Victim Testimony at the International Criminal Tribunal for the Former Yugoslavia

A platform for truth telling?

Master's Thesis *Holocaust and Genocide Studies*

University of Amsterdam

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Cover photograph: Potočari, July 10, 2010 (Martine van Trigt) / Witness stand (Courtesy of the ICTY)

The logic of law, no matter how it is applied, can never fully make sense of the logic of mass atrocity in the eyes of those who have survived it.[1]

To R.

[1] Stover, E., *The Witnesses. War Crimes and the Promise of Justice in The Hague*, Philadelphia: University of Pennsylvania Press (2005): 14.

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Introduction

Bringing war criminals to justice. Bringing justice to victims

At the beginning of the 1990s, upon the dissolution of the former Yugoslavia, the Balkans became a region of major conflicts.[1] In the periods 1991-1995 and 1998-1999, wars in the former Yugoslav countries were fought between various cultural and ethnic groups, and atrocities were committed by members of all warring parties. Crimes included deportations, imprisonments, and murder, and are often characterised as international crimes in the context of 'ethnic cleansing'. In particular the war on the territory of Bosnia and Herzegovina is considered one of the gravest in Europe since the end of World War II. It was marked by gross human rights violations and generated a high number of refugees. Furthermore, for the first time since the Holocaust, genocide was found to have been committed on European soil, in the area surrounding the eastern Bosnian town of Srebrenica.[2] Overall, the conflicts in the Balkans caused extensive victimisation among the populations of the former Yugoslavia. Thousands of innocent citizens were killed, whereas many survivors suffered physical or mental harm, lost their beloved ones, or witnessed horrendous crimes being committed.

In the aftermath of wars and gross human rights violations, victims are often eager to tell the world about their experiences. This opportunity arose with the creation of the International Criminal Tribunal for the Former Yugoslavia (hereinafter ICTY or Tribunal). In 1993, in the midst of the Yugoslav wars, the Security Council of the United Nations, under Chapter VII of its Charter, established the Tribunal in response to 'reports of widespread and flagrant violations of international humanitarian law […], including reports of mass killings, massive,

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[1] In 1992-1995, wars were fought between Serbs, Croats and Bosnian Muslims, mostly on Bosnian territory. In 1998-1999, an armed conflict took place in Kosovo between Albanians and Serbs. Extensive literature can be found on the wars in the former Yugoslavia, and the war in Bosnia and Herzegovina in particular. See for instance chapter 8 in: Jones, A., *Genocide. A Comprehensive Introduction*, London/New York: Routledge (2006): 212-231. On the background of the wars and the nature of the crimes, see for instance chapter 2 in: Vlaming, F. de, *De Aanklager. Het Joegoslavië-tribunaal en de Selectie van Verdachten*, The Hague: Boom Juridische Uitgevers (2010): 19-54. The website of the International Criminal Tribunal for the Former Yugoslavia (ICTY) (www.icty.org, hereinafter ICTY website) also provides information on the Yugoslav conflicts. All electronic sources were last accessed on October 25, 2013.

[2] Both the ICTY and the International Court of Justice (ICJ) stated that the Srebrenica massacre constituted genocide. ICTY, *Prosecutor v. Radislav Krstić*, Case No. IT-98-33, Trial Judgement (August 2, 2001), available at the ICTY website at: http://www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e.pdf, Paragraph 599: 'The Trial Chamber has thus concluded that the Prosecution has proven beyond all reasonable doubt that *genocide*, crimes against humanity and violations of the laws or customs of war were perpetrated against the Bosnian Muslims, at Srebrenica, in July 1995 (emphasis added)'. For the ICJ see: ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgement, I.C.J. Reports 2007, p. 43 (February 26, 2007), available at the ICJ website (www.icj-cij.org) at: http://www.icj-cij.org/docket/files/91/13685.pdf.

organized and systematic detention and rape of women, and the continuance of the practice of "ethnic cleansing"'.[3]

Designed as an *ad hoc* tribunal, the ICTY was the first international war crimes tribunal created after the Nuremburg and Tokyo tribunals, mandated 'to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991'.[4] Apart from the key aim of prosecuting those responsible for the crimes, *i.e.* bringing war criminals to justice, the Security Council's additional objectives were to end the crimes and to contribute to the restoration and maintenance of peace in the region.[5] The three objectives of justice, deterrence and peace are in conformity with the Council's primary goal to maintain international peace and security.[6] The Tribunal, located in The Hague, has indicted 161 persons and proceedings have been concluded against 136 defendants.[7] It is estimated that it will conclude its final cases in 2016.[8]

Witness testimony is a common feature at the ICTY. Since the commencement of the Tribunal's first trial in 1996, seventeen years have passed in which over 4.500 witnesses testified.[9] Most witnesses are 'victim or survivor witnesses'.[10] Their testimonies describe

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[3] UN Resolution re. establishment ICTY, UN Doc. S/RES/827 (May 25, 1993) (available at the ICTY website at: http://www.icty.org/x/file/Legal%20Library/Statute/statute_827_1993_en.pdf): 1.
[4] ICTY, Updated Statute of the International Criminal Tribunal for the Former Yugoslavia (September 2009) (hereinafter ICTY Statute), available at the ICTY website at: http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf, Article 1. Suspects can be charged with the following crimes: grave breaches of the Geneva Conventions of 1949, violations of the laws or customs of war, genocide, and crimes against humanity. ICTY Statute, Articles 2-5.
[5] UN Doc. S/RES/827 (May 25, 1993): 1. Reconciliation is not explicitly included in the goals of the Tribunal, although, as part of the aim to contribute to peace, it has often been reflected in ICTY judgements and reports. See for example the Tribunal's first Annual Report which states that '[t]he role of the Tribunal cannot be overemphasized. Far from being a vehicle for revenge, it is a tool for promoting *reconciliation* and restoring true peace (emphasis added)'. UN Doc. A/49/342-S/1994/1007 (August 29, 1994), available at the ICTY website at: http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_1994_en.pdf, Paragraph 16.
[6] Charter of the United Nations and Statute of the International Court of Justice (1945) (hereinafter UN Charter), available at the website of the United Nations (UN) (www.un.org, hereinafter UN website) at: http://www.un.org/en/documents/charter/index.shtml, Article 1.
[7] ICTY, Key Figures of the Cases, available at the ICTY website at: http://www.icty.org/x/file/Cases/keyfigures/key_figures_en.pdf.
[8] ICTY website at: http://www.icty.org/sections/AbouttheICTY.
[9] As of early 2013. ICTY website at: http://www.icty.org/sid/10175.
[10] The ICTY distinguishes between four groups of witnesses. Apart from victim witnesses, 'insider witnesses' are those who have been close to the accused and may provide the Court with evidence about the actions and state of mind of the accused. Furthermore, 'perpetrator witnesses' are those accused who plead guilty to (some of) the charges and agree to testify for the Prosecution. Finally, 'expert witnesses' are professionals who provide the Court with background information on the circumstances in which the crimes were committed. See ICTY website at: http://www.icty.org/sid/158.

'war-related experiences, such as extreme deprivation of food, health-care and safety; destruction of home and community; separation and disappearances of family members; severe beatings and physical torture; sexual violence and rape; abuse, torture and killing of others; perilous flight or escape and forced exile'.[11] Since victims form the majority of those who testify before the Tribunal, they are most essential for the Tribunal to accomplish its main task: to prosecute those responsible for the committed crimes. In other words, victims are central to fulfil the *first* part of the Tribunal's mission: bringing war criminals to justice.[12] It is hard to imagine a functioning Tribunal without the participation of victims or, as put by Patricia Wald, former ICTY Judge: victims are 'the lifeblood of ICTY trials'.[13]

Not only are the victims of the Yugoslav wars the Tribunal's lifeblood, they are also its main constituency. This notion is embedded in the *second* part of the Tribunal's mission: bringing justice to victims.[14] 'Justice' is a multifaceted and ambiguous word. Legally, it can mean to arrest and try in court those who committed the crimes, *i.e.* to bring persons to justice. For victims however, justice can be understood in a myriad of ways, moving beyond the legal connotation. Apart from the desire to see the war criminals arrested and tried for their crimes, justice may also encompass the need of victims and survivors to tell the truth, to speak about the suffering they endured, and to have their suffering acknowledged. Indeed, to tell the truth and to speak on behalf of the dead is one of the most important motivations for victims to testify at the ICTY, a motivation described by Eric Stover as 'the moral duty to testify'.[15]

The victims are – in a way – represented by those who testify in The Hague. Since its establishment, the ICTY has provided victims 'an opportunity to voice the horrors they

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In literature a common distinction is made between the categories of expert witnesses and fact witnesses, the latter including victim witnesses. See for instance: Ewald, U., '"Reason" and "truth" in International Criminal Justice. A Criminological Perspective on the Construction of Evidence in International Trials', in: Smeulers, A. & Haveman, R. (eds.), *Supranational Criminology of International Crimes*, Antwerp: Intersentia (2008): 427 and Tolbert, D. & Swinnen, F., 'The Protection of, and Assistance to, Witnesses at the ICTY', in: Abtahi, H. & Boas, G. (eds.), *The Dynamics of International Criminal Justice. Essays in Honour of Sir Richard May*, Leiden/Boston: Martinus Nijhoff Publishers (2006): 196-199.

[11] ICTY website at: http://www.icty.org/sid/158.

[12] The Tribunal's mission ('Bringing war criminals to justice. Bringing justice to victims') was indicated on the ICTY website's homepage, until it was replaced with the phrase '20 Years of International Justice', upon the twentieth anniversary of the Tribunal in May 2013.

[13] Wald, P.M., 'Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal', *Yale Human Rights and Development Law Journal* 5 (2002): 219.

[14] See note 12.

[15] Stover, E., *The Witnesses. War Crimes and the Promise of Justice in The Hague*, Philadelphia: University of Pennsylvania Press (2005): 126.

witnessed and experienced'.[16] In other words, it seems that the ICTY has created a forum for victims to tell their stories, in order to meet some of their needs for justice. This thesis will discuss victim testimony at the ICTY and challenge the Tribunal's claim of 'bringing justice to victims'.

Research problem: fact finding versus truth telling

Victim testimony is an indispensable component of the ICTY. It is the Tribunal's main evidentiary source to reach verdicts. In other words, victims participate in a process of fact finding; they provide the Court with details of the crimes and the accused. Fact finding is often referred to as truth finding. The importance of truth finding has been emphasised by Madeleine Albright: 'Truth is the cornerstone of the rule of law [...]. And it is only the truth that can cleanse the ethnic and religious hatreds and begin the healing process'.[17]

However, the two concepts of fact finding and truth finding should be regarded separately. First of all, there are different kinds of 'truth'. For instance, historical truth can be defined as truth based on the reconstruction of events in a larger historical context. Its aim is not to achieve an overall, objective truth, but rather to provide the public with interpretations of past events based on certain facts.[18] Furthermore, narrative or moral truth seeks to explain why things have happened, and to give a meaning to events. It aims at reconciliation by storytelling and by involving individuals and communities in the truth telling process.[19] Narrative truth is created by those who have taken part in the events – whether as victims, perpetrators or bystanders – who share their experiences from an individual perspective in conformity with what they believe to be true. It is by definition subjective and often contested since it encompasses diverse versions of past events.[20]

Finally, factual or forensic truth can be described as truth based on evidence used in legal proceedings. This kind of truth covers what the process of fact finding in a legal setting is aimed at: to establish an objective and fair reconstruction of the events. Evidence based on

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[16] ICTY website at: http://www.icty.org/sections/AbouttheICTY.
[17] US Ambassador Madeleine Albright during the Security Council deliberations leading to the establishment of the ICTY in 1993. Quoted in: Akhavan, P., 'Justice in The Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal', *Human Rights Quarterly* 20(4) (1998): 765.
[18] Akhavan (1998): 770.
[19] Ketelaar, E., 'Truths, Memories and Histories in the Archives of the International Criminal Tribunal for the Former Yugoslavia', in: Wilt, H.G. van der, et al. (eds.), *The Genocide Convention. The Legacy of 60 Years*, Leiden: Martinus Nijhoff Publishers (2012): 210.
[20] Akhavan (1998): 770-771.

facts serves to prove that certain crimes have been committed and to ascertain that the accused is responsible for those crimes. Facts on international crimes are presented as knowledge, and ultimately as truth in the judgements related to those crimes.[21] Factual truth is by definition selective and incomplete. By centralising the crimes and those who committed them, only part of the facts are used in criminal proceedings.

Overall, in embracing these various notions of 'truth', truth finding is a much broader concept in comparison to fact finding. It may comprise the establishment of truth commissions, the conduct of historical research, forensic work to determine the exact nature of victims' deaths, and the exhumation of bodies of those killed.[22] Fact finding aims at the establishment of legally relevant facts, and herewith supports the broader concept of truth finding. Perhaps the most important element of truth finding is truth telling by those who have survived the crimes. Their testimonials are indispensable for the historiography of wars and gross human rights violations. Much of our current knowledge about the Holocaust, the Armenian Genocide, and the Gulag would be unthinkable without the oral histories of survivors.[23] In other words, truth telling by victims – like fact finding – contributes to the broader concept of truth finding.

At the ICTY, victim testimony supports the process of fact finding; the testimonies of victims largely determine the outcome of judgements, *i.e.* the establishment of factual truth. At the same time, victims often wish to share their individual stories or narrative truth, as one of their needs for justice, a concept which may transcend prosecution and punishment. To put it differently, in a legal setting a tension may exist between the concepts of fact finding (to bring war criminals to justice) and truth telling (as one of the needs of victims for justice). This tension is illustrated in *Figure 1*.

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[21] Ewald (2008): 400-402.
[22] Bickford, L., 'Transitional Justice', in: Shelton, D. (ed.), *Encyclopedia of Genocide and Crimes Against Humanity*, Detroit: Thomson/Gale Vol. 3 (2005): 1045-1047.
[23] Leydesdorff, S., *De Leegte Achter Ons Laten. Een Geschiedenis van de Vrouwen van Srebrenica*, Amsterdam: Uitgeverij Bert Bakker (2008): 41.

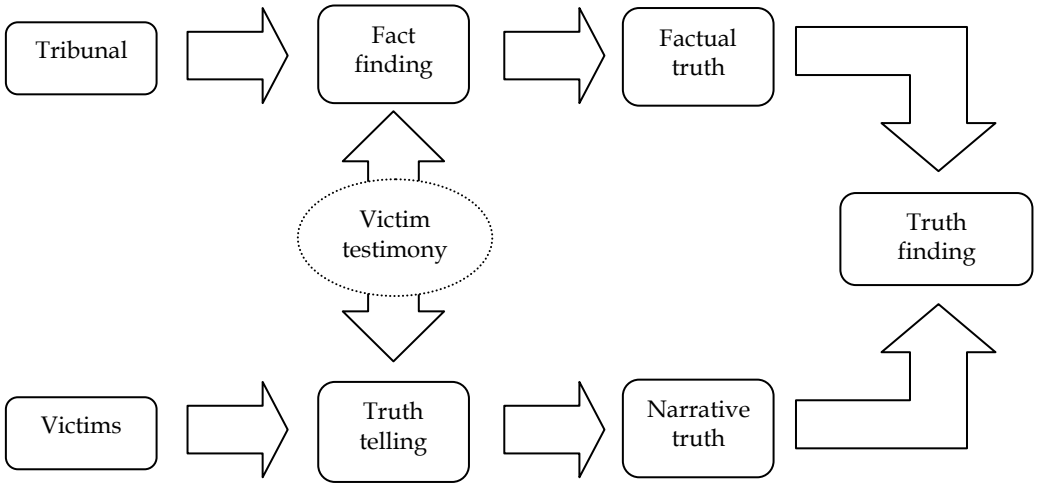

Figure 1

Research questions and objectives

It is against this background that the central research question of this thesis is formulated: *Has the Tribunal – by its extensive use of victim testimony – fulfilled its claim to provide victims an opportunity for truth telling?*

At the outset, it should be stressed that 'providing an opportunity for truth telling' is a vague and broad statement, which may be interpreted in several ways. Here, it is to be understood as the opportunity for victims to tell their stories, to be heard and to be acknowledged. Moreover, the question whether or not the Tribunal has provided victims this opportunity can only be answered by those who testify in The Hague, since the affirmative or negative response strongly depends on the individual experiences of victim witnesses. Thus, in the end, this question can only be fully addressed by extensive empirical research, going beyond the scope of this thesis. Questions with regard to the motivations and benefits of testifying at the ICTY are also beyond the scope of this research and will only be discussed briefly.

The opportunity for truth telling by victim witnesses will be examined by drawing upon a number of sub questions. These sub questions are connected to three factors that influence the extent to which victims are given the opportunity to tell their stories, to be heard and to be acknowledged: the treatment of victim witnesses, the manner in which testifying takes place, and the contents of testimonies. The following sub questions will be examined:

- To what extent do victims receive recognition and moral support during their testimonies?
- To what extent can victims freely, *i.e.* in their own way and speed, tell their stories, and which elements influence narrative storytelling in the courtroom?
- To what extent can victims tell everything they want to tell and which elements determine the contents of testimonies?

To supplement the examination of the central research question, two additional sets of sub questions will be examined. The first set relates to the development of victim testimony in international criminal justice:

- What are the goals of international criminal justice?
- Which position do victim witnesses have from a historical perspective?
- What should be the role of victim testimony in the legal system?

The second set of sub questions relates to the position of victim witnesses and the characteristics of victim testimony at the ICTY:

- Which legal position do victim witnesses have?
- What are the particularities of victim testimony?
- Which difficulties for fact finding and truth telling can be identified?

The topic of this research (victim testimony at the ICTY) has been examined by a number of scholars since the beginning of this century, but not (yet) thoroughly. This may be attributed to the fact that, at the ICTY (and other international criminal tribunals), the primary use of victim testimony as main evidentiary source is unprecedented in the field of international criminal justice.[24] Evidence to prove the defendant's guilt (or innocence) is constructed primarily by the use of witnesses.[25] In contrast, the Nuremberg Tribunal, the ICTY's predecessor, relied extensively on documentary evidence.[26] Unlike the Nazi leaders, who accurately recorded their crimes, 'the architects of more recent atrocities have left few written

[24] Although victim testimony played a key role in the Eichmann trial, a trial of international significance in international criminal justice. See section 1.2.
[25] Ewald (2008): 427.
[26] At the Nuremberg trial, witness testimony was practically absent. See section 1.2.

records, and what written records they did leave often are not made available to prosecutors'.[27]

Moreover, in general, research in the field of victim testimony often focuses on the desirability and reliability of witnesses in relation to fact finding and the fairness of trials. In other words, the topic has been addressed from a legal perspective, *i.e.* the judicial system of international criminal tribunals. An example of this perspective is the study by Nancy Combs in which she assesses the questionable reliability of eyewitness testimonies, which endangers accurate fact finding at international criminal trials.[28] Also, empirical research in this area is still scarce, in particular research on the experiences of victim witnesses.[29] The perspective of victim witnesses is herewith often neglected. An exception in this regard is the publication by Eric Stover on victim witnesses before the Tribunal, an elaborate work on the basis of interviews with both witnesses and members of the ICTY staff.[30] His study encompasses a range of issues, such as the motivations for victims to testify, the impact and potential benefits of testifying, and the perspective of victims with regard to the outcome of the trials they testified in. Although he concludes that 'by and large war crimes trials are generally ill suited for the sort of expansive and nuanced story-telling so many witnesses

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[27] Combs, N., *Fact-Finding without Facts. The Uncertain Evidentiary Foundations of International Criminal Convictions*, Cambridge: Cambridge University Press (2010): 12. Referring to the ICTY in particular, Patricia Wald states that '[t]he architects of "ethnic cleansing" in the Balkans were not so systematic or paper-bound. Many of their most notorious actions were decided on the spot or were transmitted orally or telephonically, usually encrypted on a closed circuit. […] tribunal prosecutors do not have guaranteed access to those relevant documents that do exist but are still in the hands of former belligerents. They must often negotiate to obtain them – frequently unsuccessfully – with not-so-friendly governments'. Wald, P.M., 'The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-To-Day Dilemmas of an International Court', *Washington University Journal of Law & Policy* 5 (2001): 107. In contrast, according to Alexander Zahar, the ICTY almost completely relies on witnesses *despite* the availability of extensive documentation and material evidence, the latter of which is always supplementary to oral testimony. Zahar, A., 'Witness Memory and the Manufacture of Evidence at the International Criminal Tribunals', in: Stahn, C. & Van den Herik, L. (eds.), *Future Perspectives on International Criminal Justice*, The Hague: TMC Asser Press (2010): 601, note 5.

[28] The study does not encompass however victim testimony at the ICTY, which (according to Combs) poses no distortive problems (for fact finding) unlike victim testimony at other tribunals dealing with crimes committed outside Europe. See: Combs (2010): 5.

[29] Stover (2005): 17; O'Connell, J., 'Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?', *Harvard International Law Journal* 46(2) (2005): 298-299; Dembour, M.C. & Haslam, E., 'Silencing Hearings? Victim-Witnesses at War Crimes Trials', *European Journal of International Law* 15(1) (2004): 153 note 7. The Victims and Witnesses Section of the ICTY (hereinafter VWS) envisages – in view of the near closure of the Tribunal – an extensive follow-up research on the experiences of witnesses who testified in Court (conversation by the author with Tiago de Smit, Senior Support Assistant at the VWS, August 2011). A pilot study into the experiences of witnesses and the long-term impacts of testimony has already been set up. See ICTY website at: http://www.icty.org/sid/10948.

