembour and Emily Haslam (2004) provide an insightful exploration of the role and participation of victim-witnesses and the structuring of their testimonies during the genocide trial of Radislav Krstić. Through an analysis of the transcripts of this case, they show that the victim-witnesses were prevented from testifying in a manner that goes beyond the provision of ‘literal facts’ to their subjective experiences and as such, are effectively ‘silenced’ during the trial process (Dembour and Haslam, 2004: 164, 175). For this reason, Dembour and Haslam argue that war crimes trials are not beneficial for victims as the current structure and form of legal processes may cause harm to those testifying (2004: 177). However, considering the centrality of the testimonies of victim-witnesses for this analysis, it appears problematic that the authors do not conceptualise a ‘victim-witness’ or address how they designated such status to eighteen out of the one hundred and sixteen witnesses that testified in the

²⁶³ *Tadić*, Protective Measures Decision, para. 23.

²⁶⁴ See for example *The Prosecutor v. Mile Mrškić, Miroslav Radić and Veselin Šljivančanin*. Case No. IT-95-13/1-T. Decision on Prosecution’s Additional Motion for Protective Measures of Sensitive Witnesses, 25 October 2005, para. 5 (*Mrškić et al*, Protective Measures Decision’).

²⁶⁵ Interviews with VWS staff, May and June 2006.

²⁶⁶ Email correspondence with member of staff of the VWS, December 2008.

Krstić case.²⁶⁷ More broadly, there is little consideration of the particular complexities in ascribing victim-witness status to those victims of armed conflict who provide evidence of alleged crimes (who can be both civilians and combatants), or the consequent impact that their status along the principle of distinction could have upon the process of trial proceedings.

In contrast, Eric Stover through an interview-based study of eighty-seven victims who had testified at the Tribunal does not find such overriding negative opinions of the trial experience from the victim-witnesses themselves (2005). Instead, Stover describes how the majority (seventy-seven percent) of the victim-witnesses he interviewed found testifying a positive experience, with a number of witnesses citing the professionalism of the Tribunal staff and the fairness of the trial process as the basis of this opinion (2005: 134). Similarly to Dembour and Haslam however, the establishment of a definition of a victim or a victim-witness is also lacking in Stover's study. Instead, he draws attention to the fact that in the aftermath of mass violence there are substantive difficulties in ascribing a definitive status to particular individuals or collectivities, despite the overriding tendency 'to lump those who survive into three distinct groups: perpetrators, victims, and bystanders' (2005: 4). Stover further complicates the ascription of this status by raising the issue that few survivors of armed conflict definitively categorise themselves along the victim / perpetrator divide, with it often being the case that this self-categorisation would not align to that given by other persons, social groups or institutions (2005: 4). Moreover, it is also the case that known perpetrators may claim or seek the status of 'victim' to justify or seek legitimation for their unlawful actions (Kiza, 2006; Stover, 2005). As Stover highlights, there are significant contestations over the very concept of victimhood, with the status of victim and thus 'victim-witness' being both an actively sought after status for founding address and redress for the experience of harm,

²⁶⁷ See *The Prosecutor v. Radislav Krstić*. Case No. IT-98-33. Case Information Sheet. (<http://www.un.org/icty/glance/casefactindex-e.htm>).

but also rejected for its lack of representation of the survival of mass violence (2005: 4-5). One example of this is found in *Kunarac et al*, when a civilian victim testified that the perpetrators would describe her and other women and children they had held as ‘slaves’. However, despite sustaining profound harm, she asserted that despite the perpetrators designation of her as such, she ‘wouldn’t accept that’ and that instead she felt ‘dignified and proud’.²⁶⁸ For this witness, her self-characterisation as a survivor, rather than as ‘victim’, shaped her understanding of her experiences and the violence of the conflict more broadly (see Mertus, 2004).

These difficulties in defining which persons can be understood as ‘victim-witnesses’ can arise from the complexities of ascribing a status of ‘victim’ to persons in a situation of armed conflict. Most commentators conceptualise a war victim as a person who has experienced harm, either directly from the actions of another person (most probably a combatant), or indirectly through human actions that victimise persons living through a conflict (for example in siege conditions) (see Kiza, 2006; Jaukovic, 2002). The United Nations similarly defines a victim of a breach of human rights or humanitarian law in terms of their suffering of harm, determining that this harm can take the form of physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights.²⁶⁹ For the UN, the victims of such breaches include those directly targeted individuals, but also ‘the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization’.²⁷⁰ These definitions of the victims of armed conflict (and / or human rights abuses) characterise the impact and experience of victimisation expansively, as causing harm to both ‘direct’ and ‘indirect’ victims. They understand the

²⁶⁸ *The Prosecutor v. Dragoljub Kunarac, Radomir Kovać and Zoran Vuković*. Case No. IT-96-23-T & IT-96-23/1. Transcript of Trial Proceedings, 24 April 2000, para. 2424 (*Kunarac et al*, Transcript’).

²⁶⁹ United Nations, Principles on the Right to a Remedy, para. 8. It should be noted that the UN definition of a victim does not require civilian status and therefore may include victims who are combatants.

²⁷⁰ United Nations, Principles on the Right to a Remedy, para. 8.

experience of victimisation as a relational harm, as impacting upon the direct victim as well as the broader community, particularly those with whom the victim has familial ties.

It is therefore important to recognise the widespread and systematic nature of violence perpetration and thus victimisation in armed conflict. As noted in chapter one, Ernesto Kiza points out that the process of identifying a war victim and their victimization requires employing a 'structural model of war victimization' (2006: 81). As Kiza argues, a structural model of war victimization emphasises the interrelated conditions for the existence of violence and its perpetration, and how it differs from conditions of peace, most notably in the total loss of security, the high degree of offences such as assault and rape and the lack of functioning institutions and other systems of social control to prevent its occurrence (2006: 80). Building upon the UN's recognition of the existence of both direct and indirect experiences and sources of violence during conflict situations, in this structural form, violence becomes a constituent aspect of the conditions of everyday life. Its encompassing character is evident as it permeates throughout the affected community, state or states to affect their inhabitants either directly or indirectly (Kiza, 2006). Since the massive scale of this structural victimization will 'crystallize into the sharp, hard surfaces of individual suffering', the majority of the persons within the 'larger social matrix' will become the victims of its harm or fear its future perpetration (Farmer, 2004: 282). As the trial proceedings and judgements of the Tribunal exemplify, under conditions of war, this broad spectrum of violence can range from individual assaults to the broader targeting or indiscriminate victimisation of a civilian populace or society. In *D. Milošević*, for example, conditions of structural violence and victimisation to both individual and community can be observed in the testimonies of the individual victims who act as victim-witnesses to their personal experience of sniping or shelling. Viewed

together, the Tribunal considers that these acts of violence can reflect the overall terror perpetrated to the civilian population of Sarajevo through the actions of this accused.²⁷¹

As set out previously in chapter one, this framing of structural war victimisation centres upon a recognition of the infliction (and sustaining) of ‘harm’ to both individuals and the social matrix. However, the Tribunal’s Rules of Procedure and Evidence does not follow this approach in defining a victim in relation to their sustaining of harm. It has not revised its rules to encompass the more recent definition set out by the ICC Rules of Procedure and Evidence, which defines victims as ‘natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court’ (Rule 85 (a)). Rather, the Tribunal characterises a victim as a ‘person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed’ (Rule 2 (A)). This formulation of a victim fails to acknowledge their sustaining of harm, whether it be of a physical or psychological nature, unless the perpetration of violence and victimisation against them is affirmed as an act of criminal conduct. In these terms, the Tribunal’s characterisation of a victim does not clearly figure the victim as being a victim *because of* the direct or indiscriminate actions of a perpetrator. By defining a victim’s status in terms of an (alleged) crime under the Tribunal’s jurisdiction, the role of the perpetrator is not readily apparent as the cause of the victimisation of an individual or collectivity (or their resulting harm).

Whether following the ICTY’s definition of a victim, or a more expansive conceptualisation that recognises the sustaining of harm, identifying a person as a victim of conflict is often a complex process and the subject of challenge and dispute. Rama Mani points out that legal trials over-emphasise the categories of ‘perpetrator’ and ‘victim’ as ‘mutually exclusive, rigid and unchanging’ (2002: 121). However, as Mani

²⁷¹ *The Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T. Judgement, 12 December 2007, paras. 967-978 (*D. Milošević*, Judgement). Conditions of structural victimisation as collective victimisation of collectivities of civilians is explored in chapter six.

argues, it is ‘observed – though rarely discussed – that in many conflicts the distinction between victim and perpetrator may not be so sharp’ (2002: 121). Within the conditions of the Yugoslavian conflict, as well as many others (see Mani, 2002; Moser and Clark, 2001), there are significant difficulties in ascribing or retaining the seemingly precise legal divide between civilians and combatants through the principle of distinction. The intersection of both these categories of persons figuring as victims and perpetrators complicates any simple designation of civilians figuring only as victims of the Yugoslavian conflict, or of combatants being the only perpetrators. For example, in *D. Milošević*, a number of witnesses described themselves as having been ‘forced’ to act as combatants by one of the armies present in Sarajevo.²⁷² They were not willing fighters, indeed, as one witness asserted, ‘this was not my war and I did not want to bear arms’.²⁷³ In these terms, reflecting the complexities of categorising persons in armed conflict, these combatants were victims of the actions of the military persons controlling their participation in the conflict (for it was not their choice to fight). However, they were also perpetrators of violence (in their commitment of criminal conduct) and therefore contributed to the victimisation and harm of civilians and other combatants in either direct or indirect forms.

This amalgamation of victim / perpetrator status in relation to the principle of distinction is also evident in terms of persons understood as civilians directly or indiscriminately targeted by D. Milošević, and as civilian victims by the Tribunal. In this case, the Prosecution brought civilian victims to testify to their civilian status and their experience of violence in Sarajevo, crimes which were successfully brought to judgement by the Trial Chamber. However, as chapter six will further discuss, in *D. Milošević*, a distinct feature of the trial proceedings was a number of civilian victim-witnesses describing distinct alliances to military personnel of ‘their’ side through ethnic groupings and

²⁷² Fieldwork, *D. Milošević*, 18 June 2007.

²⁷³ Fieldwork, *D. Milošević*, 18 June 2007.

refusing to acknowledge the perpetration of violence by these combatants.²⁷⁴ These military-civilian alliances illustrate that in the Yugoslavian conflict, as in others, there is often a degree of ‘participation of civilians in war as agents rather than passive victims’ (Nabulsi, 2001: 18). It is important to acknowledge that with the ‘growing involvement of both civilians and civilian installations (factories, etc.) in the war effort’ (Cassese, 2005: 404), both combatants and civilians can be active participants and integral to the structural victimisation and violence inherent in the conduct of war. In this way, following the structural model of war victimisation, it can be argued that both combatants (particularly ‘forced’ combatants) and the civilians who suffered harm from the violence were victims of the conflict. This broad experience of victimisation is a consequence of the pervasive violence of war that permeates the social matrix and all persons, on both sides of the principle of distinction, within it.

Despite the difficulties of recognising the civilian and combatant victims of armed conflict, it is a fundamental principle of the Tribunal’s legal proceedings that certain witnesses are victim-witnesses, whichever side of the civilian / combatant divide they fall. In order to analyse the Tribunal’s adjudicatory processes, it is therefore necessary to develop a definition of a victim-witness in the absence of such a definition in its Statute or RPE. Tolbert and Swinnen describe a victim-witness as a ‘victim of alleged crimes who then testifies about the events that he or she has witnessed’ (2006: 196). This definition largely follows that set out in the ICTY Statute. However, as Tolbert and Swinnen acknowledge, and as has been argued above, these witnesses have also been ‘the direct victims of crimes, such as rape, beatings or torture’ (2006: 197). They have experienced harm and may be subject to re-traumatization or fear reprisals through their witnessing of these acts of violence and victimisation (Stover, 2005: 101). However, to understand war victimisation also necessitates recognising the indirect forms of

²⁷⁴ See *D. Milošević*, Transcript, 22 January 2007, para. 808.

victimisation as outlined above, rather than narrowing a conceptualisation of violence to direct crimes or acts within a conflict situation.

For this reason, this analysis will understand victim-witnesses as persons who have either directly or indirectly experienced harm from the acts of victimisation and violence under adjudication and come to trial to narrate its perpetration. This definition of a victim-witness follows the UN's description that both the 'direct' victim and their family or dependents may suffer from the harms of victimisation, that injuries can be experienced as relational harms. For example, a person who observes the death or injury to a family member or friend through an incident of sniping or shelling should be understood as a victim-witness for their 'indirect' experience of a victimizing incident of harm. In this regard, as noted in chapter one, it is necessary to conceptualise harm expansively, as encompassing both physical and psychological injuries, to capture the variety of ways that the effects of victimisation can be sustained and felt by direct and indirect victims. As such, this definition of victim-witnesses broadens the UN's description of a victim to consider that the context of consuming violence will inevitably impact upon persons in the vicinity of such violence, or those who have observed and endured the perpetration of harm to others. It takes account of broader experiences of structural victimisation and harm by a civilian population, for example through conflict situations such as a siege or campaigns of ethnic cleansing which create an atmosphere of terror and risk for both an individual's own safety and that of others.

This analysis of victim-witnesses and their testimonies will focus upon those persons that can be identified as *civilian* victim-witnesses, those witnesses who have experienced harm either directly or indirectly as civilians. In addition to the general focus of this analysis of the Tribunal's work in relation to civilian recognition and redress, there are two main reasons for concentrating on civilian victim-witnesses, which have been set out in previous chapters. Firstly, it is evident that the conduct of the Yugoslavian conflict

centred upon a high degree of deliberate targeting of the civilian population and as such, the majority of victims were civilians (Bassiouni, 1994). For this reason, as Kiza points out, the testimonies of civilians may well 'provide the best information on events that have taken place during wartime, on the structure of victimization' (2006: 73). Secondly, as set out in chapter four, the considerable majority of cases brought by the Prosecution are for acts of violence against civilians, with all completed cases having included charges for such conduct through the various categories of crimes comprising the Tribunal's Statute. For these reasons, it is likely that a substantial number of victim-witnesses giving evidence at trial were civilians during the conflict. Indeed, courtroom observation at the Tribunal in *D. Milošević* and other cases affirmed this inclusion of civilian victim-witnesses within legal proceedings.

Enabling Victim-Witness Testimony: The Rules of Procedure, Evidence and Protection

From the initial investigations to the later adjudication of cases and charges during trial and appeals hearings, the Tribunal's Statute and Rules of Procedure and Evidence set out the framework of this institution's legal practices. These documents are central to the Tribunal's functioning as they structure the 'proper administration of justice . . . to govern the principal aspects of the proceedings' (Cassese, 1994: 57). They establish the procedural rules for the conduct of trial proceedings and the forms of evidence that can be submitted by the Prosecution and Defence to support their case. For witnesses coming to testify before the Chambers, the Statute and RPE also determine the Tribunal's provision of protection measures and the manner in which victims (as witnesses) are able to participate in the trial process. How, then, does the Tribunal understand the role of civilian-victim testimony as a form of evidence? And in consideration of the necessity to ensure the safety and security of these witnesses, how does the Tribunal *enable* civilian

victims to act as victim-witnesses? What forms of protection are in place to mitigate reprisals or re-traumatisation from their participation in trial processes?

Victim-Witness Testimony as Evidence

Following their investigations and bringing of charges, for perpetrators such as D. Milošević to come before the Trial Chamber, the Prosecution must bring 'sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the Tribunal' (Rule 47(B)). If a judge confirms the counts of an indictment an arrest warrant can be issued and 'the suspect shall have the status of an accused' (Rule 47(H)(i) and (ii)). Once trial proceedings have been initiated, Rule 66(B) determines that the Prosecution shall permit the Defence to inspect any supporting materials of the indictment that they will use as evidence or may be 'material to the preparation of the defence'. As was seen during periods of courtroom observation at the Tribunal, and as is typical of national and international legal proceedings, such evidence is generally admitted in two main forms, as either 'live' witness testimony or as documents such as maps, photographs, video and audio-recordings (May and Wierda, 2001: 254). In the later stages of the Tribunal's functioning, witness statements have also been increasingly submitted in documentary form, as will be further discussed. Accordingly, the Prosecution in *D. Milošević* brought a number of these different evidential forms to support the charges of acts of violence against civilians committed by the accused, while the Defence similarly used such materials to attempt to discredit these allegations. Following the procedures of the Tribunal, these evidential sources provided both the grounds to indict the accused and upon his arrest, the holding of a trial to adjudicate the charges brought against him.

Of these evidential sources, witness testimony and civilian victim-witness testimony more specifically has been central to trial proceedings. The Trial Chamber 'may admit

any relevant evidence which it considers to have probative value' (Rule 89). While the expansive terms of this Rule have been the subject of debate, in particular in relation to the submission of 'hearsay' evidence (Scharf and Schabas, 2002: 87), these terms of admission require that the evidence must 'be relevant and capable of authentication' (Boas, 2001: 265). At its inception, the Tribunal placed a high value on 'live' testimony as a relevant evidential source to be admitted at trial by either the Prosecution or Defence. Rule 90(A), which has since been revised, determined that '[w]itnesses shall, in principle, be heard directly by the Chambers'. This prioritisation of witness testimony arose, as unlike the Nuremberg trials 'whose prosecutions relied heavily on the meticulous documentary record seized from the Nazis' (Morris and Scharf, 1995: 242), the Tribunal 'did not begin its investigations with a victor's trove of documents' (Tieger and Shin, 2005: 669). During its early functioning, there was a predominant use of witness testimony as an evidential form within trial proceedings. Indeed, as the *Tadić* decision notes, the Tribunal was 'heavily dependent on eyewitness testimony' to try the perpetrators that come before the Chambers.²⁷⁵

There has, however, been a marked change in the Tribunal's preference for particular evidential forms over the course of its functioning. As the focus has moved to the prosecution of higher-level leaders, as discussed in chapter four, there has been a shift from the prioritisation of witness testimony to an increasing use of written and documentary evidence. Central to this shift in evidential forms was the inclusion of Rule 92*bis* to the RPE in 2000 which determines that:

[A] Trial Chamber may dispense with the attendance of a witness in person, and instead admit, in whole or in part, the evidence of a witness in the form of a written statement or a transcript of evidence, which was given by a witness in proceedings before the Tribunal, in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment.

²⁷⁵ *Tadić*, Protective Measures Decision, para. 63.

As an interview with a staff member of the VWS confirmed, a particular consequence of the adoption of this Rule has been a lessening of the number of victim-witnesses testifying 'live' before the Chambers. Although a few victim-witnesses are typically brought before the Chambers during the early stages of the Prosecution's case to give evidence, the majority of witnesses now testifying are military or political leaders, or expert witnesses.²⁷⁶ For this reason, as the Tribunal's adjudications continue, it appears that the procedural changes to its functioning are significantly reducing the possibility for a civilian victim to *be* a witness and narrate their experiences of conflict.

The modification in the Tribunal's admission of evidential forms from witnesses to documents has arisen through two interrelated factors. Firstly, the Tribunal's adoption of Rule 92*bis* is central to the process of expediting trial proceedings (Jorda, 2001: 41). In line with the terms of the completion strategy, there has been an ongoing focus on decreasing the use of time-consuming witness testimony and, instead, admitting written statements, as was often seen during courtroom observation in *D. Milošević* (see Fairlie, 2003). Secondly, the shift to the prosecution of higher-level leaders requires information and evidence that witness testimonies cannot provide. Zahar and Sluiter point out that the Tribunal's later cases concern 'defendants in formerly senior positions who did not themselves commit statutory crimes, but whose decisions are said to have caused, at the ground level, widespread perpetration of such crimes' (2008: 343). The prosecution of these accused requires documentary evidence that proves 'the so-called "crime base"', evidence which can include transcripts or statements of prior ICTY proceedings concerning the conviction of accused who were subordinate to those senior leaders now on trial (Zahar and Sluiter, 2008; also Kay, 2006). In this respect, following the 'pyramid strategy' of prosecutions, it was notable during fieldwork at the *D. Milošević* case that the

²⁷⁶ Interview with a staff member of the VWS, 3 February 2009.

judges made frequent references to the *Galić* case, involving D. Milošević's former superior.²⁷⁷

Despite the decreasing use of witness testimony in favour of other documentary forms, the Tribunal has tried, and continues to try cases that require civilian victims to come to court to name the accused and narrate his or her crimes to the Chambers. This necessary inclusion of civilian victim-witnesses within cases such as *D. Milošević* is a consequence of the charges of the indictment relating to specific injuries to individual, named civilians. As Cassese points out, unless the crime under adjudication concerns a fatality, often 'the principal witness against the perpetrator of a crime will be the victim' (1994: 78). The 'live' testimony of the victim-witness is therefore still integral to the legal process of adjudication as only they can testify to their direct experience of victimisation and harm (Mertus, 2004). It can also be seen that there is a symbolic element to the inclusion of certain victim-witnesses during trial proceedings. Victim-witnesses are not only brought before the Chambers by the Prosecution or Defence for evidential reasons, but also to impress upon the judges and, perhaps also the public, that the criminal conduct under adjudication had a direct or indirect harmful impact upon the lives of individual or collectivities of civilians. For example, in *D. Milošević*, the Defence brought a number of Bosnian Serb witnesses before the Chambers to emphasise that both Bosnian Muslims and Bosnian Serbs were victims of the siege of Sarajevo.²⁷⁸ These witnesses were portrayed as 'victim-witnesses' by the Defence to illustrate the structural nature of the victimisation and violence and its pervasive perpetration throughout the region (as will be further discussed in chapter six). However, in cases such as *D. Milošević*, the Prosecution does not only bring victim-witnesses to trial to narrate the circumstances of the act of violence under adjudication, or symbolise the personal impact of its harmful consequences. Rather, as will be further discussed, the specificity of the charges

²⁷⁷ Fieldwork, *D. Milošević*, 18 June 2007.

²⁷⁸ Fieldwork, *D. Milošević*, 18 June 2007.

necessitates that the victim was a civilian at the time of their victimisation. In this way, the Prosecution's inclusion of the victim-witness at trial through their provision of 'live' testimony enables the Trial Chamber to assess the characteristics of the victim-witness and make a judgement as to their civilian or combatant status.

Victim-Witnesses and the Tribunal's Protective Measures

In light of the dependency of these categories of cases on 'live' witness testimony, the Tribunal must facilitate the inclusion of civilian victim-witnesses within trial proceedings. However, as the Tribunal acknowledges, there is a specific social context to the acts under adjudication, namely 'that the abuses perpetrated in the region have spread terror and anguish among the civilian population'.²⁷⁹ With the conflict ongoing in the former Yugoslavia during its early years of functioning, the Tribunal was particularly aware of this social context and its probable impact upon the evidential processes of trial proceedings. As the *Tadić* decision describes, the judges of the Tribunal feared that amid an ongoing conflict 'many victims and witnesses of atrocities would be deterred from testifying about those crimes or would be concerned about the possible negative consequences that their testimony could have for themselves or their relatives'.²⁸⁰ Despite the cessation in hostilities, this social context is still a factor for victims to consider when deciding whether to testify, with the threat of reprisals remaining a possibility. As a staff member of the VWS confirmed, there continue to be instances or threats of physical violence perpetrated against potential witnesses or those that have already testified (see also Stover, 2005: 75).²⁸¹

For these reasons, the Tribunal has developed an extensive range of protective measures to enable victims to come to The Hague and testify to their harms. As well as the practical

²⁷⁹ *Tadić*, Protective Measures Decision, para. 23.

²⁸⁰ *Tadić*, Protective Measures Decision, para. 23.

²⁸¹ Interview with a staff member of the VWS, 3 February 2009.

need to include victim-witnesses within trial proceedings, the Tribunal facilitates the inclusion of victims in the trial process through the provision of protective measures because of its recognition that ‘they often testify at considerable risk to themselves and their families’ (Chifflet, 2003: 75). A central element in the Tribunal’s assessment of whether a victim requires protective measures is the determination of whether, ‘should it become known that the witness has testified, there is a real risk to his or her security or that of his or her family’.²⁸² If the Prosecution (or Defence) can prove that such a situation is a possibility, the Trial Chamber establishes protective measures for the witness. These measures are intended to facilitate the presence of the witness in the courtroom by preventing further harm, suffering or re-traumatisation to them from their act of testifying (Lobwein, 2006: 199).

The Tribunal’s central mechanism for the provision of protective measures for civilian victim-witnesses is the Victims and Witnesses Section. Comprising of Operations, Protection and Support Units and a legal officer at the Tribunal, and a Sarajevo Field Office with a Protection and Support Unit, the VWS advises on protective measures for victims and witnesses relating to their presence and participation during trial proceedings.

Under Rule 75(B) of the RPE, these protective measures may include:

- (i) measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or a witness, or of persons related to or associated with a victim or witness by such means as . . .
 - (a) expunging names and identifying information from the Tribunal’s public records
 - (b) non-disclosure to the public of any records identifying the victim;
 - (c) giving of testimony through image- or voice- altering devices or closed circuit television; and
 - (d) assignment of a pseudonym;
- (ii) closed sessions . . .
- (iii) appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed circuit television.

