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International Criminal Justice, the Gotovina Judgment and the Making of Refugees

By Rosemary Byrne and Gregor Noll

1. Introduction

By the mid-1990s, two themes had become prominent in international legal debates. First, a number of conflicts setting off large-scale refugee displacement promoted a discourse on humanitarian intervention by military means. This discourse was particularly pronounced in situations where asylum protection appeared to be unavailable, at times due to a factual or imminent breach of international refugee law. In select cases, interventions by force were directly linked to provide protection for refugees amidst threats of *refoulement* by a neighbouring state.¹ The 1990s was a decade in which industrialized states cast their asylum systems as “overburdened” by rising numbers of applicants, and the idea of “fighting root causes” of flight gained traction. Second, the same decade saw the emergence of international criminal law in its contemporary form, based on the idea that individual criminal responsibility would, *inter alia*, deter future mass atrocities.² If international criminal law (ICL) would convince decision-takers to play by the rules of human rights law and international humanitarian law (IHL), refugee displacement might be markedly reduced. Generally, the idea of prevention through accountability and the rule of law resonated

¹ The threat of *refoulement* by Turkey brought about the protection of Kurds in a “safe zone” at the Iraqi-Turkish border in Northern Iraq during Operation Provide Comfort in 1991. Likewise, the reluctance of Macedonia to receive refugees from Kosovo compelled intervening states to set up the so-called Humanitarian Evacuation Programme in 1999.

² See Theodor Meron, “The Case for War Crimes Trials in Yugoslavia”, *Foreign Affairs* 1993, pp. 122-135, underscoring the necessity of criminal prosecution to prevent future atrocities. Almost two decades later, Judge Meron would contribute to the ICTY Appeals Chamber judgment acquitting Gotovina and Markač. For further examples of deterrence arguments, see Payam Akhavan, “Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?”, *AJIL*, 2001, pp. 7-31, affirming the long-term deterrent potential of international criminal tribunals; and David Wippman, “Atrocities, Deterrence, and the Limits of International Justice”, 1999-2000, 23 *Fordham Int'l L.J.* pp. 473-488.

well with a forced displacement discourse seized by early warning mechanisms, military interventions and more aggressive Western diplomacy.

Much has been written about displacement during the Balkan wars: Jens Vedsted Hansen is one prominent contributor to the debate on “temporary protection” which was played out among governments, refugee lawyers and NGOs in Europe at the time.³ Also, there is a robust body of writings assessing the International Criminal Tribunals (ICTs).⁴ In particular, the literature on how the ICTY is perceived in Croatia is growing, and permits the conclusion that the original intent of ICL to foster reconciliation through retribution was, at the very least, naïve.⁵

What is largely missing, though, are texts reflecting on the particular function of international criminal law to prevent refugee crises of the type that provided a major trigger for the debate on military and legal interventionism in the 1990s.

With the triumphalist return to Croatia of Generals *Gotovina and Markač* in 2012 after the ICTY Appeals Chamber overturned the unanimous conviction by the ICTY Trial Chamber, heated debates about the multiple, and at times contentious, roles of international criminal

³ Jens Vedsted-Hansen delivered a formative input to a major multidisciplinary study on temporary protection funded by the Nordic Council of Ministers in the 1990s, which provided a qualified commentary to European protection policies in the wake of the Balkan crises of the early 1990s. For readers of Danish, an excellent entry point to this debate is his study on temporary protection published by the Nordic Council of Ministers: “Midlertidig beskyttelse i retlig belysning”, “TP-ordningernes forenelighed med internationale normer”, “Retlige problemer i forbindelse med ophør af kollektiv beskyttelse”, “Sammenfattende drøftelse - samt nogle konklusioner af retsstudiet”, in Nordisk Ministerråd, *Midlertidig asyl i Norden*, 1999.

⁴ See, e.g., Rosemary Byrne, “Promises of Peace and Reconciliation: Previewing Legacy at the International Criminal Tribunal for Rwanda,” *European Review*, 2006, pp. 485-497.

⁵ Victor Peskin and Mieczysław P. Boduszynski, “International Justice and Domestic Politics: Post-Tudjman Croatia and the International Criminal Tribunal for the Former Yugoslavia”, *Europe-Asia Studies*, 2003, pp. 1117-1142, arguing that nationalist groups in Croatia have raised the political costs of cooperation with the ICTY through a rhetorical strategy equating the tribunal’s indictments against Croatia’s war heroes with attacks on the dignity and legitimacy of the so-called Homeland War. See also the remarkable study by Janine Natalya Clark, “The ICTY and Reconciliation in Croatia: A Case Study of Vukovar”, *J Int Criminal Justice*, 2012, pp. 397-422, concluding that the retributive justice of the ICTY has not contributed to reconciliation in Vukovar, based on a geographically limited field study of the relationship between Vukovar Serbs and Croats.

trials have been reignited.⁶ Gotovina was the commander responsible for the Operation Storm that in the mid 1990s displaced many thousands of Serbs. This acquittal, grounded in the international rule of law, illustrates how the projected capacities of the international criminal justice to deter massive abuses, and the forced migration that follows, may be no more than false hopes when a struggling international legal system is confronted with the complexity and contexts of extreme crimes. Against this background, and with the winding up of ICTY now at hand, in this text we will seize the moment to consider what the *Gotovina* case might reveal about the promise and limitations of international criminal trials in prosecuting crimes that cause mass refugee displacement.