[30] Stover (2005). See also: Stover, E., 'Witnesses and the promise of justice in The Hague', in: Stover, E. & Weinstein, H.M. (eds.), *My Neighbor, My Enemy. Justice and Community in the Aftermath of Mass Atrocity*, Cambridge: Cambridge University Press (2004): 104-120.

yearn to engage in',[31] Stover does not specifically focus on the act of testifying and the extent of truth telling.

At the same time, due to both the sheer number and the importance of victim witnesses participating in international criminal tribunals such as the ICTY, research into the role that victims play (or should play) in the judicial process is becoming more important. This research strongly relates to the examination of whether and what kind of justice is brought to victims, in particular to those who testify in the courtroom. The purpose of this thesis is to provide an insight into the extent to which the Tribunal has provided victim witnesses a platform for truth telling, as one of the needs of victims for justice. By describing and analysing victim testimony, this thesis will attempt to assess the value of testimony for victims and to examine which concept of justice is applied at the ICTY.

Methodology and structure

The topic of this thesis will be addressed from a three-layer perspective, corresponding with the three sets of sub questions as set out above. The first layer (the development of victim testimony in international criminal justice) will be addressed in chapter 1. It will give an introduction into modern international criminal justice (section 1.1) and will briefly discuss the position of victim witnesses in a historical perspective (section 1.2). After that, the intellectual debate surrounding the role of victim testimony in international criminal proceedings will be discussed (section 1.3). In so doing, chapter 1 will provide a general background to the second layer (the position of victim witnesses and the characteristics of victim testimony at the ICTY). Chapter 2 will first discuss the legal position of victim witnesses (section 2.1). After that, the particularities of victim testimony will be examined and the related difficulties for fact finding and truth telling will be identified (sections 2.2, 2.3 and 2.4). Existing literature and documentation of the ICTY will be used to examine the first two layers.

Chapter 2 will serve as a background to the third layer (the opportunity for truth telling by victim witnesses) in providing the (legal) setting against which truth telling by victim witnesses at the ICTY is to be examined. Chapter 3 forms the core part of this research. It will examine truth telling on the basis of testimonies. To this end, this thesis will conduct a small

[31] Stover (2005): 129.

empirical research by looking at the transcripts of the testimonies of victim witnesses in one case before the Tribunal (*Prosecutor v. Radislav Krstić*).[32] Following a brief introduction into this case (section 3.1), the opportunity for truth telling will be explored by examining the treatment of victim witnesses (section 3.2), the manner in which testifying takes place (section 3.3), and the contents of testimonies (section 3.4). The three factors that influence truth telling are essentially interrelated and cannot be considered separately. However, for reasons of clarity, the examination of the testimonies is classified according to these three factors.

An analysis of victim testimony based on transcripts is by definition limited. The transcripts only show what is said, not how it is said. They will inevitably leave out the demeanour of victim witnesses, signs of sentiments, and silences. Furthermore, since the testimonies of only one case will be examined, the findings of this research will provide only a partial picture of victim testimony at the Tribunal. Although the choice for one case inevitably limits the scope of the research, a study of several cases proved not to be feasible. Leaving aside the fact that the myriad number of testimonies spanning over a long time period makes it difficult to make a selection, it is suggested that the case is representative for the purpose of this research. In other words, another selected case could equally provide the empirical findings to examine the central research question of this thesis.

Finally, the conclusion (chapter 4) addresses the value of testimony for victims at the ICTY. It will do so by evaluating the findings from the case study (chapter 3), taking into account the legal position of victims and the specific characteristics of victim testimony at the Tribunal (chapter 2). Ultimately, it will discuss which concept of justice is applied at the ICTY, *i.e.* which position should be attributed to the Tribunal within the debate discussed in chapter 1, and conclude how this position has affected the Tribunal's claim to provide justice to victims when it comes to truth telling.

[32] ICTY, Case Information Sheet, *Radislav Krstić*, Case No. IT-98-33, available at the ICTY website at: http://www.icty.org/x/cases/krstic/cis/en/cis_krstic_en.pdf. The transcripts of the Court sessions are available at the ICTY website at: http://icr.icty.org (United Nations ICTY Court Records).

1. Victim testimony in international criminal justice

1.1 International criminal justice

The development of international criminal justice finds its origins in the history of law. Whereas the meaning and contents of justice have varied over time, modern international criminal justice reflects shared moral and social values of the international community.[33] It is aimed at the establishment of the rule of law through individual accountability.[34] According to Cherif Bassiouni, the goals of international criminal justice include prevention through deterrence, retribution through (selective) prosecutions, and providing victims with a sense of justice and closure.[35]

The commencement of modern international criminal justice can be traced back to the establishment of the International Military Tribunal at Nuremberg (hereinafter Nuremberg Tribunal).[36] Prompted by the horrors of World War II, the tribunal built upon a (failed) concept, which originated from the years after World War I.[37] As the first international criminal court,[38] the Nuremberg Tribunal is considered a landmark in international law. It established the precedent of individual criminal responsibility and of universal jurisdiction over crimes against humanity.[39] International criminal justice has developed rapidly ever since. War crimes and genocide were codified, whereas crimes against humanity and aggression became embodied in international customary law.[40] Furthermore, the international community was institutionalised by the establishment of the United Nations (UN), assigned with the task to maintain international peace and security.[41] In promoting the

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[33] Bassiouni, M.C., 'Perspectives on International Criminal Justice', *Virginia Journal of International Law* 50(2) (2010): 270-271. The author offers a historical analysis of international criminal justice.
[34] Teitel, R.G., 'Transitional Justice Genealogy', *Harvard Human Rights Journal* 16 (2003): 73.
[35] Bassiouni (2010): 294.
[36] The International Military Tribunal at Nuremberg was designed by the Allied Forces in 1945 to try and punish the major war criminals responsible for Nazi crimes committed during World War II. Charter of the International Military Tribunal (1945), available at the website of The Avalon Project (http://avalon.law.yale.edu, hereinafter Avalon Project website) at: http://avalon.law.yale.edu/imt/imtconst.asp, Article 1.
[37] Bassiouni (2010): 305.
[38] Both the International Military Tribunal at Nuremberg and the International Military Tribunal for the Far East (Tokyo Tribunal) are generally considered the first international criminal courts. Although their legal character is contested, both tribunals were of an international character and their founders wished to establish an international tribunal. See: Zahar, A. & Sluiter, G., *International Criminal Law. A Critical Introduction*, Oxford: Oxford University Press (2008): 5-6.
[39] Jones (2006): 365.
[40] Bassiouni (2010): 305. The Rome Statute of the International Criminal Court (2011) (hereinafter Rome Statute) characterises these four types of crimes as international crimes. Rome Statute, available at the website of the International Criminal Court (ICC) (www.icc-cpi.int, hereinafter ICC website) at: http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf, Article 5.
[41] UN Charter, Article 1.

rule of law as the core element of its mission, the UN includes judicial mechanisms among which international criminal courts and tribunals.[42]

After the Cold War period, which brought international criminal justice to a halt, it gained a new impetus from the 1990s onwards with the establishment of the *ad hoc* tribunals for the former Yugoslavia in 1993 and Rwanda (the International Criminal Tribunal for Rwanda, ICTR) in 1994.[43] Also, several internationalised courts, such as the Special Court for Sierra Leone (established in 2000)[44] and the Extraordinary Chambers in the Courts of Cambodia (established in 2001)[45] were created, in addition to a permanent international court, the International Criminal Court (ICC), established in 2005.[46] These institutions were created to prosecute persons responsible for the aforementioned international crimes, the latter of which form the core subject of modern international criminal justice.[47]

International criminal justice represents the judicial component in a series of mechanisms – both judicial and non-judicial – in response to systematic or widespread violations of human rights, a field that has become known as 'transitional justice'.[48] International criminal justice centralises the crimes and those who committed them through the prosecution of individual perpetrators, *i.e.* it is primarily perpetrator-centered. Since the 1980s, alternative transitional justice approaches have emerged from fields mostly outside the law, aiming at restorative justice both at the individual and society level. Restoring peace and promoting reconciliation have become additional goals, moving beyond the retributive instrument of individual accountability. Non-penal approaches, such as the establishment of truth commissions, reparations and memorialisation efforts, are more victim-centered than the legal approach in the form of criminal trials.[49]

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[42] UN website at: http://www.un.org/en/ruleoflaw/index.shtml.
[43] Website of the International Criminal Tribunal for Rwanda (ICTR) (www.unictr.org, hereinafter ICTR website).
[44] Website of the Special Court for Sierra Leone (SCSL) (www.sc-sl.org).
[45] Website of the Extraordinary Chambers in the Courts of Cambodia (ECCC) (www.eccc.gov.kh).
[46] ICC website.
[47] Bassiouni (2010): 287.
[48] Transitional justice (or post-conflict justice) can be defined as an umbrella term for a variety of initiatives, including the prosecution of individual perpetrators, institutional reforms, reparations, and memorialisation efforts. Transitional justice aims at the achievement of peace and reconciliation in post-conflict societies. It provides recognition of the rights of victims, promotes civic trust and strengthens the democratic rule of law. In order for transitional justice to be effective, several measures should complement one another. Website of the International Center for Transitional Justice (www.ictj.org) at: http://ictj.org/about/transitional-justice. For an introduction into the field of transitional justice, see also: Kritz, N.J. (ed.), *Transitional Justice. How emerging Democracies Reckon with Former Enemies, Volume I: General Considerations* (1995).
[49] Teitel (2003): 77-83.

Not only are transitional justice mechanisms most effective when they complement one another, a strict separation between the concepts of retributive justice and restorative justice cannot be applied. This becomes clear from the expanded goals of international criminal courts to more restorative justice elements, such as reconciliation and peace, going beyond the retributive goal of prosecution and punishment. The ICTR, for example, specifically includes the contribution 'to the process of national reconciliation [in Rwanda] and to the maintenance of peace' among its goals.[50] The ICTY has been established to render justice and deterrence but also to 'contribute to the restoration and maintenance of peace'.[51] The ICC specifically refers to restorative justice, which 'will enable the ICC to not only bring criminals to justice but also to help the victims themselves rebuild their lives'.[52] Whether courts can or should fulfil these restorative justice aims is disputable. Martha Minow contends that 'reconciliation is not the goal of criminal trials except in the most abstract sense'.[53]

International crimes, such as genocide and crimes against humanity, are often referred to as crimes that shock the conscience of humankind; they are 'the most serious crimes of concern to the international community as a whole'.[54] International crimes are committed on a pervasive scale and involve high numbers of both perpetrators and victims. The twentieth century is replete with examples of these crimes: the Armenian Genocide, the Holocaust, and the genocides in Rwanda and the former Yugoslavia – to name a few – have caused extensive victimisation. International criminal justice and other post-conflict efforts in response to these crimes have become more common in a world in which accountability is prevailing over impunity. However, considering the high number of conflicts and killings since 1945, one can only agree with Bassiouni that 'the international community and national legal systems have hardly addressed the requirements of post-conflict justice'.[55] Most international crimes have not been dealt with and, consequently, victims have barely been granted some sort of redress.[56] Furthermore, post-conflict justice responses, whether at a restorative or retributive level, always come too late, *i.e.* they are undertaken *after* the crimes have been

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[50] UN Resolution re. establishment ICTR, UN Doc. S/RES/955 (November 8, 1994): 1, available at the ICTR website at: http://www.unictr.org/Portals/0/English/Legal/Resolutions/English/955e.pdf.
[51] UN Doc. S/RES/827 (May 25, 1993): 1. See also note 5.
[52] ICC website at: http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/victims/Pages/victims%20and%20witnesses.aspx.
[53] Minow, M., *Between Vengeance and Forgiveness. Facing History after Genocide and Mass Violence*, Boston: Beacon Press (1998): 26.
[54] Rome Statute, Preamble.
[55] Bassiouni (2010): 280-281.
[56] Ibid: 294-295.

committed. These responses are by definition not enough, since 'no response can ever be adequate',[57] and to claim that they would bring 'closure' is to insult the victims.[58]

At the same time, the position and voice of the victims has gained more recognition, both at the national and international level.[59] Victims have become key players in the (international) criminal justice process.[60] Since the end of World War II, victims' rights embodied in international legal instruments have expanded, most notably in the form of financial compensation for damages.[61] The establishment of the ICC has further strengthened the position of victims as they may supply information to the Prosecutor during investigations,[62] and participate in the proceedings by presenting 'their views and concerns'.[63] The growing involvement of victims in judicial proceedings and the expanded goals towards more restorative justice elements are both characteristics of modern international criminal justice.

The primary role of victims of international crimes in the context of contemporary international legal proceedings is that of witnesses. Witnesses help to establish the truth about the alleged crimes. The motivations for victims to testify are diverse. On its website, the ICTY states that 'witnesses are often motivated to speak for the dead, to tell the world the truth about what happened and to look for justice in the present in the hope that such crimes will not happen again'.[64] The motivation 'to speak for the dead' may be expressed in a variety of ways. For instance, '[i]t can be the last parental act that a man or woman can do for a lost child. It can be expressed in religious terms, a belief that God has allowed a person to survive for the very purpose of testifying'.[65]

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[57] Minow (1998): 5.
[58] Ibid.
[59] For an insight into the development of the position of victims at a national level, see for instance: Zedner, L., 'Victims', in: Maguire, M., et al. (eds.), *The Oxford Handbook of Criminology*, 3rd edition, Oxford: Oxford University Press (2002): 419-456.
[60] Ibid: 435.
[61] Bassiouni, M.C., 'International Recognition for Victims' Rights', *Human Rights Law Review* 6(2) (2006): 203-279. See also: Stover (2005): 23-29. At the ICC, victims may apply for reparations. See: Rome Statute, Article 75. See also ICC, Booklet Victims before the International Criminal Court, A Guide for the Participation of Victims in the Proceedings of the Court: 12, available at the ICC website at: http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/victims/participation/Pages/booklet.aspx.
[62] Rome Statute, Article 15(3).
[63] Ibid, Article 68(3).
[64] ICTY website at: http://www.icty.org/sid/158.
[65] Lobwein, W., 'Experiences of the Victims and Witnesses Section at the I.C.T.Y.', in: Ewald, U. & Turković, K. (eds.), *Large-Scale Victimization as a Potential Source of Terrorist Activities. Importance of Regaining Security in Post-Conflict Societies, Proceedings of the NATO Advanced Research Workgroup on Large-Scale Victimization Due to Protracted Conflicts as a Potential Source of Terrorist Activities, and Regaining Security in Post-Conflict Societies, Zagreb, Croatia, 23-26 September 2004*, Amsterdam: IOS Press (2006): 206. Wendy Lobwein is former Support Officer at the VWS.

Through their testimonies, victims provide evidence on the basis of which the defendant may be convicted. The participation of victim witnesses is however by definition limited. International crimes involve high numbers of victims, ranging from young to old, including both male and female victims. However, in dealing with these crimes, international tribunals focus on a selective number of perpetrators and cases only, the choice of which is left to the Prosecution's discretion.[66] As a result, evidence brought into the courtroom, whether documentary or oral, is selective as well. Only a few out of the myriad number of victims ultimately appear as witnesses in the courtroom.[67] Furthermore, the heinous and comprehensive nature of international crimes makes it difficult for outsiders (such as judicial institutions) to fully grasp their meaning and contents, let alone to understand their impact on victims, including victim witnesses. It is therefore questionable whether Bassiouni's notion that 'providing victims with a sense of justice and closure'[68] is to be considered a feasible goal of modern international criminal justice.

1.2 From abstract victims to an era of testimony

The Nuremberg trial was the first trial in which victims of international crimes participated as witnesses. However, despite the high number of potential witnesses, victim testimony was practically absent.[69] On the contrary, following the strategy outlined by Chief Prosecutor Robert Jackson, the proceedings were conducted primarily on the basis of extensive material evidence.[70] In doing so, the Nuremberg trial provided a historical record of the events, which was however not a primary concern of the tribunal but should rather be characterised as a by-product; by revealing the crimes to the world, educating the public would happen 'as a matter of course'.[71]

The Prosecution decided to minimise the number of witnesses for several reasons. First, according to Jackson, the authenticity of documents could not be contested, unlike

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[66] Both *ad hoc* tribunals focus on the prosecution and punishment of those *responsible* for serious violations of international humanitarian law. UN Doc. S/RES/827 (May 25, 1993): 2, UN Doc. S/RES/955 (November 8, 1994): 2. On the selection of defendants by the ICTY's Prosecution, see: Vlaming (2010).
[67] Rydberg, A., 'Victims and the International Criminal Tribunal for the former Yugoslavia', in: Kaptein, H. & Malsch, M. (eds.), *Crime, Victims and Justice. Essays on Principles and Practice*, Aldershot: Ashgate (2004): 131.
[68] Bassiouni (2010): 294.
[69] In total, 94 witnesses took the stand, 33 of which testified for the Prosecution. The exact number of victim witnesses remains unclear. See: Douglas, L., *The Memory of Judgment. Making Law and History in the Trials of the Holocaust*, New Haven/London: Yale University Press (2001): 15.
[70] Extensive evidence was brought into the courtroom, including thousands of documents, photographs and films, records that would be brought into the world by unprecedented media attention. See: Douglas (2001): 12-13.
[71] Buruma, I., *The Wages of Guilt. Memories of War in Germany and Japan*, London: Atlantic Books (2009): 144-145.

testimonies by witnesses who were 'open to suspicion of bias, bad memory, and influence'.[72] Furthermore, the magnitude of the crimes, in particular those related to the Holocaust, was unprecedented and not yet fully known to the world. Victim testimony could entail a risk that the stories by survivors would be dismissed as too monstrous to have actually taken place.[73] Finally, the tribunal's primary goal was to conduct impartial and fair proceedings in a newly established international judicial setting.[74] Victim testimony could not only jeopardise the objectivity of the proceedings, but also, victims simply did not play a role in the political debate at the time.[75]

Moreover, the Nazi's main victims were nearly absent in the trial; testimony on the Holocaust was provided mostly by non-Jews.[76] It was assumed that in particular Jewish victims would not provide unbiased evidence, and that they could undermine the Prosecution's case if the cooperation of some Jews with the Nazi administration would be shown.[77] By the use of non-Jews to testify about the Holocaust, the experiences of Jewish victims were equated with those of (non-Jewish) prisoners of war and political prisoners.[78] Also, at a more general level, the Holocaust was included within the category of crimes against humanity, which – in turn – was linked to either crimes against peace or war crimes. Consequently, crimes committed against the Jews before the outbreak of the war were excluded from the tribunal's jurisdiction.[79] Furthermore, genocide, the newly coined term to identify crimes with the intent to destroy national, ethnical, racial or religious groups, which could have characterised the Holocaust as a separate crime, was not included in the final judgements.[80] As noted by Lawrence Douglas, both from an individual level and from a

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[72] Jackson, R.H., *The Nürnberg Case*, New York: Cooper Square Publishers (1971): viii.
[73] Douglas (2001): 17.
[74] Chakravarti, S., 'More than "Cheap Sentimentality": Victim Testimony at Nuremberg, the Eichmann Trial, and Truth Commissions', *Constellations* 15(2) (2008): 224.
[75] Stover (2005): 18.
[76] Only three Jewish survivors testified. See: Douglas (2001): 78. Testimonies were given by Abram Suzkever (on the extermination of the town of Vilna), Severina Shmaglevskaya (on Jewish children in Auschwitz) and Samuel Rajzman (about the Treblinka death camp). Suzkever was introduced as 'a Jewish writer' whereas the Jewish identity of Shmaglevskaya was left open (she was referred to as 'a Polish woman'). Rajzman was also not introduced as a Jewish survivor, but this is evident due to his stay in the Warsaw ghetto, and after that, Treblinka. All three testified on February 27, 1946. The testimonies can be found at the Avalon Project website at: http://avalon.law.yale.edu/imt/02-27-46.asp.
[77] Stover (2005): 19.
[78] This also becomes clear from the documentary film 'Nazi Concentration Camps', shown at the beginning of the trial, in which Jews as Nazi victims were mentioned only once. The screening was one of the trial's most spectacular moments. For an extensive account see: Douglas (2001): 23-27.
[79] Douglas (2001): 48-49.
[80] Power, S., *A Problem From Hell. America and the Age of Genocide*, New York: Basic Books (2002): 50.

group level, the Nuremberg trial 'marginalized the experience of [Jewish] victims of traumatic history'.[81]

From a legal perspective victim testimony only played a supplementary role to the extensive material evidence. The number of victim witnesses was limited and their individual sufferings were clearly not a focus of the trial.[82] The Nuremberg trial exemplifies a clear distinction between the primary goal of international criminal justice (to bring to justice individual perpetrators in a just and legitimate trial) and (some of) its potential extra-legal purposes, such as providing victims a platform, the preference of which was given to the former. In other words, the trial applied a narrow, rational approach to justice.

It was only until the Eichmann trial that victims began to play a role in criminal proceedings dealing with international crimes.[83] The trial was 'the first and, in certain respect, only trial of international significance that explicitly focused on the crimes of the Holocaust'.[84] Moreover, it was a key moment in the development of transitional justice, in the sense that victim testimony formed the core element of the case and the emotions of victims earned a place in the judicial process.[85] The comparison with the Nuremberg trial is striking; whereas in Nuremberg the evidence was primarily documentary, the Eichmann trial was first and foremost testimonial.