Moreover, it is important to note that the staff of the VWS, in accordance with Rule 34(A), recommend protective measures for victims and witnesses . . . and provide

²⁸² *Mrskić et al*, Protective Measures Decision, para. 5.

counselling and support for them, in particular in cases of rape and sexual assault. They monitor the testimony process during trial proceedings to ensure that witnesses are being examined in a manner which is not intimidating or causing them any unease.²⁸³ In more practical terms, the VWS also organises the security and practical arrangements for witnesses to come to The Hague, such as visas, accommodation and travel (Lobwein, 2006).

A number of legal and transitional justice commentators contend that the Tribunal's RPE represent a significant advance in the provision of protective measures as they 'are more "victim friendly" than most parallel domestic criminal codes' (Ni Aolain, 1997: 892).²⁸⁴ In particular, the Tribunal's provision of protective measures is held to facilitate the inclusion of civilian victims of sexual violence and their giving of testimony during trial proceedings (see Chifflet, 2003; Cassese, 1994). Measures such as closed sessions and the granting of pseudonyms are understood to protect the privacy of these victims and prevent the victim from experiencing any further trauma (Chifflet, 2003: 88-89). However, as noted previously, the Tribunal does not figure victims in any other role or capacity other than as witnesses. The Tribunal's legal practices do not follow the UN's Principles of a Right to a Remedy which prioritise the rights of victims to have 'access to justice' and reparations,²⁸⁵ or the views of commentators that consider victims should have a participatory role in trial proceedings (Stover, 2005). Nor do they follow the ICC's more recent 'victim-focused' practices of participation.²⁸⁶ While there have been attempts to establish a scheme of reparations for victims by staff at the Tribunal, this has not been

²⁸³ Interview with a staff member of the VWS, 3 February 2009.

²⁸⁴ It should be noted that certain national criminal courts do include victims within legal processes, for example through the admission of victim-impact statements or facilitating victim-offender mediation (see Cornwell, 2007).

²⁸⁵ United Nations, Principles on the Right to a Remedy, para. 12.

²⁸⁶ An interview with a staff member of the Outreach Programme affirmed that the Tribunal has not adopted the more progressive victims rights and protections at the ICC, and despite liaison between the institutions, has no plans to do so (27 June 2006).

successful.²⁸⁷ For this reason, the Tribunal's RPE dealing with victims only relate to their role as witnesses, they 'are in fact part of a witness protection scheme and are not addressed to victims as such' (Chifflet, 2007: 77). Despite the UN's framework of victims' rights there is no possibility for civilian victims to participate within the Tribunal's institutional proceedings other than in this capacity. Instead, these victims remain marginal to the trial process unless called upon by the Prosecution (or Defence) to testify before the Chambers, testimonies which the Tribunal may (or may not) facilitate through the provision of protective measures.

This provision of protective measures does not, however, only apply to *victim*-witnesses or *civilian* victim-witnesses more particularly. Rather, the VWS's mandate to assist and protect applies to any 'type' of witness. Protective measures enable the testimonies of Prosecution and Defence witnesses, those persons that can be understood as victim-witnesses in accordance with the definition given above as well as persons who have themselves been indicted for war crimes (Lobwein, 2006: 199-200). As the above discussion sets out, there may be difficulties in designating witnesses as being a particular 'type' and some persons may fall within the categories of both 'victim' and 'perpetrator' witnesses. However, the amalgamation of victim-witnesses with other types of witnesses and the lack of a specific unit for them within the VWS appears problematic.²⁸⁸ By failing to designate victim-witness status, there is no institutional recognition that these victims have had a very distinct (and harmful) experience of conflict and its aftermath, which other types of witnesses have not endured in the same manner. In this regard, as Tolbert and Swinnen point out, the 'danger of re-traumatization is unique to the victim-witness' (2006: 197). However, the absence of a unit or framework of protective measures specific to these witnesses does not appear to adequately acknowledge that they will have

²⁸⁷ Interview with a staff member of the VWS, 3 February 2009. Furthermore, this staff member related that there while Rule 106 of the Tribunal's RPE allows victims to bring an action for compensation in a national court if an accused has been found guilty of causing injury to that person, there have not been any cases to date where compensation has been granted.

²⁸⁸ Interview with VWS staff, 3 April 2006.

particular needs within the testimony procedure and, as such, that they may require levels or measures of protection and support that other witnesses do not.

Whether for civilian victim-witnesses or other ‘types’ of witnesses, there are two aspects of the Tribunal’s proceedings that appear to diminish the possibilities for witnesses to find a comprehensive level of protection should they choose to testify against their perpetrators. Firstly, as Stover points out, neither before, during, or after the trial does the Tribunal ‘provide victims and witnesses with specific “rights”. Instead, the ICTY staff refer to witness services as “entitlements”’ (2005: 136). It is important to emphasise that a victim-witness cannot demand protective measures at trial. Instead, the judges of the Trial Chamber determine the risk to the person or their family in testifying without them (Lobwein, 2006: 205). In this regard, it is notable that fifty-three percent of witnesses have testified without any protective measures.²⁸⁹ Moreover, less than one percent of witnesses have testified with complete anonymity.²⁹⁰ Considering the recognition by the Tribunal that witnesses and in particular, victims that act as witnesses will ‘feel threatened, either directly or indirectly’ (Cassese, 1994: 78), it is surprising that the majority testify in open session without any confidentiality measures. This situation may arise due to the lack of witness ‘rights’ to claim protective measures, but also as Bassiouni points out, the ‘vagueness of the standards’ of the protective measures set out in the RPE ‘such as “may be in danger or at risk”, “appropriate measures” and “consistent with the rights of the accused”, leaves much uncertainty as to how the rules regarding disclosure will be applied’ (1996: 604). In highlighting these deficiencies in the protective measures framework, it is reasonable to suggest that a considerable number of victims may have been deterred from testifying due to the possible risk to their safety, fear of reprisals to themselves or their family or re-traumatization during the adjudicatory process itself.

²⁸⁹ Information supplied by the VWS, 26 January 2009.

²⁹⁰ Information supplied by the VWS, 26 January 2009.

Secondly, the international rather than domestic character of the Tribunal has a significant impact upon the actual forms of protection that can be instituted and the temporal limits of their enactment. Witnesses testifying during legal proceedings in domestic jurisdictions can often access medical, or counselling support through the provision of state services (Lobwein, 2006: 199). In domestic jurisdictions, these services assist the functioning of the legal system by providing levels of support to victims that are met through non-legal mechanisms and measures. However, due to its international character (as well as financial and staffing issues), the Tribunal ‘can only provide psychological and legal counselling in the limited period when the victims and witnesses are at The Hague, pending trial of the accused’ (Cassese, 1994: 97). Moreover, unlike a national system there is ‘no police force that can care for the safety of witnesses once they leave the premises of the International Tribunal. The International Tribunal has neither a long-term witness protection programme, nor the funds to provide for one’.²⁹¹ As Lobwein argues, this does not enact protection or support at the time when the victim is likely to need it most, upon their ‘return to an impoverished environment . . . where they do not feel totally safe’ (2003).

Civilian Victim-Witnesses At Trial

The inclusion of civilian victim-witnesses and their testimonies during the trial process is structured by the Tribunal’s largely adversarial approach (Orie, 2002). In this structure of proceedings, the Prosecution first presents their evidence in support of the charges against the accused. Witnesses brought by the Prosecution testify before the Trial Chamber with their evidence-in-chief, providing factual knowledge and ‘a narrative of events relative to the case’ (Schabas, 2006: 472). Subsequent to this evidential process, the Defence can then raise doubt ‘by attacking the credibility and reliability of the prosecution witnesses

²⁹¹ *Tadić*, Protective Measures Decision, para. 65.

by means of cross-examination and by calling its own witnesses' (May and Wierda, 2001: 251). In a divergence from the adversarial approach, Rule 85(A) also allows the judges of the Trial Chamber to summon witnesses to give evidence, although this only accounts for around two percent of witnesses testifying.²⁹² Following the 'inquisitorial' approach of civil systems, the judges are 'more actively involved in the search for the truth at trial' and through Rule 85(B) have the right to put questions to the witnesses (Orie, 2002: 1464). Fieldwork at the Tribunal affirmed that this was a common practice, with substantial periods of time being spent on the judges examining the witnesses or confirming aspects of their testimony.

The following analysis focuses upon the *D. Milošević* case to understand the role of civilian victim-witnesses and their testimonies during the adjudicatory process from the perspectives of the different parties, namely the civilian victims themselves, the Prosecution, Defence and the Trial Chamber. In particular, it examines the charges of sniping against civilians that name *individual* persons as the victims of the acts of violence. For these charges, the individual victims (or relatives or friends in the instances of fatalities) came before the Chambers to testify to their sustaining of harms. However, these victim-witnesses also had to testify and, in effect, 'prove' their status as civilian victims. This necessity for victims to identify themselves as civilians arose from the charges brought against the accused, for his perpetration of crimes against humanity (crimes directed against any *civilian* population) and the war crimes of 'terror against a *civilian* population' and 'attacks on *civilians*'.²⁹³ These crimes are therefore 'victim specific' - they concern acts of violence against civilians and do not include combatant victims within their subject-matter jurisdiction. Accordingly, the Trial Chamber held that to find the accused guilty of the charges of sniping, it would have to consider 'whether

²⁹² '1994-2004 a UNique Decade', page 34.

²⁹³ Emphasis added.

the person who was killed or seriously injured was a civilian’.²⁹⁴ Unlike trials that do not require an identification of the victim along the principle of distinction (see chapter four), the identity of the victim as a civilian victim was a central aspect of these proceedings. However, analysis of the *D. Milošević* proceedings exemplifies the lack of a consolidated legal approach to identifying victims as civilian victims. Through the divergent approaches of the different parties, this case illustrates the inherent difficulties of identifying individual victims as civilian victims and, in turn, the complexities that civilian victims face in seeking recognition of their injuries through the process of legal trials.

Identifying Civilian Victims

The Victim-Witnesses

Anne-Marie Slaughter and William Burke-White point out that the identification of persons in armed conflict has centred on the use of both ‘civilian’ and ‘non-combatant’ as definitional terms (2002). Commentators often employ the dual and interchangeable use of these terms (see for example, Primoratz, 2007).²⁹⁵ However, as Slaughter and Burke-White argue, there are important reasons to prioritise the ‘civilian’ identification of persons who choose not to act as combatants. In distinguishing between these terms, they argue that civilians should be characterised as ‘individuals who do not choose to engage in armed conflict, who seek only to go about their lives and participate in their communities’, whereas non-combatant ‘implies individuals trying to stay clear of the violence swirling around them’ (Slaughter and Burke-White, 2002: 67). In this way, the designation of ‘civilian’ status does not simply relate to individuals who avoid the violence of conflict. Rather, this definitional term identifies those individuals who make

²⁹⁴ *D. Milošević*, Judgement, para. 245.

²⁹⁵ See also *In Larger Freedom*, page 58.

an express choice not to participate or engage in the hostilities. It is, however, important to note two issues that can arise in designating either 'civilian' or 'non-combatant' status, in contrast to combatant status, during situations of conflict. Firstly, the nature of a person's participation in military conduct, or their choice to act as a combatant, may change during the course of hostilities. As such, persons can move in and out of the categories of civilian and combatant through their enactment of different forms of conduct, as the testimonies in *D. Milošević* suggested was the case for some of the witnesses.²⁹⁶ Secondly, as noted above, there are substantial difficulties in designating either civilian / non-combatant or combatant status in a situation of 'total war' or large-scale victimisation where the majority of persons in a given society or state are involved in the war effort. In this regard, it remains a matter of legal and academic debate as to the types or forms of participation and actions constitute 'civilian' or 'combatant' involvement in armed conflict (see Rogers, 2004).

By employing Slaughter and Burke-White's definition of 'civilians' and 'non-combatants', the testimonies of the civilian victim-witnesses in *D. Milošević* show that they understood themselves as civilians and not as non-combatants. During the trial proceedings a number of the victim-witnesses identified themselves as civilians, explicitly describing that they were 'speaking as a civilian' during their testimonies.²⁹⁷ In this way, these victim-witnesses drew on the legal category of 'civilian', as opposed to combatant, and stated that they held this definitional status. However, while many others did not explicitly speak of being a civilian, their self-characterisation as such was evident through their portrayal of certain aspects of their appearance or actions. As discussed in chapter one, the customary rules of humanitarian law do not establish a 'positive' definition of a civilian. They do not set out any fixed characteristics or actions that can identify a person as a civilian (in contrast to combatants who are obliged to wear military

²⁹⁶ Fieldwork, *D. Milošević*, 19 June 2007.

²⁹⁷ *D. Milošević*, Transcript, 17 January 2007 para. 570; Transcript, 2 February 2007, para. 1475.

clothing and carry weapons openly). Nevertheless, a number of victim-witnesses definitively understood themselves as being civilians and sought to emphasise or even 'prove' this status through narrating the nature of their presence and participation during the conflict. As will be shown, this self-characterisation of being a civilian (and not a non-combatant) was typically figured through the civilian victim-witnesses emphasising particular aspects of their appearance, actions and choices that they considered would identify their status as such. They described aspects of their identity that they considered would substantiate that they were not combatants or members of the military involved in the siege of Sarajevo.

This self-characterisation of being a civilian victim was figured in two main ways during the testimonies. Similarly to Slaughter and Burke-White's framing, these involve the victim-witnesses describing their active choice not to participate in military conduct and through the enactment and performance of particular actions, their attempts to preserve 'normalcy' to their own lives and that of others. Firstly, the victim-witnesses emphasised their civilian identity through suggesting they had made an informed choice not to participate in military conduct in any way:

Q. Did you know that that hill or mountain was totally controlled by the BiH army?

A. I am not meddling with these kinds of things, nor do I know anything about them.

MS. ISAILOVIC: [Interpretation] An objection with the transcript. The witness said "I'm not interested in military business," and on the transcript this is not written.

Q. So did you say that you were not interested in any -- in military business?

A. I know nothing about these things.²⁹⁸

Q. Did you know at the time where the ABiH army soldiers were?

A. No, I didn't know. I wasn't a soldier; I was simply a civilian. And I didn't know where they were.²⁹⁹

Q. Did you sometimes see soldiers pass through Sokolovic Kolonija and Hrasnica?

A. No. No, no one. Not those soldiers and not those others. I never saw that. I did say that, didn't I? I didn't want to know about those things. God forbid I should have seen anything like that. I never saw a single rifle. There was a war on, but I didn't see anything . . . I didn't see either army. Please, don't ask me about that. I wasn't interested. I didn't know about that. All I wanted to know about was my children and whether they would make it.³⁰⁰

²⁹⁸ D. Milošević, Transcript, 23 January 2007, para. 874.

²⁹⁹ D. Milošević, Transcript, 28 January 2007, para. 2885.

³⁰⁰ D. Milošević, Transcript, 16 February 2007, para. 2283.

An important narrative throughout the testimonies of the victim-witnesses was an articulation of their civilian status, whether explicitly or implicitly, through an active denial of being a combatant or participating in military conduct. As the examples above illustrate, the victim-witnesses forcefully expressed that there was a distinct separation between their own status as civilians and others who were combatants or members of the military. This separation was understood through the absence of a wish to know any details of military actions or operations or to participate in such activities. In this sense, the victim-witnesses emphasised their civilian status by focusing upon their deliberate choice not to engage in the siege as a combatant or to support their conduct. These victim-witnesses did not simply remove themselves as far as possible from the harmful conduct of the military operations, in Slaughter and Burke-White's sense of a non-combatant, but made an informed choice not to engage or have any knowledge of its perpetration.

The second way that the victim-witnesses presented themselves as civilians was by narrating their attempts to maintain a degree of 'normality' through the carrying out of tasks necessary to everyday life. As one witness, in similarity to many others illustrates, her presence as a civilian in the conflict rested upon protecting herself and her children:

Q. And now I'm going to be asking you some questions about the day on which you were shot. On the 18th of November, 1994, did you leave the place that you were living in Bistrik?

A. Yes. I went to my mother-in-law's to collect some firewood.

Q. Why did you need to go to your mother-in-law's residence in order to collect firewood?

A. I didn't have firewood at home to make fire for my children.

Q. Was there any reason connected to the war that you had to go and get firewood? Let me ask a different question. How would you normally cook in your residence during times of peace?

A. I was using electricity.

Q. Were you able to use electricity during the armed conflict?

A. No. It just was there occasionally and then it went off again.

Q. Did you use the wood that you were going to your mother-in-law's for to cook food with?

A. Yes.³⁰¹

³⁰¹ *D. Milošević*, Transcript, 22 January 2007, para. 764.

As the example above shows, this civilian victim-witness understood ‘daily life’ and participation in conflict in two ways. Firstly, her ‘civilian’ participation in the conflict is seen through the carrying out of actions to facilitate everyday life, such as collecting firewood to cook despite the obvious risks of travelling through the besieged city. As a civilian, the continuance of everyday life meant protecting their own lives and those of others from the harms of the military actions that they chose not to participate in. Notably, as this example illustrates, this protection of self and others did not figure only as safety from direct harms such as sniping or shelling, but also from indirect harms that commentators describe as prevalent during hostilities such as hunger and an impoverished environment, in the sense of structural victimisation set out above (Kiza, 2006; Slim, 2006).

Secondly, as this victim-witness and many others describe, their ‘civilian’ participation in the conflict was presented and understood as a relational experience of harm or of an ever-present potential harm. As Dembour and Haslam point out, witnesses often narrate conflict in terms of other persons, in particular those that they have lost through the hostilities (2004: 159). The witnesses portray the experience as a situation shared (and feared) with others, most often family and friends, who lived through the same atmosphere of violence and victimisation:

THE WITNESS: [Interpretation] Thank you very much. You know what your job is. Thank you very much for allowing me to get it off my chest, what I have been suffering from, in the name of the children and all other people who suffered. Thank you, and I appreciate this Honourable Court.³⁰²

As a later section of this chapter will further examine, a high number of the testimonies of the civilian victim-witnesses are not solely directed at portraying their own injuries or experiences. Rather, the relational experience of conflict can also be seen through their using the opportunity to testify as a means to speak of the harms of others. The civilian victim-witnesses therefore presented themselves as ‘civilian’ through a lived experience

³⁰² *D. Milošević*, Transcript, 27 February 2007, para. 2829.

of conflict as both a structural environment of harm and a relational experience endured by both themselves and others.

The Prosecution

The Prosecution did not begin by asking these witnesses to identify their status as a civilian during the conflict. Nor did they ask the victim-witnesses whether they were a combatant or had engaged in 'combat activity'. Instead, for each of the victim-witnesses that had been injured from the actions of a sniper, the Prosecution's approach was to adduce a 'positive' identification of the victim as a *civilian*. Following the self-identifications of the victim-witnesses as civilians in line with Slaughter and Burke-White's definition, the Prosecution characterises these witnesses as civilians rather than as non-combatants. This identification is sought through bringing evidence of their 'civilian' participation in the conflict and 'markers' of their civilian status before the Trial Chamber:

- Q. Mr. Witness, how old were you when the war began?
A. Fourteen.
Q. Where were you living between August 1994 and November 1995?
A. In Sarajevo. . .
Q. What town were you living in at that time, between August 1994 and November 1995?
A. Novi Grad.
Q. Between those dates - again, August 1994 and November 1995 - with whom were you living?
A. With my mother and sister.
Q. How did you get access to food?
A. It was difficult.
Q. Can you explain?
A. There was a war on. Sarajevo was surrounded. It was difficult to get any food aside from the humanitarian aid that kept arriving.
Q. And who was responsible for feeding your family?
A. I, for the most part.
Q. How did you get water?
A. That was difficult, too.
Q. Did you go out of your house to get food and water?
A. Yes.
Q. And how was that?
A. Water came in special water tankers and food came in shipments of humanitarian aid which would then be distributed.
Q. Was it easy to go out and get food and water?
A. No, not really.
Q. Why was that, please?
A. Shellings were quite frequent and sniping, too. It wasn't really that easy.³⁰³

³⁰³ D. Milošević, Transcript, 23 January 2007, paras. 881-882.

There are no fixed characteristics or actions that can unequivocally ‘prove’ a persons civilian identity. As noted in chapter three, the ‘negative’ definition of civilians established by the rules of humanitarian law as those persons who are not combatants leaves open the means to identify a civilian or a civilian object (see Dinstein, 2004). However, in *D. Milošević*, the Prosecution directed the testimonies of the victim-witnesses towards their giving of key ‘markers’ of identity and actions that it considered would represent the victim’s identity as a civilian identity. Most commonly, this ‘positive’ mode of identification was constructed through illustrating the young age of the victim at the time of their injury, their profession, their appearance (most often in regard to their clothing) and their actions or behaviour at the time of the incident:

Q. Was the tram crowded?

A. Yes, it was pretty crowded.

Q. Can you tell us what you were wearing on that day?

A. I was wearing a light purple jacket, blue jeans, Addidas tennis shoes, and a green blouse and a green umbrella . . .

Q. Madam Witness, how old were you when this incident occurred?

A. Eighteen, almost 19³⁰⁴

The Prosecution does not ask the victim-witness to state they were not wearing a uniform or any other typically ‘combatant’ signifier. In this way, the Prosecution does not seek to prove that the victim was not a combatant, but that the victim was in fact a civilian. The ‘positive’ characteristics of the victim are assumed to present the individual as a civilian participant in the siege of Sarajevo and as such, not a legitimate target of violence or victimisation.

The Defence

It is notable that the Defence rarely questioned the civilian status of the victim-witnesses that testified at trial, perhaps because the Prosecution only brought victims whose identity

³⁰⁴ *D. Milošević*, Transcript, 6 February 2007, paras. 1657-1658.

was unequivocally ‘civilian’ and unlikely to successfully be the subject of challenge. However, on one of the few occasions that the Defence did raise this challenge to the victim’s identity, the allegation was that the victim of a sniper was not a civilian but a combatant at the time of his injury:

Q. I have to put it again to you. I’m sorry that as a young person, a young man of 15 years of age, you found yourself in the situation with all the rest of the people of Bosnia-Herzegovina. But I’m putting it again to you that, as young as you were, you were a member of the army of Bosnia-Herzegovina. Can you answer this question for me?
A. You are just putting it to me. And second, I am saying again, and there [*sic*] is verifiable, I was not a member of the army of Bosnia-Herzegovina.³⁰⁵

As set out in chapter four, there has been a conceptual construction of military-aged men in armed conflict as ‘potential combatants’, a notion that can be seen both in the Tribunal’s judgements and the narratives of the UN and other institutions (Carpenter, 2006a: 164). In this instance of a construction of a victim’s identity along the combatant / civilian divide, the Defence reflects an empirical example of this nexus between the status of a male civilian (as the Trial Chamber found him to be)³⁰⁶ and the possibility that he is a combatant. Reflecting this notion of a ‘potential combatant’, the Defence seeks to challenge the victim’s status through his gender and age and create his personhood and presence in the conflict as ‘ambiguous’ in terms of the principle of distinction. For the Defence, a young male ‘may’ have been a combatant, that is, these gendered attributes of personhood create a greater possibility that he will have chosen to participate in the military conduct of the conflict. It is thus notable that the Defence did not similarly ‘adjudicate’ the identity of females and question their civilian or combatant status. In this way, the Defence reiterates the traditional framing of gender relations of armed conflict where it is ‘men who make war’, whilst women stay at home with the children (Cockburn, 2001: 20, 19). This understanding and representation of the civilian and combatant participants of conflict does not take into account that male civilians are often the express targets of victimisation, as the Srebrenica genocide so poignantly exemplifies,

³⁰⁵ D. Milošević, Transcript, 7 February 2007, paras. 1749-50.

³⁰⁶ D. Milošević, Judgement, para. 378.

nor that women are increasingly ‘choosing to enter, or being enlisted in, national armies’ (Cockburn, 2001: 20).

This conceptual construction of the (male) witness as a potential combatant also illustrates a lack of adherence to the legal terms of identifying a civilian, as well as Slaughter and Burke-White’s framing. The Tribunal describes that the ‘term “civilian” . . . include[s] any person who is not a member of the armed forces or an organised military group belonging to the conflict’.³⁰⁷ Following Article 44(7) of API, the ‘generally accepted practice is that combatants distinguish themselves by wearing uniforms, or at the least, a distinctive sign, and by carrying their weapons openly’.³⁰⁸ However, in their argument that this male civilian was in fact a combatant, the Defence did not allege that he was wearing a uniform, an insignia or carrying a weapon. In fact, this allegation does not appear to have any substantive basis, either from the testimony given by the witness himself or from those of other witnesses. There is no evidence that this victim had been a combatant or had any military connections during the conflict. Rather, the Defence’s proposition appears to have arisen solely from the (male) gender of the victim and his (young) age. Contrary to the ‘negative’ definition of civilians held by the customary rules of humanitarian law, this Defence argument suggests that the lack of obvious ‘markers’ of civilian *or* combatant status held by this victim creates the possibility that he was a combatant.³⁰⁹ In this way, the Defence contends that civilians must present themselves as distinct from combatants. However, as young male civilians cannot remove themselves from traditional combatant markers of identity, the Defence’s contentions in *D. Milošević* suggest that the status of this category of persons will always be a matter of particular dispute in both the practice of armed conflict and the legal adjudication of its conduct.

³⁰⁷ *D. Milošević*, Judgement, para. 945.

³⁰⁸ *D. Milošević*, Judgement, para. 946.