In the discussion that follows we shall present two interlocking arguments, both drawing on a distinction between formal and substantive models of justice. In Section 2, we first depart from the accepted presumptions about the formal delivery of international criminal justice and its capacities to deliver peace and security, to consider how alternative views on the legitimacy of international criminal tribunals and retributive justice present some far more unsettling perspectives about the performance and promise of these nascent courts. If these issues are taken seriously, then one should reconsider whether international trials are able to deliver the broader forms of substantive justice that might provide a more effective means of mitigating refugee displacement. In Section 3, we then consider why the ICTY's reasoning in the *Gotovina* case will remain unable to prevent future ethnic cleansing, as the trial paradigm does not invite judges to address the broader substantive questions as to how deeply divided communities are to live with each other. Worse still, the *Gotovina* acquittal by the Appeals Chamber risks to entrench the idea that the massive abuses, considered to constitute 'persecution' by the Trial Chamber, may be unleashed with impunity under cover of an armed

⁶ *The Prosecutor v. Gotovina et al. (Trial judgment)* - Vol. 1, IT-06-90-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 15 April 2011; *Prosecutor v. Ante Gotovina and Mladen Markač*, IT-06-90-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 16 November 2012.

conflict. In the last section, we conclude that the exercise of formal over substantive justice may in circumstances exacerbate not only the considerable legitimacy challenges that confront ICTs, but also the tensions that can threaten a fragile process of transition to peace.

2. Legitimacy and Retribution

This section will revisit the fundamental notion that the delivery of international criminal justice can be presumed to also deliver international peace and security. The expanding literature that challenges what Stahn terms appropriately as the ‘faith’ based belief in the capacities of international criminal trials notes the limited empirical evidence available to substantiate the claims of the system’s proponents, as well as the difficulty in measuring the broad range of goals the international community has set for this legal experiment.⁷ Nonetheless, an almost evangelical faith in retributive justice as the deliverer of peace remains fervent amongst leading jurists. In recent proclamations, the ICC prosecutor Fatou Bensouda claims that, ‘If we have learned anything from history, it is that accountability and the rule of law have been recognized as fundamental preconditions to provide the framework to protect individuals and nations from massive atrocities, to promote peace and international security, and to manage conflicts. Not only was prosecuting crimes seen as satisfying conceptions of fundamental justice, but also as a means to prevent their perpetration.’⁸ Hence, accountability and the rule of law will protect from, and prevent, mass atrocities that are the root cause of forced migration.

Yet Bensouda’s defense of international criminal justice is within the familiar war between peace and justice, and against the backdrop of amnesties and ‘golden exiles’ that are the incentive schemes for peace negotiations. Her battle cry decries the classic bargain whereby impunity from the rule of law is a condition for conflict actors to enter

⁷ Carsten Stahn, “Between ‘Faith’ and ‘Facts’: By What Standards Should We Assess International Criminal Justice?”, *Leiden Journal of International Law*, 2012, pp. 251-282.

⁸ Fatou Bensouda, “International Justice and Diplomacy”, *New York Times*, March 19, 2013.

into peace agreements. The discussion which follows in Section 2 reconfigures this tension. It entertains the notion that in circumstances such as those confronted by the new and struggling system of international criminal justice, the application of the rule of law, and the acquittals that can flow from this, may be perceived by actors to the conflict as delivering, rather than eliminating, impunity. Or even if succeeding in eliminating impunity, the process of justice itself may do more to hinder rather than facilitate the transformation towards a healed and functioning society.

In exploring these issues, we will not consider the performance of international criminal trials and the extent to which the justice they deliver has, or might, fulfil the benchmarks that attach to the process of building peace, security and societal reconciliation. Instead Section 2 will first consider the nexus between international justice and peace and security. It will then engage with views that set forward a more unsettling argument about the implications of international criminal trials; precisely because they comply with formal justice, and the universal rule of law standards it embraces, trials can reignite the tensions that give rise to violence and the root causes of forced migration. This will be examined through the core concepts of legitimacy and retribution. Firstly, we will consider whether formal justice per se responds to the challenges to legitimacy that both confront ICTs and impair their effectiveness to bring about societal transformation. Secondly, we will consider the limitations of formal justice as delivered through retributive prosecutions and how this clashes with the assumptions about the affirmative role played by formal and substantive justice in the global world order.