Chief Prosecutor Gideon Hausner made the testimony of Holocaust survivors the focus of the trial. Victim testimony would serve a dual function. On the one hand, it would provide survivors the opportunity to publicly share their stories and herewith fulfil their obligations towards the dead. On the other hand, victim testimony would serve an educational function of teaching history lessons about the suffering of the Jews, both to the younger Israeli generations and to the world as a whole.[86] In particular, Hausner used the trial to reconstruct the history of the Holocaust by turning the image of Jews going as sheep to the slaughter (a

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[81] Douglas (2001): 79.
[82] A close examination of the testimonies by Jewish victims illustrates that their testimonies were concise and well-structured, yet left little space for personal accounts, let alone for emotions. See also note 75.
[83] Eichmann was tried in 1961-1962 by the District Court of Jerusalem, under a special Israeli law, the Nazi and Nazi Collaborators (Punishment) Law of 1950, which had retroactive and extraterritorial jurisdiction. He faced several charges, including crimes against the Jewish people, and was held responsible for the destruction of European Jewry. Eichmann was convicted on all counts and imposed a death sentence. See: Yablonka, H., *The State of Israel vs. Adolf Eichmann*, New York: Schocken Books (2004): 9-10, 31-32.
[84] Douglas (2001): 97.
[85] Chakravarti (2008): 224.
[86] Douglas (2001): 106.

prevailing image in Israel until the trial) into a story of heroic memory, in which the Jews struggled for their psychical, mental and religious survival and became fighters and heroes.[87]

Over hundred victims who were 'survivors of concentration camps, massacres, and death marches; had taken part in resistance activity [...]; or had either met Eichmann personally or seen him in the various camps', testified in the Eichmann trial.[88] Among them, several witnesses would become symbols of the Holocaust.[89] Initially, Hausner had preferred the testimonies to take the narrative form of open-ended storytelling, against which the Judges objected, considering many details provided by the witnesses as irrelevant to the case.[90] Overall, the testimonies were lengthy, but structured around leading questions.[91] Even though the testimonies were no complete, individual stories by survivors, the appearance of the victims in courtroom left the public (and the world) with powerful emotional accounts of individual survivors.

From a legal perspective it is noteworthy that most witnesses had no direct link to the accused, and thus provided no or little evidence to clarify his guilt. In the end, Eichmann's conviction was based on documentary evidence, not on the abundance of victim testimony.[92] Whereas the Prosecution pursued a broad definition of justice, which centralised the victims through their testimonies, the Judges held on to a more narrow definition: 'The legal process has ways of its own which are determined according to law and do not change, no matter what the subject of the trial'.[93] The Judges concluded that the testimonies 'will provide

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[87] Ibid: 156-158.
[88] Yablonka (2004): 88-89. The number of potential witnesses and sources from which they were recruited was high, which made the choice of witnesses a complex process. On the choice of witnesses, see: Yablonka (2004): 89-99.
[89] See: Yablonka (2004): 108-112. The breaking down on the witness stand of Yehiel Dinur (who testified on June 7, 1961) is one of the most memorable moments of the trial, in symbolising the ongoing suffering of individual Holocaust survivors. Other witnesses, such as Rivka Yoselewska (who testified on May 8, 1961), would become symbols of rebirth, for their struggle for survival was shown and connected to the Zionist message the trial was to promote. The testimonies can be found at the website of The Nizkor Project (www.nizkor.org) at: http://www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/Sessions/Session-068-01.html and http://www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/Sessions/Session-030-01.html respectively.
[90] Douglas (2001): 134-135.
[91] Ibid: 165.
[92] Yablonka (2004): 239.
[93] District Court of Jerusalem, *State of Israel v. Adolf Eichmann*, Criminal Case No. 40/61, Trial Judgement (December 11, 1961). Quoted in: Yablonka (2004): 247. The full judgement can be found at The Nizkor Project website at: http://www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/Judgment/.

valuable material for research workers and historians but as far as this Court is concerned, they are to be regarded as *by-products* of the trial (emphasis added)'.[94]

Nevertheless, the trial clearly was 'a vehicle of the stories of survivors'[95] and its historical and societal value cannot be underestimated. It presented the chronological story of an event, told by the victims who represented almost all Nazi occupied countries, and provided valuable oral histories covering a range of aspects on the Holocaust.[96] The trial stimulated legal, political and cultural interest in the Holocaust all over Europe and motivated individual survivors to tell their stories.[97] In Israel, it was only with the Eichmann trial that Holocaust survivors began to receive attention and recognition.[98] Due to both their large number and the initial narrative approach by the Prosecution, victim witnesses were clearly given a public platform to share their personal tragedies and suffering. By including the emotional accounts of victim witnesses, the trial exemplifies a concept of justice that goes beyond accountability and punishment.

The Eichmann trial is often referred to as a watershed moment since for the first time victims of international crimes participated extensively in court proceedings.[99] The trial marked 'the advent of an "era of testimony" that continues to this day'.[100] Victim testimony has evolved ever since, in particular through the expansion of truth commissions, coinciding with the development of a restorative justice approach, and the establishment of international criminal courts from the 1990s onwards.[101]

1.3 Victim testimony in the legal system

As stated in the Introduction, in a legal setting a tension may exist between fact finding and truth telling. To put it broadly, it is 'the tension between adhering to the strictures of the legal process, while attending to the suffering of individual victims'.[102] This tension can be situated in an intellectual debate surrounding the goals of international criminal justice and

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[94] District Court of Jerusalem, *State of Israel v. Adolf Eichmann*, Criminal Case No. 40/61, Trial Judgement (December 11, 1961). Quoted in: Douglas (2001): 149. See also note 91.
[95] Douglas (2001): 106.
[96] Yablonka (2004): 249.
[97] Douglas (2001): 174.
[98] Yablonka (2004): 221.
[99] Chakravarti (2008): 223.
[100] Stover (2005): 21.
[101] On truth commissions, see chapter 4 in: Minow (1998).
[102] Dembour & Haslam (2004): 152.

its so-called extra-legal objectives or effects, a debate that strongly affects the manner in which victim testimony can be observed.

According to Hannah Arendt, 'the purpose of a trial is to render justice, and nothing else; even the noblest of ulterior purposes [...] can only detract from the law's main business: to weigh the charges brought against the accused, to render judgment, and to mete out due punishment'.[103] To put it differently, 'justice' emanates from legal rules and any extra-legal efforts such as establishing a historical record (as in the Nuremberg trial), and vindicating the suffering of individual victims (as in the Eichmann trial) should always be subordinated to the main purpose of a trial, *i.e.* the prosecution of an individual defendant in fair proceedings.[104] In supporting legal formalism or a legalistic view of the law, Arendt follows Judith Shklar who coins the term 'legalism', describing it as 'the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules',[105] which finds its expression particularly in criminal trials.[106] Shklar criticises 'legalism', since it entails a narrow view of the law separated from history, morality and politics, and instead, she approaches law as a historical phenomenon. At the same time she supports (like Arendt) a rational approach to rule following, which leaves little space for emotions, in particular by way of victim testimony, in court proceedings.[107]

Arendt's view is expressed in her report on the Eichmann trial, in which she criticises the trial for its extensive use of victim testimony. According to her, the Prosecution 'put witness after witness on the stand who testified to things that, while gruesome and true enough, had no or only the slightest connection with the deeds of the accused'.[108] In addition to the emerging 'right of the witnesses to be irrelevant',[109] Arendt finds equally disturbing the often emotional testimonies, which at times visibly moved the Judges and the public. In her opinion, emotions are inappropriate in the setting of a criminal trial.[110] For these and other reasons, Arendt describes the Eichmann proceedings as a 'show trial',[111] an expression

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[103] Arendt, H., *Eichmann in Jerusalem. A Report on the Banality of Evil*, New York: The Viking Press (1964): 253.
[104] Ibid: 285-286. See also: Douglas (2001): 112.
[105] Shklar, J.N., *Legalism. Law, Morals, and Political Trials*, Cambridge/London: Harvard University Press (1986): 1.
[106] Ibid: 1-2.
[107] Chakravarti (2008): 229-230.
[108] Arendt (1964): 18.
[109] Ibid: 225.
[110] Chakravarti (2008): 223-224.
[111] Arendt (1964): 4.

shared by Ian Buruma. Stating that trials can only be concerned with individual crimes,[112] Buruma criticises the aim of history teaching: 'Just as belief belongs in church, surely history education belongs in school. When the court of law is used for history lessons [among others through victim testimony], then the risk of show trials cannot be far off'.[113] Others, less concerned with the fairness of trials, have argued that criminal trials, by their very nature (limiting criminal responsibility to individuals) can never and should never attempt to fully grasp traumatic history, a task better explored within other disciplines, such as history, literature, or psychoanalysis.[114]

Arendt and others support a so-called rules-based theory, embraced by legal purists, those who argue that the law is a system of rules and procedures that should not be interfered by non-judicial or so-called extra-legal functions. This view comprises a narrow understanding of the purposes of criminal trials which holds on to a clear separation between, on the one hand, the collection and presentation of facts according to rules, and on the other hand, the potential wider political or social aims of trials, the latter of which are beyond the scope of legal proceedings.[115] It could be characterised as a purely retributive approach to justice, confined by the core purpose of trials, *i.e.* to try and punish the defendant. Taking the defendant as the main object of criminal trials, legal purists regard victim witnesses merely as components in a judicial play, serving a legal purpose only. As stressed by Arendt, a trial 'resembles a play in that both begin and end with the doer, not with the victim'.[116] The relevant question for legal purists is: what is the judicial value of victim testimony? In other words, to what extent do victims contribute to effective judicial proceedings?[117]

At the other end of the spectrum there are the moralists, those who support a so-called narrative jurisprudence approach towards the potential of trials. Here, a broader concept of justice is promoted which understands law 'as a vital cultural discourse through which social narratives are structured and suppressed and through which normative meaning is defined and contested'.[118] Trials should not aim solely at the facts in the specific case, but also meet

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[112] Buruma, I., *The Wages of Guilt. Memories of War in Germany and Japan*, London: Atlantic Books (2009): 152.
[113] Ibid: 142.
[114] Douglas (2001): 3-4.
[115] Stover (2005): 23.
[116] Arendt (1964): 9.
[117] Douglas (2001): 113.
[118] Ibid: 112.

broader needs that are required in post-conflict situations, such as offering a platform for victim testimony and the creation of a historical record.[119]

This view is supported by Mark Osiel, who claims that criminal trials, in particular those dealing with international crimes, should have a pedagogical function. This function extends the traditional goals of retribution and deterrence, in order to address the legacy of the past and to meet the needs of individuals and societies for recovery after gross human rights violations.[120] Building upon the examples of the Nuremberg and Eichmann trials (among others), Osiel contends that criminal trials serve as 'monumental didactics',[121] in the sense that proceedings – and ultimately judgements – promote a specific version of collective memory.[122] Although Osiel does not dwell on victim witnesses in particular, he would concur that they play an important role by producing the narratives a trial may convey.

This moralistic view is shared by Lawrence Douglas who, in examining several Holocaust trials, concludes that a strict separation between legal and extra-legal goals is basically untenable. The trials all struggled with a dual task, to both judge and represent the Holocaust, which made them 'dramas of didactic legality'. [123] Both scholars refute the legalistic view by Arendt, which, according to Osiel, wrongly presupposes the existence of shared moral values based on pre-existing legal rules.[124] In the moralistic view, trials should go beyond the purely retributive goal and include any extra-legal goals that are required in post-conflict situations. Victim testimony is regarded as an essential element to achieve these extra-legal goals.

In comparison to the legalistic view, the moralistic view could be characterised as a more restorative justice approach, taking into account broader societal needs in post-conflict situations. Education, catharsis, and reconciliation are considered elements to which (international) criminal trials should contribute. Whereas legalists focus on the trial to which victim witnesses may contribute, moralists inquire to what extent trials contribute to the restoration of victims and address the question 'did the trial do justice to the testimony of the

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[119] Stover (2005): 13.
[120] Osiel, M., *Mass Atrocity, Collective Memory, and the Law*, New Brunswick/London: Transaction Publishers (1997): 1-2.
[121] Ibid: 40.
[122] Ibid: 39-40.
[123] Douglas (2001): 2-3.
[124] Osiel (1997): 298-299.

survivors?'[125] International criminal justice is seen as a means to do justice for victims, not the other way around as promoted by the legalistic view, *i.e.* victims are not a means to achieve justice.

The analysis of the two views regarding the goals of international criminal justice demonstrates the current tension between the law on the one hand and the attendance to the suffering of victims on the other, between the core goal of a trial and some of its potential extra-legal functions. Since victim witnesses frequently participate in international criminal courts, which include restorative justice elements among their goals, it may be assumed that trials cannot avoid to address the extra-legal goals to meet the victims' needs, such as providing them a platform in court.

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This chapter has shown that international criminal justice has evolved fast, in particular since the 1990s. Simultaneously, victims of international crimes have gained more attention over time, coinciding with the development of restorative justice mechanisms. As witnesses, they have become indispensable in international criminal proceedings. Whereas at the Nuremberg trial victims only played a minor role, the Eichmann trial extensively provided victims a platform. Furthermore, the debate surrounding the (expanded) goals of international criminal justice has demonstrated that a spectrum reaching from purely retributive justice to a more restorative justice approach exists. Within this debate, victim testimony can be observed in diverse ways, either serving as a mere judicial element, or as a so-called non-legal but integral part of the judicial process. At the ICTY, a high number of victim witnesses participate in the legal process. The question arises which concept of justice is applied at the Tribunal.

[125] Douglas (2001): 113.

2. Victim witnesses at the ICTY

2.1 The legal position of victim witnesses

Before turning to the legal position of victim witnesses, it is useful to provide a brief outline of the organisation and functioning of the Tribunal. The Tribunal is composed of three main organs: the Chambers (comprising three Trial Chambers and an Appeals Chamber), the Office of the Prosecutor (OTP), and the Registry.[126] Their work is governed by the Statute of the ICTY (hereinafter ICTY Statute) and its Rules of Procedure and Evidence (hereinafter ICTY Rules).[127] It is the autonomous task and responsibility of the OTP to initiate the investigations of crimes, to collect evidence and to decide whether or not to prosecute individual suspects by issuing an indictment.[128] An indictment can be issued against several suspects and may include two or more crimes.[129] Indictments are approved by the Chambers if a so-called *prima facie* case has been established, *i.e.* if the evidence provided by the OTP is sufficiently strong enough to constitute a case that could lead to the conviction of the accused.[130]

At trial, the oral presentation of evidence forms the core part of the proceedings, which usually starts with evidence for the Prosecution.[131] Three kinds of evidence may be constructed: testimonial, physical, and documentary. Testimonies are generally supported by physical and documentary evidence.[132] Hearings are held in public, unless a Trial Chamber decides otherwise.[133] Ultimately, proceedings are concluded by judgements of the Chambers, with sentences and penalties imposed on those convicted for the crimes.[134]

The examination of witnesses is usually conducted by the three parties (the Prosecutor, Defence counsel and Judges) respectively, while the Judges may put questions at any time.[135]

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[126] ICTY Statute, Article 11. The Defence is not, as such, part of the organisation of the Tribunal but falls under the authority of the Registry. See: Zahar & Sluiter (2008): 60.
[127] ICTY, Rules of Procedure and Evidence, UN Doc. IT/32/Rev. 49 (May 22, 2013) (hereinafter ICTY Rules), available at the ICTY website at: http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev49_en.pdf. The Rules have been amended frequently during the Tribunal's lifetime.
[128] ICTY Statute, Articles 16, 18; ICTY Rules, Rules 39, 47(B).
[129] ICTY Rules, Rules 48-49.
[130] ICTY Statute, Articles 16, 18, 19; ICTY Rules, Rule 47. See also: Vlaming (2010): 56-60.
[131] ICTY Rules, Rule 85(A).
[132] Stover (2005): 45.
[133] ICTY Statute, Article 20-4; ICTY Rules, Rules 78-79.
[134] ICTY Statute, Article 23.
[135] ICTY Rules, Rule 85(A-B).

During the testimonies, the key role lies with the Prosecution. Its primary goal is to present evidence to prove that certain crimes took place and that the accused is responsible for those crimes, in conformity with the indictment. Through the examinations the Prosecution provides the Court with a number of individual accounts which – together – may confirm the crimes for which the defendant is at trial, an assessment of which is left with the Judges. The Defence, as the Prosecution's counterpart, plays an additional role. Its aim is to establish the defendant's innocence (or minor participation or responsibility in the events), *i.e.* to rebut the indictment. During the cross-examinations the Defence primarily examines the reliability of the witnesses and their accounts. Ultimately, the Judges decide which parts of the presented evidence are admitted on the basis of which a judgement is rendered.

The ICTY applies a blend of the two major world legal systems, the common law system and the civil law system. In the common law system, the Prosecutor and Defence counsel make their case and the Judge plays a passive role, mediating and helping the jury to fulfil its task. The appearance of live witnesses is preferred over paper dossiers. The civil law system on the other hand requires an investigating Judge who supervises the compilation of a dossier to which the defendant responds at trial.[136] The rules related to the examination of witnesses are set out in the ICTY Rules as part of its 'Rules of Evidence'.[137] They largely draw upon the common law tradition of adversarial procedure, with preference for live witnesses at trial.[138] In accordance with the civil law system though, the Judges control the proceedings actively and may question witnesses directly.[139] In 2000, in order to reduce the number of witnesses and the length of their testimonies, the Tribunal shifted towards a more civil law approach by adopting new rules that favour the admission of written statements and transcripts over oral testimony.[140]

When it comes to the legal position of victim witnesses, it is noteworthy that, overall, the ICTY Statute and the ICTY Rules do not distinguish between victims and other witnesses

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[136] Stover (2005): 44.
[137] ICTY Rules, Rules 89-98, in particular Rule 90.
[138] There are a number of methods for witnesses to testify, the most common of which is to testify orally in the courtroom. In fewer circumstances, witnesses may also be asked to give evidence by way of deposition or by a written declaration. ICTY, Information Booklet for ICTY Witnesses (2007) (hereinafter ICTY Information Booklet) (available at the ICTY website at: http://www.icty.org/x/file/About/Registry/Witnesses/witnesses_booklet_en.pdf): 5-6.
[139] Stover (2005): 44. ICTY Rules, Rules 85(B), 90(E), 90(F).
[140] Stover (2005): 45. In 2006 and 2009, additional rules were adopted. ICTY Rules, Rules 92 *bis*, 92 *ter*, 92 *quater*, 92 *quinquies*.

when referring to witness testimony. In general, no specific rules have been established for victim witnesses.[141] A victim is defined as 'a person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed'.[142] This is a rather narrow definition compared to the more comprehensive international standard definition as set forth in the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, which includes both direct and indirect victims, such as victims' family members.[143] A definition of a witness is not given although the ICTY distinguishes four types of witnesses.[144] Witnesses are called by the Chambers, Prosecution or Defence. Victim witnesses are usually among the largest group of Prosecution witnesses.[145]

The participation of victims as witnesses in the proceedings before the Tribunal is constraint by the ICTY Rules. Even though '[e]ach party is entitled to call witnesses and present evidence',[146] a Trial Chamber may limit the number of witnesses and the time for witness questioning to guarantee the efficiency of the proceedings.[147] A Trial Chamber may also summon additional witnesses and order their attendance in Court.[148] Thus, whether or not victims are called to testify depends on both the party's – usually the Prosecutor's – request for them to appear as witnesses, and the Chambers' approval. In short, it is by no means the case that all victims who wish to testify eventually will do so.