³⁰⁹ Similar assertions were made by the Defence in the *Perišić* case which also involves charges of sniping and shelling of the civilian population of Sarajevo. In cross-examining a witness about the sniping activity in Sarajevo, the Defence appeared to assert that if a sniper did not know whether the person was a civilian or a combatant, that it was reasonable for that person to be the target of attack (Fieldwork, *Perišić*, 2 February 2009).

The Trial Chamber

In the *D. Milošević* judgement, the Trial Chamber sets out its determination of whether the victim was a civilian or a combatant for each incident of sniping. For each victim, the Trial Chamber reiterates the Prosecution's 'positive' markers of civilian identity, namely their age, 'civilian' clothing and actions, and the Defence's challenge (if any) to this identification. In the overwhelming majority of these cases of sniping, the Trial Chamber does not raise any issues over the identification of the victim and simply declares the victim a civilian and, as such, a civilian victim of a crime alleged against the accused.

However, in making their assessment of the status of the victims, the Trial Chamber looks to further evidence of the victim's appearance and actions to corroborate their civilian status. For example, it emphasises that the clothes worn by one victim 'would have enabled the shooter to identify her as a civilian' as 'the colours would have been visible with optics mounted on the rifle'.³¹⁰ It is now considered customary law that in 'case of doubt whether a person is a civilian, that person shall be considered a civilian' (Henckaerts and Doswald-Beck, 2005: 23-4), a principle that the Trial Chamber emphasises in its judgement.³¹¹ However, in the small number of incidents where the civilian identity of the victim was called into question, the Trial Chamber does not appear to fully adhere to this principle. In this case there is no evidence brought that any of the victims were wearing a uniform, an insignia or carrying weapons at the time of the incident of sniping as the terms of API require a combatant do. Following the 'negative' defining of civilians, there are no indications that any of the victims were combatants, but were civilians. Therefore, by drawing attention to the clothing of the victim, the Trial Chamber (in similarity to the Defence) appears to place a further requirement of civilians

³¹⁰ *D. Milošević*, Judgement, para. 353.

³¹¹ *D. Milošević*, Judgement, para. 946.

to distinguish themselves as such during a conflict through their portrayal of a 'civilian' appearance and actions. In this way, the onus of combatants alone to distinguish themselves during conflict is broadened to a similar necessity for civilians to do likewise. Such a requirement appears particularly problematic, for, as argued above, in evidential terms there are no definitive 'markers' of civilian identity. There are no definitive means for civilians to protect themselves from being attributed combatant status through the use or employment of particular actions or appearance. Instead, the designation of civilian identity by the Chambers rests upon an interpretation of forms of actions or appearance that are understood *not* to characterise combatant status. As the above analysis sets out, however, it appears that there are certain categories of civilians whose status in armed conflict will be under greater scrutiny, a situation that will impact upon the provision of protections for them and legal redress in instances of their breach.

The Participatory Possibilities of Civilian-Victim Witnessing

While the *D. Milošević* trial highlights the complexities and contestations of the legal identification of civilian victims, it also provides a useful case-study for an exploration of the participation of civilian victim-witnesses within the adjudicatory process and their understanding of the role of their testimonies as a form of evidence. Although victims can only participate in trial proceedings as witnesses, the Tribunal acknowledges that the prosecutorial process 'depends on the victims themselves to tell their story'.³¹² As indicated earlier, this dependency arises through needs of the Prosecution, Defence and Trial Chambers for victims of the alleged crime to act as 'a source of information on the offence' (Tochilovsky, 1999: 287). However, courtroom observation of the *D. Milošević* trial and analysis of its transcripts and those of other cases illustrates that civilian victim-witnesses do not only see their participation in the adjudicatory process as providing evidence of the 'facts' of criminal conduct. Instead, they understand their testimonies as

³¹² '1994-2004 a UNique Decade', page 34.

enabling a broad ‘story’ of the conflict to be heard by the Tribunal, a wish that cannot be fully realised by current legal practices.

For the civilian victim-witnesses, the significance of their giving testimony before the Chambers rested upon an understanding of their participation at trial as constructing a connection between themselves and the Tribunal. Although there are undoubtedly personal reasons for seeking such a connection with the Tribunal for each of the victim-witnesses, it is possible to identify three main reasons through the substantive content of the testimonies and the broader context of this legal institution’s work. Firstly, as several of the civilian victim-witnesses in *D. Milošević* described, their reason for wanting to come to The Hague and testify was through a belief that they could facilitate or contribute to the retributive processes of the Tribunal, and so help bring the perpetrator(s) to account for their criminal conduct.³¹³ Secondly, there was a narrative throughout the testimonies that the witnesses wished to testify before the Chambers in order to express the ‘truth’ of the hostilities as they experienced it.³¹⁴ Such a motivation to testify is similarly articulated by a number of witnesses in Stover’s study (2005: 76-77). Thirdly, it is important to note that there have been relatively few national trials in the former Yugoslavia and where trials have been held there have been concerns about the fairness of the adjudications and the provision of protective measures to witnesses (Stover, 2005). As a consequence of such difficulties and a broader lack of legal (or non-legal) mechanisms in the region, it is reasonable to suggest that the Tribunal may be understood as the central, or only, means to engage with forms of post-conflict justice.

During the trial proceedings of *D. Milošević*, the victim-witnesses understanding of having a connection with the Tribunal was most notably presented through their shaping of testimonies to emphasise their experiences of harm. As will be set out, the victim-

³¹³ Fieldwork, *D. Milošević*, 18 June 2007.

³¹⁴ Fieldwork, *D. Milošević*, 18 June 2007. Interview with a staff member of the VWS, 3 February 2009.

witnesses gave testimonies to narrate and seek legal recognition of their personal experiences of harm (see Campbell, 2002; Stover, 2005). This reason for testifying is clearly expressed by one of the witnesses in Stover's study through her explanation that she came to give evidence because she 'wanted the tribunal to know that this is what was done to me' (2005: 76). Testimonies were also given by victim-witnesses to present and emphasise the harms sustained by others, of family and friends, in particular of those lost to the harms of war (see Dembour and Haslam, 2004). They were given to narrate the relational experience of conflict as a harm of the past, but also as that which continues to affect their lives in the present.

For Self

Ann Cubilie describes that in legal discourse, testimonies are spoken from the position of the person 'who was there and knows what happened because she or he experienced it with his or her own body' (2005: 189). In this sense, testimonies were given by the civilian victim-witnesses to present their personal experience of victimisation to the Trial Chamber, of the harms to their 'self'. Through their participation at trial, the witnesses used the procedure of giving testimony as an opportunity to make visible their harm and emphasise the impact it had had on their lives:

Q. How did this incident and your wartime experiences affect your life?

A. This incident itself as well as the whole war and the suspense, whether you were going to be shot or not, whether you would be injured seriously or not, prevailed throughout the war. Wherever you were, moving out or sitting in your home, we could hear the shots passing by throughout the war, including the shells. You could never know where they were going to land. They just whizzed by, and as soon as it passed it was a kind of relief. When I saw that I had sustained a slight injury, it was also a relief. But the worst thing was the moment of fear, or the fear that engulfed us throughout the war.³¹⁵

However, as the above example illustrates, it is important to note that the witnesses did not simply experience the conflict in 'physical' terms, that is, as bodily injuries as

³¹⁵ D. Milošević, Transcript, 6 February 2007, paras. 1658-1659.

Cubilie's description may imply. Rather, the harm was both physical *and* psychological. Moreover, it was not a singular injury but a continuing experience of victimisation and harm over the years of the siege. In this way, the victim-witnesses can be seen as describing their experience of the conflict in alignment with the UN's definition of a victim (and not that of the ICTY).³¹⁶ They present their experience of victimisation during the conflict as a situation that 'created' their victim status. This status was understood in relation to harm, whether physical, psychological or emotional, as well as its pervasiveness, both in terms of its encompassing injury to personhood, but also in its infliction over a substantial period of time.

For Others

Wendy Lobwein, the prior Head of the VWS, describes that witnesses testify at the Tribunal 'to speak for the dead', 'to look for justice in the present', 'to tell the world what happened' and as a 'contribution that such crimes will not happen again' (2006: 206). As Lobwein indicates, the motivation to testify frequently rests upon a wish to speak for the dead, to narrate the act of harm before the Trial Chamber on their behalf. Testimonies are given as an address to the Trial Chambers and to found some form of redress *for others*. These are testimonies that cannot be given by the victims themselves as they were fatally injured from the perpetration of the victimisation of civilians during the conflict (see Campbell, 2002; Stover, 2005):

Q. You say, Madam, that it looks like a motor, so my question is very simple. What sort of motors are you thinking of now?

A. I absolutely forgot all about that. I can't remember what it looked like. There is absolutely nothing I can tell you. I'm like really -- it's all true about the air bomb and me leaving home and being compelled to leave and the bomb landing. It's all true. What I'm telling you is true, but there is absolutely nothing else that I can tell you. There should be evidence. There is evidence. I have shrapnel lodged inside my body. You want pictures of that, perhaps? Don't press me on this, all right? There are victims. One of my brothers was killed. My father died soon after. It's all true.³¹⁷

³¹⁶ United Nations, Principles on the Right to a Remedy, para. 8.

³¹⁷ D. Milošević, Transcript, 16 February 2007, para. 2275.

As this witness illustrates, her testimony is given as an address to the Tribunal for her brother and father. Testimony is given to emphasise the relational experience of conflict and its pervasive injuries. Throughout the testimonies of this case (and others) there was a clear depiction that conflict was not a solitary experience, but, as the UN describes, a situation of violence that harms the immediate victims as well as those with whom they have familial ties. In her address to the Trial Chamber, this witness relates the *past* harms of the conflict in terms of physical, psychological and emotional injuries. Most importantly, she prioritises the harms to those close to her rather than concentrating on technical facts or details of military conduct. Participation at trial is seen to provide a role not only for the provision of ‘factual’ knowledge, but of telling the broader story of the harms of the conflict as she experienced it. There is almost a dismissal of being a source of ‘facts’ or figuring as a bystander or neutral witness to the alleged criminality as the Defence seeks to construct. Instead, the witness presents herself and others as central to the act of violence under adjudication and the civilian victim of its perpetration. For her, the incident under adjudication and the broader conflict situation was a ‘victimising event’ as Kiza describes (2006: 82). It was not only an act of criminal conduct, but also a harmful event that established herself and others as victims of the hostilities.

However, while the above testimony illustrates how the witness employs her participatory role in the trial proceedings as an opportunity to narrate past harms, it also demonstrates a temporal shift in her articulation of harm during the testimonial process. Similarly to many other witnesses testifying during the *D. Milošević* trial, this witness shows a striking move from speaking of *past* acts of harm to a narration of how these injuries affect her life in the *present*. As Dembour and Haslam point out, testimonies of the harms of conflict often become ‘inscribed in the present’ (2004: 171). As well as describing the physically present harm of having shrapnel still lodged inside her, this witness quickly moves to articulating the presence and continuation of the effects of the conflict by speaking of the loss of her family members. For this witness, the harm is ‘an event that, in

effect, *does not end*' (Laub, 1992: 67). The experience of violence and victimisation still imbues her present life both physically and emotionally. However, as other commentators have pointed out, the Trial Chamber does not and cannot facilitate such emotive discussion unless it is relevant to the charges of the case (Dembour and Haslam, 2004). For this reason, after the testimony is given by the witness (as above), the judge merely thanks the witness and requests the Defence counsel to continue with their questioning. As the Defence counsel describes, these are 'criminal proceedings and I have to defend the rights of my client . . . and therefore I need more specifications. Could you tell me exactly the place where the bomb fell . . . ?'.³¹⁸ As Dembour and Haslam articulate, the legal process is such that victim-witnesses are required to 'give their account in a form which leaves them subject to the pace and interest of those who have the power to ask questions (the Prosecution, the Defence and the Judges) (2004: 175). In this way, the Defence's requirement for 'more specifications' relates only to the facts of the case; the narrative of the experience of harm by the witness and her family is not considered relevant to the process of criminal adjudication.

This shaping of the personal experience of conflict (or that of others) or the possibility of participating at trial through speaking of these harms and injuries, figures as a broader impossibility of founding a connection with the Tribunal, as noted above. Although this relationship with the legal institution cannot be realised, there were several occasions during periods of fieldwork where witnesses appeared to suggest that their motivation for testifying was not simply founded on their wish to *provide* facts or knowledge, but as their need to *find* the broader truth of the acts under adjudication. While courtroom processes make it difficult to convey a particular instance of this during the *D. Milošević*

³¹⁸ *D. Milošević*, Transcript, 16 February 2007, paras. 2275-2276.

case,³¹⁹ a very poignant and clear example of a witness seeking answers from the Tribunal can be seen in the *Kunarac et al* case:

Q. Can I ask the Honorable Judges something?

A. Yes. Please go ahead.

Q. I just want to say that I came here today because I want to know about the bones of my husband and my daughter. That is what I wish to say to you. Thank you.

A. Thank you very much.³²⁰

In this way, the witness is ‘engaged in an appeal’ (Felman, 1992b: 204). It is an appeal not only to know of the broader harms and losses of the conflict that are not the subject of adjudication, but also to found a relationship with the Tribunal. The witness understands the testimony procedure as the possibility to participate in ‘a discursive *practice*, . . . rather than to simply formulate a statement’ (Felman, 1992a: 5).³²¹ Her perception of the trial process is as a participatory possibility for constructing or becoming a part of a two-way communicative relationship where both sides, herself and the Tribunal, found the truth of the conflict but also aid the other in achieving the finding of its harms.³²² However, the procedural and evidential models of the Tribunal do not function to facilitate an expansive narration of conflict or work as a site within which to gain or ‘find’ knowledge. Instead, as Judge Robinson explains, within the courtroom this possibility cannot be realised, the witness is there to ‘just answer the questions’.³²³

Conclusion

The inclusion of civilian victims as witnesses at trial is intended to facilitate the trial proceedings and judgement of the actions of the accused. These witnesses testify to his or her actions (or those of their subordinates) as contrary to the protective rules of

³¹⁹ For example, there were frequent occasions where the judges or the parties quickly spoke over a witness, their microphones were switched off so that it was not possible to clearly hear their questions or responses, or their responses were in non-verbal form.

³²⁰ *Kunarac et al*, Transcript, 28 March 2000, para. 1108.

³²¹ Emphasis original.

³²² As an interview with a staff member of the VWS highlighted, many victim-witnesses wish not only to retain some form of contact with the Tribunal after they have testified, but also expect or desire ‘something back’ from the process (3 February 2009).

³²³ *D. Milošević*, Transcript, 29 February 2007, para. 2924.

humanitarian law. However, the *D. Milošević* case shows how, for certain cases, the inclusion of this ‘type’ of witness necessarily gives rise to an ‘adjudication’ of their identity as *civilian* victims. Just as the previous two chapters have set out, it illustrates that this process of constructing legal recognition of civilian victims often acts as an exclusionary process of categorisation through the evoking of social categories of group membership. This case reveals both the processes that enable this construction of civilian identity, but also the possibilities that the Tribunal may fail to recognise all civilian victims and their sustaining of harms in a situation of armed conflict.

In *D. Milošević*, the parties do not employ a singular or consolidated approach to the process of recognising individual civilian victims and their status as such. Rather, the Prosecution, Defence and Trial Chamber all utilise different frameworks of identity construction to ‘adjudicate’ the status of the individual civilian victims that come before the Chambers. For example, the Defence draws upon particular notions of gendered personhood to present young males as ‘potential combatants’ irrespective of their civilian appearance and actions. By not raising similar challenges to the status of female persons, the Defence reiterates the traditional assumption of ‘innocent’ women and children as civilians within conflict, despite the growing inclusion of women within military structures. Through the employment of social categories of group membership, it can be seen that there is a construction of higher levels of doubt and particular scrutiny over the status of certain participants of conflict and their placing along the principle of distinction. Contrary to the legal terms of the principle of distinction, this case shows that these processes of constructing the identity of persons through their holding of particular attributes of personhood disrupts the notion that all persons who are not combatants are civilians. Instead, certain categories of persons must further ‘prove’ their civilian participation during hostilities in order to find legal recognition of their status as such.

Analysis of the *D. Milošević* case also begins to draw attention to the complexities of the Tribunal's work of legally recognising collectivities of civilian victims. As the above examination of the testimonies shows, there is a distinct difference between the Tribunal's notion of a (victim) witness as a source of 'factual' evidence of the crime under adjudication and the use of this participatory role by the civilian victim-witnesses themselves. These witnesses strikingly prioritise their experience of civilian participation within conflict as an environment of relational harms. Broadening the individualised nature of the charges of sniping, the civilian victim-witnesses present their experience not only in terms of the act under adjudication but as the wider victimisation and harms to other persons, most often those with whom they have familial ties. However, the Tribunal's legal practices cannot include these broader harms within the trial process nor recognise all civilian victims of the conflict. As chapter six will further explore, the current practices of legal adjudication display significant difficulties in recognising collectivities of civilian victims. Drawing further on the *D. Milošević* case, the next chapter analyses the Tribunal's adjudication of the charge of 'terror to a civilian population' brought in relation to the hostilities of the siege of Sarajevo. It examines how the judgement of this case figures (but also fails to figure) the civilian population, that is, the collectivity of civilian victims of this multi-ethnic city, as the victims of the charges brought against the accused.

Chapter Six

Recognising All? Violence to a Civilian Population

As for the suffering, any human being of any race, ethnicity, colour, or religious conviction suffers the same.³²⁴

In its Opening Statement at the trial of *The Prosecutor v. Stanislav Galić* ('Galić'), the Prosecution began with a description of the atrocities committed against civilians in the city of Sarajevo during the Yugoslavian conflict. Depicting the events under legal adjudication as causing such prolific and systematic harm to the civilian population that they were without similarity in contemporary armed conflict, the Prosecutor described how:

[t]he siege of Sarajevo, as it came to be popularly known, was an episode of such notoriety in the conflict in the former Yugoslavia that one must go back to World War II to find a parallel in European history. Not since then had a professional army conducted a campaign of unrelenting violence against the inhabitants of a European city so as to reduce them to a state of medieval deprivation in which they were in constant fear of death . . . there was nowhere safe for a Sarajevan, not at home, at school, in a hospital, from deliberate attack.³²⁵

Indeed, read alongside the casual disregard for civilians in Antony Beevor's *Berlin: The Downfall 1945* (2002), the siege of Sarajevo strikingly parallels depiction of those persons experiencing the violence of conflict – all civilians without distinction of age, gender or ethnicity. Contrary to the traditional image of 'armies on the battlefield', this state of violence does not figure combatants as the sole participants of conflict. Neither can it be understood in terms of harmful interactions between individual combatants and civilians, or as instances of collateral damage 'producing' civilian victims. Rather, the siege of Sarajevo requires recognition of the perpetration of widespread and systematic violence against persons who understood themselves as a civilian populace before, during

³²⁴ Fieldwork, *D. Milošević*, 18 June 2007. Testimony of a Defence witness.

³²⁵ *The Prosecutor v. Stanislav Galić*. Case No. IT-98-29. Opening Statement of the Prosecution, Transcript of Trial Proceedings, 3 December 2001, paras. 562-3 ('Galić, Transcript').

and after the hostilities. To adequately capture the harms of the siege, it is therefore necessary to develop a conception of a state of structural victimisation against this civilian population, that is, against *all* civilians of the city of Sarajevo.

The conceptual framework of this chapter was developed from two periods of courtroom observation at the trial of Dragomir Milošević in April and June 2007.³²⁶ Throughout the trial proceedings of this case, both the Prosecution and Defence brought evidence before the Trial Chamber to emphasise that the ‘mixity’ of the population of Sarajevo meant that civilians of all ethnicities were subject to the violence of the siege. For this reason, as commentators point out, the civilian victims of the criminal conduct were not necessarily of a different ethnicity to the perpetrators (see Donia, 2006; Glenny, 1996). Indeed, as one expert witness during the *D. Milošević* case points out, ‘an exploding shell does not distinguish along ethnic lines’.³²⁷ During the trial proceedings it also became increasingly apparent that notions of social relations and interactions were central to the civilian victim-witnesses understandings of the victims and violence of the siege. Similarly to those testimonies set out in chapter five, there was a strong narrative of the siege as a shared experience of collective harm between *all* civilians of the city without distinction.³²⁸ By contrast, however, there was also a more divisive framing of the violence, with a small number of civilian victim-witnesses framing the experience of victimisation through ‘ethnic’ lines and arguing that it was only members of their ‘side’ that were the true, or only, victims of the criminal conduct.³²⁹ How, then, did the civilian victims themselves understand ‘who’ were the victims of the siege of Sarajevo? And does

³²⁶ This chapter employs a case-study of two cases that adjudicate the actions of the accused during the siege of Sarajevo, *Galić* and *D. Milošević*. Both these accused were Commanders of the Sarajevo Romanija Corps of the Bosnian Serb Army (‘SRK’), with D. Milošević assuming command after Galić. These accused were both charged with the war crime ‘terror against a civilian population’ and crimes against humanity. Reference is also made to fieldwork carried out during February 2009 at the trial of *The Prosecutor v. Momčilo Perišić*. This case also includes charges in relation to the shelling and sniping of the civilian population. Perišić was Chief of the General Staff of the Yugoslav Army; both Galić and D. Milošević were his subordinates.

³²⁷ *D. Milošević*, Transcript, 20 February 2007, para. 2553.

³²⁸ Fieldwork, *D. Milošević*, 18 June 2007.

³²⁹ Fieldwork, *D. Milošević*, 19 June 2007.

the Tribunal's legal recognition of the civilian population as the victim of the crimes under adjudication align to the views of these civilian victim-witnesses?

This chapter explores how the Tribunal legally recognises the collectivity of persons residing in Sarajevo, who understood themselves as a civilian group, which was the 'victim' of violations of the protective rules of humanitarian law. It builds on the analysis of the previous chapter, which set out the complexities of legally recognising *individual* victims as holding 'civilian' status, to examine how the Tribunal constructs legal recognition of a *collectivity* of civilians, of a civilian population. Unlike the Tribunal's construction of legal recognition of civilian victims in the *Tadić* case through the designation of ethnic or national bonds (see chapter three), the cases of *Galić* and *D. Milošević* necessitate an understanding and recognition of an ethnically-mixed victimised civilian population. In this case, the Tribunal was called upon to adjudicate the victimisation of a mixed civilian population which had been subjected to the perpetration of a prolific campaign of 'terror' with the intention to 'achieve the breakdown of the social fabric'.³³⁰ In order to explore these complex notions of civilian relations and their interactions with combatants, this chapter first considers how to conceptualise civilians as a collectivity, that is, as a group of civilians subject to widespread and systematic victimisation. It then examines the Tribunal's adjudication of *Galić* and *D. Milošević*, focusing on their war crimes charges of 'terror against a civilian population'. Finally, this chapter employs a 'view from below' methodological approach to examine how the civilian victims themselves understand the violence of the siege. As set out in chapter two, a 'view from below' approach explores the forms of legal (and non-legal) redress of armed conflict through 'the eyes of those most affected by collective violence' (Weinstein and Stover, 2004: 4). For this reason, this section prioritises the testimonies of the civilian victims that came before the Trial Chamber as witnesses by drawing on

³³⁰ *The Prosecutor v. Stanislav Galić*. Case No. IT-98-29-PT. Prosecutor's Pre-Trial Brief Pursuant to Rule 65ter (E) (i), 23 October 2001, para. 24 ('*Galić*, Prosecutor's Pre-Trial Brief').

courtroom observation of *D. Milošević*, as well as transcripts of *D. Milošević* and *Galić*. It explores these testimonies in order to understand the forms of social relations between civilians in this context of collective victimisation, that is, how civilians of this geographic area understand their presence and interactions as constructing and comprising a civilian population during the conflict. Drawing on these notions of civilian relations, it then considers their alignment to the Tribunal's shaping of the trial proceedings and its judgement of the accused for its legal recognition, or failure of recognition, of the civilian victims of the siege of Sarajevo.

Identifying Civilian Collectivities: The Victimisation of Civilian Populations

In its contemporary focus on the protection of civilians, the United Nations identifies the 'presence' of these participants of armed conflict in collective terms. It is a 'civilian population' or civilian 'persons' in the plural that figures as the entity deserving of safety and security during the violence of hostilities and of redress in its aftermath.³³¹ As the UN and commentators describe, it is necessary to consider the protection of civilians in collective terms, for it is the 'well-being of civilian populations', rather than that of isolated individuals, that suffers from the harms of war (see Slim, 2007; Kaldor, 2001).³³²

These conceptualisations of a 'civilian population' figure civilians as a seemingly homogenous group, of a collectivity of persons who have chosen not to participate in the conflict, most probably residing in a specific geographic area. The definition of a civilian population set out by the rules and principles of humanitarian law uses this conception of civilians as a distinct collectivity or group of persons. A civilian population 'comprises all persons who are civilians', that is, all persons who do not hold combatant status.³³³ In this way, as has been discussed previously, the principle of distinction constructs and

³³¹ In Larger Freedom, para. 135. See also Resolution 1674.

³³² In Larger Freedom, para. 135.

³³³ API, Article 50(2).

identifies two categories of persons, civilians and combatants, as present in armed conflicts. Based on the nature of their actions (i.e. whether or not they directly participate in hostilities), there is a dichotomous framing of these two groups of persons as legally counter-posed to each other.³³⁴ While the UN and commentators often draw attention to certain persons within the civilian population as ‘more vulnerable’ in a situation of conflict, most often women, children, the elderly and refugees (Panyarachun, 2004; Kiza *et al*, 2006), the overall category of a ‘civilian population’ is understood to comprise of civilians. In these terms, the ‘civilian’ identity of the individuals of a group supersedes any other social characteristics that these persons may hold. The principles of humanitarian law rest on an assumption that it is the civilian identity of these persons, and no other aspect of their status, that constitutes such persons as a homogenous group, that is, as a civilian population present in a situation of conflict.