2.1. The Nexus between International Justice, Peace and Security

The legal foundation of the nexus between the establishment of international criminal courts and the stemming of refugee flows can be located in the Security Council Resolutions that established the International Criminal Tribunals for the Former Yugoslavia and

Rwanda.⁹ The trigger of Security Council powers to create these landmark courts required under Article 39 of Chapter VII of the UN Charter that the situations of widespread human rights abuses constitute a threat to international peace and security.¹⁰ The dimension to violent conflicts where mass human rights abuses were being committed internally within jurisdictions that transformed them into threats to international peace and security was the mass influx of refugees across neighbouring borders. Locked within the paradigm of Chapter VII, the underlying rationale for the creation of the ad hoc Tribunals was that the introduction of accountability and retributive justice would be a measure to enhance international peace and security. The adoption of international trials mechanisms to deter the root causes of systemic human rights abuses was ardently seized by the United Nations, with an investment of over 2 billion US dollars since the creation of the ICTs, and in select years, expenditure that accounted for up to 15% of the total UN budget.¹¹

The faith in the role and powers of justice for an improved international order, was not simply a strategic adaptation of language by the Security Council to trigger Chapter VII powers in contemporary crises. The creed that equates justice with peace that is echoed in the words of Bensouda discussed above, was eloquently articulated in the first international criminal trial at the IMT Nuremberg in the opening address by Prosecutor Justice Robert Jackson. He stated:

“We are able to do away with domestic tyranny and violence and aggression by those in power against the rights of their own people only when we make all men answerable to the law. This trial represents mankind's desperate effort to apply the discipline of the law to statesmen who have used their powers of state to attack the

⁹ Statute of the International Criminal Tribunal for Rwanda, SC Res. 955, annex (Nov. 8, 1994), 33 *ILM* 1602 (1994); Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, SC Res. 827, annex (May 25, 1993) 33 *ILM* 1159 (1993).

¹⁰ United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

¹¹ UN Security Council, *The rule of law and transitional justice in conflict and post-conflict societies: report of the Secretary-General*, 23 August 2004, S/2004/616, para. 42. Marc Drumbl, *Reimagining Child Soldiers*, 2012, p. 207.

foundations of the world's peace and to commit aggressions against the rights of their neighbors.”¹²

Yet it is now accepted that the way that IMT Nuremberg applied ‘the discipline of the law’ to statesmen in the exceptional circumstances that followed the end of the Second World War departed from the strictures of strict legality of the rule of law. As McAuliffe observes, while in context, the rule of law deviations may not seem so significant, more importantly, they “signalled ambiguity in the commitment to scrupulously fair trials in international criminal law in the pursuit of transitional dividends.”¹³ With the advance of international rule of law norms during the interceding six decades since the Nuremberg trials, and notwithstanding the experience of domestic transitional trials, in the international criminal trial chamber due process rights rarely succumb to peace dividends.¹⁴

2.2. Legitimacy

The capacities of international criminal justice to render peace and security are linked to underlying perceptions of the legitimacy of the system and its respective institutions. Institutions that are struggling for legitimacy are less likely to have a transformative impact on the deep-rooted tensions that gave rise to serious human rights abuses. They furthermore are unable to alter the political realities of the international and local communities within which they operate. While the ICTs auto-proclaim their own legitimacy, the voices of external actors reflect a somewhat contested reality, be it with the African Union’s Declaration of non-compliance with the ICC arrest warrants for Sudanese Head of State Al Bashir, or the recent election of Uhuru Kenyatta as President of

¹² Robert H. Jackson, “Opening Statement before the International Military Tribunal, Nuremberg, Germany”, available at: <http://avalon.law.yale.edu/imt/11-21-45.asp> Accessed February 8, 2013.

¹³ Padraig McAuliffe, “Transitional Justice and the Rule of Law: The Perfect Couple of Awkward Bedfellows?” *Hague Journal of International Law*, 2010, pp. 127-154, at 143.

¹⁴ When the Appeals Chamber of ICTR overturned its decision to dismiss the case against media leader Barayagwiza on the grounds that his prolonged detention, might constitute an example of transitional dividends informing the process of judicial deliberation. *Prosecutor v. Jean-Bosco Barayagwiza*, Case No. ICTR-97-19-AR72, Decision of the Appeals Chamber, 2 November 1999 (and *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, Decision on Prosecutor’s Request for Review or Reconsideration).

Kenya months before he is due to stand trial before the ICC for the alleged commission of crimes against humanity. In both these instances, the legitimacy of alleged international criminals, rather than the courts, paradoxically would appear to have been buttressed. For Bashir, by direct resistance of AU States, and for Kenyatta, by the indirect resistance of Kenyan citizens.

Legitimacy is as essential for the operation of international as for domestic courts. Yet international criminal courts are confronted with constructing their legitimacy for a more diverse audience of multiple stakeholders including states, civil society, and the varied constituencies within divided societies. ICTs are global governance institutions as well as courts, hence, the challenge of responding to the diverse and charged legitimacy expectations of stakeholders is considerable. All the more so, concepts of legitimacy are fluid and evolving. Consequently, there are indeed many competing 'legitimacies' that are applied to ICTs, with a moveable feast of criteria for their assessment depending upon the priorities and perspectives of the assessors.

