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Forced Displacement and International Crimes

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1. International crimes: An introduction to war crimes and crimes against humanity

International criminal law is a relatively new branch of international law and the list of international crimes – i.e., those breaches of international rules entailing individual criminal liability (as opposed to the responsibility of the State for which individuals may act as agents) – has come into being by gradual accretion. International crimes consist of violations of international customary rules or treaty provisions unquestionably binding on States and other entities, and are intended to protect values considered important by the whole international community, so that individual criminal responsibility arises for their breach. Moreover, there exists a universal interest in repressing these crimes.[1]

Situations such as the ones that give rise to war crimes and crimes against humanity have been dealt with through various means, such as peace treaties, amnesties or truth and reconciliation commissions. However, it is an undisputable trend that, during at least the past two decades, the criminal law component has played an ever more prominent role. The ICTY and ICTR are key examples of this trend, and have most contributed to the refinement of many of the notions discussed in this paper, in particular the crime of persecution, which has provided a firm legal framework to address what is often described as 'ethnic cleansing'.

In the late nineteenth century, and for a long time, the only international crimes, apart from piracy, were war crimes. It is only since World War II that new categories of crimes have been developed, while war crimes law has essentially been restated. The Statutes of the International Military Tribunal at Nuremberg (IMT) and the International Military Tribunal for the Far East (IMTFE) were adopted in 1945 and 1946, respectively, and enshrined new categories of international criminality. Crimes against humanity and crimes against peace (chiefly: wars of aggression) were added, followed in 1948 by genocide as a special subcategory of crimes against humanity (but which would soon become an autonomous crime). This paper will mainly focus on war crimes and crimes against humanity, in particular those related to forced displacement.[2] While acts of genocide – in particular 'deliberately inflicting conditions of life calculated to bring about the physical destruction of the group', 'forcibly transferring children of the group to another group', and (according to some commentators) 'ethnic cleansing', might also be relevant in order to understand some of the interactions between international criminal law and forced displacement, the present contribution will not address this crime, which would involve a discussion of the special intent to destroy in whole or in part a protected group.[3] Such a discussion would lead us too

[1] On this point, see generally A. Cassese et al., *International Criminal Law – Cases and Commentary* (Oxford: OUP, 2011) 113-114.

[2] I shall use the expression 'forced displacement' as a general clause describing the acts underlying deportation, forcible transfer and the other offences related thereto discussed in this paper. See for instance *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Judgment, 17 September 2003, paras 217-218 ('*Krnojelac* Appeals Judgment') (referring to displacement as one of the underlying acts of persecution).

[3] See, however, F. Jessberger, 'The Definition and the Elements of the Crime of Genocide', in P. Gaeta (ed.), *The UN Genocide Convention* (Oxford: OUP, 2009) 87, especially 100-105.

far – the special intent necessary for a finding of genocide is extremely difficult to establish and the nuances of genocide prosecutions would capture much of the attention away from the topics more closely related to forced displacement. For instance, in the Report of the International Commission of Inquiry on Darfur to the Secretary-General pursuant to Security Council Resolution 1564 (2004) of 18 September 2004, 25 January 2005 ('Darfur Report'), the Commission found that:

> [g]iven the systematic and widespread character of the forced displacement of persons in Darfur, the Commission finds that such action may well amount to a crime against humanity. The requisite subjective element (awareness of the systematic nature of the forced displacement) would be inherent in the fact that such displacement clearly amounted to a Government policy consistently pursued by the relevant Government authorities and the Janjaweed. Furthermore, given the discriminatory character of the displacement, these actions would amount to the crime of persecution as a crime against humanity.[4]

However, the Commission went on to find that there was inconclusive evidence as to the existence of genocidal intent.[5]

Despite this paper's limitation to two categories of international crimes, its analysis will show that the interactions between war crimes and crimes against humanity, on the one hand, and forced displacement, on the other, are numerous and multifaceted. Given the amount of judicial output and scholarly research, the discussion will be limited to a general overview of the main topics. Only a few amongst the challenges raised by the concrete application of such crimes to forced displacement will be considered in more detail, in particular the import of war crimes and crimes against humanity in dealing with forced displacement and the significance of these crimes for humanitarian agencies; the distinction made in the case law between forcible transfer and deportation; and the meaning of the clause that a victim of forced displacement must have been 'lawfully' present in the territory from which he or she is transferred.

[4] Report of the International Commission of Inquiry on Darfur to the Secretary-General pursuant to Security Council resolution 1564 (2004) of 18 September 2004, Geneva, 25 January 2005, para. 332 ('Darfur Report').

[5] Darfur Report, paras 513-517, in particular para. 515: '(…) The populations surviving attacks on villages are not killed outright in an effort to eradicate the group; rather, they are forced to abandon their homes and live together in areas selected by the Government. While this attitude of the Government of the Sudan may be held to be in breach of international legal standards on human rights and rules of international criminal law, it is not indicative of any intent to annihilate the group. This is all the more true because the living conditions in those camps, although open to strong criticism on many grounds, do not seem to be calculated to bring about the extinction of the ethnic group to which the internally displaced persons belong (…)'. *Contra:* the ICC Arrest Warrant issued against Sudan President Al Bashir by Pre-Trial Chamber I on 12 July 2010 (Case No. ICC-02/05-01/09-94) for, *inter alia*, three counts of genocide (genocide by killing, genocide by causing serious bodily or mental harm, and genocide by deliberately inflicting on each target group conditions of life calculated to bring about the group's physical destruction).