This conception of civilians being both part of, and constituting, a broader category of persons can also be seen through the self-characterisations of civilian victim-witnesses who testify before the Chambers. A distinct narrative of the testimonies of these witnesses in *D. Milošević* was their descriptions of participating and experiencing the conflict in collective terms. For example, one witness described how ‘we were cannon fodder. *We* were just clay pigeons for them to fire at’.³³⁵ Another witness testified how ‘that period changed *our* lives considerably, *our* way of life’.³³⁶ As these witnesses, in similarity to many others, illustrate, their participation in the conflict was not understood through a perspective of being an isolated individual who was, or may be, subjected to violence. Rather, there is a distinct self-characterisation of being both part of, and constituting, a broader category of persons understood as a civilian population. As will be further discussed, a prominent narrative throughout the testimonies was the civilian

³³⁴ See chapter five for discussions of the difficulties or problems with this distinction in terms of situations of ‘total war’ and the movement of persons in and out of the categories of civilian and combatant through the nature of their participation in hostilities.

³³⁵ *D. Milošević*, Transcript, 2 February 2007, para. 1510. Emphasis added.

³³⁶ *D. Milošević*, Transcript, 25 January 2007, para. 1062. Emphasis added.

victim-witnesses expressing that their presence and participation in the conflict was as a collective experience of living through and enduring the violent practices of the armies in the region.³³⁷

These accounts of civilians having a common experience of conflict suggest that it is necessary to recognise civilians as a social group present in situations of conflict (Shaw, 2007: 122). It is necessary to conceptualise civilians in this way due to the nature of the *practices* of military-civilian interactions, as will be set out. Employing the principle of distinction provides the legal designation of a civilian population by a court of law or by combatants undertaking military actions. However, this legal principle does not provide or enable the construction of a broader conceptual framework for the recognition of civilians as a social group for their distinct experiences of conflict. Nor does it allow for an exploration of how civilians of a specific geographic area understand their presence and participation with others during a situation of conflict as constructing and comprising a civilian population. In particular, it does not allow for identification of civilians as a social group through their commonality of experiences, choices and actions, or how these aspects of their participation in conflict are in contradistinction from that other group of persons in conflict, namely combatants. For this reason, following the ‘view from below’ methodological approach, it is important to consider how civilians themselves understood the form of their relations with other civilians, as opposed to combatants, during the violent practices of hostilities. It is also necessary to consider both how civilians themselves view their relations with others as constituting a broader category of persons understood as a civilian population, as well as how the conduct of war targets and victimises civilians as collectivities and not isolated individuals.

Iris Marion Young argues that a social group ‘is a collective of people differentiated from at least one other group by cultural forms, practices, or way of life’ (1990: 43). As

³³⁷ Fieldwork, *Perišić*, 4 February 2009.

Marion Young points out, social groups are ‘an expression of social relations; a group exists only in relation to at least one other group’ (1990: 43). More particularly, this notion of social groups provides a framework through which to examine how ‘many groups suffer the oppression of systematic violence’ by another group (Marion Young, 1990: 61). As Marion Young argues, it is necessary to recognise the experience of systematic and unequally distributed violence by a social group from the actions of another group (1990: 61-63). As set out in chapter five, such violence takes the form of direct and indirect victimisation and can be understood as a relational harm to the targeted social group. Although it is important to note that Marion Young was not writing specifically in relation to the presence or participation of groups in a situation of conflict, this framing of social groups provides a useful means to identify civilians as a similarly situated collectivity of persons through their commonality of choices, actions and experiences during hostilities. It enables the identification of these aspects of the presence and participation of civilians that figure in contradistinction to that other group of persons in conflict, of combatants. Utilising Marion Young’s conception of social groups enables the exploration of how systemic violence ‘is directed at members of a group simply because they are members of that group’, in this instance, as has been discussed throughout this research, how combatants as a social group (unlawfully) direct violence against civilians as the other social group present in situations of conflict (1990: 62).

As the above descriptions of the collective experience of conflict given by the civilian victim-witnesses and Marion Young’s framing shows, it is appropriate to understand civilians as a *social* group as well as a *legal* group of persons. Drawing on the testimonies of the civilian victim-witnesses in the previous chapter, it can be seen that there are three main aspects of the presence and participation of civilians in conflict that figure these persons as a social group. Firstly, employing Marion Young’s concept of groups, civilians can be seen as a social group through their differentiation from another social group, namely combatants who participate as ‘legitimate fighters’. Civilians as a social

group are distinct from combatants through their common ‘practices, or way of life’. This common way of life is most obviously seen through the civilians informed choice not to participate in military conduct or operations (see Slaughter and Burke-White, 2002; also chapter five). As the civilian victim-witnesses describe, it was this choice not to participate in military conduct which meant that they were a distinct and separate group of persons from ‘those soldiers’ from whose actions they feared the sustaining of injury or broader harms.³³⁸

Secondly, civilians figure as a social group differentiated from combatants through their different experiences of living through a situation of structural victimisation. Marion Young argues that ‘[m]embers of a social group have a specific affinity with one another because of their similar experience or way of life, which prompts them to associate with one another more than with those not identified with the group, or in a different way’ (1990: 43). This affinity between civilians, as this civilian victim-witnesses testimony illustrates, figures through collective actions to provide safety and security for themselves and other members of the social group of civilians:

Q. . . . My colleague asked you a question, and you showed us three high-rises located in Grabavica and from which – you know, that place where you were hit actually – from which it was . . . The exposure in A and in I is absolutely identical; do you agree with me?

. . .

THE WITNESS: [Interpretation] I never had any weapons in my hand and I cannot say which position is easier to shoot from. But all the civilians who went through the wall, you even go into the cupboard believing that it will give you protection and shelter. This place where the tram stopped, it was practically between the two buildings on each side. That is where we stood between. When you are a civilian, you can find shelter in any place. You can bend down, et cetera. There were a million different situations in the war where we tried to protect ourselves, and being between these two buildings gave us a sense of security, as opposed to this place which was a clear area.³³⁹

A central narrative of the testimonies of the individual civilian victim-witnesses was their self-characterisation as a civilian through their commonality of having a ‘civilian’ experience of the hostilities alongside other civilians, and that this experience was distinct from that of the combatants in the region. This common civilian experience of the

³³⁸ *D. Milošević*, Transcript, 16 February 2007, para. 2283.

³³⁹ *D. Milošević*, Transcript, 2 February 2007, para. 1469.

conflict was typically emphasised through their collective actions and efforts to try and protect themselves from the military, whether physically from the ever-present potential of violence and harm, or through having any knowledge of their conduct. As will be further discussed, it was the entirety of the civilian population that was collectively the target of the criminal conduct of combatants during the siege (see Donia, 2006). For this reason, the structural victimisation of the civilian populace meant that there was a common experience of fear and harm by the civilian populace, whether through the direct sustaining of injury or the wider atmosphere of terror constructed by the accused. The siege of Sarajevo illustrates that the nature of the relations between these two groups of persons has led, both historically and in contemporary states of hostilities, to civilians similarly experiencing the harms of conflict *because* of the actions of combatants and as such, in contradistinction to this group of persons (see Kiza, 2006; Slim, 2007).

Thirdly, the civilian victim-witnesses in *D. Milošević* as well as other cases, articulated how civilians as a group held a commonality, and often a solidarity, in trying to maintain a 'normality' to their lives. Donia points out that Sarajevans 'survived under siege by adhering to their normal routine and rhythms of everyday life to the greatest possible extent' (2006: 318). As the testimonies of the civilian victim-witnesses set out in chapter five describe, this attempt to adhere to normality figured through carrying out tasks central to everyday life such as cooking, shopping or going to work. More particularly, this attempt to maintain normality was put into practice through protecting their own lives and those of others of the civilian populace, as the witness above testifies to. This affinity between civilians, as will be further discussed, can be seen through the collective efforts of civilians of all ethnicities and social categorisations to defend the city of Sarajevo and its populace from the violence of the combatants.³⁴⁰ Their practical attempts of self-protection were not 'individual', but collective actions to provide safety and security for

³⁴⁰ *D. Milošević*, Transcript, 2 March 2007, para. 3063. It should be noted that there were civilian victim-witnesses who articulated understandings of social relations through ethnic identifications, as will be discussed later in the chapter.

themselves and other members of the social group of civilians. It was a collective effort to defend the city from violence, but also the civilian population as a whole from the effects of the perpetration of violence by the combatants (see Donia, 2006).

If it is necessary to conceptualise civilians as present and participating as a collectivity or group in conflict situations as the above analysis sets out, it is also necessary to consider how they are the subject of collective victimisation through the actions of perpetrators and the conduct of war. As the testimonies of the civilian victim-witnesses and the discussions of chapter five have begun to indicate, ‘the majority of the population is traumatized and victimized in a collective manner’ through the systematic and widespread perpetration of violence in situations of conflict (Kiza, 2006: 80). For this reason, it is not useful to employ a model of ‘classical victimisation’, that is, as Ewald and Oppeln describe, of an ‘individual victim versus individual perpetrator’ in order to understand the victimisation of civilian populations (2002: 40). Nor is it adequate to consider the perpetration of such victimisation through characterising the conduct of combatants as ‘simply acts of insanity, barbarity, or hatred’ (Jones and Cater, 2001: 240). Utilising these individualised models of violence perpetration does not allow for the recognition of the ‘strategic purpose’ of the actions of combatants, that is, of the intentional and deliberate victimisation of civilians as collectivities (Jones and Cater, 2001: 240). They cannot frame a distinct enquiry into the evident patterns of particular modes of civilian victimisation in armed conflict, such as those discussed in chapter four in reference to the Yugoslavian conflict.

For these reasons, it is important to recognise the conditions of *structural* and *collective* victimisation against civilian populations in situations of armed conflict, as set out in chapter’s four and five. Kiza points out there exists a ‘whole spectrum of victimization’ in situations of conflict that ranges from individual assaults to the ‘structurally induced vulnerability of the whole population’ (2006: 79, 80). As Kiza *et al* argue, the violence of

conflict must be understood as encompassing the *collective* victimisation of civilian groups or populaces and not just the targeting of individuals (2006: 17). This framing of the conduct of war enables the recognition of civilian groups as the subject of systematic and widespread victimisation. It moves from the 'classical victimisation' model of individualised acts of violence to those involving a collectivity of civilians. As the examples of Sarajevo and Srebrenica exemplify, entire cities or regions are the target of deliberate and intentional attacks, with all persons within that geographical area vulnerable to attack (Panyarachun, 2004; Slim, 2007). In this way, the conduct of the perpetrator(s) 'produces' or 'constructs' the civilian population as a collectivity as the 'victim' of large-scale and systematic victimisation (Ewald, 2006: 185-6). While the perpetration of civilian victimisation may take different forms against different individuals, for example as gendered violences such as rape and enslavement, all civilians of the broader civilian population share a common experience of conflict as a victimizing event. This victimisation typically takes the form of direct harms to individuals, as well as indirect injuries through the actions of combatants. It is also often the case, as the siege of Sarajevo exemplifies, that repeated attacks on individuals are perpetrated to terrorise the civilian group as a whole by creating an environment of violence and fear. As Slim points out, such attacks are 'a deliberate intent to inflict widespread wounding so that the horror of the attack lives on and is embodied by in the community long after the event' (2007: 59). In this way, the victimising effects of such conduct may go beyond those directly affected individuals to the individuals of successive generations or refugees who have fled from the 'possibility of being shelled, subjected to torture, killed or wounded' (Kiza, 2006: 81; see also Ewald, 2006).

However, there are further complexities in understanding 'who' the victims of war crimes are when examining the victimisation of civilians as a collectivity, as a 'civilian population'. Most commentators conceptualise 'collective victimisation' and, in turn, the presence of collectivities of civilian victims in relation to social categorisations, most

often ethnicity. For example, Kiza *et al* describe that ‘collective victimisation emerges when victimisation is directed against a group or specific population. This specific group is often identified through religion, ethnicity, and other means of exclusive categories of “otherness”’ (2006: fn.14; see also Separovic, 1999). In these terms, collective victimisation does not figure as the perpetration of violence against a civilian population as the targeted group, whatever the characteristics of those civilians may be. Rather, as the ‘new wars’ literature describes, this type of warfare is either predicated upon, or constructive of, ethnic divisions (Kaldor, 2001; Münkler, 2005). In conflicts such as the former Yugoslavia and Rwanda, the social characteristics of civilian collectivities shapes the perpetration of collective victimisation against them by the ‘opposing’ social group (Ewald, 2006: 185). As discussed in chapter four, this form of civilian victimisation and interactions between victims and perpetrators forms the basis of the majority of the cases heard by the Tribunal. For example, the *Tadić* case was concerned with the collective victimisation of Bosnian Muslims by the accused, a Bosnian Serb. In this case, the social characteristics of the victims, of their being a different ethnicity was the ‘reason’ for their victimisation by the accused rather than simply their being a part of the civilian population.

This form of collective victimisation is typically defined as ‘ethnic cleansing’ (see Münkler, 2005; Kaldor, 2001). As set out in chapter four, its perpetration encompasses modes of civilian victimisation such as murder, torture and sexual violence. The Commission of Experts defines ‘ethnic cleansing’ as a ‘purposeful policy designed by one ethnic or religious group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas’.³⁴¹ As this definition sets out, the perpetration of ethnic cleansing as the collective victimisation of a civilian population takes the form of structural victimisation as set out above. Its structural and collective nature can be seen through the targeting of the whole of a

³⁴¹ COE Report, Part III (B).

civilian populace understood as a collectivity because of their ethnic or religious characteristics or political views (see Münkler, 2005: 82-83; Cairns, 1997: 27). This state of violence and victimisation 'produces' the civilian collectivity as the victim of the crimes of war in relation to their social characteristics (Ewald, 2006). In this way, building on the definition set out in chapter five, this form of collective victimisation can be understood as a 'relational harm' to that civilian population. It is a relational harm as all civilians of the collective group are potentially the target of intentional and systematic harm by the combatants of the 'other' social group present in the hostilities. Whether each individual civilian person experiences victimisation through either direct or indirect harms, the overall systematic and structural victimisation impacts upon the broader community of civilians of that specific social collectivity (Ewald, 2006: 186). This relational harm constructs, to some extent, a common and shared experience of conflict by that (ethnic, religious or politically-motivated) civilian group. It is, as one witness in *D. Milošević* describes, a shared experience of victimisation by that ethnic group, for the potential or actual sustaining of injury was an experience of 'fear that engulfed *us* throughout the war'.³⁴²

However, while this framing of collective victimisation enables an understanding of the systematic victimisation of civilian populations in certain contexts, it does not provide an adequate framing for all situations of civilian victimisation. In particular, it does not allow for an understanding of collective victimisation against a civilian population of heterogeneous composition. Cynthia Cockburn employs a conception of 'mixity' to describe the composition of social groups along national, ethnic, religious or gender lines that retain their distinctiveness, but also interrelate and intermingle (1998: 6). As Cockburn suggests, the societal constitution and relations of persons of Bosnia-Herzegovina reflect the 'extraordinary ethnic mixity of this population' (1998: 29). As noted above, the composition of the civilian population of Sarajevo can be understood

³⁴² *D. Milošević*, Transcript, 6 February 2007, paras. 1658-1659.

through these terms of ‘mixture’. Both prior to the conflict and amid its perpetration, the populace did not figure as a homogenous group of a singular ethnicity or of discrete regions in which specific groupings of persons lived and worked (Donia, 2006; Bevan, 2006; Silber and Little, 1996). Rather, this city had a mixed and integrated populace where ethnic (or other) groupings did not necessarily figure as determinative of social allegiances or relations, as many witnesses in *D. Milošević* drew attention to during their testimonies (Ali and Lifschultz, 1993: xiii; Jones, 1993: 29).³⁴³ It was, as will be further discussed, the very ‘mixture’ and ‘common life’ of this population that was the target of attack and prolific acts of violence and all of its inhabitants that suffered from the harms of collective victimisation (Bevan, 2006; Donia, 2006).³⁴⁴

For this reason, it is necessary to consider social relations and the relational harms of armed conflict in broader terms, as both destructive but also more importantly, as reflective or even constructive of communal relations and allegiances between civilians across ethnic divides. Ewald points out that if we are to more adequately understand the nature of suffering in conflict, it is necessary to take ‘into account the fact that victimization is shaped by the collective modes of experiences and individual interactions’ (2002: 95). The siege of Sarajevo compels us to recognise and understand notions of ‘relational harms’ beyond the typical framing of collective victimisation and consequent injuries to a specific socially-defined group of the broader civilian population. It requires recognition, both socially and legally, of relational harms experienced through a state of violence and injury to all civilians of the mixed civilian population. How, then, does the Tribunal conceptualise the collective victims of this siege? Does the city of Sarajevo retain its ‘mixture’ through the processes of legal adjudication?

³⁴³ See for example, *D. Milošević*, Transcript, 18 January 2007, para. 609; *D. Milošević*, Transcript, 22 January 2007, para. 764.

³⁴⁴ Robert Donia points out that before the 1990s, Sarajevans themselves did not use the terminology of ‘multi-ethnic’ but instead, referred to the composition and relations of their city as a ‘common life’ (2006: 3-4). Similarly to the notion of ‘mixture’, the concept of ‘common life’ affirms the existence of distinct social categorisations, such as nationality or religion, but refers to the respect for such differences and the intermingling between persons as ‘experiences, institutions, and aspirations shared by Sarajevans of different identities’ (Donia, 2006: 4).

Enacting Legal Judgement: The Prosecution of Terror Against a Civilian Population

In March 1999, Stanislav Galić was charged with both direct and command responsibility under Article 7(1) and 7(3) of the Statute for the war crime ‘terror against a civilian population’ (Kravetz, 2004). This charge was brought for Galić’s alleged conduct in ordering and participating in a campaign of violence against the civilian population of Sarajevo ‘with the intent to terrorize the entirety of the population’.³⁴⁵ While the presiding judge of the *D. Milošević* case contended that the charge of terror was ‘a troubling area’ in terms of the elements of the crime and its jurisprudence,³⁴⁶ the case of *Galić* is significant for the enforcement of the protective rules for civilian populations. It is the first instance of the Tribunal’s adjudication of the war crimes charge of ‘terror against a civilian population’ (Kravetz, 2006), as well as being ‘the first time an international tribunal has pronounced on the matter’.³⁴⁷ For these reasons, the case of *Galić* (and *D. Milošević*), to employ Hagan and Levi’s framing, represents ‘new law with new force’ for crimes committed against civilian populations in breach of the protective rules of IHL (2005: 1520).

The war crimes charge of ‘terror against a civilian population’ arises from Article 51(2) of Additional Protocol I of the Geneva Conventions 1949, which determines that ‘[t]he civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited’. However, the ICTY Statute does not set out the

³⁴⁵ *The Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T. Case Information Sheet (<http://www.un.org/icty/cases-e/cis/galić/cis-galić.pdf>).

³⁴⁶ Fieldwork, *D. Milošević*, Statement of Judge McDonald, 19 June 2007. During a session break in the trial proceedings of this case, the judges expressed concern over the charge of terror and the elements of this crime. In particular, the judges agreed that there was a necessity to consider how the Trial Chamber in *Galić* had interpreted the charge and the evidence that had come before it (Fieldwork, *D. Milošević*, 18 June 2007).

³⁴⁷ *The Prosecutor v. Stanislav Galić*. Case No. IT-98-29-T. Judgement, 5 December 2003, para. 66 (‘*Galić*, Judgement’).

specific elements of the offence, nor was there any case-law for the Trial Chamber in *Galić* to draw upon. After an extensive review of national and international treaties and Conventions, the Trial Chamber in *Galić* held that the following specific elements had to be met for the crime of terror:

1. Acts of violence directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population.
2. The offender wilfully made the civilian population or individual civilians not taking direct part in hostilities the object of those acts of violence.
3. The above offence was committed with the primary purpose of spreading terror among the civilian population.³⁴⁸

The *Galić* judgement held that in definitional terms, ‘terror’ is ‘extreme fear’.³⁴⁹ While the Trial Chamber in the later case of *D. Milošević* found that ‘the SRK succeeded in spreading the terror it intended to cause’,³⁵⁰ there is no requirement to prove the experience of extreme fear by the civilian population, since the ‘actual infliction of terror is not a constitutive legal element of the crime of terror’.³⁵¹

The offence of ‘terror against a civilian population’ is a ‘specific intent crime’ (Schaak and Slye, 2007: 567).³⁵² In *Galić*, the Trial Chamber held that the specific intent is ‘spreading terror among the civilian population’.³⁵³ For this reason, the Prosecution must prove ‘not only that the Accused accepted the likelihood that terror would result from the illegal acts – or, in other words, that he was aware of the possibility that terror would result – but that was the result which he specifically intended’.³⁵⁴ The later case of *D. Milošević* follows the specific elements of the crime of terror set out in *Galić*. However, it is important to note that the Trial Chamber in *D. Milošević* determines that the evidence of the Prosecution must establish ‘that the terror goes beyond the fear that is only the accompanying effect of the activities of armed forces in armed conflict. The prohibition

³⁴⁸ *Galić*, Judgement, para. 133; *D. Milošević*, Judgement, para. 875.

³⁴⁹ *Galić*, Judgement, para. 137.

³⁵⁰ *D. Milošević*, Judgement, para. 993.

³⁵¹ *Galić*, Judgement, para. 134.

³⁵² *Galić*, Judgement, para. 136; *D. Milošević*, Judgement, para. 878.

³⁵³ *Galić*, Judgement, para. 133; *D. Milošević*, Judgement, para. 878.

³⁵⁴ *Galić*, Judgement, para. 136.

of spreading terror among a civilian population must therefore always be distinguished from the effects that acts of legitimate warfare can have on a civilian population'.³⁵⁵

While the convictions of Galić and D. Milošević by the Tribunal establishes beyond reasonable doubt these accused's criminal responsibility for the perpetration of the crime of 'terror', it is important to point out that the customary status of this crime was a factor of contention during their adjudication. The legal basis of the charge does not arise from an enumerated crime in the Tribunal's Statute, but from Article 3 which 'functions as a residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the International Tribunal'.³⁵⁶ However, in compliance with the maxim *nullem crimen sine lege* (no crime without law), this expansive jurisdictional determination is contingent on the violation brought before the Tribunal being 'beyond any doubt part of customary law'.³⁵⁷

A recent exposition of the customary rules of international humanitarian law by the International Committee for the Red Cross ('ICRC') found that that 'State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts' (Henckaerts and Doswald-Beck, 2005: 8).³⁵⁸ However, in *Galić* the Trial Chamber did not pronounce upon the customary nature of the charge.³⁵⁹ This omission was a factor contributing to the dissenting opinion of Judge Nieto-Navia³⁶⁰ and commentators contending that Galić's conviction could be 'going beyond the Tribunal's jurisdiction and infringing upon the principle of legality'

³⁵⁵ *D. Milošević*, Judgement, para. 888.

³⁵⁶ *Tadić*, Interlocutory Appeal on Jurisdiction, para. 91.

³⁵⁷ Report of the Secretary-General, 1993, para. 34.

³⁵⁸ The ICRC also notes that no reservations have been made to this provision and that it is an offence under the legislation of numerous States, with for example, the United Kingdom holding that it is 'a "valuable reaffirmation" of an existing rule of customary international law' (Henckaerts and Doswald-Beck, 2005: 8).

³⁵⁹ *Galić*, Judgement, para. 97.

³⁶⁰ Judge Nieto-Navia contends that the 'jurisdictional requirements of the Tribunal' had not been met due to the Majority's lack of determination of whether the charge constituted an offence under customary international law (*Galić*, Summary of Judgement).

(Mettraux, 2005: 129).³⁶¹ Despite its contentious justiciable foundation, the majority of the Trial Chamber accepted jurisdiction of the charge, citing that the warring parties had entered into agreements under the auspices of the ICRC, including ratification of the Additional Protocols.³⁶² Galić was found guilty of this charge and the crimes of murder and inhumane acts as crimes against humanity. Following an appeal, of which the customary status of the crime of terror was one ground put forward by the Defence, the Appeals Chamber in 2006 found that the prohibition of terror against a civilian population was contrary to customary international law at the time of its perpetration and was subject to individual criminal liability for its violation.³⁶³ The Appeals Chamber sentenced Galić to life imprisonment, the only accused to date to receive this sentence.³⁶⁴ D. Milošević was sentenced to thirty-three years imprisonment by the Trial Chamber; his case is currently pending before the Appeals Chamber.³⁶⁵ Radovan Karadžić has also been charged with the crime of terror against civilians by the OTP of the Tribunal; his case is in the pre-trial phase of proceedings. It is alleged that Karadžić knew or had reason to know that Bosnian Serb forces under his control [such as Galić and D. Milošević] had committed acts which inflicted terror upon the civilian population of Sarajevo and had failed to take the necessary and reasonable measures to punish the perpetrators thereof.³⁶⁶

³⁶¹ See Kravetz (2006) for a contrary opinion.

³⁶² See *Galić*, Judgement, paras 21-22. This agreement was concluded on 22 May 1992.