For many jurists, the delivery of formal justice is the most confident, if not the *only*, response to legitimacy challenges. As a former President of ICTY and the Special Tribunal for Lebanon (STL), Cassese offered an analysis of the legitimacy of ICTs that reflects an institutional perspective from the vantage point of international courts and their direct experience of the barriers that impair the operation and effectiveness of international criminal trials in the societies to which they are committed to deliver justice. Cassese argues that in spite of the many legitimacy challenges confronting ICTs, they earn their legitimacy through their performance of justice that adheres to the rule of law. In essence, formal justice is the trump card to overcome the compromised situation of many courts that have been created, and frustrated, by international and local political forces. While discussing one of the more troubled contexts for institutional legitimacy, that pertaining to the STL, Cassese concedes that even if 'the STL initially lacked some forms of legitimacy' it could achieve or affirm legitimacy through fulfilling the

criteria related to ‘performance’ legitimacy. This is exercised through the proper functioning of ‘impartial, independent, and absolutely fair international court, which dispenses justice in an unimpeachable manner’. “In sum, the Tribunal is legitimate as long as its polar star is Plato’s maxim that ‘justice is a thing more precious than many pieces of gold’”.¹⁵

From the vantage point of the UN Secretary General, such performance legitimacy is to be pre-supposed, not earned. Strikingly, in the 2013 General Assembly debates on international criminal justice, Ban Ki-Moon concluded, ‘Supporting the tribunals and courts means respecting -- and not calling into question -- their independence, impartiality and integrity’.¹⁶

At the end of the day, Cassese’s conclusion is a pragmatic one, as rule of law criteria are those that professionals working within the ICTs have the capacity to meet. Court officials cannot retrospectively redraft their establishing statutes or agreements, reconfigure the global and local political pressures within which they operate, nor redirect referrals from the Security Council. However, within their domain and powers, they can ensure that they operate a judicial system in accordance with the principles of the rule of law.¹⁷ Notwithstanding that within the evolving system of international criminal justice, even the ‘performance legitimacy’ that should attach to justice rendered in line with rule of law principles has not been so readily attained. The delicate balancing required between the competing rights of the accused and victims within an underdeveloped legal tradition has been mired in controversies over trial rulings in issues ranging from disclosure to the admission of evidence, and witness protection.¹⁸ In any adversarial and evolving legal

¹⁵ Antonio Cassese, “The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice”, *Leiden Journal of International Law*, 2012, pp. 491-591, at 498.

¹⁶ Secretary General’s Remarks to General Assembly thematic debate on the Role of the International Criminal Justice in Reconciliation, April 10, 2013 (available at: <http://www.un.org/sg/statements/index.asp?nid=6726>)

¹⁷ *Id.*, at 499.

¹⁸ Rosemary Byrne, “The New Public International Lawyer and the Hidden Art of International Trial Practice”, *Connecticut Journal of International Law*, 2010, pp. 243-305

system, there will often be rulings and trial practices that generate critiques from within and without the trial chamber that still meet the broad rule of law standards of judicial independence, impartiality and fairness. For the nature of the international legal system which is built upon the foundation of legal pluralism allows for a considerable discretion in the diverse range approaches to the adopted mechanics of justice.¹⁹ Some would argue that when formal justice is realized under the wide discretionary ambit of international criminal trial procedure, it may, at times be perceived to be at the expense of the substantive justice of victims and witnesses.

When rule of law norms are upheld, respecting the rights of the accused often results in cross-examinations in international adversarial trials that are a difficult experience for many victims and witnesses. In this respect, international criminal trials share this discomforting feature with domestic criminal proceedings. As many victims' rights advocates and international trial observers argue, the international trial process may at its worst re-traumatize witnesses and victims through the arduous process of testifying and being subject to often aggressive cross examination. An experience worsened by the fact that the adversarial approach to eliciting testimonial evidence in international trials is one that is not shared in local legal traditions of the witnesses, as would be the case in the Balkans and Rwanda. For many witnesses that testify at the risk of their mental health and often physical safety, they are gratified by at least anticipating that their evidence will lead to the conviction of those responsible for heinous crimes. Yet this is not the case for all witness. The exacting legal standards that apply to determinations of guilt in international fora may often not be met by select witness testimony. The testimony of victims of extreme crimes may often be credible, but found ultimately not to be reliable due to the circumstances within which they were witnessed. The application of rigorous standards of proof, critical for the rights of the accused and the delivery of formal justice, subjects the victim to a sense of having been disbelieved, and more critically, of having had justice denied. A cruel

¹⁹ Id, at 248-256.

outcome for those having experienced atrocity in the first instance, been compelled to relive the trauma in the second instance before the court, and in the third instance, been given the message that their testimony was disbelieved or disregarded. There is little research that measures whether the delivery of judgments from the ad hoc Tribunals in the past two decades has facilitated closure for victims and allowed for the progression to societal reconciliation. It would appear however that the harsh realities for victims that attach to testifying and having their own evidence and credibility adversely assessed is a necessary outcome of a legitimate justice process, but a factor more likely to dissuade rather than encourage reconciliation.²⁰

