

THE CONCEPT OF THE CIVILIAN

Legal Recognition, Adjudication and the Trials
of International Criminal Justice

CLAIRE GARBETT

a GlassHouse book



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Abbreviations

ABiH	Army of the Republic of Bosnia and Herzegovina
BiH	Bosnia and Herzegovina
HVO	Croatian Defence Council
ICC	International Criminal Court
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
OSCE	Organization for Security and Co-operation in Europe
OTP	Office of the Prosecutor
SRK	Sarajevo Romanija Corps
TRIAL	Track Impunity Always
UK	United Kingdom
UN	United Nations
USA	United States of America
VRS	Army of Republika Srpska
VWS	Victims and Witnesses Section

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The concept of the civilian

War, law and post-conflict justice

Q. Between August 1994 and November 1995, what did you and the other civilians do to avoid snipers?

A. Mostly we ran.¹

On 5 February 1994 in Sarajevo's Markale market, men, women and children gathered among the busy stalls in an attempt to buy groceries and other necessities that were increasingly scarce in the war-torn city. Although this once normal daily task was now fraught with risk and danger due to the sniping and shelling that characterized the violence of the siege of the city during the early 1990s, the shoppers had presumed they were protected, at least in part, by the high-rise buildings surrounding the market place. Tragically they were wrong, and when a mortar shell hit the crowded market place 68 persons were killed and many more seriously injured (Fish, 2004).

Nearly 10 years later in Trial Chamber I at the International Criminal Tribunal for the former Yugoslavia (ICTY/Tribunal), the Prosecution in the case of *The Prosecutor v. Stanislav Galić* spoke of this and other atrocities committed during the siege of Sarajevo as exemplifying the 'darker dimension' of armed conflict.² In the words of the Prosecution, this darker dimension comprises the deliberate and intentional targeting of civilians and civilian populations. It refers to the blatant disregard for the distinction between civilians and military personnel as legitimate targets of attack by the perpetrators of violence, and the protections afforded to civilians in accordance with the rules and principles of international humanitarian law. In Sarajevo, thousands of civilians of both sexes and all ages, including children and the elderly, were unlawfully killed during the siege, with many more sustaining serious injuries and harm.³ As the judgement of this case sets out, civilians 'were attacked while attending funerals, while in ambulances, trams, and buses, and while cycling. They were attacked while tending gardens, or shopping in markets, or clearing rubbish in the city'.⁴ However, in the case of *Galić* the fundamental question of how to identify persons as civilian, and so as civilian victims of this violence, was an ongoing and contentious issue. So

too was the scope of the protective rules of international humanitarian law applicable to this state of hostilities. As the adjudication of this and other war crimes cases emphasize, the very notions of 'civilian', 'protection' and 'redress' that underpin the current practices of international criminal justice continue to evoke both definitional difficulties and analytic contestation. For this reason, it remains unclear how the practices of international criminal justice work to address and redress the civilian victims of conflict situations.

Civilians in war and law

Civilian victimization in conflict situations has a long and complex history. Conflicts past and present, both internal and international in character, evidence that civilians suffer harm and injury from the violence of hostilities. It is now commonly recognized that acts of civilian victimization often arise from explicit policies implemented and approved by states and other armed groups (Downes, 2006; Slim, 2007). This form of violence must, therefore, be understood to comprise a 'wartime strategy that targets and kills (or attempts to kill) noncombatants' (Downes, 2006: 156). The suffering endured by civilians does not solely arise from the 'legitimate' violence of conflict situations, as the conduct of World War II and the more recent conflicts of Bosnia and Rwanda among many others attest. Civilian casualties are not 'produced' only as an aspect of unfortunate but inevitable collateral damage or through the unintentional actions of combatants. Rather, civilians are subject to direct and intentional attacks by combatants and other armed elements that breach the rules of international humanitarian law.⁵ While the prevalence and patterns of their victimization varies between conflicts, civilians often constitute a significant proportion of the casualties of its conduct (Lovell, 2012: 2).⁶ Their harms frequently arise from the perpetration of unlawful, and not lawful, acts of violence.

This book asks how mechanisms of transitional justice construct persons as civilians when their harms become subject to the judicial processes of adjudication and judgement. It examines (1) how to understand civilians as a social and legal category of persons; and (2) how legal rules and practices shape victim identities and protections in relation to these persons. Broadly put, the contemporary rules of international humanitarian law define a civilian as a 'non-combatant' (Dinstein, 2004).⁷ Civilians are persons who are not members of the armed forces or a military organization and so do not directly participate in hostilities. In this seemingly 'neutral' and straightforward formulation of personhood, any person who is not a combatant holds the status of civilian in a situation of conflict. However, this study shows that the legal construction of persons or collectivities as 'civilian' does not figure as a fixed process, concept or designation. Employing an interdisciplinary framework that draws on conceptual and methodological insights from transitional justice and socio-legal scholarship, it illustrates that particular notions of group