Witnesses are provided with a few entitlements. For instance, they receive allowances to cover their expenses during their stay in The Hague.[149] Furthermore, the ICTY Statute refers

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[141] Except for Rule 96, which specifically relates to victims testifying in sexual assault cases, and Rule 106 concerning compensation to victims, although the latter may also include victims who did not testify. ICTY Rules, Rules 96, 106.
[142] ICTY Rules, Rule 2(A).
[143] The UN Declaration defines victims as 'persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power'. In addition, it states that '[a] person may be considered a victim, [...], regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term "victim" also includes, where appropriate, 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'. UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN Doc. A/RES/40/34 (November 29, 1985), available at the UN website at: http://www.un.org/documents/ga/res/40/a40r034.htm, Paragraphs 1-2.
[144] For the typology of witnesses, see note 10.
[145] So far, almost two-thirds of all witnesses have been called by the Prosecution, according to statistics as of February 2013, see: http://www.icty.org/sid/10175.
[146] ICTY Rules, Rule 85(A).
[147] Ibid, Rule 73 *bis* (B) and (C).
[148] Ibid, Rule 98.
[149] ICTY Information Booklet: 11-12.

to the provision of protection measures for witnesses, one of the most vital entitlements of victim witnesses.[150] These measures are also set out in the ICTY Rules. A Judge or a Chamber may order 'appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused'.[151] Protection measures are taken in those cases where legitimate threats to the witness exist because of his or her testimony.[152] Several measures may be taken to prevent disclosure of a witness' identity, such as the opportunity for witnesses to testify through image- or voice-altering devices, the assignment of a pseudonym, and closed sessions.[153] Moreover, a Chamber 'shall, whenever necessary, control the manner of questioning to avoid any harassment or intimidation'.[154] Most witnesses testify without any protection measures.[155] The Tribunal does not grant compensation for injury caused to victims, the task of which is left to national jurisdictions.[156] In certain circumstances, a Trial Chamber may order the restitution of property.[157]

In accordance with the ICTY Rules, the Registry, responsible for the administration of the Tribunal,[158] has established a Victims and Witnesses Section (hereinafter VWS).[159] The VWS is an independent and neutral body that provides all logistical, psychological and protection measures to support those who come to testify before the ICTY.[160] The VWS recommends protection measures, and – in exceptional cases – carries out the relocation of witnesses to a third country.[161] In setting up the VWS, the ICTY has recognised the specific problems and needs of victim witnesses. In its second annual report, the Tribunal recognised that 'in giving

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[150] ICTY Statute, Article 22.
[151] ICTY Rules, Rule 75(A). This Rule applies to the trial proceedings. Rule 69 deals with pre-trial protection measures.
[152] ICTY Information Booklet: 19.
[153] ICTY Rules, Rules 75(B), 79(A). See also: ICTY Information Booklet: 20-21.
[154] ICTY Rules, Rule 75(D).
[155] Approximately a quarter of the total number of witnesses testifies with some sort of protection measures, according to statistics as of February 2013, see: http://www.icty.org/sid/10175.
[156] ICTY Rules, Rule 106.
[157] Ibid, Rule 105.
[158] ICTY Statute, Article 17.
[159] ICTY Rules, Rule 34. The VWS (initially called Victims and Witnesses Unit) became operational in April 1995. UN Doc. A/50/365 (August 23, 1995) (the Tribunal's second Annual Report), available at the ICTY website at: http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_1995_en.pdf, Paragraph 108.
[160] No distinction is made between victims and other witnesses: the VWS 'facilitates the appearance of all witnesses before the Tribunal, whether called by the Chambers, Prosecution or Defence'. ICTY Information Booklet: 9. The name of the VWS is rather misleading since it implies that victims are distinct from witnesses, whilst they are to be grouped among witnesses.
[161] ICTY Information Booklet: 22. Less than a fraction of one per cent of witnesses have been granted long-term protection such as relocation to third countries, according to statistics as of February 2013, see: http://www.icty.org/sid/10175.

testimony before it, victims and witnesses will have to relive their experiences in a country far away from their own and without the support from relatives and friends which they would normally receive if testifying in an ordinary court of law in their own country, in time of peace'.[162] It further noted that the VWS has the task 'to alleviate the anxieties as far as possible and to create an environment for victims and witnesses in which they can give their testimony with dignity and in safety'.[163]

With regard to witnesses' obligations, all those who testify at trial are first required to make a 'solemn declaration' to tell the truth.[164] False testimony constitutes an offence under the ICTY Rules.[165] The same counts for contempt of the Tribunal, when a witness 'knowingly and wilfully interfere[s] with its administration of justice', applicable in such cases where the witness fails to attend before a Chamber or refuses to answer questions.[166] Furthermore, while they are under oath, witnesses are not allowed to discuss the court proceedings with anyone.[167]

Despite the fact that – in a legal sense – the position of victim witnesses is usually equated with that of other witnesses, there are a number of particularities that apply to victim testimony alone. These interrelated particularities relate to specific characteristics of the Tribunal, to the nature of international crimes, or to both, and may generate a number of difficulties for both fact finding and truth telling.

2.2 The legal setting

Some of the particularities of victim testimony are grounded in specific characteristics of the Tribunal's legal setting. To commence however with a practical circumstance, it should be noted first that most victim witnesses come from the countries of the former Yugoslavia.[168] In order for them to testify, travelling is inevitable since the Tribunal is located over 2,000 kilometres away. Some of the victim witnesses may have never travelled before, let alone to The Netherlands. Also, they are required to stay in The Hague for several days, the average

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[162] UN Doc. A/50/365 (August 23, 1995), Paragraph 109.
[163] Ibid, Paragraph 110.
[164] 'I solemnly declare that I will speak the truth, the whole truth and nothing but the truth', ICTY Rules, Rule 90(A).
[165] ICTY Rules, Rule 91.
[166] Ibid, Rule 77(A).
[167] ICTY Information Booklet: 15.
[168] ICTY website at: http://www.icty.org/sid/10175.

of which is seven.[169] During their stay, they are in a foreign country, with often unfamiliar surroundings such as culture, language, climate, etc. Moreover, they are mostly by themselves, although provisions exist for being accompanied by family members or friends.[170] For many victim witnesses, the practical circumstances in which they are required to testify turn the act of testifying into a new, unique, and often distressing experience.

Furthermore, most victim witnesses find themselves in a courtroom for the first time and are confronted with complex legal procedures. This is exacerbated by the Tribunal's newly established legal system which – although a blend of two legal systems as set out above – primarily draws upon the common law system. This system is often unknown to victim witnesses who usually come from civil law countries.[171] They are, for example, unfamiliar with the feature of cross-examination by Defence counsel.[172] The latter relates to the system of questions and answers according to which victim witnesses are required to testify. Instead of asking them to tell all they can remember, they are confronted with so-called controlled narrative questions. However, victims are usually not used to talk about their experiences in this manner, which may influence their capability to testify.

Also, studies have demonstrated that a narrative or free form of recounting shows a higher level of accuracy, yet a lower level of completeness.[173] In a trial setting, both the accuracy and completeness of testimonies are essential ingredients for fact finding. To cover both would require a combination of free monologues followed by specific questioning, *i.e.* to 'let the witness tell the story in his own words, and when he has finished, then ask specific questions'.[174] In the *Krstić* trial, victim witnesses can sometimes freely speak in long monologues. Yet, the primary standard of narrating takes place through questioning by the parties (the Prosecutor, Defence counsel and Judges), which may cause less accurate fact finding.

Moreover, apart from the manner in which testifying takes place, the legal setting also strongly determines the contents of victims' testimonies. Namely, a defendant is on trial for

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[169] ICTY Information Booklet: 11.
[170] Ibid: 12.
[171] Tolbert & Swinnen (2006): 199.
[172] Wald (2002): 233.
[173] Loftus, E., *Eyewitness Testimony*, Cambridge: Harvard University Press (1979): 91.
[174] Ibid: 92.

specific offenses only, as set out in the indictment, and is entitled to a fair trial.[175] Evidence that is not relevant to the specific case is not admitted.[176] Consequently, only specific information from victim witnesses is sought during the questioning. This entails by definition that the whole story, both in the sense of a historical record and in the sense of the full stories of individual victims, cannot be dealt with.[177] Moreover, due to time constraints, the testimonies by victim witnesses are often shortened. According to Geoffrey Nice, former Prosecutor at the Tribunal, the legal process is imperfect for those who come to testify in The Hague: 'Under pressure of time, the advocates of both sides squeeze from them what is necessary to the case and deny [the witnesses] the chance to speak at length when they want or need to. [...] it cannot be otherwise if cases are to finish within a reasonable time'.[178] Different victim witnesses may provide different details with regard to the accused, and the time and place of the incident.[179] Together, these testimonies contribute to the Tribunal's process of fact finding and ultimately to the verdicts. However, at the individual level, the contents of a victim's testimony is by definition incomplete.

At the same time, the nature of international crimes requires an investigation into the context in which these crimes were committed. International crimes are committed in a planned and organised manner, especially in the case of genocide, which legally requires an 'intent to destroy, in whole or in part, a national, ethnical, racial or religious group'.[180] In the *Krstić* case – in order to establish that genocide had in fact taken place in Srebrenica – it was essential for the Tribunal to explore the events preceding the actual deeds for which the defendant stood trial, in order to determine that the accused had knowledge of the broader context in which his acts occurred.[181] The requirement of a broader context inevitably entails

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[175] ICTY Statute, Article 20(1).
[176] ICTY Rules, Rule 89(C): 'A Chamber may admit any *relevant* evidence which it deems to have probative value (emphasis added)'.
[177] Even though, according to Antonio Cassese, the first president of the ICTY, one of the major merits of international criminal trials – including those conducted at the ICTY – is the establishment of a fully reliable, impartial and objective, historical record of events. Cassese, A., 'On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law', *European Journal of International Law* 9(1) (1998): 9-10 and Cassese, A., 'Reflections on International Criminal Justice', *The Modern Law Review* 61(1) (1998): 6.
[178] Nice, G., 'Trials of Imperfection', *Leiden Journal of International Law* 14(2) (2001): 392.
[179] ICTY, Manual on Developed Practices (2009): 7, available at the ICTY website at: http://www.icty.org/x/file/About/Reports%20and%20Publications/ICTY_Manual_on_Developed_Practices.pdf.
[180] Convention on the Prevention and Punishment of the Crime of Genocide, UN Doc. A/RES/260 (III) (December 9, 1948), available at the UN website at: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/260%28III%29.
[181] Akhavan (1998): 785.

that, sometimes, evidence from victim witnesses is heard, that does not relate to the charges. This so-called background evidence can be critical of the defendant, implicate the defendant in another crime or be sufficiently atrocious that it remains in the mind of the fact finders, *i.e.* the Judges who ultimately decide upon the defendant's guilt. In other words, there is a risk that Judges are being exposed to irrelevant and possibly prejudicial evidence.[182] This risk is perhaps more present, the more victim witnesses are allowed to speak freely and provide evidence that does not directly relate to the specific case at trial, which may jeopardise accurate fact finding.

Another characteristic of the legal setting is that the testimonies of victim witnesses often need to be translated and interpreted since the Tribunal's working languages are English and French, whereas most victim witnesses testify in their own language.[183] Translation and interpretation can be complicating factors. Contrary to documentary evidence, the translation of court testimonies takes place simultaneously. This may prove difficult at times, if only because victims sometimes speak at high-speed. Moreover, due to the language differences, the Judges almost completely depend on the translators for an accurate translation of the contents of testimonies. In setting up a code of practice for translators and interpreters, the Tribunal has underscored the importance of correct translations during court proceedings.[184] For instance, '[i]nterpreters, when working in the courtrooms, shall inform the Judges of any doubt arising from a possible lexical lacuna in the source or target language'.[185] They are required to accurately and completely translate the wording of victim witnesses.[186]

Yet, literal translations are not always possible. According to Robert Cryer, 'although speech is in general more idiomatic than writing, and can often be translated without too many problems, spoken language cannot always be rendered literally or even by close

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[182] Cryer, R., 'Witness Evidence Before International Criminal Tribunals', *The Law and Practice of International Criminal Tribunals* 2(3) (2003): 419-420.
[183] The Tribunal is basically multilingual. Apart from the working languages English and French, Bosnian-Croatian-Serbian (BCS), Albanian and Macedonian are languages used. Victim witnesses, accused and Defence counsel mostly speak in one of the languages of the countries of the former Yugoslavia. On translation and interpretation, see also the ICTY website at: http://www.icty.org/sid/165.
[184] ICTY, The Code of Ethics for Interpreters and Translators employed by the International Criminal Tribunal for the Former Yugoslavia (IT/144) (March 8, 1999), available at the ICTY website at: http://www.icty.org/x/file/Legal%20Library/Miscellaneous/it144_codeofethicsinterpreters_en.pdf.
[185] Ibid, Article 6(2).
[186] Ibid, Article 10(1).

approximation'.[187] The impact or importance of the original may get lost in the translation process, when testimonies are translated literally.[188] Also, the actual words and voice of the victims are not always heard (by the Judges), which reduces an assessment of the demeanour of victims to looks and body language alone: '[u]nless the witness breaks into tears or screams and shouts, the judges do not know what parts of her testimony she may sound hesitant about and which she is confident about'.[189] Thus, an evaluation of both the contents and the demeanour of victim witnesses is challenged by the inherently multilingual Tribunal.

Translation and interpretation problems may also relate to cultural and educational differences. According to Nancy Combs, 'because the ICTY prosecutes crimes that took place in Europe, the educational, cultural, and linguistic divergences between witnesses and courtroom staff […] do not prove as distortive'.[190] Yet, also at the ICTY, translation can be difficult when no adequate translation for certain words exists, or when words have taken on specific meanings in the context of war.[191] Sometimes, words can only be understood in their cultural context, although, according to Combs, this is a more pertinent problem when cultural differences between witnesses and court staff are larger, the case of which exists, for instance, at the ICTR.[192] Furthermore, educational background of victim witnesses may also influence their ability to express themselves. In the *Krstić* trial, victim witnesses are rarely incapable of answering the questions posed to them. In cases this does happen, it is difficult to establish a causal relationship with education.

A final characteristic of the legal setting that strongly affects victim testimony is the commencement and length of the proceedings. The period between the indictment and arrest of the defendant may take up to several years.[193] Once the proceedings have started, the period between the defendant's initial appearance in the courtroom and the date the final

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[187] Cryer, R., 'Witnesses before International Criminal Tribunals', in: Roberts, P. & Redmayne, M. (eds.), *Innovations in Evidence and Proof. Integrating Theory, Research and Teaching*, Portland: Hart Publishing (2007): 383.
[188] Ibid: 385.
[189] Wald (2002): 237.
[190] Combs (2010): 5. See also note 29.
[191] For instance, during the Yugoslav wars, the word 'genocide' was often misunderstood, or used so often that it had taken on a broader meaning. Cryer (2007): 388.
[192] Combs (2010): 79-100.
[193] The most prominent example is the case against Ratko Mladić, who was arrested and taken to The Hague in May 2011, almost seventeen years after the first indictment against the accused was issued. ICTY, Case Information Sheet, *Ratko Mladić*, Case No. IT-09-92, available at the ICTY website at: http://www.icty.org/x/cases/mladic/cis/en/cis_mladic_en.pdf.

judgement is rendered may equally last many years.[194] Consequently, usually much time elapses before victim witnesses testify in the courtroom. They are asked to memorise and describe in detail events that happened years before, which can turn the act of testifying for victim witnesses into a difficult undertaking. The passage of time may also affect the contents of their testimonies due to a number of memory problems.

2.3 Time and memory

As said, victim witnesses usually testify many years after the events have taken place. Victim testimony is essentially memory-based. Memorising is not simply retrieving events. Rather, it is an individual and selective understanding of the past. Moreover, memory is not static but a process that can be divided into several phases. First, there is the acquisition stage, *i.e.* the perception of the original event, in which information is encoded into a person's memory system.[195] According to Elisabeth Loftus, in this first phase, the witness' ability to perceive accurately is influenced by so-called event factors, such as the amount of time a witness looked at what is to be remembered, or the violence of the event, and so-called witness factors, such as the amount of stress experienced during the event, certain expectations or prior knowledge.[196] Together, these factors may influence a witness' perception and interpretation of the events.

The difficulty of this first phase in the memory process has been stressed by Patricia Wald. According to Wald, testimonies by eyewitnesses are almost always grounded in both the witness' observations of the events at the time (perception), and the unconscious opinion about what these observations mean (interpretation). The latter is influenced by factors such as the witness' background, culture, whether the witness was a passive observer or the crime victim, and the extent to which the witness realised at the time that he or she witnessed a criminal act. Thus, the witness inevitably gives his or her interpretation of the events on the very moment these events occur, based on his or her *prior* knowledge.[197]

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[194] For instance, the closing arguments in the trial against Vojislav Šešelj took place in March 2012, over four years after the trial commenced in November 2007, and over nine years since the defendant was transferred to the Tribunal. ICTY, Case Information Sheet, *Vojislav Šešelj*, Case No. IT-03-67, available at the ICTY website at: http://www.icty.org/x/cases/seselj/cis/en/cis_seselj_en.pdf.
[195] This three-stage analysis is universally accepted among psychologists. See: Loftus (1979): 21.
[196] Loftus (1979): 23-51.
[197] Wald (2002): 225-226.

At the same time, the witness' observations can be strongly influenced by what Daniel Schacter calls 'absent-mindedness'. Some information 'is either never registered in memory to begin with, or not sought after at the moment it is needed, because [at the time of the events] attention is focused elsewhere'.[198] Omission – of certain facts, details or entire events – is an important feature of memory. According to Loftus, not all details of an event are equally salient, or memorable. This is because the 'extraordinary, colorful, novel, unusual, and interesting scenes attract our attention and hold our interest'.[199] The *Krstić* case shows several examples in which victim witnesses have forgotten about certain details, whereas other aspects are remembered more strongly.

The problem of omission is strongly related to the passage of time. During the retention stage (the period between the occurrence of the events and the recollection of information), '[b]oth the length of this retention interval and the events that take place during it affect a witness' testimony'.[200] During this second phase of the memory process, the time frame causes two sets of difficulties. First, it may cause what Schacter refers to as the problem of 'transience', another problem of omission; forgetting occurs with the passage of time.[201] Secondly, the passage of time may lead to distortion of memory, caused by numerous influences during the second phase of the memory process. According to Loftus, both the external information the witness obtains after the events as well as the witness' own thoughts can cause changes in the witness' recollection of his or her experiences. Information may be added or altered, and may even change the witness' feelings about what he or she remembers.[202] Thus, the initial perception and interpretation of the events may become distorted with the passage of time due to new information gained *after* the events.

According to Schacter, distortion of memory is caused by the problem of bias, which refers to 'distorting influences of our present knowledge, beliefs, and feelings on new experiences or our later memories of them'.[203] Schacter suggests amongst others that people – often

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[198] Daniel Schacter identifies seven sins of memory, three of which relate to 'omission', namely, transience, absent-mindedness, and blocking. In addition, he divides four problems of 'commission' (misattribution, suggestibility, bias, and persistence): 'some form of memory is present, but it is either incorrect or unwanted'. Schacter, D.L., *The Seven Sins of Memory. How the Mind Forgets and Remembers*, Boston/New York: Houghton Mifflin Company (2001): 4-5.
[199] Loftus (1979): 25-27.
[200] Ibid: 53.
[201] Schacter (2001): 12.
[202] Loftus (1979): 54-87.
[203] Schacter (2001): 138.

unconsciously – tend to rewrite their memories to make them either more consistent with, or different from the present.[204] Also, bias may happen due to external factors. Over the years, many victim witnesses have talked to fellow victims, journalists, therapists and prosecutors. Talking to family, friends or others can have important effects on the victim's ability to recall events accurately; by discussing and retelling the same story, details may vary from one version to the other, and information from others is added to a person's memory.[205] Bias may also occur through the media. Victim witnesses may have read newspapers, or seen images on television of the accused or the events.

Distortion can also be caused by misattribution which entails that '[s]ometimes we remember events that never happened, […] [or] we recall correctly what happened, but misattribute it to the wrong time or place'.[206] This problem can be connected to the fact that victims of international crimes are often victimised in several ways; they may have been detained in camps, escaped execution, and lost family members.[207] According to Wald, in complex cases, in which a victim has suffered a multitude of violations, misattribution of memory to the wrong facts is a common feature.[208] Also, victims of international crimes are never merely individually victimised; most victims have relatives and friends who likewise have suffered similar wrongs. As a result, the risk occurs that 'at other times […] we mistakenly credit a[n] image or thought to our own imagination, when in reality we are recalling it […] from something we read or heard'.[209] Again, external influences may cause distortion of memory.

In summary, memory is grounded in an individual and selective perception and interpretation of the events at the time of their occurrence, which – over time – decays and may become distorted. Memory is a serious problem at the ICTY since victim witnesses usually testify many years after the events have taken place. When they are called to testify, the third phase of the memory process comes into action (the retrieval stage) during which victim witnesses are asked to retrieve information from memory. The degree to which they succeed in retrieving information accurately is strongly related to the two preceding phases

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[204] Ibid: 139-144.
[205] Wald (2002): 236.
[206] Schacter (2001): 90.
[207] This is called repeated victimisation. See: Heikkilä, M., *International Criminal Tribunals and Victims of Crime. A Study of the Status of Victims before International Criminal Tribunals and of Factors Affecting This Status*, Turku/Åbo: Institute for Human Rights, Åbo Akademi University (2004): 59.
[208] Wald (2002): 236.
[209] Schacter (2001): 90-91.

of the memory process and their inherent problems.[210] The problems of perception, interpretation, omission and distortion are more pertinent the more time has passed between the occurrence of the events and the retrieval of those events in the courtroom. In the *Krstić* trial, the time issue is stressed by the Presiding Judge as follows:

> Judge Rodrigues: [...] We all realise that it is very difficult for a witness to be very specific and precise after five years, and we cannot expect the witness to tell the exact time of the day, the exact number of the victims. I don't think that these particular details are relevant for the present case. [...] but we simply cannot ask this witness to remember things that took place five years ago, and he just told you that he hadn't had any sleep for five days. We have to be able to imagine the circumstances of the event, which was very emotional, and we have to bear in mind that there are certain limitations on human perception. I'm sorry, but I have to tell you that it is almost a torture -- I'm a bit reluctant to use this word -- for the witness, to try to remind him of all these events. [...][211]

This time issue is intensified by the fact that testifying is hardly ever an isolated event. It is common for victim witnesses to have given statements during the investigation phase of an upcoming trial. Also, victim witnesses sometimes testify in multiple cases about the crimes they have witnessed. The latter relates to the Tribunal's jurisdiction over natural persons who are individually responsible for the committed crimes.[212] This responsibility also comprises superior or command responsibility, which attributes individual criminal liability to superiors if they knew or could have known that crimes were committed by their subordinates.[213] Several individuals can be held responsible for a single criminal act, the reason for which victim witnesses may be required to testify in several cases.[214] When victim witnesses testify more than once, their statements often show a number of inconsistencies among each other, which underscores the notion that memory may become biased and distorted over time.

Most importantly, differences among multiple testimonies may affect accurate fact finding. The *Krstić* trial shows several examples in which names, numbers and other aspects between previous statements and court testimonies of victim witnesses differ. During the cross-examinations, Defence counsel frequently use this discrepancy to demonstrate the

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[210] Loftus (1979): 22.
[211] Transcript dated March 29, 2000: 1622 (Bego Ademovic).
[212] ICTY Statute, Article 6.
[213] Ibid, Article 7.
[214] Heikkilä (2004): 59.

unreliability of victim witnesses.[215] Here, it is noteworthy that, although victim witnesses may find it offensive that their credibility is questioned, the cross-examinations are still an important element in the process of fact finding. In favouring live testimony over (merely) written statements, Wald stresses that 'the engine of cross-examination is still a powerful tool to uncover critical errors of perception or memory on the part of the witnesses'.[216]

The concern of credibility and accuracy of testimonies caused by memory problems leads to the issue of the victim witness' honesty and confidence in relation to what he or she considers to be true. According to Loftus, 'eyewitness testimony is likely to be believed [...], especially when it is offered with a high level of confidence, even though the accuracy of an eyewitness and the confidence of that witness may not be related to one another at all'.[217] Sometimes, the process of reconstruction (the second phase of the memory process) takes place unconsciously. A victim witness may, for instance, be convinced of something that he or she did not see or hear.