While the experience of appearing before courts may not necessarily encourage individual and social healing, the impact of a prosecution strategy aiming to enhance perceptions of neutrality and independence, may also bring unintended consequences. The indictment of Croats by ICTY was part of an overall strategy to ensure that the crimes of Serbs, Bosnians and Croats were prosecuted alike and that justice was not seen to exclusively be meted out to the Serbs.²¹ In the Balkans, unlike Rwanda, those tried and acquitted before the international criminal tribunal, have returned to the Former Yugoslavia to enjoy a hero's welcome among their ethnic co-patriots.²² Given that the issuance of indictments against Croatians was part of an overall strategy to ensure that Serbs, and others, perceived the ICTY as a neutral court, it follows logically that the serial acquittals of Croats before ICTY has lead many Serbs to believe that justice has been denied. This raises the question as to whether, like with Al Bashir and Kenyatta, international criminal justice might run the risk of contributing to the legitimacy, rather than the accountability, of the accused? Formal justice is delivered for the individual defendant, but one has to accept that a rigid application of the rule of law may deny victims and their communities the 'peace

²⁰ On the experience of witnesses before the ICTY see Eric Stover, *The Witnesses: War Crimes and the Promise of Justice in The Hague*, 2005.

²¹ Dan Saxton, "Exporting Justice: Perceptions of the ICTY Among the Serbian, Croatian, and Muslim Communities in the Former Yugoslavia." *Journal of Human Rights*, 2005, pp. 559-572.

²² Kevin Jon Heller, "What happens to the acquitted?", *Leiden Journal of International Law*, 2008, pp. 663-680, at 664-665.

dividends' that are embodied in expectations of a broader substantive justice. Is the harm done to building a sustainable peace greater if impunity is seen to emanate from the application of the 'rule of law' that legitimizes the accused, rather than impunity having been simply the price for peace? The answer is not so evident, but the heretical question is nonetheless worth asking.

2.3. Retribution and Peace and Security

It is important to note that the narrative provided by state practice reveals a far from universal adherence to the principle that the rule of law *should* be applied to the perpetrators of past systemic human rights, as is it is framed in the mantras of international law. While we view the establishment of ICTs as the paramount example of the international communities embrace of accountability as a tool towards conflict resolution, the monolithic impression is somewhat compromised with over 500 pieces of amnesty legislation introduced in 130 countries since the end of the Second World War. Even within the Balkans, broad amnesties were introduced in Bosnia-Herzegovina and Republika Srpska that were adapted to exclude crimes under the jurisdiction of ICTY, but which aimed to encourage the reparation of refugees to their pre-war homes.²³ Nobel Peace Prize laureate and veteran peace mediator Martti Ahtisaari articulates the views of many skeptics of the role of prosecutions in fragile peace processes, noting that 'recording past injustices and creating conditions for reconciliation are not always best realized through criminal law.'²⁴ Although it is widely acknowledged that prosecutions can be a destabilizing force in peace processes, state practice might lead to the conclusion that there is a more forceful opposition to the role of retribution more generally as a response to past atrocity.

²³ Claire Moon, "Healing past violence: traumatic assumptions and therapeutic interventions in war and reconciliation", *Journal of Human Rights*, 2009, pp. 71-91.

²⁴ Martti Ahtisaari, "Lessons of Aceh Peace Talks," *Asia Europe Journal*, 2008, pp. 9-14, at 12-13.

Moon's survey of the emergence of therapeutic approaches to past atrocity focuses upon the increasingly adopted premise that post conflict societies are traumatized societies that require therapeutic intervention for healing and reconciliation. This perspective fostered the creation the South African Truth and Reconciliation Commission.²⁵ Moon highlights the positions taken by leading figures in the South African debates at the time, such as Asmal's cautions that trials in the context of post-apartheid South Africa could become a mechanism for the re-traumatization of South Africans, preventing 'closure'. Tutu, likewise, argued for restorative rather than retributive justice, equating retribution with vengeance, and thus endless cycles of reprisals and counter reprisals.²⁶ National discourse and practice often has not precluded selective and symbolic prosecutions alongside therapeutic interventions. There is also no definitive research that indicates the actual impact of these divergent approaches on transitional societies. What warrants considering, nonetheless, is that the theoretical underpinnings of the approaches to therapeutic intervention heralded by many transitional regimes collide with, rather than complement, those of retribution. While the debates between the objectives of peace and justice have a long history, for the purposes of considering the role of international trials in Croatia, it serves as a reminder that a universal application of the rule of law to past atrocity is confronted by a widening school of thinking on national levels, that perceives prosecutions as a harm rather than a good.