³⁶³ *The Prosecutor v. Stanislav Galić*. Case No. IT-98-29-A. Appeals Judgement, 30 November 2006, para. 86-90 ('*Galić*, Appeals Judgement'). *D. Milošević* follows this determination of the customary nature of the crime of terror (see *D. Milošević*, Judgement, para. 874).

³⁶⁴ *Galić*, Appeals Judgement, paras. 90-98.

³⁶⁵ It should be noted that the exact grounds of the appeal are not known as the Appeal Briefs are not posted online, although there is reference to part of the accused's appeal being confidential (see *The Prosecutor v. Dragomir Milošević*. Case No. IT-98-29/1-A. Decision on Dragomir Milošević's Motion to Present Additional Evidence, 20 January 2009).

³⁶⁶ *The Prosecutor v. Radovan Karadžić*. Case No. IT-95-5/18-I. Amended Indictment. 28 April 2000.

The Judgement of Social and Legal Relations: Recognising Collective Victims and Collective Victimisation

The charges of ‘terror’ under adjudication in *Galić* and *D. Milošević* arise from acts of collective victimisation against civilians, specifically that the SRK forces under their command ‘conducted a protracted campaign of shelling and sniping upon civilian areas of Sarajevo and upon the civilian population’.³⁶⁷ In the indictments brought against the accused, there is no reference to ethnic categories in its conceptualisation of the composition of the civilian population. There is no determination that the victims of the crimes should be ethnically ‘other’ to the accused, in fact there is no identification of the victims of scheduled incidents as to their ethnicity. Rather, the indictments broadly describe that the military campaign was intended to ‘kill, maim, wound and terrorise the civilian inhabitants of Sarajevo. The shelling and sniping killed and wounded thousands of civilians of both sexes and all ages, including children and the elderly’.³⁶⁸ In this way, the indictments conceptualise the civilian population as a collectivity of civilians without any form of ethnic categorisation. The only reference made to ethnic categories is to assert that before 1992, ‘Sarajevo was a flourishing multi-ethnic community’.³⁶⁹ However, as this chapter will go on to argue, analysis of the trial proceedings illustrate a shift from this notion of the civilian population as a mixed collectivity of civilians to a conceptual conflation of the victimised populace as ‘other’ to the perpetrator and ethnic divisions as constructive of civilian victim status.

The adjudication of the charges against *Galić* and *D. Milošević* for the war crime of ‘terror against a civilian population’ and the ‘totality of the campaigns of sniping and shelling’ was based upon the Prosecution’s submission of two schedules of certain

³⁶⁷ *The Prosecutor v. Stanislav Galić*. Case No. IT-98-29-I. Indictment, 2 November 2001 (‘*Galić*, Indictment’). See also *The Prosecutor v. Dragomir Milošević*. Case No. IT-98-29/1-PT. Prosecution’s Submission of Amended Indictment Pursuant to Rule 50 and Trial Chamber’s Decision Dated 12 December 2006, 18 December 2006 (‘*D. Milošević*, Indictment’).

³⁶⁸ *Galić*, Indictment; *D. Milošević*, Indictment.

³⁶⁹ *Galić*, Indictment; *D. Milošević*, Indictment.

incidents of direct attacks on civilians, one in relation to incidents of sniping and the other for incidents of shelling.³⁷⁰ These schedules were examined by the Trial Chamber as to whether they were representative of the alleged campaign of sniping and shelling (in addition to evidence of non-scheduled shelling and sniping incidents and other aspects of the situation in Sarajevo) (Kravetz, 2004: 522).³⁷¹ As such, the schedules ‘should not be understood as reducing the Prosecution’s case to the scheduled incidents’, that is, of individualised acts of violence between combatant and civilian.³⁷² Rather, as was found in *D. Milošević*, these incidents ‘fit in a pattern of shelling and sniping contemplated and implemented by the Accused’.³⁷³ In its assessment of these scheduled (and non-scheduled) incidents, the Trial Chambers heard testimony from the civilian victims themselves and / or expert witnesses who gave technical evidence in relation to military strategy and weapons. For each incident, the Trial Chambers assessed whether it was ‘beyond reasonable doubt representative of the alleged campaign of sniping and shelling or whether it is reasonable to believe that the victim was hit by ABiH forces [Army of Bosnia-Herzegovina], by a stray bullet, or taken for a combatant’.³⁷⁴ As such, the Trial Chambers considered whether the Prosecution had proved that the SRK (and not the ABiH army) deliberately carried out ‘attacks against civilians or against persons whose status should have been presumed to have been civilian’.³⁷⁵ In this way, the Trial Chambers do not adjudicate all incidents of civilian victimisation during the siege of Sarajevo, and as consequence, legally recognise all civilians subject to its violence. The Trial Chambers will not hear evidence of attacks against civilians by the ABiH or any other forces other than the SRK.³⁷⁶ Nor will they adjudicate attacks against legitimate

³⁷⁰ *Galić*, Indictment; *D. Milošević*, Indictment.

³⁷¹ *Galić*, Judgement, para. 188.

³⁷² *Galić*, Judgement, para. 188.

³⁷³ *D. Milošević*, Judgement, para. 978.

³⁷⁴ *Galić*, Judgement, para. 188.

³⁷⁵ *Galić*, Judgement, para. 207.

³⁷⁶ Fieldwork, *D. Milošević*, 18 June 2007.

military objectives which, as a result, cause civilian casualties through ‘collateral damage’.³⁷⁷

The collective victimisation of a civilian population is typically perpetrated by the conduct of an invading or occupying army, for example through the plunder of civilian property and violation of its populace (see Best, 1994: 35-36), or through the ‘ethnic cleansing’ of an ethnically, religiously or politically defined group, as set out above. Using the Bosnian conflict as an example, Marie-Joëlle Zahar develops a framework for understanding the form of such identifications and interactions between militia groups and civilian populations (2001). Zahar defines militia groups as ‘all nonstate actors who resort to violence in order to achieve their objectives’, including irregular forces and those formed along ethnic lines such as the Bosnian Serb forces (2001: 44, 46). Members of such groups may include former civilians who identify with a specific ethnic group, or in the words of one witness in *D. Milošević*, of persons such as himself, who had a normal ‘work’ obligation during the day (i.e. as a ‘civilian’) and a war obligation at night (i.e. with the ‘military’).³⁷⁸ Zahar argues that there is often an ‘identification’ made between such militia groups and particular members of a civilian population (2001: 46). Such identification arises from ‘social constructs, such as ethnicity, religion, language’ (2001: 46). Members of the same group, civilians and militias, understand themselves as an ‘in-group’ in accordance with these social constructs, in opposition to the ‘out-group’ that do not hold the same characteristics of identification (Zahar, 2001: 46). Through such identifications, ‘militias are often involved in the protection and promotion of the rights of their own civilian populations (in-group members)’ (Zahar, 2001: 47). However, in similarity to the notions of collective victimisation set out earlier, social categorisations and characteristics are often decisive of the perpetration of violence and victimisation by militias to those civilians understood as part of the ‘out-group’ (Zahar, 2001: 46-47).

³⁷⁷ *Galić*, Prosecutor’s Pre-Trial Brief, para. 3.

³⁷⁸ Fieldwork, *D. Milošević*, 19 June 2007.

Zahar's account is premised on the identifications and relations between militias and civilians in situations of conflict. However, if this account is developed to include 'regular' combatants and military forces as well as militia groups, it provides a useful framework for exploration of the identifications and interactions made between those civilians and combatants present in Sarajevo during the siege, that is, of their 'civilian-combatant' relations. As has been noted above, however, it is also important to recognise that the terms of social relations in situations of conflict do not solely rest upon the identifications and relations between civilians and combatants. Rather, the types and terms of social relations and allegiances between civilians can be seen to shape their experiences of conflict situations. In particular, the social relations between civilians, that is, of their 'civilian-civilian' interactions are instructive of how we should conceptualise civilian collectivities and their victimisation as a civilian population. Utilising the notions of 'in-groups' and 'out-groups' in these terms can therefore frame analysis of civilian-combatant interactions as well as civilian-civilians relations in regard to ethnic categorisations and interactions. In this way, employing a developed account of Zahar's framework of 'in' and 'out' groups allows for identification of civilian relations and victimisation that take the form of ethnically-based divisions. As will be set out, such identifications and relations can be seen to shape some of the understandings of which persons were the victims of the crimes of terror under adjudication by both the civilian victims themselves and the parties to the *D. Milošević* trial. However, more importantly, utilising this framework allows for recognition and analysis of social interactions that do not 'fit' within this model of civilian-combatant relations. Drawing on this framework of civilian-combatant identifications and relations provides a means through which to begin to understand and develop a notion of social relations and the relational harms experienced by a socially 'mixed' civilian populace.

‘Our Side and Those Others’

Following this conception of civilian-combatant identifications, for many of the civilian victim-witnesses in *D. Milošević*, there was an explicit linkage between one side of the warring parties in Sarajevo and ‘their’ ethnic group.³⁷⁹ Despite evidence from members of the ABiH and other witnesses that the composition of its troops were not solely Bosnian Muslim soldiers, but also Bosnian Serbs and persons of other ethnicities,³⁸⁰ there was an underlying perception from many witnesses that the ABiH forces were solely constituted by Bosnian Muslims and the SRK by Serbs. For example, one Bosnian Muslim witness described this in terms of one of the warring parties constituting ‘our men’ (the ABiH forces) as opposed to ‘those others’ (the SRK forces).³⁸¹ For this witness, her understanding of ‘our side’ encompasses persons, whether civilians or military personnel, of the same ethnicity as herself.³⁸² An important narrative during a small number of the civilian victim-witness testimonies was an assertion that they could not consider or recognise having any form of solidarity or ‘positive’ social relations with persons of other ethnicities during the hostilities. As the testimony of this witness exemplifies, it was held that any civilians or soldiers that comprised part of the ‘other side’, or the ‘out-group’, to utilise Zahar’s framing, did not constitute part of their community. In this narrative of civilian-combatant relations, any ‘other’ persons were not part of these civilian victim-witnesses’ community, despite being residents of the city of Sarajevo.

Cynthia Cockburn argues that the Bosnian conflict ‘was a war waged against the principle of mixity itself’ (1998: 205). As she suggests, ‘[w]ar is a powerful device for convincing the survivors that: “We can’t live together ever again”’ (1998: 205). A study carried out by Corkalo *et al* in three different cities in the former Yugoslavia, Mostar,

³⁷⁹ When the witness’s ethnicity is referred to, this has been established from assertions by the witness themselves during testimony or reference from either the Prosecution or Defence.

³⁸⁰ *D. Milošević*, Transcript, 5 March 2007, para. 3197; Fieldwork, *Perišić*, 4 February 2009.

³⁸¹ *D. Milošević*, Transcript, 22 January 2007, para. 771.

³⁸² See *D. Milošević*, Transcript, 22 January 2007, para. 809; *D. Milošević*, Transcript, 20 February 2007, para. 2553.

Prijedor and Vukovar, using participant observation, focus groups and interviews with citizens of these communities generally appears to affirm this assertion. Through the views of citizens of these communities, all of which have an ethnically-mixed populace, the researchers found that immediately before the hostilities and during their perpetration, the ethnic 'boundaries between "us" and "them" were solidified' in these regions (Corkalo *et al*, 2004: 146). In fact, they find that in post-war Vukovar and Mostar, 'people from different national groups have withdrawn from one another and feel insecure in social situations that go beyond family and close friends' (Corkalo *et al*, 2004: 155). Such ethnically divisive relationships can be seen in the testimony of the Sarajevan citizen noted above, as well as several others which will be referred to. Of greater concern, it appears that such divisive relations are unlikely to change in the near future for some civilians. The cessation of intermingling has fed through to the next generation of persons of these regions, constructing what could be understood as an 'indirect' but relational harm to those persons, in the sense outlined above. For example, although it is important to highlight the misgivings of some parents and teachers, in many schools in Mostar, Vukovar and Sarajevo the children of different ethnicities are educated separately (Corkalo *et al*, 2004: 156; see also Warshauer Freedman, 2001).

This ethnically-divided framework of social relations has also had an impact upon the views of the victims and victimisation of the Yugoslavian conflict. Through various studies, researchers have found that although persons of the former Yugoslavia 'recognized the existence of war criminals within their own ranks, they considered their national group to be the greatest victim' (Corkalo *et al* 2004: 147-8; see also Saxon, 2005: 562). In accordance with these terms of identification, many witnesses claimed or perceived that it was only 'one's own people' that were the victims of the terror under adjudication.³⁸³ Following Corkalo *et al*'s findings, many witnesses in *D. Milošević* asserted that their ethnic group was *the* victim of the war and that no other group suffered

³⁸³ Fieldwork, *D. Milošević*, 19 June 2007.

the same level of violence or victimisation. For example, during one instance of cross-examination, the Prosecution sought to establish from one Bosnian Muslim witness that all civilians, whatever their ethnicity, were the victims of the siege but without success:

Q. Bosnian Serbs were also targeted, were also sniped at, weren't they?

A. What sniping activity do you have in mind?

Q. I'm talking about the full period from 1992 to 1995, and in particular 1994 to 1995, . . . everyone suffered, civilians suffered, and civilians of all ethnicities were targeted. Would you agree with that?

A. . . . I don't know that.³⁸⁴

Despite indisputable evidence from expert and other witnesses that Bosnian Serbs were also casualties of the siege, from this witness there was no recognition or acceptance that there were civilian victims of any ethnicity that are not members of his 'own' ethnic group. Rather than considering the violence as an experience by all civilians of the civilian population, the implicit depiction from this witness is that it was his 'side' that was either the only victimised civilian group or the predominantly targeted group. A significant narrative during the testimonies of a small number of civilian victim-witnesses was their refusal to speak of the victimisation of the other 'side', of the other warring party or of the civilian population as a homogenous group of civilians. This narrative of the siege centres on a description of the violence as constructive of ethnic divides, as defining of both its perpetrators and its victims. As the witness above, as well as several others in *D. Milošević* narrate, the violence of the siege is constitutive of the identification of Serbs as the aggressors and persons of other ethnic groups as the victims. In this way, identification of civilians and armies in these terms consolidates the identification of his group as those persons who were victimised as opposed to other ethnic groups of whose fate he will not speak.

Through these witness testimonies it can be seen that, following Cockburn, it is in part the 'mixity' of a populace which suffers during war (1998: 205). In these testimonies, the collective groupings of civilians are understood along ethnic lines, as a collectivity of

³⁸⁴ Fieldwork, *D. Milošević*, 18 June 2007.

'their' group of either Bosnian Serbs or Bosnian Muslims. It is 'their' side as a collectivity that has sustained injury and so suffered a 'relational harm' through either direct or indirect victimisation and violence. As the witness who spoke of 'one's own people' through an ethnic identification shows, the prior identification of being either a 'Sarajevan' or being a Sarajevan of a particular ethnic group has been lost to an exclusive emphasis on ethnic groupings alone.³⁸⁵ Breaking with the prior mixity of the populace, of ethnic categorisations being irrelevant to everyday life or social relations as was previously seen in the pre-war Sarajevo community (Ali and Lifschultz, 1993; Jones, 1993), these testimonies are illustrative of a definitive understanding of relations of 'us and them' during the hostilities. These testimonies are a narrative of the conduct of siege as breaking the previous 'solidarity' and co-mingling between civilians and the ethnically-mixed constitution of the civilian population as a whole.

All Civilians of the Civilian Population

However, in *D. Milošević* there also exists a powerful counter-narrative to this presumption of a demise of ethnic co-existence and intermingling through many of the witness testimonies. Instead of an understanding of the violence as breaking the possibility of social relations between persons of different ethnic groups, ethnic identifications are, in some cases at least, revealed as having been, and continuing to be, irrelevant. Chandra Mohanty employs a notion of 'solidarity' to refer to the 'recognition of common interests as the basis for relationships among diverse communities' (2006: 7). While not specific to a situation of armed conflict, Mohanty's conception of solidarity enables recognition of the intermingling and cohesion of interests of 'communities of people who have chosen to work and fight together' (2006: 7). In this way, moving beyond a conception of intersections between different social groups, this notion of solidarity can be analytically employed alongside Cockburn's framing of 'mixity' to

³⁸⁵ Fieldwork, *D. Milošević*, 19 June 2007.

frame an understanding of the *practice* of mutuality, connection and cohesion between persons of different communities (Mohanty, 2006: 7, 242). It focuses on the active political struggle and resistance of persons to retain and continually re-assert the common and ‘positive’ social relations between individuals and collectivities (Mohanty, 2006: 7, 243; see also Cockburn, 1998: 196-197). In this way, a notion of solidarity is a particularly useful conceptual tool for examining the forms of social relations between civilians of different ethnicities amid the symbolic and actual violence of ‘nationalist fear and murderous loathing that was induced in many people’ in the former Yugoslavia (Cockburn, 1998: 196). It enables recognition and exploration of the active political struggles of retaining and re-asserting solidarity between persons, a state of social relations which holds a particular importance and meaning during armed conflict. This practice of solidarity can be seen in the resilience and agency of women and men in the former Yugoslavia not only actively protesting against the hostilities, but also forming organisations for education and health provisions for all citizens without distinction (Cockburn, 1998; Boric, 1997).³⁸⁶

A particularly notable aspect of several of the witness testimonies was their explicit wish to make clear that amid the targeting of *all* civilians, there was a strong will and practical effort to retain the mixity of the population and the social infrastructure supporting the continuation of such inclusive relations. As one witness describes, irrespective of their ethnic background, many of ‘my neighbours stayed with me in the city’. As he goes on to describe, both Muslims and ‘Serbs stayed and remained with me in the city of Sarajevo, to defend it’.³⁸⁷ Through his description of being ‘neighbours’ with persons of other ethnicities and residing in the city alongside them, this witness provides an important illustration of some of the ways in which the mixity of the population was, and is,

³⁸⁶ For example, during trial proceedings of *The Prosecutor v. Vojislav Šešelj* (Case No. IT-03-67), a witness described how there were campaigns and movements in Zvornik, Bosnia and Herzegovina organised by the ethnically mixed population to demonstrate against the war. These demonstrations were organised for both Serbs and Muslims knew ‘that war only meant suffering for both ethnic groups’ (Fieldwork, *Šešelj*, 4 February 2009).

³⁸⁷ *D. Milošević*, Transcript, 2 March 2007, para. 3063.

retained. As his determination of physically defending the city with his neighbours appears to suggest, the mixity of the populace was not simply a continuation of the prior co-existence of social relations across ethnic lines, but an active struggle to assert and re-assert such relations in the face of the actions of others to destroy the city and its populace. In this regard, it is important to note that such inclusive relations, in contravention to political and military objectives, were not limited to Sarajevo. Rather, as commentators point out, despite having a shared ethnicity, civilians in divergent regions of the former Yugoslavia did not follow the extremist views of the leadership or approve of the actions 'being done in their name' (see Cockburn, 1998: 33; Zahar, 2001).

The siege of Sarajevo resulted in 10,000 persons killed and 60,000 wounded (Weiss, 2005: 85). However, although quantitative accounting is indicative of the scale of violence-perpetration, it fails to recognise its experiential effect; 'numbers tell us little about how a war is lived, felt, and died' (Nordstrom, 2004: 43). As an inevitable consequence of civilians of all ethnicities remaining in Sarajevo, it is reasonable to contend that all civilians of all ethnicities were subject to the atmosphere of terror and actual sustaining of injury through the actions of the perpetrators and their subordinates (Bevan, 2006). The crime of terror did not affect one 'in-group' of a particular ethnic identity, but as one witness explains, was experienced by 'the entire neighbourhood'.³⁸⁸ For this reason, many witnesses do not align to a narrative of the siege where only one 'side' or 'group' experienced injury, but instead relate that the widespread nature of the campaign of terror had a profound effect upon all civilians of the civilian population:

Q: Civilians were Bosnian Serbs, Muslims, Croats and other ethnicities. Civilians of all ethnicities remained in Sarajevo didn't they?

A: Yes.

Q: The hardships, not just Serbs but Muslims and Croats also suffered didn't they?

A: Yes³⁸⁹

³⁸⁸ D. Milošević, Transcript, 6 March 2007, para. 3234.

³⁸⁹ Fieldwork, D. Milošević, 18 June 2007.

For this witness, who, it should be noted spoke in emphatic tones which cannot be adequately captured by the court transcripts,³⁹⁰ the violence and terror of the siege is not reducible to the acts of violence by the SRK army to non-Serbs or Bosnian Muslim civilians alone. Rather, it was a state of violence experienced by all members of the community. Ethnic identity did not play a role in ‘sparing’ a civilian from harm or injury; the indiscriminate nature of the shelling and sniping of civilians precluded safety from such attacks and as noted during the trial, it is impossible to identify (and thus target) a person as a Serb, Croat or Bosnian Muslim through appearance (also Cockburn, 1998: 29).³⁹¹ While the Tribunal’s terms of trial adjudication generally focus upon the perpetration of hostilities from SRK areas to those held by the ABiH forces, these witnesses refute any suggestion that it was only one ethnic group that suffered or were subject to sniping or shelling attacks. As many other witness testimonies determine, during the hostilities that consumed the city, ‘all the people in Sarajevo were equally exposed to the [same] level of stress, regardless of their ethnicity, whether they were Serbs, Croats, or Bosniaks’.³⁹² There was ‘no monopoly of suffering in this particular war’; it ‘was desperate times for all the people of Sarajevo on both sides of the lines’.³⁹³

The ‘active struggle’ to retain the mixity and solidarity between persons of the populace, as noted above, is particularly evident through testimonies relating that key services such as the police force and hospital care were staffed by a multi-ethnic staff:

Q. There were both Serbs and Croats among the victims, as well as Muslims; would that be a fair statement?

A. It's true that many Serbs stayed back in Sarajevo. Many of them joined the ranks of the BH army. As for my own bomb squad unit, there were more Croats and Serbs than Bosniaks. They were all loyal citizens, honourable citizens, who tried to get on with their lives . . . Those up on the hills who were targeting everybody else took everybody else down in the valley to be their enemy. So they just killed indiscriminately. That's what they did.³⁹⁴

³⁹⁰ Following the argument set out in chapter two, it should be noted that a number of the testimonies heard during courtroom observation and referred to in this thesis were spoken in emotive or emphatic terms that cannot be understood or related through transcript analysis alone.

³⁹¹ *D. Milošević*, Transcript, 15 January 2007, para. 399.

³⁹² *D. Milošević*, Transcript, 29 January 2007, para. 1147.

³⁹³ Fieldwork, *Perišić*, 4 February 2009.

³⁹⁴ *D. Milošević*, Transcript, 20 February 2007, paras. 2553-2554.

Similarly, one witness, a doctor working at one of Sarajevo's hospitals emphasised that of the casualties treated, 'the approximate ratio [of patients] was 80: 20 per cent in favour of civilians . . . the number of injured civilians was always vastly greater than the number of military personnel admitted'.³⁹⁵ More significantly, the civilians that were admitted and treated were not identified or provided with treatment according to any social characteristic; the hospital 'received all the patients that came to see us, regardless of the gender, the age, the religion'.³⁹⁶ As this doctor's testimony emphasises, the services attending to the injuries of the conflict remained operative for all civilians caught up in the conflict, notwithstanding their ethnic or social identity. For employees of these services and institutions, it was particularly important to stress that the social infrastructure did not become operative for only 'one side' or group, but 'admitted everyone'.³⁹⁷

Indeed, for the majority of the witnesses, it was either irrelevant or wholly wrong and inappropriate to ascribe an ethnic status to persons that were the victims of the violence as they did not perceive persons in such terms:

Q. Did you ever notice them [Serb Doctors] being deliberately targeted? . . . Were any of those ever deliberately targeted?

A. You mean the doctors?

Q. Yes.

A. I can't remember the year, but it may have been the year when outside the war hospital at Igman, Dr. Dragan Stevanovic was hit. He lost his foot.

Q. He was a Serb; right?

A. Yes.

Q. I was asking about members --

A. He was an employee of my hospital, regardless of his ethnicity. Serb or non-Serb, he was a hospital employee.³⁹⁸

Despite the Defence's attempts to designate 'victim status' to a civilian through their ethnic status, the witness does not adhere to this prioritisation of ethnic ties and refuses to

³⁹⁵ *D. Milošević*, Transcript, 17 January 2007, paras. 571-2.

³⁹⁶ *D. Milošević*, Transcript, 17 January 2007, para. 560.

³⁹⁷ *D. Milošević*, Transcript, 17 January 2007, para. 571.

³⁹⁸ *D. Milošević*, Transcript, 29 January 2007, para. 1146.

speaking in 'ethnic' terms of the victim of the injuries sustained. He does not identify or relate to other Sarajevan citizens in the terms of an 'in-group' or 'out-group' along ethnic lines as Zahar's framework suggests (2001). Rather, this witness identifies with this victim in relation to his status as a co-worker and a person injured by the hostilities. His understanding of other persons is framed through notions of solidarity, to employ Mohanty's notion, of social relations between individuals who are actively trying to overcome the harms of the hostilities. The Serb doctor does not figure as a person 'other' to the witness, but as a person with whom he has solidarity for being a Sarajevan citizen.