In the end, it is up to a Trial Chamber to assess the credibility of the evidence provided by the victim witness, not his or her honesty. This was emphasised in the *Vasiljević* case in which the Trial Chamber concluded that '[t]he fact that a witness gives their evidence honestly is insufficient to establish the reliability of that evidence. The issue is not merely whether the evidence of [a] witness is honest; it is also whether the evidence is objectively reliable'.[218] It further stated that '[e]ven the most honest witness can convince themselves of what must have happened by a perfectly natural process of *unconscious* reconstruction (emphasis added)'.[219] Thus, a Trial Chamber may conclude that the evidence provided by an honest witness is distorted and therefore unreliable. At the same time, more weight is attributed to a thorough account by the victim witness of the essence of an event than to a lack of details, or to minor discrepancies in evidence of various witnesses.[220]

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[215] Wald (2002): 228-229.
[216] Ibid: 230.
[217] Loftus (1979): 19, 100-101.
[218] ICTY, *Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-T, Trial Judgement (November 29, 2002), available at the ICTY website at: http://www.icty.org/x/cases/vasiljevic/tjug/en/vas021129.pdf, Paragraphs 16.
[219] Ibid, Paragraphs 112.
[220] ICTY, Manual on Developed Practices (2009): 7.

2.4 The impact of trauma

Many victim witnesses at the ICTY are traumatised by the events they have witnessed or suffered from. According to Judith Herman, those 'who have endured horrible events suffer predictable psychological harm. There is a spectrum of traumatic disorders, ranging from the effects of a single overwhelming event to the more complicated effects of prolonged and repeated abuse'.[221] According to Herman, '[t]raumatic events overwhelm the ordinary systems of care that give people a sense of control, connection, and meaning'.[222] As a result, victims of trauma suffer from 'a feeling of "intense fear, helplessness, loss of control, and threat of annihilation"'.[223]

Trauma causes several problems. First of all, talking about their experiences can be difficult for many traumatised people. Victims often find themselves in what Herman calls the 'dialectic of psychological trauma'.[224] Briefly, this implies that, on the one hand, there is the wish to deny or suppress the horrible events and to move on with daily life, and on the other hand, there is the need and desire to speak. Remembering and speaking about traumatic events can be therapeutic as well as traumatic, as it often brings a feeling of reliving the traumatic events all over again.[225] Furthermore, traumatic memories, unlike ordinary memories, often lack a verbal narrative and context. Rather, they comprise fragmented images and emotions.[226] In her elaborate work on the women of Srebrenica, Selma Leydesdorff notes that – when survivors are fully given the opportunity to speak – they will not tell the hard facts of what happened but rather their impressions, traumatised snapshots of the past, and narratives about grief.[227] This makes it difficult for victims to convey, and for their listeners to understand the whole story.

The legal setting exacerbates the difficulties of talking about traumatic experiences. Unlike 'testimony psychotherapy', which proceeds according to the victim's psychological requirements in a safe environment and is aimed at recovery and healing, court testimony is constraint by the judicial system, which is not designed as a place where victims are treated

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[221] Herman, J.L., *Trauma and Recovery. From Domestic Abuse to Political Terror*, London: Pandora (1994): 3.
[222] Ibid: 33.
[223] Ibid.
[224] Herman (1994): 1, 47.
[225] McNally, R.J., *Remembering Trauma*, Cambridge/London: Harvard University Press (2003): 105.
[226] Herman (1994): 37-38.
[227] Leydesdorff (2008): 36.

in a psychological sense.[228] On the contrary, testimony may cause psychological suffering and re-traumatisation due to the emotional aspects inherent to the act of testifying, such as 'recalling the trauma, assembling memories coherently, experiencing aspects of the environment as similar to the original trauma, and having to prove that one suffered'.[229] Victim witnesses often display intense emotions but the parties are no therapists that can help them to deal with their sufferings. Also, according to Eric Stover, unanticipated events in the courtroom, such as the sight of a photograph of a loved one, can devastate victim witnesses and thus influence their capability to testify.[230]

At the same time, in literature it is often assumed that testifying brings a sense of catharsis or healing to victims.[231] This assumption is based on increasing research into the psychological effects of experiences of gross human rights violations.[232] The most fundamental manner to cope with these experiences is to talk about one's suffering instead of repressing it. Psychotherapeutic work is grounded in the belief in the restorative power of truth telling; through narrating the traumatic event, the story becomes a testimony which is believed to generate healing.[233] This premise is also reflected in anecdotal evidence revealing the desire of victims to tell their stories.[234] Whether testifying has therapeutic value is however questionable. Not only is it doubtful whether full recovery is possible at all, for survivors of gross human rights violations healing is an individual,[235] long-term,[236] and complicated process, dependent upon a myriad of variables.[237] For some, courtroom testimony may have some short-term benefits, but for others it may not have a therapeutic value at all.[238]

Not only can it be difficult to talk about traumatic events, trauma may also influence memory. It is generally accepted that emotional events are usually remembered persistently,

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[228] Shuman, D.W. & McCall Smith, A., *Justice and the Prosecution of Old Crimes. Balancing Legal, Psychological, and Moral Concerns*, Washington: American Psychological Association (2000): 107-108.
[229] O'Connell (2005): 332.
[230] Stover (2005): 129.
[231] Fletcher, L.E. & Weinstein, H.M., 'Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation', *Human Rights Quarterly* 24(3) (2002): 593.
[232] O'Connell (2005): 306-316. The author offers an overview of the most common long-term psychological effects of human rights violations.
[233] Herman (1994): 181.
[234] Minow (1998): 66-70.
[235] The variety of psychological responses to human rights violations is wide and cannot be predicted. O'Connell (2005): 306 note 42.
[236] Fletcher & Weinstein (2002): 593.
[237] O'Connell (2005): 317 note 102.
[238] Fletcher & Weinstein (2002): 593-594.

vividly and with a great amount of details.[239]At the same time, according to Richard McNally, violence and stress can 'direct attention to the central features of the arousing event at the expense of the peripheral features. Accordingly, an extremely stressed person will encode and remember central aspects of the experience while failing to encode trivial details'.[240] Similarly, it has been stated that the memory of persons suffering from a Post Traumatic Stress Disorder (PTSD) may be affected due to high levels of stress hormones at the time of the events.[241] Consequently, certain details can be forgotten or mixed up. In other words, the emotional impact of the events at the time of their occurrence can cause problems of omission and distortion. Sometimes, entire traumatic experiences are (temporarily) blocked from memory.[242]

Also, traumatic experiences may become more distressing over time, for instance due to knowledge gained afterwards. The events at Srebrenica are a good example in the sense that for many survivors the full extent of what happened only became apparent *after* the events of July 1995. As shown before, post knowledge may influence (traumatic) memory. Furthermore, many victims have undergone some sort of therapy to overcome their suffering. According to Cryer, there is a risk of contamination of witness evidence during trauma counselling or in psychiatric treatment.[243] Again, talking to others about one's suffering may cause distortion of memory.

The impact of trauma may affect the ability of victims to testify, and the contents of their testimonies, and therefore influence the processes of both fact finding and truth telling. This does not necessarily mean that victims' testimonies are to be considered unreliable or inaccurate. In the *Furundžija* case, the Trial Chamber decided that 'even when a person is suffering from PTSD, this does not mean that he or she is necessarily inaccurate in the evidence given. There is no reason why a person with PTSD cannot be a perfectly reliable

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[239] Schacter (2001): 163, 173-174; Stover (2005): 9.
[240] McNally (2003): 49-50.
[241] In the *Furundžija* case, several expert witnesses testified on the issue of trauma. According to one expert witness 'high levels of stress hormones can damage the area of the brain called the hippocampus, responsible for memory. Studies showed that the hippocampus in people with PTSD had been damaged and people suffering from PTSD performed more poorly in memory tests than people without PTSD'. ICTY, *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Trial Judgement (December 10, 1998), available at the ICTY website at: http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf, Paragraph 102.
[242] Schacter (2001): 80, 82-87.
[243] Cryer (2007): 397.

witness'.[244] It also concluded that victim witnesses 'cannot reasonably be expected to recall the precise minutiae of events, such as exact dates or times. Neither can they reasonably be expected to recall every single element of a complicated and traumatic sequence of events'.[245] In the case of *Kunarac, Kovač and Vuković*, the Appeals Chamber concluded that 'there is no recognised rule of evidence that traumatic circumstances necessarily render a witness's evidence unreliable. It must be demonstrated [by the Trial Chamber] in *concreto* why "the traumatic context" renders a given witness unreliable'.[246] In summary, the Tribunal has recognised the specific problems of trauma, but at the same time acknowledges that there is no causal relationship with reliable fact finding and truth telling.

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This chapter has shown that the legal position of victim witnesses at the Tribunal is often equal to that of other witnesses. At the same time, a number of provisions have been established to facilitate victims who come to testify in The Hague. Furthermore, victim testimony at the ICTY entails a number of particularities that affect both fact finding and truth telling. The legal setting, time and memory, and trauma, are all factors that may influence the accuracy and reliability of testimonies of victim witnesses. When it comes to truth telling, the legal setting is the most important factor. It determines both the manner in which victims tell their stories, as well as the contents of their testimonies. In short, the legal setting provides the framework for truth telling by victim witnesses.

[244] ICTY, *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Trial Judgement (December 10, 1998), Paragraph 109.
[245] Ibid, Paragraph 113.
[246] ICTY, *Prosecutor v. Kunarac, Kovač and Vuković*, Case No. IT-96-32-A&IT-96-23/1-A, Appeals Judgement (June 12, 2002), available at the ICTY website at: http://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf, Paragraph 324.

3. Truth telling by victim witnesses: a case study

3.1 Introduction

The *Krstić* case is one of the groundbreaking cases before the ICTY.[247] For the first time, an international court confirmed that genocide had taken place in Europe.[248] In July 1995, the Bosnian Serb Army conducted a military offensive on the Srebrenica enclave, in the eastern part of Bosnia and Herzegovina, which was until then a 'safe area' under control of the United Nations Protection Force (UNPROFOR). Its Bosnian Muslim residents fled into Srebrenica town, and after that, into the UN compound at the nearby village of Potočari. A large number of men attempted to flee towards Bosnian Muslim held territory, many of which were captured. At the same time, at Potočari, men were separated from women and children and both transferred. Thousands of Bosnian Muslim prisoners were killed by the Bosnian Serb Army, mostly by mass executions. In addition, the events generated a high number of refugees. As Chief-of-Staff/Deputy Commander (later Commander) of the Drina Corps of the Bosnian Serb Army, Radislav Krstić was sentenced to 35 years' imprisonment for, *inter alia*, aiding and abetting genocide and murder.[249]

The *Krstić* trial was conducted from March 2000 until June 2001, during 98 days in which 116 witnesses testified, 103 of which were called by the Prosecution.[250] Among the Prosecution witnesses 22 victims testified, from March to July 2000.[251] Out of these 22 victim witnesses of various ages and educational backgrounds 17 men and 5 women testified. A number of 16 witnesses testified under protection measures, *i.e.* during their court testimonies face distortion and a pseudonym were applied. The testimonies of most witnesses (15) took place during one day; a smaller number (7) testified during two days. An overview of the victim witnesses in the *Krstić* case is provided for in *Annex I*.

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[247] The following brief account is based on: ICTY, Case Information Sheet, *Radislav Krstić*, Case No. IT-98-33.
[248] See note 2.
[249] On August 2, 2001, the Trial Chamber convicted the accused to 46 years' imprisonment. Both the Defence and the Prosecution appealed against the Trial Chamber's judgement, which led to the Appeals judgement of April 19, 2004 in which the Appeals Chamber sentenced the accused to 35 years' imprisonment. ICTY, Case Information Sheet, *Radislav Krstić*, Case No. IT-98-33.
[250] ICTY, Case Information Sheet, *Radislav Krstić*, Case No. IT-98-33. According to Patricia Wald, Judge at this trial, a total of 118 witnesses testified, of which 58 testified under pseudonym or face or voice distortion, and 9 gave their evidence in closed session, *i.e.* over 50% did not testify publicly. Wald (2002): 223-224.
[251] The victim witnesses all testified in the period between March 13, 2000 and July 28, 2000, the period in which the Prosecution presented its case. The number of victim witnesses is based on the author's examination of the transcripts of the trial proceedings. It should be noted that in this period two witnesses (Witness C (March 23-24, 2000) and Witness G (March 30, 2000)) testified in closed session. Whether these testimonies can be classified as those given by victim witnesses remains undefined. Furthermore, according to Marie-Bénédicte Dembour and Emily Haslam, only 18 victim witnesses testified. See: Dembour & Haslam (2004): 158.

Testimonies proceed according to a systematic structure. They commence with the entering of the witness into the courtroom, upon which he or she is welcomed by the Presiding Judge and asked to read the solemn declaration to tell the truth and to confirm his or her name.[252] After that, the Prosecution commences its examination, normally with a few preliminary questions about personal details of the witness, such as date and place of birth, background, previous and current profession, and nationality.[253] The examination is followed by cross-examination by the Defence, and examination by the Judges. The Judges may put questions at all times. In the *Krstić* case, they rarely do so and instead, usually question the witnesses during the final examinations at the end of their testimonies.

3.2 The treatment of victim witnesses

The treatment of witnesses in the courtroom is the first factor that influences truth telling by victims.[254] This section examines how victims are treated and to what extent they receive recognition and moral support during their testimonies. At the outset, it should be stressed that recognition is an essential part of the truth telling process. If the judicial process recognises 'that the events happened, that they caused the victims great suffering, and that they were wrong',[255] victims who testify may feel individually acknowledged, since they are being heard and their accounts believed.[256] During testifying, signs of sympathy and support towards witnesses by the parties may provide victims with a sense of acknowledgement of both their suffering and their very existence as victims.

Witnesses are generally treated in a sympathetic manner. At the beginning of their testimonies, they are usually welcomed by the Presiding Judge who inquires whether the witness is comfortable and thanks him or her for coming:

> Judge Rodrigues: Thank you. You may be seated. Are you comfortable?
> The witness: Yes, I am.
> Judge Rodrigues: Did you have an opportunity to walk around a little bit, to see The Hague?
> The witness: No.

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[252] In case protection measures apply, the witness confirms his or her name written on paper by stating 'yes'. See also note 164.
[253] In some cases, when protection measures apply, these details are redacted from the transcripts.
[254] In sections 3.2, 3.3, and 3.4, the words 'witness(es)' and 'victim(s)' are used interchangeable, when referring to victim witnesses.
[255] O'Connell (2005): 317
[256] Ibid: 328-330.

> Judge Rodrigues: Not yet? We hope that you will be able to do so later on, that you will have a chance to see this beautiful town. Thank you very much, madam, for coming to testify before the Tribunal. You will now be answering questions that will be put to you by Mr. Cayley. He's going to treat you like a gentleman, I'm sure. Mr. Cayley, you have the floor.[257]

The Prosecutor and Defence counsel equally commence their (cross-)examinations with a few words of kindness. The Prosecutor usually stresses that the witness is safe and asks him or her to try to relax:

> Mr. Cayley: Now, Witness, I know you're feeling very nervous at the moment. Relax as best you can. Let me let you into a little secret. Whenever I stand up in this courtroom, I feel exactly the same way; the only difference is that I've learned to hide it over the years. This may be the only opportunity that you get to tell this account. Don't worry if you can't remember things. I'll remind you. Just relax, speak slowly, and tell the Judges what happened to you.[258]

Furthermore, during their testimonies, witnesses are facilitated in a variety of ways. For instance, the parties often offer a break and ask the victims whether they are capable to continue with their testimonies:

> Judge Rodrigues: Mrs. Hajdarevic, please have some rest. Take your time. If you need a break, we'll have a break. We understand how painful this must be for you.
> The witness: I thank you too, Your Honour. We could perhaps have a little break if you want.
> [...]
> Judge Rodrigues: Very well, then, we will still have a 15-minute break. I hope that you will be able to get some rest so that you can come back and continue with your testimony. A 15-minute break.[259]

> Mr. Cayley: If you want to take a break at any time, just indicate to the President, if you want to just take a five-minute break, and I'm sure we can do that. Do you want to continue?[260]

Witness J, who had been waiting for several hours to be called into the courtroom, testifies for thirty minutes on a Friday afternoon on the suggestion of the Prosecutor:

> Mr. Cayley: [...] Last night when I spoke with him, he was very fragile. He has a great deal of courage but he was very fragile. He has been waiting this morning for several

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[257] Transcript dated April 3, 2000: 1939 (Mirsada Malagic).
[258] Transcript dated April 13, 2000: 2861-2862 (Witness O).
[259] Transcript dated April 11, 2000: 2590 (Hava Hajdarevic).
[260] Transcript dated May 25, 2000: 3432 (Witness T).

> hours to come. In a sense, I think it may actually be worthwhile commencing testimony, because then he will at least become accustomed to the courtroom and he's not going to worry all weekend long about coming back, because he's been waiting now in a room. I think that's probably the best way to proceed, but I will leave it to you.[261]

The examples demonstrate that the parties are well aware of the difficult task of testifying. When it comes to recognition, a twofold distinction can be made: recognition for the act of testifying and recognition of the events themselves. For victims, testifying about their experiences and sufferings can be hard and demanding. During the (cross-)examinations, this difficulty is frequently stressed by the parties:

> Mr. Cayley: Mr. Mandzic, try and speak more slowly, because there are interpreters that have got to keep up with you. I know it's difficult to speak about these events, but stay calm, and we'll get through your testimony as quickly as I can.[262]

> Judge Riad: Good morning, Witness J. I'll have to call you J and not to call you by your name. We do appreciate your coming here to testify, and we fully realise how painful it is for you. I'll not prolong your ordeal, but we would like to see more clearly some of the events you mentioned in a few questions. [...][263]

Recognition that talking is difficult cannot be separated from recognition of the experiences witnesses are asked to convey. The testimonies are filled with signs of recognition of the painful events and sufferings of victims:

> Judge Riad: Witness I, we fully realise how painful it must be for you to recount all these tragic events and to relive it again. You're a man of great courage, and we are highly grateful to know that you got out alive from these horrors. But we also deplore very much the disappearance of the others.
> The witness: Thank you. Thank you.[264]

> Mr. Cayley: Let's go back to uniforms again. I realise these were very difficult moments for you. Do you recall on any of these Serb soldiers, on any of these 50 soldiers, seeing any badges on them?[265]

At the same time, the indications of recognition often remain on a general and superficial level. This can be explained by the fact that by definition full recognition (for the painful

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[261] Transcript dated April 7, 2000: 2439 (Witness J).
[262] Transcript dated March 21, 2000: 961 (Nesib Mandzic).
[263] Transcript dated April 10, 2000: 2484 (Witness J).
[264] Transcript dated April 7, 2000: 2418 (Witness I).
[265] Transcript dated May 23, 2000: 3205 (Witness R).

events victims have experienced) can never be given during the testimonies. Namely, trial proceedings deal with evidence that is presented and examined, but not yet admitted by the Court. In particular the Judges who – in line with the civil law tradition – strongly control the proceedings and question the witnesses, remain (and should remain) impartial and objective during the testimonies, which inevitably limits them in offering victims full acknowledgement of their sufferings.

Some of the victims, like Camila Omanovic, find it hard to control their emotions, in particular when recounting about the loved ones they have lost:

> The witness: [...] My children were leaving to an unknown destination. I didn't know what was going to happen to them, but I had enough force to fight because of this maternal instinct in me. I thought that there must be something that can be done to help my children who had been taken away. They were both under-aged. That's why I jumped out of that truck. I wasn't brave, I was just trying to use the little force that was left in me in order to save my children. I apologise for crying.
> Judge Rodrigues: Please do calm down. We have profound respect for you and what you have suffered, and you are indeed a brave woman, because you needed a lot of force, a lot of strength to experience what you have been through. We also know you are a brave woman because you have come here to testify. May I continue, Mrs. Omanovic?
> The witness: Yes, Your Honour. Thank you very much.
> Judge Rodrigues: Mrs. Omanovic, you described, in very negative terms, Serbian soldiers. I would like to know: What was their image before the war? Did they have this negative image before or was it only the result of the war?[266]

The example makes clear that, despite the presence of supportive remarks of recognition, the examination continues and the witness is asked a question unrelated to what she has just said. Even though victims have the opportunity to speak about their suffering, they often seem to talk without being heard since responses are either missing or not referring back to what was said:

> The witness: [...] I have lost a number of relatives and cousins and people who could have helped me, but today I have to help their children, and it's very difficult for me to help anyone. I am barely surviving.
> Judge Riad: We are very happy that you have survived.
> The witness: Yes, I was lucky. Yes, that's what I keep telling myself. But what's it worth now? My life has been damaged, my health. When I have to sit for a long time and then when I have to stand up, it's very difficult for me to stand up on my right leg from rheumatism.

[266] Transcript dated March 23, 2000: 1137-1138 (Camila Omanovic).