Truth seeking and telling is a core function of international criminal justice, as well as of truth commissions, and is seen by the courts themselves to contribute to peace and reconciliation. Former ICTY prosecutor Dan Saxton has emphasized the role that the trials played in 'truth telling and reconciliation' which the Trial Chamber in Erdemović asserted was the cornerstone of the rule of law. The conundrum confronted by Saxton and many supporters of international criminal justice is that even when the courts seemed to be fulfilling this role during the first decade of the ICTY's existence, the Tribunal is described

²⁵ Moon, *supra* note 22, at 85.

²⁶ Moon, *supra* note 22, at 81-82.

as ‘widely despised’ in the Balkans, and by Serbs and Croats in particular.²⁷ Somewhere within the model of retributive justice, the curative role of truth seeking, and its real or hoped for therapeutic attributes with which it is vested, does not seem to be widely realized through the early legacy of ICTY trials.

This practice runs counter to the obligation incumbent upon states to prosecute international crimes now considered by many, most notably the United Nations High Commissioner for Human Rights, to be part of customary international law. State practice reveals a more complex matrix of beliefs about the role of justice in transition. While they are often seen as compatible in their underlying truth seeking functions, the schism between these approaches is far more pronounced when taken to their logical ends. As populations divide over desired responses to past atrocities, so to will their conceptions of legitimacy of the trials that have been imposed to bring them justice.

²⁷ Saxton, *supra* note 20, at 562.

3. *Gotovina*, Distinction and Proportionality

The idea of the deterrence and hence prevention of mass abuses under the spectre of potential accountability under international criminal law, leaves the fundamental task of drawing the contours of individual responsibility to the jurisprudence of the ICTs. As the judges give definition to the bright lines that divide lawful and unlawful conduct, this, in theory, would bring potential perpetrators to abstain from conduct close to, or beyond this divide. In this Section, we will use the *Gotovina* case before the ICTY to illustrate how the ICTY was incapable of marking the schism between lawful and unlawful conduct as a result of their formalist inclinations. The two IHL principles of distinction and proportionality, both part of treaty law and custom, play a major role in *Gotovina*. Compared to the principle of distinction, the principle of proportionality expresses a substantive, rather than formalist conception of justice. This is so because any proportionality judgment ultimately expresses ideas of how communities are to live together.²⁸ By giving primacy to the principle of distinction, the Tribunal in fact shied away from this question on which *Gotovina* pivots.

Why is *Gotovina* such a paradigmatic case for the deterrence of future cases of forced displacement? Because it is squarely placed at the junction between lawful warfighting and unlawful persecution. If international criminal law manages to draw a reasonably clear line between the two, ethnic cleansing will be harder to cast as a lawful side effect of an armed conflict. If it fails to do so, the objective of prevention will morph into incitement. Future actors will use the military conflict with an enemy armed force as a convenient cover to drive out unwanted civilians present in the same location. Put differently, lawfulness under *jus in bello* might become an umbrella covering commanders from criminal liability for persecution and endowing violent identity politics

²⁸ Gregor Noll, "Analogy at War: Proportionality, Equality and the Law of Targeting" *Netherlands Yearbook of International Law*, 2013, pp. 205-230.

with some form of legitimacy.²⁹ What is more, the refugees fleeing the effects of such a campaign risk to be perceived as lawfully produced refugees, which might prove detrimental in times where IHL appears to assume an ever more decisive role in European refugee law.³⁰

Here is a condensed version of the *Gotovina* trial. Between July and September 1995, Croatian leaders had initiated and implemented *Operacija Oluja* (Operation Storm) to take control of the Krajina region of Croatia, then forming most of the territory of the Republic of Serbian Krajina. Operation Storm ended with a decisive victory for the Croatian side. In August 1995, the U.N. Secretary General reported a refugee outflow of some 150.000 persons.³¹ Gotovina, a Colonel General in the Croatian Army at that time, ‘was the overall operational commander of Operation Storm in the southern portion of the Krajina region’.³² Markač served as the Assistant Minister of the Interior and Operation Commander of the Special Police in Croatia during the same period.³³ The ICTY Trial Chamber sentenced Gotovina to a single term of 24 years and Markač to a single term of 18 years for having ‘shared the objective of and significantly contributed to a [Joint Criminal Enterprise], whose common purpose was to permanently remove the

²⁹ Already in 1999, Carlyn Carey saw signs that Slobodan Milosevic had understood the script for evicting civilians under the cover of counterinsurgency in the province of Kosovo in 1998. ‘Milosevic was not relying on the previously utilized method of forced relocation as was utilized during the Yugoslav War, possibly because he knew to avoid legally indefensible acts. Through the government’s use of limited armed attacks under the guise of ferreting out rebels, civilians preferred to flee the area rather than surrender themselves to the government forces and forcibly be transported to another location.’ (Footnotes omitted). Carlyn M. Carey, “Internal Displacement: Is Prevention Through Accountability Possible? A Kosovo Case Study.” *American University Law Review*, 1999, pp. 243-288, at p. 287-288.