As this testimony of this witness indicates, the violence, and more importantly, the victimisation of the siege was emphatically understood and related as a state of injury to all civilians comprising the civilian population of Sarajevo. It was an act of collective victimisation perpetrated to the civilian population as a whole in the urban space of Sarajevo, rather than to civilians of specific social characteristics or categorisations. For this reason, it is necessary to recognise that the violence of the siege was experienced as a relational harm to all civilians that comprised Sarajevo's civilian population and who were collectively subject to the systematic and widespread perpetration of terror and harm. This form of relational harm did not figure as a state of fear shaped through ethnic identifications (although, as set out above, this was the case for certain civilian victim-witnesses). Rather, it was a relational harm in the sense of an inclusive experience of injury and violence by all civilians within the collectivity of the civilian population of Sarajevo. Whether through acts of direct violence such as sniping or shelling, or the 'indirect' violence of the experience of 'terror', there was, as the Prosecution in *Galić* determine, 'nowhere safe for a Sarajevan, not at home, at school, in a hospital, from deliberate attack'.³⁹⁹ As such, despite the intentions of the perpetrators to divide the population across ethnic lines, as will be further discussed, such a desire was not realised. Indeed, for many civilian victim-witnesses, despite the extensive physical evidence of

³⁹⁹ *Galić*, Transcript, 3 December 2001, para. 563.

pock-marked buildings and loss of family members and neighbours, the 'imagined community' of Sarajevo, to employ Benedict Anderson's framing (2006), continued throughout the war and to the present day as the multi-ethnic community that it was prior to the violence of the siege. It was this ethnically-mixed imagined community that was the target of the perpetrators and their destructive violence, but which continues to be defended and re-constructed by the majority of its populace.

The Intent of the Perpetrators

Through the terms of the indictment, there is no necessity for the Prosecution (or the Defence) to establish the social characteristics of the civilian population of Sarajevo other than as comprising a collectivity of persons who were civilians. However, it was notable during the trial proceedings that both the Prosecution and Defence emphasised the ethnically-mixed composition of the population. For example, the Prosecution did not argue that the SRK forces aligned to a military strategy of targeting non-Serbs and sparing Serbs, as civilians comprising of their 'in-group'. Rather, the Prosecution alleged that the evidence shows that 'the VRS that were – that encircled Sarajevo . . . when they sniped into the city at civilians, it didn't matter to them whether the civilians were Muslims or Croat or Serb'.⁴⁰⁰ Although the composition of the civilian population as an ethnically-mixed population does not affect the charges against the accused, the Prosecution does not allege that the victims of the (Bosnian Serb) accused were only Bosnian Muslims or non-Serbs.⁴⁰¹

In contrast, the Defence sought to emphasise the mixed composition of the civilian population for two reasons, both of which related to an overall challenge to the nature of the charges. Firstly, the Defence brought a number of Serb victim-witnesses allegedly

⁴⁰⁰ Fieldwork, *D. Milošević*, 18 June 2007.

⁴⁰¹ Fieldwork, *D. Milošević*, 18 June 2007.

injured by the actions of the forces of the ABiH before the court to show the ‘terror sustained by Serbs, the unnecessary suffering by Serbs’ during the siege.⁴⁰² Although the Presiding Judge frequently intervened to question the relevance of these testimonies, there were continual attempts by the Defence to assert that it was the victimisation of Serbs in SRK-held territory that should be the subject of recognition and condemnation, despite these attacks not coming under the terms of the charges.⁴⁰³ In fact, at times, it appeared that such witnesses and their testimonies were being used as an opportunity for the Defence lawyers to narrate their own grievances of the victimisation of Serb civilians, rather than as supporting the legal aspects of their case.⁴⁰⁴ The second way in which the Defence drew on the mixity of the civilian population was through a line of argument that sought to determine that the actions of the accused were legitimate in accordance with the laws of war. Although this argument was not entirely clear, it appears that the Defence was contending that there was a general state of armed conflict between two warring parties such that it was not the intent of the accused to target civilians, but to ‘legitimately’ fight the opposing army.⁴⁰⁵ However, as the Presiding Judge went on to state that the Trial Chamber did not understand the Defence’s strategy of defence and prevented the Defence from furthering this line of argument on numerous occasions, it would appear that this was not a line of argument that was taken into account during the adjudication.⁴⁰⁶

This recognition by both the Prosecution and Defence that there was targeting of all civilians of the civilian population during the siege raises the issue that the pervasive perpetration of terror through sniping and shelling to Sarajevo may have been committed *because* of its mixed population. Although not an aspect of the charge under adjudication,

⁴⁰² Fieldwork, *D. Milošević*, 18 June 2007. Similarly, during the trial of *Perišić*, there were many instances where the Defence sought to emphasise the suffering of Bosnian Serbs during the siege (Fieldwork, 4 February 2009).

⁴⁰³ Fieldwork, *D. Milošević*, 18 June 2007, 19 June 2007, 21 June 2007.

⁴⁰⁴ Fieldwork, *D. Milošević*, 18 June 2007, 19 June 2007, 21 June 2007.

⁴⁰⁵ Fieldwork, *D. Milošević*, 21 June 2007.

⁴⁰⁶ Fieldwork, *D. Milošević*, 18 June 2007, 19 June 2007, 21 June 2007.

historical and biographical accounts relate that despite Serb nationalists trying to portray the city 'as overwhelmingly Bosniak . . . [t]hat characterization was false . . . large numbers of Serbs and Croats, and a smaller number of Jews, remained in Sarajevo during the war and suffered with Bosniaks the indiscriminate death, injury, deprivation, and fear created by the Serb nationalist assault on the city' (Donia, 2006: 321). As one witness describes, during the siege, everyday life was 'business as usual', there were 'plenty of them [Serbs] who never left Sarajevo during the war'.⁴⁰⁷

From these accounts, it appears that the SRK forces did not perceive of Serb civilians as part of their 'in-group' and consequently did not seek to advance the 'protection and promotion of the rights of their own civilian population' (Zahar, 2001: 47). Instead, as biographer Robert Donia's detailed account of the siege of Sarajevo illuminates, targeting was directed to 'the signal achievements of the city's secular common life . . . shells and bullets hit virtually every mosque, synagogue, and Serbian Orthodox structure' (2006: 314). Not only were the SRK forces seeking to expel and destroy the non-Serb populace, violence was perpetrated to destroy images and symbols of prior peaceful social relations and solidarity between persons across and within ethnic groupings. In this way, as Robert Bevan argues, the 'co-mingling of mosque, Catholic and Orthodox churches in Sarajevo is an embodiment in stone of everything the Serbs were fighting against' (2006: 122). Sarajevo was targeted because these social relations across ethnic lines constituted a denial of the nationalistic groupings sought by the perpetrators. Targeting of 'the city's chief institutions of collective memory' sought destruction of the past peace of these relations (Donia, 2006: 314). Sarajevo's prior mixed constitution was being forcibly 'forgotten' through destruction of any reminder of such relations. Through the perpetrators violently enforced forgetting, Sarajevo was to have its future sociality re-

⁴⁰⁷ *D. Milošević*, Transcript, 1 February 2007, para. 1427.

shaped. As a witness cited in the *Galić* judgement determines, the intent of Galić and other SRK commanders was to ‘either destroy the city or rid it of Muslims’.⁴⁰⁸

The Trial Chamber’s Judgement of Social and Legal Relations

During the trial proceedings of *D. Milošević*, Judge McDonald, the Presiding Judge of the Trial Chamber, stated that the Tribunal ‘is a court of law, and we are not running a university course in the history or sociology of the conflict in Sarajevo’.⁴⁰⁹ The Judges of the Trial Chamber are not ‘interested in a general history of the conflict. We are only concerned with the charges of the indictment’.⁴¹⁰ The judgements rendered against both Galić and D. Milošević reflect this focus upon the charges of war crimes and crimes against humanity brought against them in the indictments. While there is a brief overview of the events leading up to the conflict in Sarajevo and the conduct of the hostilities, the structure and content of the judgements predominantly centre on the Trial Chamber’s determination of the role of accused, the military structures and confrontation lines and the findings in relation to the scheduled incidents. There is little discussion of the context of the siege of Sarajevo amidst the break-up of the former Yugoslavia or the ‘reasons’ or ‘purpose’ of spreading terror against its ethnically-mixed civilian population.⁴¹¹ Rather, as Judge McDonald relates, the Trial Chambers are concerned with the charges of the indictment and the guilt or innocence of the accused in conducting a campaign of shelling and sniping in Sarajevo with the primary purpose to spread terror among the civilian population. In this way, the judgements are concerned with *whether* the accused conducted this campaign of civilian victimisation, not *why* they perpetrated the violence against civilians of all ethnicities and social groupings.

⁴⁰⁸ *Galić*, Judgement, para. 745.

⁴⁰⁹ Fieldwork, *D. Milošević*, 19 June 2007.

⁴¹⁰ Fieldwork, *D. Milošević*, 21 June 2007.

⁴¹¹ It should be noted that while the Trial Chamber must find that the accused specifically intended to spread terror among the civilian population to convict him of this war crime (as discussed above), it is not necessary for there to be a determination of the ‘social’ reasons or motives for the causation of terror. The ICTY Statute does not require that intent or motive be proven for charges of crimes against humanity (Cryer, 2007: 190-192).

However, as a consequence of the ‘victim-specific’ nature of the charges, the judgements rendered by the Trial Chambers *did* have to provide a definition of the civilian population that was the target of the charges of terror under adjudication. Drawing on Additional Protocol I, the *D. Milošević* judgment describes that the ‘term “civilian population”, broadly interpreted, refers to a population that is predominantly civilian. The ‘civilian population comprises all persons who are civilians’.⁴¹² Utilising this definition, the *D. Milošević* judgement describes that ‘the *entire* civilian population of Sarajevo [was] the direct target of countless acts of violence’ and the crimes of terror, murder and inhumane acts at the hands of the accused.⁴¹³ The entire area of Sarajevo was held to be ‘civilian’ and, in particular, the ‘populated urban areas within the confrontation lines were civilian in status’.⁴¹⁴ In this formulation, the entirety of the civilian population of Sarajevo was the ‘victim’ of the crime of terror. The finding of guilt against the accused constructs legal recognition of *all* civilians of this populace as the victims of the campaign of terror. Although it is important to note that the *D. Milošević* judgement does refer to the movements of some Bosnian Serbs and Bosnian Muslims to areas dominated by persons of such ethnicities,⁴¹⁵ the overall conception of the civilian population for the terms of the charges relates to the whole of Sarajevo. There is no determination that the civilian population or civilian persons should be ethnically ‘other’ to the accused or of an ‘opposing’ group. Rather, as stated above, there is no identification of the civilian victims of sniping or shelling attacks as to their ethnicity. The judgement simply determines whether the person or persons were civilian, and if so, that they were civilian victims of the crimes under adjudication.

⁴¹² *D. Milošević*, Judgement, para. 992. This section will focus upon the *D. Milošević* judgement and the trial adjudication. The factual and legal findings in this case follow that of *Galić*.

⁴¹³ *D. Milošević*, Judgement, para. 994. Emphasis added.

⁴¹⁴ *D. Milošević*, Judgement, para. 896. See paras. 889-906 for discussion.

⁴¹⁵ *D. Milošević*, Judgement, para. 895.

However, notions of ethnic identification and affiliations *did* arise as issues of factual or evidential concern during the trial proceedings. Although the legal definition of a civilian population refers only to a collectivity of persons who are civilians, the Trial Chamber can be seen to fill this term with content by drawing upon and evoking ethnic categorisations. During the trial process, the Trial Chamber appears to rely on certain notions of civilian groupings and social relations in regard to ethnic categorisations and identifications which are then used to construct a conception of the civilian population of Sarajevo. This conceptual construction of Sarajevo's civilian populace has significant consequences for both founding and finding legal recognition of the civilian victims of the siege, understanding the terms of social relations between the civilians and combatants present in this context of hostilities and recognising how the civilian collectivity as a whole was subject to victimisation and violence. As will be discussed, by evoking notions of ethnic identification and allegiances, the Trial Chamber during the trial proceedings constructs a very different conception of the civilian population of Sarajevo to that of the majority of the civilian victim-witnesses. In the trial process, the 'mixity' of this populace becomes lost to divisive understandings of ethnic groupings and territorial boundaries.

First, the Trial Chamber's structuring of the evidential processes during the trial proceedings can be seen to construct a notion of particular civilians being understood as civilian victims of the crime of terror in relation to their presence within certain geographical areas. As noted above, the Defence frequently sought to admit evidence or structure the testimonies of witnesses to depict the perpetration of violence to Serb civilians in SRK-held territory. For example, one witness testifies for the Defence that his father-in-law and other Serb civilians were injured by shells allegedly fired by the ABiH forces.⁴¹⁶ The Defence brought this witness and others to trial to provide evidence that

⁴¹⁶ Fieldwork, *D. Milošević*, 21 June 2007.

there were two warring sides and therefore not just civilian victims on one side.⁴¹⁷ However, as Judge McDonald held, ‘the Chamber has absolutely no interest in the number of Serbs that were killed, unless it relates to a specific issue, no matter how hurtful that may be to you or to the witness’.⁴¹⁸ In this instance and many others, the Trial Chamber refuses to allow the continuance of the testimony of the witness on these civilian deaths and casualties. As evidence of injuries to the civilian population of SRK-held territories are not relevant to the actions of the accused, ‘it should be excluded’.⁴¹⁹ Legal recognition of these civilian victims cannot and will not be established by the Trial Chamber, for their injuries are not part of the criminal acts under adjudication.

In this way, the Trial Chamber can be seen to ‘divide’ the civilian population into territorial areas. In accordance with the terms of the indictment, the Trial Chamber will only hear evidence in relation to incidents of shelling or sniping of the civilian population in ABiH-held areas of Sarajevo. The terms of the indictment thus excludes those civilians residing in SRK-held territory from being legally recognised as civilian victims of the siege, whether or not they were the victims of terror or direct attack. In this way, there is a conceptual disjuncture between the entire civilian population of the judgement and the territorially-defined civilian populaces referred to during the trial proceedings. Following the Rules of Procedure and Evidence, ‘in order to be admissible, evidence must be relevant to the issues at trial’ (May and Wierda, 2001: 252). For this reason, any testimonial or documentary evidence that the lawyers bring before the Chambers concerning crimes against civilians in areas other than ABiH-held territory will not necessarily be admitted. As the above example shows, the issue of relevancy precludes the Defence from bringing Serb civilians who resided in SRK-held territory before the Chambers to narrate their experience of victimisation during the siege. For this reason, only the civilian population of ABiH-held territories will find legal recognition of being

⁴¹⁷ Fieldwork, *D. Milošević*, 21 June 2007.

⁴¹⁸ Fieldwork, *D. Milošević*, 21 June 2007.

⁴¹⁹ Fieldwork, *D. Milošević*, 19 June 2007.

the victims of the crime of terror in the case of *D. Milošević* (and *Galić*). It is only the harms to the civilians residing in those geographic areas that will be heard and condemned by the Trial Chamber. As there are no cases that have brought charges for crimes committed against civilians in SRK-held territory, it appears that the Tribunal will not pronounce legal judgement on the harms to that collectivity of civilian victims. In this way, the Tribunal will not hear evidence about the victimisation of *all* civilians of the entirety of the civilian population of Sarajevo. Instead, both geographically and symbolically, the civilian population is split into two populaces dependent on territorial boundaries.

Second, the judges of the Trial Chamber can be seen to draw upon and shape a notion of civilian-combatant relations within the city of Sarajevo along ethnic lines. In particular, the presiding judge of the Trial Chamber assumes that the troops of the warring parties have a specific ethnic composition and that civilian groups of the same ethnic categorisation will identify and have an allegiance with that army:

Q [Defence lawyer]: Based on your recollection, can you tell us whether before 1993, you were still living in Trnovo, and this territory was controlled, held by your army, wasn't it?

A [Witness]: Yes.

JUDGE ROBINSON: Mr. Cannata.

MR. CANNATA [Prosecution lawyer]: I'm sorry, just for -- to be sure there is no such "her army." The witness hasn't any army to my recollection, and I invite the Defence counsel to be more precise on that. There is no such "her army." The witness is a civilian.

JUDGE ROBINSON: Well, it's a technical point but she understood, and I think we understand. Please proceed.⁴²⁰

While it was notable that the victims of the alleged crimes were not explicitly asked of their ethnicity during the trial proceedings, in this instance of cross-examination there is a distinct alignment of this Bosnian Muslim witness with 'her army', the ABiH forces. Although the Prosecution questions this immediate and unquestioned nexus between this civilian and one of the armed forces, the Trial Chamber does not raise doubt over this alignment nor ask the witness for her identification, if any, with one of the warring

⁴²⁰ *D. Milošević*, Transcript, 16 February 2007, para. 2270.

parties. The Trial Chamber assumes that a Bosnian Muslim witness would align with the ABiH forces. There is no question over whether the army was not necessarily a 'Muslim' army (as the testimony of other witnesses described), or that even if this were the case, that the civilian witness may not have any form of identification with it, despite being a Bosnian Muslim. In this way, the Trial Chamber can be seen to understand the warring parties and civilians in Zahar's framing of an 'in-group' based upon ethnic identity (2001). During the trial process, there is assumption that civilians and combatants of the same ethnicity will identify and have an allegiance with each other.

These notions of civilian-combatant relations therefore align to the conception of 'our side and those others' that was put forward by a small number of the civilian victim-witnesses. Through the implicit (and often explicit) linkages between civilians and combatants during the trial proceedings, as noted above, the Trial Chamber appears to both rely on, and construct a notion of the siege of Sarajevo through a framing of collective victimisation by one 'ethnic side' against another. By aligning civilians of a specific ethnicity to an army held to have the same ethnicity, the violence and its victims becomes framed through notions of collective victimisation centred on divisive ethnic relations (see Kaldor, 2001). Despite evidence relating that all civilians were the targets of the SRK forces and the crime of terror under adjudication, the Trial Chamber appears to figure the siege of Sarajevo as the SRK forces 'producing' non-Serb civilians as victims of terror and other crimes, while the ABiH targets Serb civilians and perpetrates the conduct of their victimisation, although not to the same extent. Such a conception of the victims and perpetrators of the siege aligns with the image of 'good Muslims, bad Serbs' that was portrayed by the media at the time.⁴²¹ It does not employ a more complex or nuanced conception of collective victimisation that takes the 'mixity' of this populace into account. Nor does it explicitly figure, either in the trial process or the judgement, that

⁴²¹ Fieldwork, *Perišić*, Testimony of an expert witness (Reporter residing in Sarajevo during the siege), 4 February 2009.

social relations during a situation of conflict are not necessarily divisive, but may strengthen across ethnic divides through a collective experience of victimisation and necessary attempts at protection.

If the trial process does not adequately capture all the civilian victims of the siege, neither does it recognise the civilian populace of Sarajevo as a cohesive collectivity of civilians. From the examples of the shaping of civilian victims and civilian-combatants relations along ethnic lines, it can be seen that the Trial Chamber does not figure the entirety of the civilian population of Sarajevo as the victims of the terror created by the accused during the trial proceedings. In this way, it appears that the testimonies of many of the civilian victim-witnesses who described their loyalty to each other as Sarajevans throughout the hostilities and their active struggles to retain the mixity of the populace and the terms of solidarity between its people have become lost to divisive and exclusionary notions of ethnic identifications and relations. The trial proceedings do not recognise the relational harm to the civilian populace through their collective experience of victimisation or violence. There is no explicit recognition that it was a common experience of harm to all members of this collectivity, or that the violence may have been perpetrated in order to construct divisive relations between individuals and social groups. Instead, there is a further symbolic relational harm to the civilian population of Sarajevo by failing to legally recognise the importance of its mixed populace and the collective experience of the siege by its citizens.

In this way, the trial proceedings in *D. Milošević* re-imagine the previously mixed community of Sarajevo and understand its constitution through notions of divisive and exclusionary social relations. The Trial Chamber does not capture the 'mixity' and solidarity between its civilian residents and that it was this form of social relations that constructed this collectivity of persons as a civilian population before and during the hostilities. Without that recognition of the mixity of the populace, the trial proceedings

appear unable to emphasise that in the present day, despite ‘the losses that violence has cost the city in the past century, Sarajevans have demonstrated the capacity and the will to revitalize the city’s common life and preserve its legacy of diversity’ (Donia, 2006: 356).⁴²²

⁴²² It is, of course, necessary to note that there were a small number of civilian victim-witnesses who did speak of the populace as divided along ethnic lines and that such forms of social relations have continued to the present day.

Conclusion

International Criminal Trials: Civilian Subjects, Protective Practices, Trial Proceedings and Progressive Futures

Justice is always perfectible.⁴²³

This thesis examined how international criminal justice mechanisms legally recognise, protect and redress the civilian victims of armed conflict. It has shown that there have been important developments in the rules and practices of humanitarian law that work to regulate and enforce civilian protection over the course of the past century. This thesis has also shown that international criminal justice institutions are now understood by the international community to be a key mechanism for the legal recognition, protection and redress of civilian victims. In this regard, the work of the ICTY has been particularly important because of the high numbers of prosecutions of acts of civilian victimisation brought to trial and its significant contribution to the development of the jurisprudence of civilian protection law. However, this thesis has also shown that there are significant conceptual and substantive difficulties with the current practices of international criminal justice mechanisms when acts of civilian victimisation are the subject of prosecution, trial proceedings and judgement.

What new definitions, rules and practices could, then, provide a better framework for the recognition, participation and protection of civilian victims when acts of civilian victimisation come before a court of law? In order to begin to address this question, this chapter first reflects on the key conceptual, substantive and procedural difficulties with the current legal framework of civilian protection. Drawing on the previous analysis, it

⁴²³ Bassiouni (1999: 87).

emphasises the problems and gaps in the rules and practices of humanitarian law that work to exclude or complicate the legal recognition of the civilian victims of armed conflict. This chapter then develops new legal practices to conceptually and substantively shift the framework of international criminal justice practices from the current perpetrator-focused approach to an institutional approach in which there is a greater recognition of the views, interests and needs of civilian victims.

Existing academic scholarship has not yet adequately developed a victim-centred framework through which to explore the legal recognition, protection and redress of civilian victims by international criminal justice mechanisms. As chapter one set out, neither sociological or transitional justice scholarship sufficiently address the key concepts and issues of this thesis, namely, ‘civilians’, ‘protection’ and ‘redress’. More particularly, these literatures do not adequately examine the construction of legal recognition and protection of civilians by international criminal justice mechanisms. For this reason, the chapter drew on diverse fields of academic scholarship to develop a broader conceptual and analytic framework through which to examine the concepts that underpin models of the legal recognition and protection of civilians. The first section developed a victim-centred approach to identify the patterns of structural victimisation against civilian populations. The second section examined the nature of civilian-military interactions during the practices of conflict and argued that contrary to the ‘new wars’ thesis, it is necessary to recognise the direct targeting and high numbers of civilian victims in both contemporary and historical conflicts. The third section identified the various mechanisms that the international community has established for the enforcement of civilian protection in armed conflict. The chapter concluded by drawing on transitional justice literatures and debates to determine that an analysis of the role and practices of the ICTY must consider its provision of forms of retributive *and* restorative justice.

An exploration of the legal recognition, protection and redress of civilian victims requires analysis of both the rules *and* practices of international criminal justice mechanisms. As chapter two showed, Bourdieu's notion of the 'juridical field' provides a useful methodological approach for understanding the ICTY as a site of complex rules and practices that work together to construct legal recognition of civilians, their protection and redress. Following this methodological approach, this chapter then argued that utilising a mixed-method approach incorporating documentary analysis, courtroom observation and interviews would enable identification of both the protective rules of humanitarian law for civilians as well as the legal practices of the ICTY which work to enforce instances of their breach. In accordance with the overall approach of the thesis, the final section of the chapter argued that it was necessary to utilise a 'view from below' approach in order to examine the ICTY as it functions for the civilian victims of the acts of violence under adjudication, rather than simply as a prosecutorial mechanism of trying and condemning the perpetrators of criminal conduct.

Even though the legal concept of the civilian is crucial to the recognition of this category of persons, this thesis has shown that the meaning of this term shifts and changes. Social characteristics of group membership are drawn upon and evoked during legal processes that can act as exclusionary categorisations and prevent certain civilian victims from being legally recognised as such. As chapter three argued, the legal recognition of civilians through the rules of this body of law has not figured as a fixed or static juridical concept. Rather, the recognition of civilians has been a gradual and shifting process over the past century dependent on the legal protections afforded to this category of persons. Chapter three's analysis of the *Tadić* case shows that civilians do not necessarily hold 'protected person' status through their civilian status alone when acts of victimisation charged as grave breaches of the Geneva Conventions, 1949 come before a court of law. It showed that for the adjudication of some forms of criminal conduct, civilian victim status remains problematically constructed in relation to ties of social characteristics that

can work to exclude certain categories of civilian victims from having their status legally recognised as such.

The second way in which civilians can have their victim status recognised as such is through the prosecutorial practices of international criminal justice mechanisms. However, chapter four revealed that there are exclusionary practices in the modes of civilian victimisation that have been brought to trial as criminal prosecutions through an analysis of completed cases heard by the ICTY. In particular, it showed that there is a significant and problematic 'gap' in the international legal recognition of the female civilian victims of the Yugoslavian conflict. This legal 'gap' has arisen due to the few prosecutions brought for acts of gendered violence as well as their designation as being 'less serious' than other forms of criminal conduct. These exclusionary patterns in the prosecutions have, in turn, meant that the ICTY has constructed a legal record of the conflict that is in distinct contrast to other authoritative accounts. As this chapter showed, the prosecutorial strategy of this institution reflects a broader problem of a lack of a consolidated or cohesive representation or record of the victims and acts of victimisation central to the Yugoslavian conflict.