> Judge Riad: Well, I think that will pass with time. You're still a young man.
> The witness: If I were allowed to go back to my land, yes, but they wouldn't let me go back. And lots of criminals are still at large and the world is simply watching, and the world could have helped us.
> Judge Riad: The world is listening very carefully to what you are saying, so be fully aware of that.[267]

> Judge Rodrigues: Madam, do you wish to continue or is that all you wanted to say? We feel very much for you, as I have already said.
> The witness: I would like to finish there.
> Judge Rodrigues: Take your time, please, Witness T. What did your mother tell you? You told us that you wanted to end there with what your mother told you.
> The witness: That they had killed my father at Potocari a day later. That's what my mother said.
> Judge Rodrigues: So, Witness, we do not wish to make you suffer any further. I think that you were very brave to come here and to tell us everything that you have told us, and therefore that ends your testimony here. We wish you a safe journey to your place of residence and that you will be able to recover, because you have children who need you. [...][268]

Words of compassion are merely absent, the reason for which also stems from the fact that a judgement has not yet been rendered. Yet, at other times, in particular at the end of the examinations, the Judges do not refrain from providing comments which seem to indicate moral support. They usually conclude the testimonies with general remarks about the courage of victims to testify and the importance of justice and reconciliation. Sometimes, the Judges convey a message of hope for a better life and comment on how victims should consider their future lives:

> Judge Rodrigues: [...] What you have told us here, Witness I, is indeed an extreme type of human conduct. It goes beyond all horror films that have been made so far. But on the other hand, there is a humane story that you have told us here too. Remember the waiter that you mentioned, you said that he had told you that he liked everyone, that he liked all people. You're a wise man, Witness I, you have experienced a lot in life, and all I can tell you at the end of your testimony is that I hope that once you go back to your country, you will no longer feel as a dry tree standing alone in the forest and that you will manage to find new hope and that this tree will live again. Witness I, this is the end of your testimony. Thank you very much for coming here to testify before the Tribunal. Let me tell you once again that we greatly admire your courage.[269]

> Judge Rodrigues: [...] Mr. Husic, you're still a very young man and you will probably live a very long life. We would like to congratulate you that you have survived, and I

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[267] Transcript dated April 10, 2000: 2487-2488 (Witness J).
[268] Transcript dated May 25, 2000: 3442-3443 (Witness T).
[269] Transcript dated April 7, 2000: 2437-2438 (Witness I).

> know -- hope that you are aware of the importance of the role that you have to tell the story that you have been through. All these events should be condemned. They cannot be tolerated by humanity. We would just like to thank you once again for coming here to testify and wish you a safe journey home. The usher will show you out of the courtroom. Thank you, very much.[270]
>
> Judge Riad: I share the views of the president in saying that we have a great deal of admiration for your courage, and we understand and feel for your pain, but there is a life ahead of you, and the whole world is on your side. [...][271]

These final remarks suggest to help and support victims. However, the contrary may occur. For instance, wishing a victim 'a safe journey home' or 'a long life', or expressing the hope that one's relative will come back, may leave the witness with an empty feeling of not being heard.

3.3 The manner of testifying

The manner in which testifying takes place is the second factor that influences truth telling by victims. This section examines to what extent victims can freely, *i.e.* in their own way and speed, tell their stories, and which elements influence narrative storytelling in the courtroom.

The manner in which victims testify occurs through a system of questions and answers. The position of victims is herewith constraint; unlike recounting all they remember and wish to tell, victims tell their stories by responding to questions posed to them by the Prosecutor, Defence counsel and Judges. The extent to which the questioning is guiding is clearly shown in the testimony of Witness R who, at the beginning of his testimony, is strongly lead by the Prosecutor:

> Mr. Cayley: I want to cast your mind back to the 11th of July, to 5.00 or 6.00 in the afternoon on that day. You were in the village of Susnjari. Can you tell the Judge what you recall happened at that time?[272]
>
> Mr. Cayley: Let's now move on to the 14th of July of 1995, and if you can tell the Judge what you did on that day?[273]
>
> Mr. Cayley: Now, let's move ahead in time to the 18th of July 1995.[274]

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[270] Transcript dated April 11, 2000: 2645-2646 (Enver Husic).
[271] Transcript dated July 26, 2000: 5763 (Witness DD).
[272] Transcript dated May 23, 2000: 3188 (Witness R).
[273] Transcript dated May 23, 2000: 3193 (Witness R).
[274] Transcript dated May 23, 2000: 3194 (Witness R).

Sometimes, the Prosecutor explains to the witness how he or she is requested to respond:

> Mr. Cayley: [...] Now, Witness, if you could tell the Judges what happened to you after you surrendered to the Serbs on the 13th of July. And if you would speak for a minute, minute and a half and then take a pause, I may have a few questions to ask you to clarify your testimony, or I may just ask you to proceed on with your story. Can you do that?[275]

During the examination, the Prosecutor continues to lead the witness through his or her testimony. The same applies to Defence counsel and Judges who are similarly in control of the questioning and the pace with which questions and answers are dealt with:

> Mr. Petrusic: Mr. Mandzic, at that time we see the establishment of armed forces in Potocari, for example, Sucaskin (phoen) And other villages, under the leadership the Naser Oric, Zulfo Tursunovic, and others. Do you have any knowledge about that?
> The witness: I think we should move back in time a little and see about the cause. It is true that the consequence was the formation of certain village guards.
> Mr. Petrusic: Please allow me, Mr. Mandzic, to repeat the question. I think you should answer the question as it was put to you.[276]

> Judge Wald: So I'm asking you what was the time between that time when he came in the gym and talked about -- you said he talked about saying that you would be exchanged and the time they began to blindfold you and take you in the trucks to the execution field. Was it an hour, two hours, or what?
> The witness: In the gym, Mladic did not say that we would be exchanged. He said that we would be sent to Kladusa and Bijeljina and it was only in Bratunac that he said that we would be exchanged.
> Judge Wald: All right. But the question remains: How much time between whatever he said in the gym and the time when they began to take you out?
> The witness: Two to three hours.[277]

In general, witnesses are thus strongly guided by the parties during their testimonies. At the same time, the different kinds of questions influence the extent to which victims are given control over the answers they are asked to provide, in terms of both length and contents. A common distinction can be made between open and closed questions. Open questions usually commence with words such as 'what', 'why', 'how', and 'describe':

> Mr. Cayley: [...] You're inside the UN Compound. Can you describe to the Judges the scene that you saw in and around the compound at Potocari and inside the compound on the morning of the 12th of July, 1995?[278]

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[275] Transcript dated April 10, 2000: 2502 (Witness K).
[276] Transcript dated March 22, 2000: 1026 (Nesib Mandzic).
[277] Transcript dated April 13, 2000: 2851-2852 (Witness N).
[278] Transcript dated March 22, 2000: 984 (Nesib Mandzic).

Open questions are likely to receive long answers, unlike closed questions which require short answers and tend to focus more strongly on facts:

> Mr. McCloskey: And who were you afraid of?
> The witness: We were afraid of the Serb troops.
> Mr. McCloskey: And about what time did you and your family get to the area of the UN compound?
> The witness: About 4.00, 4.00 in the afternoon.
> Mr. McCloskey: And where did you take your family?
> The witness: To the Transport.
> Mr. McCloskey: Is that the Transport Factory that had all the old buses in front of it?
> The witness: Yes, yes, yes, yes, yes.
> Mr. McCloskey: And did you actually go inside the building of the Transport Company?
> The witness: I did.
> Mr. McCloskey: And how many other people were inside the building that afternoon that you went there?
> The witness: You mean both men and women?
> Mr. McCloskey: Yes, everybody.
> The witness: Many.
> Mr. McCloskey: And did you spend the night there?
> The witness: Yes.[279]

Open questions grant victims more liberty over the answers they are asked to provide, unlike closed questions in which control remains with the questioner. Despite the alternation between open and closed questions, witnesses are more frequently requested to provide information about precise details. In the following example, after Camila Omanovic' description of the atmosphere in Potočari, the witness is brought back to testify upon plain facts:

> Mr. Harmon: Mrs. Omanovic, do these images that we've been looking at for the last few minutes accurately depict the condition of the refugees as you recall them?
> The witness: Yes, they do. This is exactly how it happened. Only this is just a small excerpt. You have to imagine thousands and thousands of more people coming in; you have to imagine all those voices. The whole thing has to be magnified. This is only one truck that we saw. Now, you have to imagine several thousands of people and the noise being much louder, and you also have to bear in mind that we kept hearing fire and the shells that were falling all around us.
> Mr. Harmon: What were the weather conditions like on the 11th of July in Potocari?
> The witness: It was a very warm day. It was very hot.
> Mr. Harmon: And when you arrived in Potocari, where did you go specifically?
> The witness: Together with my family, I went to the compound of the Zinc Factory.[280]

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[279] Transcript dated March 30, 2000: 1682-1683 (Witness H).
[280] Transcript dated March 22, 2000: 1084-1085 (Camila Omanovic).

Within the system of questions and answers, victims are obliged to answer questions. During the (cross-)examinations a number of difficulties may occur. Namely, even though in general the questions are clear and victims are able to respond accordingly, victims may encounter difficulties in answering the questions posed to them. Sometimes, they misunderstand the question:

> Mr. Harmon: Can you tell the Judges, was the football pitch -- how many men were on the pitch and how much of the area of the football field was covered by those men?
> The witness: I didn't quite understand your question. You mean the Bosniaks?
> Mr. Harmon: Let me ask it again. Did the Bosnian Muslim men cover the entire football pitch, half of the pitch, a quarter of the pitch?
> The witness: I think that the whole pitch was covered.[281]

The example demonstrates that the problem of misunderstanding is generally solved by explaining and rephrasing the question. Furthermore, victims do not always respond to the question:

> Mr. Cayley: Was it the Bosnian Serb army that had entered Srebrenica and surrounded the enclave?
> The witness: As they were entering the town of Srebrenica, I had already started towards the woods, together with the military. The command of the army ordered the able-bodied men to go through the woods; and those who were weak, they were supposed to go to Potocari.
> Mr. Cayley: Were you in the army at the time yourself?
> The witness: No, I wasn't in the army.[282]

The example shows that non responding to the question is not by definition a problem; the questioning continues. It also shows that the parties have control over the proceedings; they decide whether or not the witness is interrupted or brought back to the question when he or she fails to respond.

The problems of misunderstanding and non responding to questions are intrinsically linked to the system of questions and answers. Furthermore, victims are sometimes hampered by memory problems when requested to (accurately) recount their experiences, since details can be forgotten or distorted over time. Victims may find it difficult to respond, in particular when asked after specific details they do not remember:

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[281] Transcript dated April 14, 2000: 2951-2952 (Witness P).
[282] Transcript dated April 12, 2000: 2734-2735 (Witness M).

> Mr. Petrusic: In what alphabet was that written?
> The witness: In view of the fact that I studied Latin and Cyrillic scripts, there was no Cyrillic, as far as one could remember. But this was a very difficult moment when you can't notice or hear or register everything. It is hard to imagine, and it is hard to be certain at that moment.
> [...]
> Mr. Petrusic: So regarding "Drinski", you have a feeling that it was there?
> The witness: Yes. As to what I feel now and remember now, I must underline once again that these were difficult moments, and in such moments it is difficult to expect a lot, because imagine if you were in such a situation, how you would feel.[283]

The difficulties that sometimes occur are usually solved, but interruptions and confusion may affect the extent to which victims can freely tell their stories. Furthermore, emotions, such as irritations, disappointments, and traumatic feelings can play a role during the questioning. For instance, during cross-examinations, witnesses may feel offended when their credibility is questioned, in particular when Defence counsel inquire after certain inconsistencies with previous statements:

> Mr. Visnjic: Witness M, you made a statement previously to the Tribunal and the Ministry of the Interior after you crossed into free territory?
> The witness: Yes. I told the truth everywhere. I made a statement, telling the truth, and I have come here to tell the truth, to tell everything I saw and experienced.[284]

Victims may be overwhelmed by painful feelings when recounting about the loved ones they have lost:

> The witness: [...] But Mr. President, Your Honours, when one -- when I leafed through that list before I left Bosnia for The Hague and for this august institution, I went through that list and I felt a lump in my throat, because those people are no more. And the world watched quietly.
> Judge Riad: Some people refused to have their names on the list. Are they also no more, or perhaps some of them are still around?
> The witness: If I may just a minute. May I have just a minute? I need to calm down.
> Judge Riad: Sorry. I can stop my questions.
> The witness: Yes, but, you know, they were all my fellow townsmen. I can. I can. Yes, I'm alright now. I'm all right now. [...][285]

During the questioning, victims are frequently interrupted in their narratives. The most important cause for interruptions relates to the substance of the answers provided by the

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[283] Transcript dated May 23, 2000: 3223-3225 (Witness R).
[284] Transcript dated April 12, 2000: 2771-2772 (Witness M).
[285] Transcript dated March 21, 2000: 1048 (Nesib Mandzic).

witnesses. Sometimes, victims tend to stray from the questions put to them and to continue recounting what they have experienced:

> The witness: [...] We lit a fire to dry ourselves. There was some fruit: apples and plums, and pears, whatever we could find. It was August, I remember well, and --.
> Mr. Cayley: Witness, if I could just interrupt you. [...][286]

> The witness: There was no one there to help me. I managed to get up. It was hard. I was all stiff. But by budging left and right, I managed to sit up. And after sitting for five to ten minutes, I somehow managed to climb up against a tree to get on my feet. As I was wounded in the shoulder, I could walk. I hadn't lost so much blood as not to be able to walk. I could walk with difficulty but…
> Judge Riad: Very good. Just with reference to the insignia that you saw, [...][287]

The examples show that witnesses are cut down when they are dwelling too much about details that are not asked for or which are of no interest to the Prosecutor, Defence counsel or Judges. Again, this makes clear that the questioning is leading. Witness S is interrupted and requested to focus on 'the main things that occurred':

> Mr. McCloskey: Witness, as you know, what you're saying has to be interpreted. I can tell that you're going a little – if you can just slow down a little bit and just tell us the main things that occurred.[288]

Witness M, in his response to the Defence counsel's question, deviates from the question, after which the Presiding Judge interferes:

> Mr. Visnjic: You said somebody had told you; was that somebody specific or were there just rumours?
> The witness: This is what we heard. They were shouting and they were telling that the weak ones should go to Potocari and that the others should go to the woods, to Susnjari. And those were the orders, and some people survived, some didn't. I managed to survive. And so let me tell you once again, it was very difficult for us. I have not come here to argue with you. I have come here to tell the truth about what we have been through. And I have come to tell you about the 130 days that I spent in the woods and how I managed to survive. I've come here to tell the truth about what has happened to me. And I feel very sorry for the people. And this gentleman sitting here, if he had known for this Tribunal, he wouldn't have come here, would have lived -- stayed there and lived with us as he did before the war.
> Judge Rodrigues: Witness M, I'm sorry to interrupt you, but could you please try and answer Mr. Visnjic's questions in a direct manner. If a question is a direct one, please

[286] Transcript dated April 12, 2000: 2746 (Witness M).
[287] Transcript dated May 23, 2000: 3228-3229 (Witness R).
[288] Transcript dated May 23, 2000: 3246 (Witness S).

> try to give us a direct answer. We are here to do justice and there are two parties here in this case. There is the Prosecution and the Defence. Everybody has the right to defence. Imagine if something should happen to you, you would also need somebody to represent you. We do understand the suffering you've been through, but please try to answer the questions of Mr. Visnjic directly, please.[289]

The example shows that victims are required not to elaborate on matters that go beyond the questions posed to them. Sometimes, interruptions can be explained by the fact that some evidence is already heard. In the following example, Witness DD is eager to tell her whole story, but is stopped by the Prosecutor:

> Ms. Karagiannakis: Witness, you mentioned black Thursday. What happened on that black Thursday when you were going to be transported out?
> The witness: I was going to tell you the whole story from Tuesday to Thursday. Can I do that?
> Ms. Karagiannakis: Witness, the Judges have already heard quite a lot of evidence in this case about the events in Potocari, so for the purposes of my examination, I'm not going to ask you questions about those days. [...][290]

Finally, the interruptions or simply cutting off the witnesses can also relate to time constraints. References to the limited available time are frequently made. At the end of his examination, the Prosecutor clearly wants to speed up Witness J's testimony:

> Mr. Cayley: Witness, I realise that the trip that you made to Zepa was very difficult and very frightening, but I would just like you to simply confirm a number of points to the Judges by simply answering yes or no. Otherwise, I think we're going to be here a very long time, and I know you want to go home to Bosnia tomorrow. So simply answer yes or no. Do you understand?
> The witness: Why should I say yes or no to your questions?
> Mr. Cayley: Did you arrive in Zepa on the 26th of July.
> The witness: On the 26th of July, I arrived in Zepa, about 3.00 in the afternoon.
> Mr. Cayley: And then I think, on the 29th of July, Zepa fell, you --
> The witness: On the 29th, Zepa fell.
> Mr. Cayley: You left Zepa and you spent a long time -- Witness, listen to my question and simply answer yes or no to the question. I think you left Zepa on the 29th of July and you spent over 40 days wandering in Bosnian Serb territory, and then you eventually made your way to the free territory on the 17th of September of 1995. Is that right? Just yes or no.
> The witness: Yes. Yes. Yes.[291]

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[289] Transcript dated April 12, 2000: 2763-2764 (Witness M).
[290] Transcript dated July 26, 2000: 5752-5753 (Witness DD).
[291] Transcript dated April 10, 2000: 2474-2475 (Witness J).

During the cross-examination of Witness M, the Presiding Judge interrupts, referring to the waste of time that is taking place:

> Judge Rodrigues: Mr. Visnjic, I'm sorry to interrupt you. I should like to ask you to ask very specific and short questions so that we don't lose too much time, waste too much time. The question was what distance it was. If you can try to control the witness, please, Mr. Visnjic. You can interrupt the witness. That's okay with me. If you don't do that, I will have to intervene every time.
> Mr. Visnjic: Thank you, Mr. President. I didn't want to interrupt the witness, but otherwise I would have intervened.[292]

Similar examples can be found throughout the testimonies. The most prominent example is the testimony of Witness Q during which the parties are evidently in a rush to finish before the break[293]:

> Mr. McCloskey: All right. Now, I'm going to – we're going to go a little quicker now. I'll ask you a few questions which you can answer yes or no, and if you feel like you need to explain them, that's okay too. But did you spend the night on the killing field there?[294]

Unlike all other testimonies, the Judges do not question the witness at the end of his testimony and in addition, do not allow him to add something to his testimony:

> Judge Rodrigues: In that case, Witness Q, you have finished your testimony here at the International Criminal Tribunal. We're very glad that you managed to survive those terrible events that you were able to testify to. We wish you a safe journey home and we hope that you will have a life that will give you reason to smile again. [...][295]

On the other hand, it seems that the parties sometimes deliberately intervene to facilitate the witnesses, in order for them to finish their testimonies in time, and to avoid the need to return the next day, which becomes clear from the following examples:

> The witness: [...] When the day broke, I reached one area of the forest, near the field, and I stayed there for a while, to have some rest. Again I was trying to find some food --

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[292] Transcript dated April 12, 2000: 2768 (Witness M).
[293] No Court sessions were held between April 14 and May 22, 2000.
[294] Transcript dated April 14, 2000: 3044 (Witness Q).
[295] Transcript dated April 14, 2000: 3050-3051 (Witness Q).

> Mr. McCloskey: If I can just interrupt you. Could you tell us now, this next day, about the vehicle you saw, and try to tell us as you feel the important parts are, but remember, we don't want you to testify -- we want you to be able to finish your testimony today. So if you could tell us the most important parts of that story, when you see the vehicle, and then we'll go on from there.[296]
>
> Mr. McCloskey: Witness S, in order to give you a chance so you can finish up today, I know that there's more to this story and that you survived a difficult hike through the woods and weren't able to get out to Nezuk until the 16th of July. But at this point I'm going to stop my questions so the Defence counsel can ask questions, and then of course the Judge will ask questions.
> [...]
> Mr. Petrusic: I shall try, Mr. President, to finish today, bearing in mind what I have already notified you about, the medical treatment for General Krstic, but in any event to spare the witness coming into the courtroom again.[297]

Interruptions not only take place because the Prosecutor, Defence counsel and Judges are in charge of the questions and answers, but also due to another set of factors. During all testimonies, the victims' accounts are interspersed with documentary evidence, such as written statements, maps, videotapes and photographs. For instance, the testimony of Enver Husic, who recounts how he managed to escape by joining a group of women on a bus which drove them to free territory, is extensively filled with interruptions. Several videotapes are played, and the witness is asked to indicate specific locations on maps and to identify himself and other persons on photographs.[298]

Furthermore, victims are often asked to slow down since they speak too fast, and the interpreters have difficulty to keep up with the witnesses during the simultaneous translations:

> Mr. McCloskey: Excuse me for interrupting you, but the interpreters have to interpret everything you're saying in English and French and you're going a little quickly. So if you could try and slow down and give some breaks so I might be able to ask some questions in between.[299]

In particular during the cross-examinations in which Defence counsel and victims speak the same language, the necessary pauses for translations are sometimes overlooked by the victims:

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[296] Transcript dated April 7, 2000: 2400-2401 (Witness I).
[297] Transcript dated May 23, 2000: 3281 (Witness S).
[298] Transcript dated April 11, 2000: 2598-2646 (full testimony of Enver Husic).
[299] Transcript dated April 11, 2000: 2658-2659 (Witness L).