³⁰ Consider art. 15.c of the EU Qualification Directive (QD), extending protection to refugees from armed conflict situations through the formula of ‘serious harm’, that *inter alia* consists of

(c) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

It is worth the while to reflect on this norm in the light of Gotovina’s acquittal. What if decision-takers in the asylum procedure would start to read the term ‘indiscriminate violence’ in art. 15.c QD in the light of the term “indiscriminate attack” as used in IHL? The victims of future replicas to Operation Storm would be ineligible for protection under this provision.

³¹ UNSC, *Report of the Secretary-General Submitted Pursuant to Security Council Resolution 1009*, S/1995/730, 23 August 1995, p. 3.

³² *Gotovina*, Trial Chamber, paras 4, 72-73, 96.

³³ *Gotovina*, Trial Chamber, paras 6, 167, 194.

Serb civilian population from the Krajina region'.³⁴ In what appeared as a remarkable turn of events, the Appeals Chamber, with two judges dissenting, acquitted Gotovina and Markač, ordering their immediate release.

Central to the case was the question whether a number of artillery attacks commanded by Gotovina and Markač were lawful under the laws of war or not. Both Chambers found that 'departures of civilians concurrent with lawful artillery attacks cannot be qualified as deportation'.³⁵ It is at this point that international criminal law becomes critically dependent on substantive norms of IHL.

The *crime against humanity of persecution* played a dominant role in the conviction of Gotovina and Markač by the Trial Chamber, and provided the prism through which it analysed the artillery attacks. In the case law of the ICTY, persecution has been understood as an act or omission which (a) discriminates in fact and denies a fundamental human right laid down in international law; and (b) is carried out with the intention to discriminate on political, racial, or religious grounds.³⁶ The Trial Chamber deemed a sufficiently large fraction of the artillery attacks as *indiscriminate*, using an IHL term of art. In doing so, it suggested that IHL norms on distinction, or proportionality, or both, had been violated. From that, and changing to ICL terminology, the Trial Chamber drew the conclusion that the attacks at issue constituted 'unlawful attacks on civilians and civilian objects', discriminating against the Krajina Serbs. At this point, the Chamber had established an *underlying act* to the crime against humanity of persecution. Critical in this assessment was the finding that a violation of the laws of war had taken place that placed inhabitants of a certain ethnic affiliation at a relevant disadvantage.

Apart from one particular attack against President Martić's apartment, the Trial Chamber considered all other artillery attacks so central to the

³⁴ Gotovina, Trial Judgment, paras. 2369-2371 (Gotovina) and 2579-2583 (Markač).

³⁵ Gotovina, Appeals Chamber, para 114.

³⁶ Gotovina, Trial Chamber Judgment, para. 1802 with further references in fn 881.

case under the principle of distinction alone.³⁷ It inferred the intent of Gotovina and Markač to target towns as a whole by inventing a technical standard that was loosely based on testimony of one expert witness. According to this standard, ‘those artillery projectiles which impacted within a distance of 200 metres of an identified artillery target were deliberately fired at that artillery target’.³⁸ Suffice it here so say that the Appeals Chamber rightly rejected this standard as unfounded, which brought down the Trial Chamber’s reasoning and paved the way for the acquittal of Gotovina and Markač.

In sum, the Trial Chamber banked on the principle of distinction and a quantitative standard it set to make that principle operable. This was a choice, and another could have been made: one and the same attack may be assessed by applying the principles of distinction and proportionality consecutively. Was the particular attack directed at civilians, or at a military objective? If the attack was assumed to be targeting a military objective, were civilian losses expected at the time excessive in relation to the anticipated military advantage? Otherwise put, the Trial Chamber could have treated the question whether civilians were attacked directly with lesser emphasis, and rather considered whether the artillery campaign was disproportionate.

What advantages does a proportionality argument have in the *Gotovina* context? The *mens rea* relevant to the principle of distinction is the wilful attack of civilians. This corresponds to a form of *dolus directus* in causing harm amongst civilians. It brought the Trial Chamber to link the artillery attacks to persecution. In comparison, the *mens rea* related to the proportionality principle is the decision to launch an attack that may be expected to cause incidental civilian harm excessive in relation to the

³⁷ While the Trial Chamber found that President Milan Martić had been a legitimate target, it deemed that the particular artillery attacks against his apartment had violated the principle of proportionality. As civilians could have reasonably been expected to be present on the streets near the target area, the Trial Chamber concluded that the attack was disproportionate in relation to the military advantage expected. *Gotovina*, Trial Chamber, para. 1910. In footnote 935 of its judgment, the Trial Chamber enters the caveat that it “does not pronounce on the proportionality of the [Croatian army’s] use of artillery against other targets in Knin on 4 and 5 August 1995”. This choice, we think, was one major cause for the acquittal of Gotovina and Markač by the Appeals Chamber.

³⁸ Trial Chamber, para. 1898.

military advantage anticipated. Here, a *dolus eventualis* would seem to be pertinent, by which the accused is shown to accept disproportionate incidental losses anticipated. This would be a less far-reaching intent, and an evidential burden less difficult to shoulder. To be sure, a violation of the principle of proportionality may very well be linked to persecution, as the Trial Chamber did with respect to the attacks against Martić's apartment. Yet the Chamber could have considered disproportionate attacks as a violation of the laws and custom of war independently of persecution, which might have proven a more stable framework for subsuming the vast majority of artillery attacks.