The third important form of legal recognition of civilians can be found in the determination of an individual's civilian or combatant status. As chapter five showed through an analysis of trial proceedings, the negative definition of civilians means that there are no 'positive' attributes or markers that can be brought as evidence to identify civilians as such. The consequence of this deficiency is that there are no standard means for the parties to a trial to prove, or disprove, the civilian status of an individual. For that reason, social characteristics become evoked or drawn upon to make that assessment which, it was revealed, places particular scrutiny over the identification of certain groups of civilians and may work to exclude the legal recognition of their civilian victim status. It was also shown in chapter five that civilian victim-witnesses do not have any measure

of participation in trial proceedings, other than as witnesses. As chapter five argued, the failure to define civilian victim-witnesses as such or enabling their participation at trial has the consequence that the harms of their victimisation, of that of others, are not adequately recognised or addressed through the current legal framework.

The fourth important form of legal recognition of civilian victims is their recognition as a collectivity of civilians, that is, as a civilian population. As argued in chapter six, legal proceedings do not adequately recognise the ‘mixture’ of the civilian populace and its constitution through social interactions. For example, the Trial Chamber in *D. Milosević* did not adequately recognise the ‘mixture’ of the civilian populace of Sarajevo and its constitution through the social relations of its inhabitants. Through analysis of the trial proceedings, the chapter showed that the Trial Chamber failed to recognise the entirety of this civilian collectivity as the victim of the ‘terror’ under adjudication or their common experience of its perpetration as a relational harm. Instead, the Trial Chamber drew on models of collective victimisation that re-inscribed the ethnic divisions and antagonisms which reflected the aims of the perpetrators. For that reason, the current legal framework of trial adjudication does not recognise the ‘positive’ social relations and solidarity between civilians that are actively struggling to retain the mixture of this populace.

These substantive and conceptual absences in the construction of legal recognition, protection and redress of civilian victims in armed conflict by international criminal justice mechanisms indicate that it is necessary to develop and re-conceptualise the way in which these processes and procedures currently operate. The problematics and difficulties highlighted throughout the preceding chapters show that there are two main areas that require the development of new definitions, conceptualisations or practices. Firstly, it is necessary to develop a new way of defining civilians as the subjects of victimisation in armed conflict. In particular, it is necessary to construct a ‘positive’ definition of civilians to replace the current ‘negative’ definition in contemporary

humanitarian law. Secondly, it is necessary to re-consider and develop a better framework of participatory and protective practices for civilians when acts of civilian victimisation come to trial. This broadening of civilian participation and protection requires the development of two key areas. First, it requires addressing difficulties with the current practices of charging acts of civilian for their representation of the civilian victims of a conflict situation and second, the legal practices that enable such crimes to be brought to trial such as victim-witness protection and support. Following the overall conceptual and methodological approach of this thesis, the re-working of both these aspects of the legal framework necessitates employing a victim-centred approach. This development of new participatory and protective practices seeks to prioritise the interests, views and needs of the civilian victims of armed conflict. Such an approach should work to develop a better framework of practices and procedures for the construction of legal recognition, protection and redress to civilian victims of armed conflict by the ICTY prior to its impending closure, as well as the ICC and other international criminal justice mechanisms that may be established in the future.

Civilian Subjects and Protective Practices at Trial: New Rules, Definitions and Practices

(1) The Civilians Subjects of War and Law

The Tribunal describes the ‘protection of civilians in time of armed conflict, whether international or internal, [as] the bedrock of modern humanitarian law’.⁴²⁴ The rules and principles of humanitarian law understand civilians as a distinct category of persons that are legally counter-posed to combatants. As the earlier analysis shows, the large-scale victimisation of civilians necessitate that this category of persons require particular

⁴²⁴ *The Prosecutor v. Drago Josipović, Vladimir Šantić, Zoran Kupreškić, Mirjan Kupreškić, Vtlako Kupreškić and Dragan Papić*. Case No. IT-95-16-T. Judgement, 14 January 2000, para. 521 (*‘Kupreškić et al, Judgement’*).

protections during a situation of conflict. However, as this thesis has shown, the legal concept of the civilian does not figure as a coherent norm of conceptualisation or designation. When acts of civilian victimisation come before a court of law such as the ICTY, there are shifting norms of conceptualisation, as well as deficient and exclusionary categorisations that limit the possibility for the legal recognition of civilian victims and the redress of their harms. In particular, social characteristics and notions of group membership such as nationality, ethnicity, gender and age influence or determine the processes of legally recognising persons as civilians. For these reasons, it appears necessary to re-consider (1) how the principle of distinction works as a legal concept; and (2) the way in which legal mechanisms designate persons as either combatant or civilian during the prosecution of breaches of humanitarian law.

Despite the international community's increasing focus on the legal recognition and protection of civilians, it is important to note that certain commentators argue against the notion of 'civilians' as a legally recognised category of persons. In this analysis, the principle of distinction is both irrelevant and impossible to sustain due to the nature of the conduct of contemporary conflicts. For example, Swiney (2005) argues that the principle of distinction must be abandoned as it rests on an outdated conception of large-scale inter-state wars and not the internal wars of the contemporary period. In particular, Swiney argues that the principle of distinction does not capture the complexities of the 'types' of persons within internal conflicts such as military contractors, civilian settlers or civilians working for the war effort (2005: 752). Through an analysis of the protection of civilians, Johnson also draws attention to a further challenge to the civilian/combatant distinction in relation to conflicts where combatants or armed groups identify 'the entire enemy society or party, and not just its armed forces or its responsible political leadership, as the foe' and so perceive that all persons 'may be rightly targeted' (2000: 423). Drawing on this form of civilian-military relations in conflict, it is argued that the status of civilian does not have any meaning for it does not provide any measure of safety

to such persons (Johnson, 2000). As civilians are frequently and often overwhelmingly the direct targets of violence, the principle of distinction is held to be unworkable and irrelevant in practical terms.

However, this thesis suggests that there are five key reasons for retaining the principle of distinction and, as such, a category of persons legally recognised and protected as civilians. Firstly, as the victim-witnesses in the *D. Milosevic* case show, there are a substantial number of persons who explicitly choose not to participate or have any knowledge of the conduct of hostilities. These persons often actively seek to remove themselves from the conflict, maintain their normal lives as far as possible and present themselves as 'civilian' through their actions or appearance. It is argued that approximately two-thirds of persons in armed conflicts can be considered 'civilians' (Downes, 2006: 158). Secondly, as Johnson points out, in situations where 'no distinction is made between enemy combatants and enemy non-combatants, the non-combatants suffer disproportionately' (2000: 422). To remove a status of civilian from those persons who choose not to join the military or participate in their conduct therefore increases the potential of their being the target of victimisation. As such, it legitimates their sustaining of injury and harm from such attacks. Thirdly, a dismissal of the principle of distinction implies that all persons within an armed conflict may be thought of, or should be thought of, as combatants. This framing of the participants of conflict constructs a conceptual framework in which all persons are involved, to some extent, with the military and as such as choosing to participate in the hostilities. From that conception of the choices of the participants of conflict, there may be a further move to conflating all persons as potentially or actively committing violent acts, or of being complicit in acts of victimisation against others. As the victim-witnesses testimonies referred to in this thesis illustrate, such a proposition is neither tenable nor reflective of the needs or wishes of a vast majority of the civilians present in conflict situations.

Fourthly, the principle of distinction shapes the legal framework of protective rules afforded to civilians that seeks to mitigate, at least in part, such suffering (Detter, 2000). This body of protective rules prohibits the intentional or deliberate targeting of civilians and establishes the terms of the appropriate treatment of civilians if interned or within occupied territory (Henckaerts and Doswald-Beck, 2005). The principle of distinction is therefore central to the protection of civilians and civilian objects as the rule ‘of targeting only combatants and military objectives, is only made possible when the parties to a conflict have distinguished combatants from civilians’ (Maxwell, 2004: 18). Without the designation of the distinction between such persons and objects, the provision of specific protections to civilians cannot be made. For that reason, as Alexander Downes argues, a dismissal of the distinction between civilians and combatants is unacceptable as the designation of civilian status ‘makes a difference as to whether they may be killed’ and under which circumstances (2006: 157). As Downes suggests, the designation of civilian status establishes a certain measure of safety and security to this specific category of persons through the protective rules and norms afforded to them through the principles of humanitarian law. However, as indicated previously, it should be noted that ‘humanitarian law provides *minimum* standards applicable to the most vulnerable in situations of armed conflict’ (Panyarachun, 2004: 232).⁴²⁵ This body of law does not, for example, prevent or provide protection from instances of collateral damage or from many other forms of indirect civilian victimisation such as lack of food, healthcare or an impoverished environment (see Slim, 2007).

Fifthly, therefore, abandoning the legal status and category of ‘civilian’ may work towards dismissing the very notion and necessity of the existence and enforcement of a legal framework of protective rules for such individuals and collectivities. That position could lead to there being no restraint on the conduct of warfare and thus no condemnation of civilian victimisation. It would re-invoke an older argument that this body of law ‘is in

⁴²⁵ Emphasis added.

the final account nothing more than camouflage and fraud', that the 'failures of conflict-restraint in our own time' and throughout history evidence that it is neither effective nor useful (Best, 1994: 9, 15). Accepting such a proposal would not only inevitably place civilians in a situation of conflict at further risk, but also negate any possibility for further enhancing the protective measures that civilians require. If we take account of the unnecessary and prolific harm sustained and articulated by the victim-witnesses that have been referred to throughout this thesis, the dismissal of such a project is undoubtedly unacceptable. Instead, as the testimonies of those victim-witnesses that actively sought legal recognition of their own status as civilian victims and that of others illustrates, it is necessary to affirm the importance of a 'civilian' status and the protection that it affords to this category of persons. However, as has been shown, the difficulties of constructing civilian status through legal practices suggests that it is also necessary to consider the development of a better definition of civilian status which enables a more effective process of constructing legal recognition of such victims when their harms come before a court of law. This process of re-defining civilians should, at least in part, work to provide a more comprehensive framework of legal address and redress to this category of persons in instances of the breach of the protective rules of humanitarian law.

Re-defining the Civilian Subjects of War and Law

Within the field of humanitarian law, the possibility for its protective rules for civilians to develop and change is a central aspect of its form and functioning. First seen in the 1899 Hague Conventions on the Laws and Customs of War on Land, the updated version of the principles termed the 'Martens Clause' in Additional Protocol I determines that:

In cases not covered by this Protocol or by any other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.⁴²⁶

⁴²⁶ API, Article 1(2).

A conception of ‘protection’ for civilians and combatants thus serves as an underpinning and guiding principle of humanitarian law. As the terms of the Martens Clause set out, humanitarian law is, and should remain, a historically enduring and evolving body of protective rules and customs. The Clause enables the provision of protective ‘norms in cases where there is no textual support’ (Detter, 2000: 375) and so ‘confirms[s] the continuance of customary law’ (Rogers, 2004: 7). During the course of its adjudication of the crimes and criminals of the Yugoslavian conflict, the ICTY has drawn upon the Martens Clause to affirm that the prohibition of attacking civilians emanates from this Clause and determine that potential illegalities must be interpreted so as ‘to expand the protection accorded to civilians’ (see Meron, 2000b).⁴²⁷

In this way, the Martens Clause not only affirms that a notion of protection for civilians serves as a guiding principle of humanitarian law, but that this protection does not figure as a static judicial determination. Employing the terms of the Clause alongside a Bourdieuan framing of the ‘transformative potential’ of the rules and practices of the juridical field therefore provides a useful framework for understanding how such practices can continue to be a site of development and change (see Hagan *et al*, 2006: 587). As such, the difficulties and deficiencies set out in this thesis can serve as a basis to consider how to re-formulate and develop a more effective framework for the construction of legal recognition and protection of civilians. The most important rule that requires examination and re-formulation is the current definition of civilians. In order to develop a better definition of civilians, it is first necessary to indicate two key areas of difficulty with the existing framework of humanitarian law and the terms of its enforcement. These are the conceptual problems with the ‘negative’ definition of civilians and the exclusion or inadequate recognition of particular groups of civilian victims through the current trial practices of this mechanism of international criminal justice.

⁴²⁷ Kupreškić *et al*, Judgement, para. 525.

As this thesis has shown, the principle of distinction inherent in humanitarian law describes that it is necessary to distinguish between civilians and combatants as categories of persons. The customary rules of humanitarian law describe that combatants are persons who take a direct and active part in hostilities (Henckaerts and Doswald-Beck, 2005: 12). The recognition of persons as combatants is always contextual. For example, the wearing of a uniform, an insignia and carrying weapons openly are signifiers of a person being a combatant (Palmer-Fernández, 1998: 518). In this way, there is a 'positive' definition of combatants as a distinct category of persons present and participating in a situation of conflict. There are specific 'markers' of combatant identity that distinguish such persons in their own terms and without reference to any other category of persons. Combatants are therefore identifiable as such through their actions and appearance during a situation of conflict.

However, the rules of humanitarian law do not set out a 'positive' definition of civilians, either as individuals or collectivities. Civilians are defined in the negative: they are all persons who are not combatants (Sassòli and Bouvier, 2006). This conceptual framing of the participants of war thus fails to attribute a distinct identity to civilians as a category of persons present in situations of conflict. The negative definition of civilians means that there is no conception of 'who' a civilian may be, nor any determination of typical 'markers' or features that could identify or distinguish such persons. For that reason, the process of legally recognising and defining persons in situations in conflict rests on an interpretation of their nexus to the military. Whether by military personnel or the adjudicatory processes of a court of law, the assessment of a person's status focuses on whether they are or are not a combatant, rather than whether they are a civilian or not. For example, in *D. Milošević* the Trial Chamber made its assessment of the status of the victims of the accused as civilian victims through an interpretation of their forms of action and appearance as not being characteristic of being a combatant (see chapter five). In this framework, persons are either combatants and thus have the 'right to fight', or are

not combatants and so are lacking the 'privilege' of being able to actively participate in hostilities (Nabulsi, 2001).

If the principle of distinction fails to construct civilians as a category of persons with a distinct identity, it also fails to recognise the agency of such persons in terms of their choices and actions during situations of conflict. Kinsella points out that since its earliest manifestations, the civilian has been seen 'as an "innocent" and as a "protected person"' rather than an agent (2005: 257). Similarly, Jones and Cater note that civilians are typically 'termed [as] "those who are passive"' (2001: 250). However, as noted above, the negative definition of a civilian does not give any 'content' to what a civilian may be. For this reason, there is no conception of civilians as agentic persons who actively seek to act as civilians and not as combatants during a situation of conflict. While this category of persons undoubtedly requires protection and assistance, this conception of 'innocent' or even 'passive' civilians does not align with the reality of the agentic qualities of their choices and actions in situations of conflict. As the civilian victim-witnesses referred to in chapter five illustrate, the very basis of their self-characterisation as civilians was their informed choice *not* to participate in the hostilities and the active struggle to maintain their normal lives. It was this agency of choosing to be a civilian rather than a combatant that shaped and gave meaning to their understanding of being present and participating in the siege of Sarajevo as a civilian. There was not a perception of being a 'passive' participant or 'non-combatant', but of actively retaining and enacting their civilian status through their choices and actions.

As well as there being significant conceptual problems with the definition of civilians, exploration of cases heard by the Tribunal also highlights difficulties with the current practices of trial proceedings that recognise harms to civilians. A central issue for cases such as *Galić* and *D. Milošević* is the identification of the civilian status of the victims of the accused. However, analysis of trial proceedings illustrates two key problems with the

current processes of defining and legally recognising civilians during trial proceedings. Firstly, the lack of a distinct definition of a civilian means that there is no foundation or standard means through which the parties to a trial can prove, or attempt to disprove, the civilian status of an individual or collectivity of civilians. As set out in chapter five, when ‘victim-specific’ charges of civilian victimisation are brought to trial, the victims themselves and the Prosecution have to ‘prove’ that they were civilians at the time of the perpetration of a crime against them. For this reason, the Prosecution sought to present particular ‘markers’ that were understood to demonstrate the civilian identity of the individual civilian victims. However, the negative definition of civilians means that there are no definitive markers of civilian identity. There are no foundational aspects of a person’s identity, actions or appearance that can be brought as evidence to unequivocally prove such a status and thus aid the construction of legal recognition of civilian victims by the Trial Chambers. The absence of a definition of civilian identity suggests that the construction of persons as such will ultimately rest on a legal determination that the person was not a combatant. It also suggests that there will always be legal debate and enquiry as to whether the victim was in fact a combatant, or whether there were reasonable grounds for the perpetrator of violence to consider that they held this status.

Secondly, my analysis of cases heard by the Tribunal, building on the work of other commentators, has shown that there is an assumption that certain social categories of persons are more likely to be civilians than others. Despite the rules of humanitarian law describing that *all* persons who are not combatants are civilians, social characteristics are often evoked to either substantiate or attempt to exclude particular categories of persons from being designated the status of civilian. For example, exploration of the *D. Milošević* case drew attention to the conceptual conflation of young males as being ‘potential combatants’ during a conflict (see also Carpenter, 2006a). Cases including charges of crimes committed during the Srebrenica genocide describing the victims as ‘men of a military age’ indicates that the status of male persons is not only held to be ambiguous,

but that there may be no legal recognition of their status as either civilian or combatant.⁴²⁸ In contrast, however, women have long been associated with conceptions of ‘innocence’ and ‘passivity’ and thus given nexus to being a civilian in need of protection (see Kinsella, 2005).⁴²⁹ As Carpenter points out, ‘the “civilians” frame has been distorted by reliance on a proxy – “women and children” – that both encompasses some combatants (female and child soldiers) and excludes some non-combatants (adult civilian men)’ (2005: 296). This conceptual framing of the participants of war thus leads to the potential of legal mechanisms failing to recognise certain civilians as holding that status, or at the least making them the subject of particular scrutiny. It undermines the very precept of humanitarian law that *all* persons who are not combatants should find safety and security from its protective framework of rules and principles. As Bruderlein points out, the practice of ‘grouping’ civilians may problematise efforts to ‘proclaim generic standards or “fundamental principles” to protect all civilians in all circumstances’ (2001: 225).

For these reasons, it appears necessary to construct a ‘positive’ definition of civilians that captures the nature of their presence and participation in situations of conflict. This definition requires a conceptualisation of civilians as a category of persons in their own terms, rather than through a nexus to the military. Civilians are ‘individuals who do not choose to engage in armed conflict, who seek only to go about their lives and participate in their communities’ (Slaughter and Burke-White, 2002: 67). Therefore, civilians are ‘agentic’ persons – they choose not to participate in conflict as part of the military or, in many cases, even know of its conduct.⁴³⁰ As the civilian victim-witnesses referred to in chapter five indicate, it was the enactment of this choice which defined their identity as a civilian and shaped how they acted during the conflict. Their agency of choices and actions figured as the means through which to separate their status and participation as a

⁴²⁸ See chapter four.

⁴²⁹ As noted throughout the chapters, the construction or denial of legal recognition of civilian victims has also worked through the evoking of social characteristics of nationality and ethnicity, as well as gender and age.

⁴³⁰ Fieldwork, *Djordjević*, 6 February 2009.

civilian from those persons who comprised the military group(s) in that geographic area. However, although this choice not to participate in the military conduct of a conflict reflects one aspect of the actions and agency of civilians, this definition of civilians remains in the 'negative' and so does not overcome the nexus to the military.

If one aspect of the identity of civilians is their choice not to participate in conflict, then the other main factor defining this status is their active struggle to maintain a normal life amid the violence. For example, an expert witness in the *Perišić* case articulated that civilians could be identified through their attempts 'to just get on with normal life'.⁴³¹ It is this maintenance of normal life, as far as is possible in a conflict situation, that was referred to by civilian victim-witnesses through their carrying out of actions such as cooking and collecting firewood (see chapter five). These actions display their agency in carrying out actions to protect themselves and others from the harms of a situation of conflict. However, there are difficulties with numerating specific actions that can definitively identify or 'prove' civilian status. For this reason, a definition or identification of civilians through their attempts to maintain their normal life must necessarily be contextual in similarity to the contextual defining of combatants. Whether by the military or a court of law, the interpretation of civilian status through the actions of persons must always take account of the particular features of the environment, of the presence of systematic violence such as shelling for example, as well as the overall context of the armed conflict. An interpretation of the actions of 'normal life' has to consider the different means that a civilian may utilise to protect themselves and others from forms of both direct and indirect violence.

Therefore, if a contextual notion of the maintenance of normal life as an aspect of the presence and participation of civilians is conceptually and analytically prioritised, the definition of civilians put forward by Slaughter and Burke-White can be re-formulated to

⁴³¹ Fieldwork, *Perišić*, 2 February 2009.

‘civilians are individuals who choose to maintain their normal lives and participate in their communities’. As such, this re-formulation constructs a ‘positive’ definition which provides a means to understand and identify civilians as a category of persons in their own terms. This definition overcomes the reliance of conceptualising or identifying civilians only in relation to their lack of a connection with the military. It conceptually prioritises the agency of civilians in choosing to maintain their normal lives and protect themselves and others. This re-worked definition therefore conceptualises civilians as a distinct category of persons through the nature of their ‘positive’ choices and actions.

This new ‘positive’ definition of civilians also enables us to re-consider how the process of legally recognising civilians could be undertaken during trial proceedings. Firstly, this positive definition of civilians can be used to develop a framework through which the parties to a trial could recognise persons as civilians. It can work to frame definitional qualities of a civilian in the same manner as wearing a uniform, an insignia and carrying arms openly, are specified as ‘markers’ of combatant identity (Palmer-Fernández, 1998: 518). As has been set out throughout the thesis, the designation of persons as either combatants or civilians rests on the nature of their choices and actions, namely, whether they are directly participating in the hostilities or not (Rogers, 2004). The development of a framework through which to identify civilians can therefore begin with the identification of choices and actions that signify persons who are attempting to maintain their normal lives and participate in their communities. For example, the carrying out of tasks such as cooking, shopping or, as an expert witness drew attention to, carrying water to their homes, are all ‘markers’ of civilians trying to maintain a normal life.⁴³² Such tasks, as this witness described, are not typical actions of a combatant.⁴³³ Although, as Palmer-Fernández points out, there will always be ‘grey areas’, of persons whose actions may not be easily distinguishable as ‘civilian’ or ‘combatant’ (1998: 515), the

⁴³² Fieldwork, *Perišić*, 2 February 2009.

⁴³³ Fieldwork, *Perišić*, 2 February 2009.

development of a framework of actions understood as markers of civilian identity shifts the focus of trial proceedings away from notions of what a combatant would not be or do, to a conception of who a civilian is through their choices and actions. It would work to frame an account of 'positive' markers of civilian identity that could be used as evidence at trial to support the 'adjudication' of the identity of such persons.

Secondly, then, this framework of civilian choices and actions can be used to develop a standard and consistent basis through which the parties to a trial can approach the process of legally recognising persons as civilians. As noted in chapter five, there is no standard legal practice for approaching the task of identifying persons as civilians. Rather, the parties to a trial utilise different approaches, and often evoke notions of social characteristics such as age or gender to either substantiate or exclude persons from having a civilian status. However, by developing a positive definition of a civilian and a framework of actions that works to identify such persons, there can be a subsequent development of a standard basis through which to adjudicate the identity of persons as civilians. This standard basis of identifying persons would not start with an assumption that a person was or could be a combatant, such as through their being a young male for example, but instead would begin with ascertaining whether the person displayed choices or actions of being a civilian such as those outlined above. This new legal practice could therefore work to overcome the problematic use of evoking social characteristics to infer that certain groups are more likely to be combatants, or conversely more likely to not hold that status. It could provide a new legal framework that enables all civilians to equally be defined and identified as civilian victims of acts of harm during conflict.

(2) Protective and Participatory Practices at Trial

Alongside the utilisation of this new 'positive' definition of civilians, it is also necessary to develop a legal framework that both protects civilian victim-witnesses and allows for

them to participate more fully in trial proceedings. As set out during the preceding chapters, the ICTY does not formally recognise persons as being different ‘types’ of witnesses, such as civilian victim-witnesses (Tolbert and Swinnen, 2006). Nor does it provide these witnesses with a participatory role during legal proceedings in terms of being able to articulate their experiences of victimisation and consequent harms before the Chambers, unless it is integral to the evidential process. For these reasons, it can be seen that victim-witnesses figure as ‘passive objects’ in the legal process rather than persons central to the very ability of the ICTY to prosecute and punish Yugoslavia’s war criminals (Jorda and Hemptinne, 2002: 1389).