> The interpreter: Could the speakers please pause between question and answer.
> Judge Rodrigues: I'm sorry to interrupt you, Mr. Visnjic, but Witness, please, try to make a pause before you start answering the questions. This will be much easier for the interpreters. You speak the same language, the counsel and you, and I know that it is very easy for the two of you to communicate speedily, but you have to bear in mind that there are interpreters between you. If you can please bear this fact in mind, the Chamber will be grateful. I could perhaps motion to you, I can tell you either to slow down, like this [indicates], or to make a pause.
> Judge Riad: I should like to remind the interpreters to say "Question" and "Answer" because sometimes it is very difficult to distinguish between the two.[300]

Regardless of the causes that underlie the interventions by the parties, the interruptions influence the extent to which victims can freely tell their stories. Also, cutting witnesses short essentially limits the contents of testimonies and herewith the stories they may wish to convey in the courtroom.

Despite the many interruptions, victims often deliver long monologues. In the *Krstić* trial, a high number of witnesses tells the Court how they survived or escaped from executions. Witness O for instance, a teenager in July 1995, describes how he survived an execution:

> The witness: [...] So when I reached my spot, at that point we were watching those dead people. You could tell that those were dead people there. There were several Serb soldiers there. I don't know how many there were, five or ten, but they were standing behind our backs. But it all happened very quickly, in a matter of seconds. And then I thought that I would die very fast, that I would not suffer. And I just thought that my mother would never know where I had ended up. This is what I was thinking as I was getting out of the truck. And when we reached the spot, somebody said, "Lie down." And when we started to fall down to the front, they were behind our backs, the shooting started. I fell down, and I don't know what happened then. I wasn't thinking. It wasn't my idea to fall down first and to survive like this, I just thought it was the end. [...][301]

In most cases, when witnesses testify about these kinds of experiences, witnesses are allowed to speak at length without being interrupted. For instance, Witness R, who (like Witness O) was shot during executions and pretended to be dead, tells his story in a long monologue in response to the Prosecutor's question ('Can you tell the Judge what happened to you and these other men on the 19th of July?'[302]). Only after he has finished his story ('And that is the

[300] Transcript dated March 29, 2000: 1617 (Bego Ademovic).
[301] Transcript dated April 13, 2000: 2912 (Witness O).
[302] Transcript dated May 23, 2000: 3196 (Witness R).

end of that story'[303]), the Prosecutor continues with his questions about the evidence provided by the witness. The latter systematically occurs; the Prosecutor collects his questions, finds an appropriate moment to intervene, and sometimes even apologises for interrupting:

> Mr. Harmon: Now, let me interrupt you right there for a minute, Witness N. I want to clarify a couple of points in your testimony.[304]
>
> Mr. McCloskey: Excuse me, Witness S. Let me interrupt you to go back and clarify a couple of things.[305]

Witness DD, who describes being separated from one of her sons, is only interrupted by the Presiding Judge, who encourages her to take her time and to proceed:

> The witness: [...] And then I begged them, I pleaded with them. Why are you taking him? He was born in 1981. But he repeated his order. And I held him so hard, but he grabbed him. And then my son threw out that bag, and the soldier picked up the bag and threw it on a pile on the right-hand side, and he took my son's hand, and he dragged him to the left side. And he turned around, and then he told me, "Mommy, please, can you get that bag for me? Could you please get it for me?"
> Judge Rodrigues: Madam, please, take your time. Take your time to calm down. We are here with you; we're listening to you. Take your time.
> The witness: That was the last time I heard his voice.
> Judge Rodrigues: Take your time, madam. Do you think you'll need a break? Would you prefer to go on? If you feel able to continue, please let us know that.
> The witness: Yes, yes, I can continue. [...][306]

In fact, witnesses are frequently encouraged to continue to speak:

> Judge Riad: So continue telling your story, which is of great value.[307]
>
> Mr. McCloskey: Why don't you tell us, continue to tell us this story of what happened.[308]

The extensive monologues of some of the witnesses take place during the examinations by the Prosecutor. During the cross-examinations, Defence counsel usually do not let the

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[303] Transcript dated May 23, 2000: 3202 (Witness R).
[304] Transcript dated April 13, 2000: 2825-2826 (Witness N).
[305] Transcript dated May 23, 2000: 3278 (Witness S).
[306] Transcript dated July 26, 2000: 5755 (Witness DD).
[307] Transcript dated April 7, 2000: 2422 (Witness I).
[308] Transcript dated April 14, 2000: 3040 (Witness Q).

victims repeat their stories but instead, question witnesses about specific aspects of their testimonies, while sometimes referring to previous statements. In other words, the monologues are an integral part of the evidence presented by the Prosecutor.

3.4 The contents of testimonies

The contents of victims' testimonies is the third factor that influences truth telling by victims. This section examines to what extent victims can tell everything they want to tell and which elements determine the contents of testimonies.

The contents of victims' testimonies are first and foremost constraint by the trial proceedings which examine specific events in a specific period of time, in order to determine the defendant's guilt or innocence. In the *Krstić* case, the Trial Chamber emphasises its dual task:

> The Trial Chamber leaves it to historians and social psychologists to plumb the depths of this episode of the Balkan conflict and to probe for deep-seated causes. The task at hand is a more modest one: to find, from the evidence presented during the trial, what happened during that period of about nine days and, ultimately, whether the defendant in this case, General Krstić, was criminally responsible, under the tenets of international law, for his participation in them.[309]

As direct witnesses of the crimes, victims are the primary sources of information to reconstruct the events. In the *Krstić* trial, the name of the accused only appears in a small number out of the 22 victims' testimonies, which suggests that victims were particularly used as witnesses to create an account of the events, rather than an account of the defendants' involvement in the crimes. This assumption is confirmed by the Trial Judgement in which references to the victims' testimonies are particularly made in relation to the events surrounding the fall of Srebrenica.[310]

The limited timeframe that is dealt with, becomes clear at the very beginning of the testimonies. After a few preliminary questions, the examination by the Prosecutor immediately focuses on the events that are central to the case, *i.e.* the fall of the Srebrenica enclave in July 1995:[311]

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[309] ICTY, *Prosecutor v. Radislav Krstić*, Case No. IT-98-33, Trial Judgement (August 2, 2001), Part I-2.
[310] ICTY, *Prosecutor v. Radislav Krstić*, Case No. IT-98-33, Trial Judgement (August 2, 2001).
[311] An exception in this regard is Witness DD who, at the beginning of her testimony, is extensively asked about her life prior to the fall of the Srebrenica enclave, amongst others about her marriage, how she spent her days,

> Mr. Cayley: I want to now move forward in time, and I want you to think about the 11th of July, 1995. And I think at that time you and the other men from the Srebrenica enclave gathered at Susnjari; is that right?[312]
>
> Mr. Harmon: Now, I'd like to focus your attention on the fall of the enclave in July of 1995, specifically on the 11th of July, 1995. At that point in time were you married and did you have children?
> The witness: Yes. I was married and had four children.
> Mr. Harmon: And could you tell the Judges what happened on the 11th of July that caused you and your family to go in different directions?[313]

The limited timeframe inevitably entails that the full stories of victims cannot be told. For instance, in the *Krstić* trial, the years from the beginning of the Yugoslav wars up to the fall of the Srebrenica enclave are not dealt with. The same applies to the aftermath of the events of July 1995. The testimonies solely cover a specific period in the past. Only in a few cases, the Prosecutor refers to the present and future lives of the witnesses, mostly at the end of the examinations:

> Mr. Cayley: Now, I know you suffered some trauma as a result of these events, and that's shown in your medical records. How do you feel now?
> The witness: I don't feel very well. That's all I can tell you. But all in all it's okay. I cannot complain.
> Mr. Cayley: Do you still have any night-time recollection of the events at Kravica? Do you still have dreams or nightmares about these events?
> The witness: Yes, of course I do. I have dreams. I wake up in the middle of the night and I shiver. I become anxious, I start trembling, and everything comes back to my mind, my journey from Srebrenica to Tuzla. Everything sort of passes through me once again and it makes me fearful again. It's difficult to describe how I feel.[314]
>
> Mr. McCloskey: I'm sorry to ask you this question, but I think the Court and, perhaps, the world would like to know. How is it living without your two sons and without your three brothers in the wake of the tragedy of Srebrenica?
> The witness: How? You have children of your own. Only I know how I feel. I had two sons, now I don't have any, and I lost my brothers too.[315]

The contents of victims' testimonies is constraint in another important sense as well. Namely, the testimonies cannot be separated from the evidence that is presented and examined at trial

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and her relationships with neighbours. Only after that, the Prosecutor attends to the events of July, 1995. Transcript dated July 26, 2000: 5744-5748 (Witness DD).
[312] Transcript dated April 12, 2000: 2733 (Witness M).
[313] Transcript dated April 14, 2000: 2943 (Witness P).
[314] Transcript dated April 10, 2000: 2548-2549 (Witness K).
[315] Transcript dated April 11, 2000: 2589-2590 (Hava Hajdarevic).

and ultimately admitted by the Court. The contents of victims' stories are largely confined by the evidence the Prosecutor wants to present:

> Mr. Harmon: Now, Witness P, I'm not going to ask you questions about your experiences in the woods -- perhaps the Judges would like to inquire about that, perhaps counsel will inquire about that -- but I want to fast-forward the experiences that you had to the 13th of July, when there was a decision taken by you and by others to surrender to the Bosnian Serb army. Can you tell the Judges, did you surrender, and can you tell the Judges why you did?[316]

> Mr. McCloskey: I know you spent some time through the woods, but I'm going to – the counsel for the Defence may ask you about that, the Judge, but I would like also, I'd like to take you, if I could, through the 12th and start out with the late evening hours of the 12th. If you could tell us where you were on the late hours of the 12th and what you recall happening then, and then work your way onto the morning of the 13th when you were captured.[317]

The examples illustrate that the Prosecutor determines what is discussed and what not, *i.e.* which parts of the victim's story are included in his or her testimony, and subsequently (cross-)examined by the parties. The focus on evidence is underscored by the frequent use of the words 'testimony' and 'evidence' by the parties, when referring to the accounts of victims.

Against this background it is useful to distinguish various types of evidence that witnesses are asked to provide. A threefold distinction can be made. First, victims provide the Court with general, background information into the events. In particular the first victim to testify (Nesib Mandzic) presents extensive details about the circumstances in which the events at the Srebrenica enclave took place. At the beginning of his examination, the Prosecutor explains to the witness the kind of information he is asked to tell:

> Mr. Cayley: I want to now take you back to July of 1995, and it's important, as we've already discussed, that you, in response to my questions, you tell the Judges exactly what you heard and saw at the time, how you felt about things, and your perceptions about the feelings about the population in Srebrenica while these events in July of 1995 were taking place. [...][318]

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[316] Transcript dated April 14, 2000: 2945 (Witness P).
[317] Transcript dated May 23, 2000: 3242 (Witness S).
[318] Transcript dated March 21, 2000: 948-949 (Nesib Mandzic).

This kind of general evidence focuses on what happened in general, mostly during the immediate days preceding and following the take-over by the Bosnian Serb army of the Srebrenica enclave. It does not deal with the experiences of victims at a personal level. At the same time, the overall open nature of the questions about this kind of evidence leave more space for victims to elaborate upon what they have witnessed.

The second kind of evidence victims are asked to provide comes closer to victims' personal stories; they tell the Court what happened to them personally:

> Mr. Cayley: Witness, thank you. Can you tell the Judges who were the male members of your family that you lost during the war?
> The witness: After 130 days, I reached free territory. It was the 18th of November when I reached Kladanj. I learned that I lost my father, my brother, cousins, my neighbours; and my father who I loved most. I have my mother, my wife, and children, no brother, no father, no 14-year-old nephew. They have disappeared.
> Mr. Cayley: And they -- all of these members of your family disappeared at the time of the fall of Srebrenica in July of 1995?
> The witness: Yes, the fall of Srebrenica.
> Mr. Cayley: Thank you Mr. President. I don't have any further questions for the witness.[319]

This kind of personal evidence gives victims the opportunity to tell their personal experiences. When it comes to the most gripping parts of their stories, victims can speak at length without being interrupted. At the same time, the individual accounts are not isolated but together serve a common goal. Namely, in the *Krstić* trial, a number of testimonies are similar; no less than 11 male victims describe how they succeeded in fleeing from execution sites. The fact that many stories are comparable confirm the Prosecution's aim to demonstrate that the alleged crimes took place, *i.e.* one victim's story is corroborated by another victim's story. Finally, an alternation between general and personal evidence frequently occurs, which demonstrates that personal stories by victims are integrated into a larger account of the events in general.

Thirdly, and most importantly, the testimonies are filled with factual evidence. For example, witnesses are frequently asked to specify uniforms and insignia to establish the chain of command leading to the defendant:

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[319] Transcript dated April 12, 2000: 2759-2760 (Witness M).

> Mr. Harmon: Could you describe the uniforms as best you can recall them, each of the different types of uniforms.
> The witness: I can remember that there was a blue police uniform, which was also a camouflage uniform, and a military uniform that was used by the Serbian army. I also remember a multicoloured open uniform, light coloured.
> Mr. Harmon: How many blue police camouflage uniforms did you see while you were at the meadow?
> The witness: I didn't see a single one, but I could recognise the pattern of the uniform. It was a green camouflage uniform.
> Mr. Harmon: Now, we have seen in both the films that we've played and the still images, we've seen people in green camouflage uniforms. Is that the type of uniform that you saw, generally speaking?
> The witness: Yes.[320]

Witnesses are also often asked about details such as objects, numbers, and times:

> Mr. McCloskey: Can you describe the size of this trailer and the height of the sides?
> The witness: The trailer was at least 10 metres long and the sides may have been 1.20 metres, 1.40 metres.
> Mr. McCloskey: About how wide was it?
> The witness: Probably two and a half to three metres, I don't know exactly. But that would be my estimate that is how wide it should be.
> Mr. McCloskey: And do you know roughly how many men were put in the back of this trailer?
> The witness: I don't know. Between 25 and 30 at least could fit, but I don't remember. I didn't count.[321]

> Mr. Cayley: Now, you've said that the execution took place on the 19th of July, and I know this is not a time that you were inspecting your watch regularly, but do you recall approximately what time these executions took place?
> The witness: I think it was about 12.30. From 12.00 to 1.00 in the afternoon, in that time.[322]

This kind of evidence focuses on legally relevant facts that serve to establish the crimes and the defendant's guilt. According to Marie-Bénédicte Dembour and Emily Haslam:

> [t]he collection of legal evidence privileges 'positive' or 'objective' facts: it tends to disregard other kinds of facts, however useful they may be to understand 'what happened'. Lawyers learn to consider as facts only those that are precise, pedantic, quantifiable, thus structured within a true/false dichotomy.[323]

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[320] Transcript dated April 11, 2000: 2618-2619 (Enver Husic).
[321] Transcript dated April 11, 2000: 2663-2664 (Witness L).
[322] Transcript dated May 23, 2000: 3212 (Witness R).
[323] Dembour & Haslam (2004): 163.

The prevalence of factual evidence results from the fact that – after being examined and challenged – they can more easily establish the events, unlike, for instance, impressions and opinions.[324] In this regard, three observations are worth mentioning. First, this kind of evidence brings witnesses back to focus on literal facts about 'the where, when, who and how of events'.[325] It inevitably leaves out emotions, impressions and reminiscences of witnesses, aspects that victims may consider essential parts of the stories they wish to convey. Only in a few cases, witnesses are asked how they personally felt about things:

> Mr. Cayley: Did he state to you whether Mladic had said anything about the safety of the civilian population in and around Potocari?
> The witness: I don't remember. I do not know really what you have in mind.
> Mr. Cayley: Let's move on. You then went with the Dutch officers to Bratunac. How did you feel at the time?[326]

Secondly, victims may find it difficult to provide the requested facts, the reasons for which can be varied, for example due to memory problems:

> Judge Riad: Because you got a bullet, as you said. Was it a machine-gun or was it individual shooting on each one, if you remember?
> The witness: Those were seconds, so I really can't remember. But they certainly weren't single bullet shots. This was a moment of dying, so I don't know if anyone could remember. These are terrible moments.
> Judge Riad: Well, I'm glad you don't remember it. Thank you very much.[327]

Thirdly, factual evidence that witnesses are asked to provide may seem totally irrelevant to their own stories. The *Krstić* trial is filled with questions about details that – to victims – may appear insignificant. For instance, Witness K is asked from which window he managed to escape the execution site:

> Mr. Cayley: If you can recall, could you indicate to the Judges which window it was that you jumped through?
> The witness: I don't know exactly which window now. I can roughly show you.
> Mr. Cayley: As best you can remember, Witness.
> The witness: It may have been one of these two [indicates], or maybe this one, the third one. One of these. One of these three or four. I don't know exactly which one it

[324] Ibid.
[325] Ibid.
[326] Transcript dated March 21, 2000: 967 (Nesib Mandzic).
[327] Transcript dated April 13, 2000: 2934 (Witness O).

was because I wasn't looking when I jumped. I didn't remember. I didn't turn around to look at the windows.[328]

The irrelevance of facts can be disturbing to victims. Witness H, who states during the Prosecutor's examination to have seen 20 to 30 dead bodies, is cross-examined about this number:

> Mr. Petrusic: On page 4 of that statement, the third paragraph from the bottom, let me read you the first sentence of this paragraph: "Near to Gavric I also saw a red-coloured digger, making a hole, and next to this I saw a pile of approximately 40 or 50 dead bodies."
> The witness: You expect me to answer? Is that a question? Well, it is very difficult for you to understand me. I was terribly afraid. I saw this machine, I saw this excavator, I wasn't sure it was an excavator, and I saw dead bodies, but they were on a pile. At that moment, I panicked and I became sick from that panic and from the fear, and I'm still suffering from the stress that I experienced at that moment. So don't tell me about that. I mean, do you understand that there are people doing such evil things? It's probably difficult for you to imagine that. But those people had to be defended, whereas they were actually doomed to disappear from the face of the earth.[329]

The latter example illustrates that Defence counsel more frequently focus on facts, which emphasises the difference between the presentation of evidence by the Prosecution on the one hand and the rebuttal of this evidence by the Defence on the other. In general, the Prosecution focuses to a greater extent on general and personal evidence, whereas the Defence focuses on the examination of facts, amongst others those which seem to be inconsistent with victims' previous statements.

The foregoing has shown that the contents of testimonies are constraint by evidence that is presented and examined. This does not mean that there is no opportunity for victims to tell more. During the (cross-)examinations, victims frequently – both solicited and unsolicited – add information that is not specifically asked for, such as their emotional state of mind at the time of the events:

> Mr. McCloskey: Now, when the soldiers started taking men away, what did you do with your family?
> The witness: When I saw four soldiers bringing ten young men and taking them away, then I became scared and I realised what would happen. And then I took my

[328] Transcript dated April 10, 2000: 2529-2530 (Witness K).
[329] Transcript dated March 30, 2000: 1705-1706 (Witness H).

> family and we went along the road and spent the night inside an old bus, to be as close as possible to UNPROFOR.[330]

At other times, victims do not refrain from providing their personal thoughts about what happened or from questioning how the events could have occurred:

> Mr. Petrusic: So the cooling of relations on both sides occurred, as you say, about a year prior to the beginning of the war.
> The witness: As I say, a year before the war. Though I still have friends that I communicate with, but after everything I've gone through, how can you trust them, and who can you trust? Just imagine a situation when you meet a man in the street every day, you say hello to him, and at the end he kills you just because you have a Muslim name. Is that the deign of a human being? I can understand some things, but some things I simply cannot. If I had been an important man, I might understand it. But for an ordinary citizen, with a secondary school education, I think there's absolutely no explanation.[331]

Also, victims often refer to lost family members and to the present and future:

> The witness: […] And 8.000 Srebrenica inhabitants are missing, and we must all know that. We must all know that there must have been children, poor people, between 16.000 and 20.000. And one needs to feed them all, to bring them up. There are so many fathers without sons, and sons without fathers. I had two sons, and I don't have them any more. Why is that? […] But why did they have to kill my sons? And I stand today as dried as that tree in the forest. I could have lived with my sons and with my own land, and now I don't have either. And how am I supposed to live today? I don't have a pension or anything. Before that, I relied on my sons. They wouldn't have left me. They wouldn't have left me to go hungry. And today, without my sons, without land, I'm slowly starving. Isn't that sad?[332]

Victims not only provide additional information in response to questions. At the end of their testimonies, when the questioning has basically finished, the Presiding Judge usually offers witnesses the opportunity to add something to their testimonies. Most witnesses take this opportunity to express thoughts or ideas that have not been dealt with during the (cross-)examinations. The contents of these final statements varies. For instance, Nesib Mandzic stresses the importance of refugees to be able to return home and requests the Tribunal for recommendations:

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[330] Transcript dated April 11, 2000: 2583 (Hava Hajdarevic).
[331] Transcript dated May 23, 2000: 3283-3284 (Witness S).
[332] Transcript dated April 7, 2000: 2420-2422 (Witness I).