For want of better alternatives, the *mens rea* will often have to be inferred from actual conduct. Its banking on distinction brought the Trial Chamber to adopt, somewhat erratically, the 200-Metre-Standard for the artillery attacks, interpreting projectiles impacting farther away than 200 metres from a military objective as targeted at civilians. Had it emphasised proportionality, there would have been no need to set such a precise quantitative standard.

It is recognized in IHL doctrine that concrete proportionality assessments may vary within a group of reasonable military commanders.³⁹ Put otherwise, there is a range of outcomes, rather than one single outcome to any proportionality assessment. Had the Tribunal chosen to base its argument to a larger degree on the proportionality principle, this range would have given a greater robustness to its judgment than the precise, but fragile, limit attempted in the 200-Metre-Standard. Arguably, the Trial Chamber should have directed its judgmental capacity towards the issue of proportion, which jurists encounter frequently, rather than towards the technicalities of artillery projectiles, which jurists rarely need to think about.

What the Trial Chamber did was to misguide the creativeness inherent in the role of the judge to the invention of a formal standard.

³⁹ Joseph Holland, "Military Objective and Collateral Damage: Their Relationship and Dynamics", *Yearbook of International Humanitarian Law*, 2004, pp. 35-78, at pp. 48-49.

Proportionality, with its emphasis on substantive rather than formal justice, had offered a more adequate stage for judge's creativity than ballistic stipulations. Ultimately, we cannot know whether a proportionality argument on a larger scale would have altered the outcome of *Gotovina* or not. We can be reasonably sure, though, that a Trial Chamber argument drawing the line on proportionality would have better chances of finding acceptance at the appeals stage. It might have also better chances to be heard and understood by both groups behind the historical conflict. Judges would have been induced to engage in a more holistic assessment of the case before them, and engage with the primordial questions of how two communities are to relate to each other, live with each other and fight with each other. Now, reading both Chamber judgments in conjunction, one is left with the impression that war in abundance of IHL carves out a space of impunity for causing mass displacement.

4. Conclusions

Why do we believe that the ICTs have been unable to deliver justice in a way that will prevent massive refugee displacement in the future? To state the obvious, the tribunals were set up in a way that excluded outright those populations most affected by their work: the inhabitants of territories over which they have jurisdiction. This exclusion effectively isolated the tribunals from the only source that could provide them with a form of popular legitimacy: the *pouvoir constituant*⁴⁰ of the people engaged in revolutionary conflict.⁴¹ To be utterly clear on this point, the people must be understood as an undifferentiated multitude, a *demos*. It is not subsumed in a nation, a state or another institutional form.

Our point here is not that the people at issue actually *could* have been included in the setting up of the tribunals. This would evidently have been practically challenging during or immediately after violent conflict.

⁴⁰ Abbé Sieyès, one of the main thinkers of the French Revolution, famously distinguished the concepts of *pouvoir constituant* (constituting power) and *pouvoir constitué* (constituted power) in his 1789 pamphlet *Qu'est-ce que le tiers état?*

⁴¹ This original legitimacy is what Cassese must mean when he refers to "some forms of legitimacy" that the STL was lacking. Cassese, *op cit*.

Rather, we argue that the tribunals' inclination to compensate for the lack of popular legitimacy by meticulous adherence to "the rule of law" was misguided. Far from producing what Cassese termed "performance legitimacy", the practice of formalism actually exacerbates the tribunals' popular illegitimacy.

Why is that? First, Cassese founded his hope on a categorical error. Any rule of law producing "performance legitimacy" bases itself on a *pouvoir constitué*: powers established under a constitutional process, by which the *demos* institutes its legislative, executive and judicative. Where the *demos* has been excluded from this process (that is, the drafting and enactment of the SR Resolutions setting up the tribunals), we cannot reasonably expect that very *demos* to regard the tribunals' work as the legitimate exercise of a *pouvoir constitué*.

By this argument, we have shown that the adherence to the rule of law does not offer a de facto compensation for the lack of popular legitimacy. But why would this lack of popular legitimacy actually be exacerbated through the tribunals' adherence to formalist styles of legal reasoning? So here is the second argument. By choosing formal over substantive justice, the tribunals commit themselves to an illusory standard of universal justice. This we were able to show through examples stretching from victim protection to the laws of war. In the area of procedure, such as witness examination, there were no universal templates, but a number of choices on offer in the common and civil law traditions that the tribunals sought to integrate. And the same is true for the area of IHL, judges sought to compensate its lacking precision by inventing their own ballistic standards.

Had the tribunals committed themselves to substantive justice instead, they would not have escaped from critique. Yet the question of how communities are to live with each other is always a deeply political one and any attempt to address it directly will inevitably involve the judiciary assuming a "political" function. Rather than shying away from

this critical role, the tribunals should embrace and vest it with a more profound meaning.