Recent developments in legal practices and academic literatures are increasingly prioritising forms of ‘restorative’ justice to shape the role and positioning of the victims of the crimes of war within institutional practices (see Mani, 2002; Bassiouni, 2006). These new notions of ‘restorative’ justice can therefore provide a useful means to explore the development of legal practices that give civilian victims a more inclusive and participatory role throughout the course of legal proceedings. I draw on the principles of restorative justice to develop a series of strategies that would provide civilian victims with a greater role in legal proceedings. The following suggestions do not attempt to reformulate the entirety of the legal process or make civilian victim-witnesses ‘parties’ to the trial as the procedures of the ICC have sought to do.⁴³⁴ Instead, these are practical proposals that, it is suggested, would contribute to this category of witnesses having a degree of ‘ownership’ of the process and making the experience of testifying more productive and beneficial than is currently the case. My suggested strategies focus on the development of two key areas of the legal framework. Firstly, I consider how the structure of criminal prosecutions could provide a more adequate record of the civilian

⁴³⁴ Fieldwork, International Criminal Court, *The Prosecutor v. Thomas Lubanga Dyilo*, 5 February 2009 (‘Fieldwork, ICC, *Lubanga*’). It is too early in the ICC’s functioning to know how successful its more ‘victim-centred’ approach will be. Although there are many commentators who praise its efforts to provide a more comprehensive framework of participation and redress for victims, it is important to note that there are critiques and debates over the effectiveness or practicalities of this approach (see Trumbull, 2008).

victims and acts of victimisation in a situation of conflict and secondly, a re-formulation or amendment of legal practices that would work to provide civilian victims with a greater level of participation and protection during the various stages of trial proceedings.⁴³⁵

As discussed in chapter one, there has been an emerging trend in academic literatures and debate which argues that international criminal justice mechanisms should function to recognise and provide 'remedy' to the civilian victims of armed conflict as well as prosecute the perpetrators of criminal conduct (Aldana, 2006; Bassiouni, 2006).⁴³⁶ Typically characterised as a move toward the provision of 'restorative' justice, this body of scholarship generally considers that legal mechanisms and practices of retributive justice as they currently exist can render the victim 'invisible' or even cause their re-victimisation through the 'harshness' of the adversarial process (Aldana, 2006). A number of studies exploring the forms of remedy that are available to victims through both legal and non-legal transitional justice mechanisms describe that the inadequacies of their current practices are a consequence of their perpetrator-orientated focus (see Chifflet, 2003; Mani, 2002). For this reason, proponents of restorative justice principles consider that it is necessary for international criminal justice mechanisms to shift from a predominant focus upon the prosecution of perpetrators to a framework of legal practices that provides for the inclusion and remedy of victims of conflict (Bassiouni, 2006).

This new focus upon the civilian victims of armed conflict and their need for redress has not, however, only arisen in academic scholarship and legal debate. Rather, the various bodies of the United Nations have increasingly identified the civilian victim of a violation of humanitarian law as holding the 'right' to recognition and remedy for their harm by a

⁴³⁵ There are, of course, many areas of legal practice that could be developed to provide a better framework of victim-centred justice and figure their needs and interests within trial processes. Due to the constraints of this project, this section focuses on the prosecutorial strategy of charging acts of civilian victimisation and the participation and protection of civilian victim witnesses during legal proceedings.

⁴³⁶ United Nations, Principles on the Right to a Remedy.

‘justice mechanism’.⁴³⁷ In particular, the United Nations Principles on the Right to a Remedy determines that victims have the right to:

- (a) Equal and effective access to justice;
- (b) Adequate, effective and prompt reparation for harm suffered;
- (c) Access to relevant information concerning violations and reparation mechanisms.⁴³⁸

This conception of the victim of the violence of armed conflict constructs a relationship between their being the holder of ‘rights’ and the formation of official recognition of this status of being a victim. There are numerous critiques of the provision and use of ‘rights’ models and frameworks and the terms of their enforcement (see Charlesworth *et al*, 1991). However, this specific formulation of rights by the UN provides an important potential to challenge and overcome the traditional ‘societal imbalances’ in ‘social positions’ held by victims and perpetrators (Charlesworth *et al*, 1991: 635). By framing the processes of transitional justice mechanisms as having to encompass specific forms of participation and ‘redress’ for victims, as well as founding accountability of perpetrators, the UN’s framework of rights conceptualises *both* these categories of persons as having a role and position within their practices.

Patricia Williams points out that the potential of a rights framework lies in the ability for the bearer of these rights to find ‘visibility’ within institutional structures (1987: 431). As Williams suggests, the holding of rights enables the ‘inclusion’ of persons within a previously exclusionary process or practice, such as a legal framework (1987: 431). The institutional practices of the ICC provide an important example of the ‘inclusion’ of traditionally excluded persons through the granting of rights to victims. Stahn *et al* contend that the ICC’s legal practices represent a ‘major structural achievement’ (2006: 219). This ‘structural achievement’ figures through the recognition of victims as

⁴³⁷ United Nations, Principles on the Right to a Remedy; Resolution 1674; Resolution 1738.

⁴³⁸ United Nations, Principles on the Right to a Remedy, para. 11.

participants and ‘parties’ to its legal proceedings.⁴³⁹ The ICC describes how victims have the opportunity to present ‘their views and observations’ before the Court (Article 68(3)), although the practices of legal proceedings appear to limit the possibility for victims to have a comprehensive participatory role.⁴⁴⁰ In this way, the granting of rights to victims shifts the framework of legal practices from simply founding criminal accountability of the perpetrators to establishing a ‘balance between retributive and restorative justice that will enable the ICC . . . to help the victims themselves obtain justice’.⁴⁴¹ Alongside the UN’s ‘Principles on the Right to a Remedy’, therefore, the ICC’s granting of rights to victims exemplifies the growing notion that transitional justice mechanisms should function for both victims *and* perpetrators as subjects of their practices.

Civilian victims can therefore, be seen to figure as subjects, rather than mere objects, of the ICC’s legal practices. This important recognition that civilian victims should be subjects of transitional justice mechanisms figures through their ‘right’ to ‘access justice’ and have a participatory role in proceedings.⁴⁴² How, then, could the participation of victims re-configure the role of subjects within the ICC’s legal practices and those of future international criminal justice mechanisms? How can the new notions of restorative justice provide a framework for international criminal justice mechanisms to have a more adequate focus upon the ‘disclosure of truth and public recognition of wrongdoing’?⁴⁴³ And how can we develop the current practices of the ICTY and suggest new practices for

⁴³⁹ <http://www.icc-cpi.int/victimissues.html>. Although neither the ICC Statute or its Rules of Procedure and Evidence describe victims as ‘parties’ to a case (see Article 68; Rules 89-93), the Trial Chamber in *The Prosecutor v. Thomas Lubanga Dyilo* did refer to victims and witnesses as ‘parties’ to the trial proceedings (Fieldwork, *Lubanga*, 5 February 2009).

⁴⁴⁰ For example, victims are not ‘present’ in the courtroom themselves. Rather, their ‘views and concerns’ are put forward by their legal representatives during the trial process (Fieldwork, ICC, *Lubanga*, 3-5 February 2009). It is also important to note that a number of applicants who wished to participate as victims in the Lubanga trial were refused participating status. This was either due to their application forms being incomplete, the incidents being outside of the time frame of the charges or the applicants being older than 15 years at the time of their alleged recruitment (see *The Prosecutor v. Thomas Lubanga Dyilo*. Case No. ICC-01/04-01/06. Decision on the Applications by Victims to Participate in the Proceedings, 15 December 2008).

⁴⁴¹ <http://www.icc-cpi.int/victimissues.html>.

⁴⁴² See also Jorda and Hemptinne (2002).

⁴⁴³ Mani (2002: 174).

the ICC's framework so as to enable civilian victims to have a more inclusive role and 'active participation' during legal proceedings?⁴⁴⁴

Most importantly, as Duff *et al* point out, a participatory role would 're-position the victim as one of the central agents in the process' (2007: 200). From this new positioning, it can be argued that the participation of victims would serve two functions. Firstly, as Duff *et al* suggest, recognising victims within trial processes 'might help ensure that the case for the prosecution is presented in the most effective way' (2007: 214). In both practical and evidential terms, victims 'are generally best placed publicly to describe and give an account of the way in which crimes have been perpetrated' as they experienced the conduct under adjudication (Jorda and Hemptinne, 2002: 1400). Therefore, as Jorda and Hemptinne point out, if granted a more central role in criminal processes, and the opportunity to provide a fuller account of the crimes under adjudication than is currently the case, it is possible that victims could 'establish more accurately the truth' which may 'assist the judge by clarifying the facts of the case' (2002: 1400, 1397). In this way, civilian victims could contribute to the construction of a more accurate or comprehensive 'collective memory' or representation of the prior hostilities. This form of collective memory would encompass not only the criminality of the perpetrators, but also make visible the experiences of victimisation by both individuals and collectivities of victims. As such, civilian victim participation at various stages of the proceedings could potentially overcome the current problems of legal accounts of armed conflict arising primarily from the choices and decisions of the prosecutor, as discussed in chapter four.

Secondly, the provision of a personal and participatory role for civilian victims may 'make the international criminal justice system more "transparent" in relation to them' (Jorda and Hemptinne, 2002: 1397). By allowing victims to participate more fully during legal proceedings, it would appear reasonable to suggest that there would necessarily be

⁴⁴⁴ Sriram (2001: 60).

more information and greater access to processes of justice for this group of persons. Moreover, a re-configuration of criminal processes as more 'victim-centred' could serve to make legal decisions and judgements appear more relevant or authoritative to the individual and collectivities of victims of the hostilities. As such, in addition to a more encompassing system of protective measures, a framework of civilian victim participation may encourage other victims of war crimes to come forward to narrate their sustaining of crimes to investigators and to testify to these harms within legal institutions. Although it is much debated, a related consequence may be that they hold a greater value of deterrence and so are more active in 'preventing [the] repetition of crimes' (Jorda and Hemptinne, 2002: 1397).

Charging Acts of Civilian Victimisation

As chapter four shows, the charges and cases brought before the Tribunal reveal significant selectivities in the modes of civilian victimisation that become the subject of legal adjudication. The patterns in the charges of crimes against humanity, in particular the notable few numbers of charges of enslavement, rape and imprisonment, do not follow the trends in the acts of civilian victimisation that authoritative accounts narrate were central to the conduct of the Yugoslavian conflict. Moreover, they show significant selectivities in their construction of legal recognition of particular groups of civilian victims, in particular as the analysis sets out, of female civilian victims as the targets of victimisation.

The most effective means to overcome, at least in part, these partialities is to adopt that which Ewald terms a 'victimological approach', namely, to take the 'appropriate representation of all significant victim issues and victim needs' as the guiding principle of

a prosecutorial strategy (2006: 185).⁴⁴⁵ This representative approach should seek to legally record the particular patterns and trends of acts of civilian victimisation of a conflict through two main, but necessarily related, practices. Firstly, it is necessary for prosecutions to represent the central ‘sites’ or instances of the collective victimisation of civilians across the particular geographic area. The focus of this approach should be to ‘systematically reflect the victimising results’ of the different forms of civilian-combatant interactions that were perpetrated in different areas of a conflict (Ewald, 2006: 185). As noted in chapter four, different regions of the Yugoslavian conflict were characterised by the perpetration of differential forms of civilian victimisation, for example the siege of Sarajevo by sniping and shelling, and the Srebrenica genocide by the mass killing of Bosnian Muslim men and boys. Utilising a prosecutorial strategy that represents the main ‘sites’ of civilian victimisation should therefore work to capture the different modes of such victimisation that were perpetrated during the course of a conflict. Consequently, it should represent the different categories of civilian victims that were the direct or indirect target of victimisation and violence. Indeed, the representation of all categories of civilian victims based both on their social characteristics such as gender or ethnicity, as well as the forms of victimisation perpetrated against them should be an integral aspect of this representative approach.

However, this representative approach also necessitates taking account of the different ‘levels’ of accused and crimes that are brought to prosecution. It is an inevitable aspect of criminal prosecutions that the most senior leaders will be, and should be, charged for their responsibility in planning and ordering criminal conduct (Del Ponte, 2003). However, as Schrag notes, it is also necessary to prosecute lower-level accused who themselves committed acts of violence so as to ‘bring a personal sense of justice to the victims’ (1997: 21). As many civilian victim-witnesses emphasised during their testimonies, they

⁴⁴⁵ See also Campbell (2007) and Schrag (1997) for arguments that the ICTY or other legal institutions should utilise a representative model of prosecutions.

wanted to see the person who personally committed the crimes against them, their family or the broader community brought before the Chambers.⁴⁴⁶ For this reason, the second aspect of this victim-centred prosecutorial approach necessitates the charging of both high and low level accused and their crimes *throughout* the course of the functioning of a legal institution or its prosecution of particular regional atrocities. This practice should work to overcome the current practice of typically bringing lower-level accused to trial at the early stages of prosecutorial functioning which creates the impression that these ‘direct’ crimes and the civilian victims of their harms are of lesser concern to the international community. By bringing charges against a representative selection of lower-level accused for acts of civilian victimisation throughout the prosecutions, the legal institution would be seen to take all forms of victimisation and violence as equally of concern to the practices of international legal adjudication. Such an approach should therefore retain a more effective ‘connection’ to the victims of the conflict by actively prosecuting representative cases of personal harm and constructing a collective memory of such conduct. It would move from a predominantly perpetrator-orientated focus to a ‘victim-centred’ prosecutorial approach which reflects the different categories of civilians victims subjected to harm and the perpetration of different modes of victimisation during the conflict.

Re-defining Protective and Participatory Legal Practices

In terms of the protection and participation of victim-witnesses, the most important practice for international criminal justice mechanisms to employ is an institutional recognition and definition of different categories of witnesses and, in particular, the recognition of a distinct category of persons who are ‘civilian victim-witnesses’. The designation of witnesses as civilian victim-witnesses could draw upon the ‘positive’ definition of civilians set out above to distinguish their status in terms of the principle of

⁴⁴⁶ Fieldwork, *D. Milošević*, 19 June 2007.

distinction. It would then apply to civilians who are victims, that is, to those persons who have either directly or indirectly experienced harm from the acts of victimisation and violence under adjudication and come to trial to narrate its perpetration.⁴⁴⁷

This recognition of civilian victim-witnesses would also necessarily construct a conceptual and legal framing of this category of persons as ‘agents’. This category of witnesses must be understood as ‘agents’ for their ‘civilian’ choices and actions in the conflict, but also in recognition that they often need or wish to testify to their harms or those of others, as the testimonies in chapter five illustrate. Utilising this conception of civilian victim-witnesses as agentic persons can therefore frame an exploration into how, as McEvoy and McGregor describe, ‘institutions of transitional justice can broaden *ownership* and encourage the *participation* of those who have been most directly affected by conflict’ (2008: 5).⁴⁴⁸ It is suggested that the process of designating persons as civilian victim-witnesses should be undertaken by the ‘neutral’ body of the VWS,⁴⁴⁹ rather than the Prosecution or Defence (who may have an interest in the designation or non-designation of this status to its witnesses). It is also suggested that the development of the participatory and protective practices outlined below should build upon the VWS’s existing framework of protective measures and be undertaken in consultation with its staff members for their invaluable experience of enabling civilian victims to testify before the Trial Chambers.

There are three key reasons for developing a practice of categorising witnesses and employing a conceptual and legal category of ‘civilian victim-witness’. Firstly, it recognises civilian victim-witnesses as a distinct category of witnesses (and victims) for their particular experience of conflict as persons who have chosen to maintain their

⁴⁴⁷ Following the definition of a ‘victim-witness’ set out in chapter five.

⁴⁴⁸ Emphasis original.

⁴⁴⁹ Interview with staff member of the VWS, 3 February 2009. The VWS is part of the Registry and therefore is neutral in the sense that it is not connected to any of the parties (Tolbert and Swinnen, 2006: 200).

normal lives and not participate in military conduct and yet have been (allegedly) subjected to direct or indirect victimisation and violence. Secondly, such designation can serve as a basis for the establishment of a distinct unit within the VWS or specialist staff to focus specifically on the needs and protections that this category of witnesses, as distinct from other categories of witnesses, require throughout legal proceedings (see Stover, 2005). Thirdly, the categorisation of witnesses as civilian victim-witnesses enables the construction of a more participatory and protective framework of legal practices for these witnesses throughout the judicial process, as will be set out below. It can begin to shift the framework of international criminal trials from a predominantly perpetrator-orientated approach to a legal process that provides a substantive role for the civilian victims of situations of conflict.

In order to develop a more comprehensive framework of civilian victim-witness participation and protection, it is important to recognise that legal proceedings do not simply comprise of the trial in the courtroom, but also pre-trial and post-trial practices. For this reason, this section makes several suggestions for new legal practices that figure as a framework of rights held by civilian (and non-civilian) victim-witnesses to enhance their participation and protection in each phase of legal proceedings. Framing these new legal practices in terms of rights held by victim-witnesses works to prioritise and enable the 'visibility' and inclusion of these persons with legal proceedings, as Williams' conception of the potential of rights describes. A rights framework also ensures that all victim-witnesses have equal access, entitlement and information to these new participatory and protective practices.

Firstly, international criminal justice mechanisms should ensure that they assign a designated VWS contact to civilian victim-witnesses (and other victim-witnesses) at the earliest opportunity during pre-trial proceedings who remains their contact throughout the

course of the legal proceedings, to the greatest extent that is practically possible.⁴⁵⁰ This VWS contact would act as a neutral 'link' to the Tribunal or any other international criminal justice mechanisms in the sense of being separate from the Prosecution or Defence, and provide information on the nature of the legal process and assess any possible issues of support or protection that could arise from their giving testimony. In this regard, the VWS contact should ensure that the victim-witnesses have adequate knowledge of the location and work of the legal institution's field-offices if applicable, as well as the relevant support services within their region such as the police, social services and any NGOs which could provide assistance should it be needed.

Secondly, it is necessary for a VWS contact to undertake a standard 'familiarisation' process with victim-witnesses once they arrive at an international criminal justice mechanism to give evidence. This familiarisation process should include an opportunity to visit the courtroom before the day of testifying so that the witness is made aware of where they will testify as well as the actual physical layout of the courtroom.⁴⁵¹ A staff member of the VWS emphasised that victim-witnesses often wish to know where the accused in particular will be seated and their proximity to him or her, as well as where the Prosecution and Defence lawyers are positioned.⁴⁵² Although it is already an aspect of the pre-trial process, it is also important to emphasise that all witnesses should be fully informed of the structure of the trial process, that is, that both the Prosecution and Defence may put questions to them and not only the party who has called them to testify.⁴⁵³

⁴⁵⁰ Although the VWS of the ICTY does already assist witnesses during their stay in The Hague, it is not does not appear that they have the same staff member as a specifically designated contact ('Information booklet for ICTY witnesses, 2007'; supplied by a staff member of the VWS). This is not to suggest that the designated VWS contact would not be assisted by staff members in the support, operations and protection units for their specialist roles and work.

⁴⁵¹ The VWS of the ICTY do provide a 'familiarisation' process with witnesses. However, it does not appear that this is a standard procedure, but rather that it is conducted at the request of the witnesses themselves (Interview with a staff member of the VWS, 3 February 2009).

⁴⁵² 3 February 2009.

⁴⁵³ Information booklet for ICTY witnesses, 2007. During one instance of testimony it appeared that the civilian victim-witness was unaware that they would be examined by the Defence as well as the Prosecution who had called them to testify (Fieldwork, *Perišić*, 4 February 2009).

During the trial itself, it is possible to improve the participation and protection of victim-witnesses through the development of two legal practices. Firstly, victim-witness should have the right to request protective measures during their testimonies. The lack of provision of protective measures for some witnesses has led to them refusing to testify or, it has been alleged, of being subjected to violent reprisals after they have given evidence.⁴⁵⁴ This process of applying for protective measures, if the witness desires to make such a request, should be undertaken with the assistance of their VWS contact, as few persons are likely to be familiar with the particular legal procedures of the ICC or those of any other international criminal justice mechanisms. It is possible to foresee an obvious opposition to witnesses being able to request protective measures, that is, that a large number of witnesses would do so and thus compromise the 'public' and transparent nature of legal proceedings. However, fieldwork at the Tribunal as well as close reading of trial transcripts of various cases does not appear to substantiate such a claim. Instead, as set out in chapter five, the majority of civilian victim-witnesses wished for their experiences and the (alleged) actions of the accused were made public to the international community. It appears unlikely that protective measures, in particular closed sessions, would be requested frequently unless the civilian victim has a substantive and important reason for doing so.

The second way in which civilian victim-witnesses could participate more fully in trial proceedings, even if it were not in person, is through the admission of victim-impact statements during the adjudicatory process. Victim impact statements 'allow victims to express, unencumbered by evidentiary restrictions, their pain resulting from the crime, and sometimes their desire for justice' (Aldana, 2006: 111). The use of this process could therefore enable civilian victim-witnesses to narrate their experiences of harm more expansively than is possible during the process of examination and cross-examination by

⁴⁵⁴ Interview with a staff member of the VWS, 3 February 2009. See also Stover (2005).

the Prosecution and Defence. In cases that concern the fatality of an individual or collectivities, it should also be possible for their relatives to put forward such a statement in regard to their 'indirect' experience of violence. The practice of admitting victim-impact statements is already an established procedure in some national jurisdictions and various truth commission models (see Aldana, 2006: 111). It has not, however, been an aspect of the ICTY's trial process to date.⁴⁵⁵ Employing this process of allowing victim-impact statements to be given during the trial should serve to provide a greater inclusivity and participation for civilian victim-witnesses. It would make the narration of harms that stem from the actions of the accused an aspect of the criminal process that it is not necessarily tied to the process of proving, or disproving the perpetration of criminal conduct.

Finally, it is necessary for the ICTY to retain a 'connection' with civilian victim-witnesses once they have given evidence at trial. As noted in chapter five, many civilian victim-witnesses seek to remain in contact with the Tribunal and be kept informed of developments in the case that they testified in (see also Stover, 2005). For this reason, it is necessary for the VWS to establish a 'follow-up policy' for victim-witnesses and any other witnesses who wished to be kept informed about its proceedings. This follow-policy could comprise of a monthly information sheet sent either by post or, if applicable, by email, that summarises the key aspects of the trial process. In particular, this follow-up policy should provide information once a judgement, either by the Trial Chamber or the Appeals Chamber has been rendered which explains the finding of guilt or non-guilt of the accused for each of the crimes charged against him or her and the sentence imposed by the Tribunal. It should also summarise the reasons why an accused has been found not-guilty of any of the charges if this is applicable.

⁴⁵⁵ The ICC does not incorporate the admission of victim-impact statements during the adjudicatory process. Although victims can put forward their 'views and concerns', this appears to function through their legal representatives being able to question witnesses rather than give statements. It should be noted that parameters of the participation of victims at the ICC is still being shaped and as such, it is not clear exactly how this practice will operate (see *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06. Transcript of Trial Proceedings, 27 January 2009).

The Presence of the Civilian: Addressing and Redressing the Harms of Conflict

This examination of the legal recognition, protection and redress of civilian victims by international criminal justice mechanisms has shown that the legal concept of the ‘civilian’ does not exist as a fixed norm of conceptualisation or designation. Despite the seemingly dichotomous framing of the subjects of war through the principle of distinction, this analysis of the ICTY has shown that the explicit or implicit evoking of social characteristics is influential or determinate in the construction of legal recognition of civilian victims. Throughout the different stages of legal proceedings, notions of nation, ethnicity, gender and age underpin the rules and practices of humanitarian law such that these social characteristics can act as exclusionary categorisations and prevent civilian victims from having their status legally recognised as such.

For this reason, this chapter developed new rules, definitions and practices that can provide a more comprehensive and effective legal framework for the recognition, protection and redress of civilian victims. Firstly, the legal concept of the ‘civilian’ needs to be re-framed as a ‘positive’ definitional status. The legal rule that designates civilian status requires a conceptualisation that captures their actions and choices to maintain ‘normal’ life during a situation of conflict and choice not participate in military conduct. This ‘positive’ definition of civilians provides a standard and consistent foundation from which the parties to a trial can assess the status of persons in conflict which does not rely on notions or ideas of what a combatant should not be. It provides a definitional framing of civilians that legally recognises their choices and actions as determinate of their civilian status, rather than drawing upon social factors to make that assessment.

Secondly, the participation and protection of civilian victim-witnesses (and other victim-witnesses) should underpin legal practices when acts of harm come before a court of law.

As set out above, international criminal justice mechanisms should employ a more 'victim-centred' approach to re-structure or develop seven new legal practices. First, these institutions should take the representation of all significant victim issues as the guiding principle of a prosecutorial strategy. Second, the VWS should designate witnesses as being different categories, such as civilian victim-witnesses. Third, victim-witnesses should be given a designated VWS contact during the duration of their inclusion in the legal proceedings. Fourth, it is necessary for VWS staff to follow a standard 'familiarisation' process with all victim-witnesses. Fifth, victim-witnesses should have the right to request protective measures during their testimonies. Sixth, the admission of victim impact statements should be an aspect of trial proceedings and finally, the VWS should develop a follow-up policy to retain a connection with victim-witnesses and keep these persons informed of legal developments in the cases. By prioritising the inclusion, participation and protection of civilian victims and victim-witnesses more generally, the legal practices of international criminal justice mechanisms can thus work toward rendering justice to both victims and perpetrators. With the implementation of these progressive legal practices, civilian victims can become central to the future processes of addressing and redressing the harms of conflict.

The legal recognition and protection of civilians in armed conflict is an important issue of contemporary concern. The role of international criminal justice mechanisms in applying the protective rules of humanitarian law is central to this process. However, as the above analysis has shown, there are significant problems and difficulties with the construction of legal recognition, protection and redress of the civilian victims of armed conflict when acts of civilian victimisation are the subject of prosecution, trial proceedings and judgement. Although the challenges of protecting civilians through a legal framework will continue to face the ICTY and the ICC, it is hoped that the development of the strategies outlined above can go some way towards addressing these difficulties.

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