> The witness: Mr. President, Your Honours, about life in Srebrenica between 1992 and 1995, about the suffering of the population, the expulsion, and so on and so forth, one could go on and on. But what I should like to emphasise, and it goes beyond this institution, is how to overcome the effects. In the first place, I have in mind tens of thousands of expelled who live in Tuzla, Sarajevo, and dozens of other places around the Federation, and most of them have said that they would like to go back to their homes. But for political and other barriers, people are not returning. And they live now as second-rate citizens. They suffer because their life is not worthy of man. But I do know that that is not a subject that is dealt by this Tribunal. But any advice, any recommendation that you might have, I would think would be of great help to other institutions who are responsible for trying to resolve the problem of refugees and displacement as soon as possible, to help those people go back home and live life worthy of human beings.[333]

Mirsada Malagic expresses the grief of the women of Srebrenica and the importance of remembrance:

> The witness: I simply want to thank you once again. Yesterday afternoon, when I returned from here, I went out to walk around your city, that is what I wanted to tell you. I couldn't really see much, but what I really liked, what caught me eye, was a monument that we visited and that was a monument to women, that is, women awaiting sailors who never come back. And the monument to those wives touched me profoundly. I should like to find this statue and take it to Bosnia with me. Perhaps it could be likened to mothers and wives of Srebrenica who have been waiting and hoping for all those years, except that we followed different roads. We could turn to our empty forests. We saw our sons and our husbands off to those woods and never found out anything about them again, whether they are alive or dead, where are their bones lying. Many mothers have died hoping against hope, and it is quite possible that all the other mothers would end up like that because their numbers are dwindling every day. Thank you once again.[334]

The above examples illustrate that victims have the opportunity to provide information that moves beyond evidence. Even though interruptions frequently occur, the Prosecutor and Defence counsel let the victims elaborate upon their feelings, thoughts and ideas, and the Judges specifically provide them with an opportunity to freely talk at the end of their testimonies.

However, at the same time, two observations are noteworthy. First, despite the sometimes successful attempts by the victims to extend their answers with their own views, ideas and

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[333] Transcript dated March 22, 2000: 1067 (Nesib Mandzic).
[334] Transcript dated April 4, 2000: 1995 (Mirsada Malagic).

personal anecdotes, responses by the parties are often missing. Instead, witnesses are brought back to questions concerning factual evidence:

> The witness: [...] And that is how it was. That list exists to this day, but those men are no longer alive. And it is of no help to their families, because they are still grieving and still searching for all those missing people.
> Mr. Cayley: Mr. Mandzic, the evacuation outside the UN compound, the movement of this population, what time did it finish on the 13th of July?
> The witness: In late afternoon, as far as I can remember, sometime around 1900.[335]

> Mr. Petrusic: You said that the Serb soldiers entered. As far as I understood your testimony, they opened the door and fired.
> The witness: They fired through the door and they threw grenades through the windows and used rifle grenades, and all sorts of things. It was really a disaster. I don't know what kind of a nation they can be to kill people like that. Let everyone live as they will.
> Mr. Petrusic: Did you say they were using Zoljas?[336]

Similarly, at the end of their final statements, the Judges, unlike responding to the witness' account, usually limit themselves to thanking the witness for testifying:

> The witness: Well, I think after all this, the most important thing is that I have survived, though my health is poor. I have come here to tell the truth, and I thank the attorneys of the accused who treated me correctly, and everyone else. I would like to appeal to this Tribunal, if it can, to bring the people who did this to me so that I can look them in the face and we can clear everything up, and for Attorney Petrusic to be there too so I can tell him how this could have happened. When you meet somebody in the street every day and say hello and then he turns around and kills you, it's something I find incomprehensible. And I think friendship with those people who did this to me is over forever. That's as much as I have to say.
> Judge Riad: Thank you very much, Witness S.[337]

Secondly, when witnesses do receive responses, in particular during their final comments, these responses are often in sharp contrast with the witness' remarks. For instance, after Nesib Mandzic has stressed the problem of returning refugees, the Judge's response is the following:

> Judge Rodrigues: Very well, Mr. Mandzic. We have finished. You have told us about your suffering. Thank you. You showed great courage in coming and testifying here. You have also given evidence of your spirit of tolerance. I believe I speak in the name

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[335] Transcript dated March 22, 2000: 999 (Nesib Mandzic).
[336] Transcript dated April 10, 2000: 2480 (Witness J).
[337] Transcript dated May 23, 2000: 3289-3290 (Witness S).

> of my colleagues when I tell you that we all wish you a happy return to your home. Yes, those places were witness to suffering, but they should also be witness to tolerance and peace. Injustice, wherever, shall always be a threat to everybody. Now I believe I must make it up to everybody, and especially the interpreters, and we shall make a half-an-hour break now and we'll resume after the break with another witness. Half an hour, therefore. Thank you and farewell.[338]

Instead of following up on what the witness has just said, the Judge thanks the witness for coming and wishes him 'a happy return' home. A similar example is the response to Mirsada Malagic' final statement, in which a reply to the witness' plea for attention to the mothers of Srebrenica is merely absent:

> Judge Rodrigues: We share your grief, Mrs. Malagic, and the grief of all other people, and I hope that in your misfortune you nevertheless have a feeling for -- to manage to overcome this suffering, and independently of who are the responsible for this, they are no doubt a disgrace to humanity. But, Mrs. Malagic, I hope you will be able to find hope again and that you will continue along with this sensibility that you gave evidence of today. Thank you very much and a safe journey home.
> The witness: Thank you very much.[339]

These final exchanges demonstrate that Judges and witnesses talk past each other, instead of to each other. However, sometimes these exchanges seem to point to a true conversation:

> The witness: Mr. lawyer, you are defending a man who left 50.000 children orphaned, without one or both parents. Don't you feel guilty for those orphans, and what right do you have to defend him? That is my question.
> Judge Rodrigues: I'm going to answer that, Witness L. The Defence attorneys are doing their job here, and they're doing their job properly. All the accused have the right to a Defence, and that is why we are here. We are here to hear the Prosecution and the Defence, and it is always important that the Prosecution does its job well, and the Defence also do their job well, and the Judges are there to judge. Thank you very much for coming here and for the spontaneous manner in which you answered our questions. I hope I will help you understand that all the attorneys are doing their job, which doesn't mean that they share any responsibility.
> The witness: I know that.
> Judge Rodrigues: And regardless of the responsibility of the --
> The witness: I know that. I understand that.
> Judge Rodrigues: -- and regardless of the perpetrators of acts, and those acts are certainly horrible acts, and you are alive to tell the world that such acts must not be repeated. [...]
> [...]

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[338] Transcript dated March 22, 2000: 1077 (Nesib Mandzic).
[339] Transcript dated April 4, 2000: 1996 (Mirsada Malagic).

> Judge Rodrigues: [...] Witness L, you have completed your testimony. Thank you very much for coming. And as I have told you, you must tell the world, you, who have lived through these experiences, that we should do everything to prevent a repetition of such acts. And please remember that all the accused are presumed to be innocent until proven guilty. That is the spirit of justice, and we are rendering justice here in the best way we can. [...][340]

The example illustrates that sometimes the Judge does respond to the witness' final remarks in a substantive manner. Yet, similar examples also show that, ultimately, the Judge – not the victim – by commenting on the witness' remarks or questions, provides a final account and herewith ends the testimony.

When it comes to the contents of testimonies, special attention is to be given to victims' personal losses. Witnesses are never merely individually victimised; many have lost friends and family members. The loss of loved ones is an integral part of the experiences of witnesses and therefore of the stories they may wish to tell. In several cases, the Prosecutor asks the witness about family members who disappeared or died:

> Mr. McCloskey: Okay. And did you have two sons at the time?
> The witness: Yes, I did. They had gone through the woods.
> Mr. McCloskey: And have you seen them since that time that they went through the woods?
> The witness: No, I haven't. I just know that the youngest one went to the hospital, took out all the wounded persons to UNPROFOR, put them on a truck, and then afterwards he left and went through the woods.[341]

> Mr. Cayley: How many of your male relatives did you lose during Srebrenica?
> The witness: Many. I lost many members of my family. My brother, my father, and a lot of other family members, practically all of them.
> Mr. Cayley: Are you one of the few male members of your extended family still alive?
> The witness: Yes, I'm the only one.[342]

In most cases however, questions regarding personal losses can be found during the final examination by the Judges, at the end of the testimonies:

> Judge Riad: Yes. Then, concerning your father, you are sure he did not survive? Did they find his corpse, or did some people inform you that he did not survive? Can we still hope that he is alive?

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[340] Transcript dated April 12, 2000: 2729-2730 (Witness L).
[341] Transcript dated April 7, 2000: 2366-2367 (Witness I).
[342] Transcript dated May 23, 2000: 3212 (Witness R).

> The witness: I can always hope, but judging by the kind of people who were there, I very much doubt that he would have survived. I didn't hear anything and he has not been identified as one of the killed.[343]
>
> Judge Riad: [...] Did you hear anything about your brother since you were captured?
> The witness: No, I haven't heard anything. He went one way and I went the other and I don't know anything about what happened to him.
> Judge Riad: Since the 11th of July, 1995, he has not --
> The witness: Since the 13th of July, 1995, I haven't heard of him. Since that -- from the time when we were sitting together in the meadow. He was maybe 10 to 15 rows behind me sitting on that meadow.
> Judge Riad: Did you try to make any search to find out? Did you get any news?
> The witness: Well, we searched for him through the Red Cross. He has a wife and children, but they were unable to locate him.[344]

Not all witnesses tell the Court about their personal losses. This can be explained by the high number of witnesses who testify under protection measures: going into detail about relatives and friends could disclose the witness' identity. More importantly, questions regarding relatives and friends do not necessarily point to an interest into the personal lives of victims, their losses and their suffering. Rather, similar stories by different witnesses serve the common goal of establishing that certain events took place:

> Judge Riad: [...] You gave us a nutshell of the generations which were exterminated. You started by your father-in-law, Omer, who must be an elderly man; then your husband and his brother, Salko and Osman; then your sons, Admir and Elvir. But we didn't reach Adnan, who was 11. So to start, was Admir and Elvir in the fighting brigades? Were they more or less militarily involved in anything, or were they taken just because they represented the youth, the Muslim youth?
> The witness: [...] And Adnan Malagic, my youngest son, I did not mention him, well, because he crossed over with me, but thank you for remembering him in the end. The traumas he suffered, believe me, there are still effects of all those traumas today.
> Judge Riad: Of course. But are you convinced that all of them have disappeared, or just up to now you are in search of them?
> The witness: We mothers, wives, sisters, we're still looking for our missing, and we hope. But deep down, after all these years, I think we fear that they are no longer among the living.[345]
>
> Judge Rodrigues: I'm sorry to bring these memories back to you. You have lost two sons, you have lost three brothers. Did you get any information after they went away what happened to them or where they were?
> The witness: I learned about my sons, that they had reached Baljkovica, the crossing point, and that's all I know about them. As regards my brother, he was in Potocari

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[343] Transcript dated April 11, 2000: 2636 (Enver Husic).
[344] Transcript dated April 12, 2000: 2718 (Witness L).
[345] Transcript dated April 4, 2000: 1988-1989 (Mirsada Malagic).

and he was left there. My cousins, my relatives, they were among those who went to the woods, and I haven't heard of them ever since.
Judge Riad: "Ever since" means since July 1995?
The witness: Yes.
Judge Riad: Do you know many people in your family, in your acquaintance, who also passed through the same sad experiences, where their sons and brothers disappeared and they have no news?
The witness: Yes, I do. There are so many such cases.[346]

The examples show that the Judges want to clarify the circumstances and causes in relation to missing relatives. In other words, even though victims are asked about their personal losses, this kind of information is to be ascribed primarily to the creation of evidence.

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The case study has shown, first, that the parties often stress the difficult task of testifying and acknowledge the occurrence of the painful events. Yet, these indications of recognition remain at a general and superficial level. Also, signs of compassion or moral support are merely absent. Furthermore, the victims are strongly guided by the parties, who decide the pace with which questions and answers are dealt with. At the same time, when victims recount about their most emotional and impressive experiences, they can tell in detail and in their own words what has happened to them and are encouraged to continue to speak. Finally, the contents of victims' testimonies is largely determined by factual evidence that is presented and examined. At some occasions, in particular at the end of their testimonies, victims can extend their answers and provide information that is not specifically asked for. However, in these cases, substantive responses by the parties are often limited or absent.

[346] Transcript dated April 11, 2000: 2592-2593 (Hava Hajdarevic).

4. Conclusion

This thesis has addressed the topic of victim testimony at the ICTY. More specifically, the goal of this research was to examine the extent to which the Tribunal has provided victim witnesses a platform for truth telling. The core part of this research was formed by a case study. It examined in detail several aspects of the opportunity for truth telling by victim witnesses in the *Krstić* case, grouped around three interrelated factors (the treatment of victim witnesses, the manner in which testifying takes place, and the contents of testimonies). The findings of this case study, taking into account the legal position of victim witnesses and the specific characteristics of victim testimony at the Tribunal, lead to four interconnected conclusions.

First, the legal system of the Tribunal entails an inherently asymmetrical relationship between the victim witnesses and the parties. Due to their defined task of merely answering questions, victim witnesses take a subordinate position in relation to the Prosecutor, Defence counsel and Judges. They are guided by the parties, who frequently interrupt or cut off the testimonies when victims stray from the questions, when evidence has already been treated, or due to time constraints. Victims are not a partner equal to the parties. Rather, they are essentially dependent upon the parties when it comes to the extent to which they can freely tell their stories. In short, whether or not victim witnesses can speak, and what they can tell, is beyond their control since it is in the hands of the parties.

The presentation and examination of evidence is at the heart of the proceedings, which leads to a second conclusion: a hierarchy exists between the stories of victim witnesses and their testimonies in Court. This hierarchy is twofold. First, only parts of the victims' stories are selected by the parties, in particular by the Prosecutor, to be used as evidence in the case. This selection is motivated by the fact that cases only deal with specific events in a specific period of time. Moreover, despite the variety of evidence that is handled, factual evidence prevails. Consequently, victims' testimonies are generally reduced to the establishment of legally relevant facts, which may leave out emotions, impressions and reminiscences on the part of the victims. Also, when victims provide personal details (for example with regard to relatives and friends who have been killed), these parts of their testimonies usually serve to create a larger account of the events in general. In other words, the complete stories of victims are not told, and those parts which are told (*i.e.* their testimonies) are adjusted in order to serve as evidence, the latter of which prevails over the former. The many

interruptions and the fact that victims are cut off in their stories can be attributed to this unilateral selection made by the parties, which – as a result – fundamentally limits the contents of victims' testimonies. In short, at the Tribunal, victim witnesses, and their stories, are basically used as instruments for the presentation and examination of evidence.

Both the asymmetry (between the parties and victim witnesses) and hierarchy (between the stories and testimonies) are elements that are intrinsically linked to the legal system and its primary goal to establish the defendant's guilt. They are features of the retributive justice approach which lies at the core of international criminal justice.

At the same time, a third conclusion can be drawn. Within the legal setting of the Tribunal, which strongly frames and limits the manner of testifying and the contents of testimonies, an extent of leniency or flexibility towards victim witnesses on the part of the parties can be observed. This approach underscores the Tribunal's recognition of the special status of victims who testify about international crimes. The exposure to these crimes, due to their nature, brings an extraordinary high level of victimisation and suffering, which is reflected in some of the particularities and difficulties of victim testimony. In an unfamiliar, legal setting, victim witnesses are requested to testify, sometimes at multiple occasions. The act of testifying may be complex and stressful, if only because victims are not used to talk about their experiences through questioning. Memory and trauma are often complicating factors. Victim witnesses are asked to memorise and describe events they witnessed or suffered from years ago. Details may have been forgotten or distorted over time, due to which their reliability as witnesses can be questioned. Moreover, talking about the harm inflicted upon them can be hard for traumatised victims, who are herewith again confronted with their suffering.

The case study has shown that the parties are well aware of these special characteristics of victim testimony. Victims are treated in an overall sympathetic and facilitating manner. Moreover, they can deliver long monologues when they provide the Court with very personal, emotional and impressive accounts of their experiences. They are also allowed to extend their answers and to provide information that is not specifically asked for, in particular at the end of their testimonies. In other words, victims can sometimes freely speak without being interrupted, and are permitted to move beyond evidence. The attention given to victim witnesses at the Tribunal also becomes clear from specific provisions that have

been established for them, even though their legal position is often equated with that of other witnesses. In particular, victim witnesses are entitled to protection measures, which enable them to testify without having their identity disclosed.

The special status of victim witnesses entails that – at moments – the primary goal of the legal system (to prosecute war criminals) is put aside, and victims are free to elaborate upon matters that are not central to the case. To put it differently, an additional, non-legal, objective of the Tribunal seems to enter the courtroom, *i.e.* to provide victims a platform. The emergence of so-called extra-legal objectives of international criminal courts is to be attributed to the expanding field of transitional justice mechanism in general, and the growing restorative justice approach in international criminal justice in particular. This development becomes clear from the examination of the Nuremberg and Eichmann trials. Whereas in Nuremberg, in line with a purely retributive justice approach, victim witnesses were practically absent, the extensive use of victim testimony at the Eichmann trial clearly served the non-legal objective to offer victims a place in the judicial system, in line with a more restorative justice approach. Moreover, the value of victim testimony in the Eichmann trial was basically non-judicial in the sense that, in the end, the testimonies by victims only had a marginal part in the verdict. In contrast, in the *Krstić* case, despite a similar lack of connections between the victim witnesses and the accused, the judgement is replete with references to their testimonies.

The fact that victim witnesses are sometimes allowed to extend their testimonies beyond the requested evidence leads to a fourth and final conclusion: a discrepancy exists between, on the one hand, what victims may wish to convey and, on the other hand, how the parties deal with and respond to the extended accounts of victims. This discrepancy is perhaps best expressed during the signs of sympathy, compassion and recognition by the parties towards the victims (for both the act of testifying and the suffering of the victims), and during the final exchanges between the victim witnesses and the Judges. These comments are fundamentally flawed, the reasons for which are threefold.

First, during the proceedings the legal system by definition prohibits the acknowledgement to victims of the harm that was inflicted upon them. Only after the proceedings have ended – once the final judgement is rendered – full recognition of the events, and of the sufferings caused to victims, may be given. Second, the parties (in particular the Judges), by

commenting on the victims' experiences and sufferings, embark upon a (non-legal) field that goes beyond the core goal of a criminal trial. They are simply not trained to comfort or give moral support to those who testify. Consequently, substantive responses by the parties remain general, superficial, or absent, and are herewith not beneficial to the victims, which confirms the notion that the courtroom is not a place for them to receive psychological support. Third, at the end of the questioning, the victims are usually given the opportunity to add something to their testimonies. Many take this opportunity to express their feelings or thoughts, to refer to the present and future, or to commemorate the loved ones they have lost. Here, comments by the parties are often limited or in sharp contrast with the victims' accounts. The parties fail to respond adequately to the victims, which may leave them with a feeling of not being heard. In short, no true dialogue between the victim witnesses and the parties exists, which is another indication of their asymmetrical relationship.

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The foregoing has shown that a clear distinction exists between narrative truth and factual truth. Victims often have the wish to tell their own, personal stories, *i.e.* their narrative truth, whereas the legal system is aimed at factual truth. In short, the case study has confirmed that a tension exists between the concepts of fact finding and truth telling.

On the one hand, the judicial value of victim testimony cannot be underestimated; victim testimony is the Tribunal's main evidentiary source and herewith contributes to the outcome of the proceedings. As a result, victim witnesses primarily serve as tools in the judicial process of fact finding, which underscores the retributive justice approach of the Tribunal. On the other hand, the special status given to victim witnesses – taking into account the large impact of international crimes on victims and the particularities of victim testimony – is reflected in the parties' leniency towards the victims, and in their efforts to respond to the victims' stories. These non-legal elements point to a restorative justice approach of the Tribunal, in the sense that the proceedings also serve as a means to do justice to victims. The aims of the Tribunal (to bring war criminals to justice and to bring justice to victims) seem to co-exist. In other words, a mixture of retributive and restorative justice is applied at the ICTY.

Despite this mixture, the legal setting of the Tribunal strongly determines and predominates the position of victim witnesses and creates the conditions for the extent to which they are given a platform for truth telling. For victim witnesses, their position and the framework within which they are required to testify, are essentially limited and imperfect. This thesis has demonstrated that, when it comes to truth telling (as one of the needs of victims for justice), the Tribunal's claim to provide justice to victims essentially falls short. In a time in which victims of international crimes are becoming more important in the international criminal justice field, claims to provide justice to victims should be made with great caution.

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Annex I: Overview of victim witnesses in the *Krstić* case

	Name	*Date(s) of testimony: transcript pages*
1.	Mandzic (Nesib)	March 21, 2000: 946-982 & March 22, 2000: 983-1068
2.	Omanovic (Camila)	March 22, 2000: 1072-1087 & March 23, 2000: 1088-1141
3.	Witness D	March 24, 2000: 1244-1311 & March 27, 2000: 1328-1340
4.	Witness E	March 27, 2000: 1341-1375
5.	Ademovic (Bego)	March 29, 2000: 1580-1633
6.	Witness H	March 30, 2000: 1679-1726
7.	Malagic (Mirsada)	April 3, 2000: 1939-1979 & April 4, 2000: 1980-1997
8.	Witness I	April 7, 2000: 2363-2438
9.	Witness J	April 7, 2000: 2439-2452 & April 10, 2000: 2453-2497
10.	Witness K	April 10, 2000: 2497-2575
11.	Hajdarevic (Hava)	April 11, 2000: 2576-2597
12.	Husic (Enver)	April 11, 2000: 2598-2646
13.	Witness L	April 11, 2000: 2647-2692 & April 12, 2000: 2693-2731
14.	Witness M	April 12, 2000: 2731-2790
15.	Witness N	April 12, 2000: 2790-2817 & April 13, 2000: 2818-2860
16.	Witness O	April 13, 2000: 2860-2939
17.	Witness P	April 14, 2000: 2940-3014
18.	Witness Q	April 14, 2000: 3014-3053
19.	Witness R	May 23, 2000: 3185-3233
20.	Witness S	May 23, 2000: 3235-3292
21.	Witness T	May 25, 2000: 3428-3443
22.	Witness DD	July 26, 2000: 5742-5769