2. War crimes

2.1 Origins of the notion

Despite having evolved over many centuries,[6] until recently war crimes remained a relatively vague concept, even for legal scholars. It is true that, at Nuremberg, certain individuals were charged and tried for war crimes. Only a few years later, however, when drafting the texts of what would become the four Geneva Conventions of 1949, States were reluctant to use this term and resorted instead to a list of 'grave breaches', which only includes *some* but not all of the acts which until then had been considered war crimes. It was only in 1977, at the time of the drafting of Protocol Additional to the 1949 Geneva Conventions relating to the protection of victims of international armed conflicts (Additional Protocol I), that States agreed to insert an explicit clause according to which 'grave breaches of these instruments shall be regarded as war crimes.'[7]

The first issue for discussion is the obvious requirement that war crimes can only take place in war time, or, more accurately, during an armed conflict. The ICTY *Tadić* Jurisdiction Decision stated that:

> an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.[8]

A separate question is that, of course, not all crimes committed during an armed conflict actually constitute war crimes; there must be a 'nexus' (link) between the criminal conduct and the armed conflict. In *Kunarac*, the ICTY held that:

> What ultimately distinguishes a war crime from a purely domestic offence is that a war crime is shaped by or dependent upon the environment – the armed conflict – in which it is committed. It need not have been planned or supported by some form of policy.

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[6] In general, see L. Green, 'International Regulation of Armed Conflicts', in M. C. Bassiouni (ed.), *International Criminal Law* (vol. 1, Ardsley: Transnational Publishers, 1999) 355-363. See also T. Meron, *Henry's Wars and Shakespeare's Law, Perspectives on the Law of War in the Later Middle Ages* (Oxford: Clarendon Press, 1993). Other examples of 'early' war crimes trials have been suggested: G. Maridakis, 'An Ancient Precedent to Nuremberg', in (2006) 4 *JICJ* 847 (for an example of 'international' trial in Ancient Greece); G. Schwarzenberger, *International Law* (vol. 2, London: Stevens, 1968) 462-466 (for an account of the trial of Peter van Hagenbach in 1474 by an 'international' tribunal).

[7] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) 1125 UNTS 3, 8 June 1977, entered into force 7 December 1979, art.85(5).

[8] *Prosecutor v. Tadić*, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70 ('*Tadić* Jurisdiction Appeals Decision'). As the ICRC Commentary to Geneva Convention I states, '[a]ny difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Art.2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place. The respect due to human personality is not measured by the number of victims. Nor, incidentally, does the application of the Convention necessarily involve the intervention of cumbrous machinery. It all depends on circumstances' (J. Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949, Volume I* (Geneva: International Committee of the Red Cross, 1952)32). For a more comprehensive discussion on the topic, see G. Acquaviva, 'War Crimes at the ICTY: Substantive and Jurisdictional Issues', in R. Bellelli (ed.), *International Criminal Justice – Law and Practice from the Rome Statute to Its Review* (Farnham: Ashgate, 2010) 295.

> The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed. Hence, if it can be established, as in the present case, that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict.[9]

One of the requirements characterizing an offence as a war crime is that the victim be generally a *protected person* under international humanitarian law.[10] While originally the expression 'protected person' referred only to the categories of individuals explicitly protected under one of the four Geneva Conventions of 1949 (which, according to their Common Article 2, are only applicable to international armed conflicts), international humanitarian law now extends recognition to other categories of persons, who can therefore be considered, albeit somewhat non-technically, as 'protected'. For the purpose of the present paper, mention should only be made of persons who are *not* members of armed forces or other belligerent groups *and* are *not taking direct part* in the hostilities.[11]

The qualification of the victim is however not enough to establish *per se* the existence of a war crime: not all violence against civilians during the course of an armed conflict automatically amounts to war crimes. It must be shown that the armed conflict created both the context and opportunity for the offence. This is generally an easy task when the perpetrator is acting on an official mission occasioned by the armed conflict (when he is, for example, a military combatant on operation). However, if the perpetrator is a civilian, a finding must be made that the armed conflict indeed created the situation and opportunity for the offence – for instance, if the offence was carried out in accordance with the goals of the

[9] *Prosecutor v. Kunarac et al.*, Case Nos. IT-96-23 & IT-96-23/1-A, Judgment, 12 June 2002, paras 57-59 ('*Kunarac et al.* Appeals Judgment'); see also *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Judgment, 15 May 2003, para. 518 and *Prosecutor v. Rutaganda*, Case No. ICTR-96-3 -A, Judgment, 26 May 2003, para. 563.

[10] The four Geneva Conventions of 1949 (Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 35, 12 August 1949, entered into force 21 October 1950; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 UNTS 81, 12 August 1949, entered into force 21 October 1950; Geneva Convention relative to the Treatment of Prisoners of War 75 UNTS 135, 12 August 1949, entered into force 21 October 1950, and Geneva Convention relative to the Protection of Civilian Persons in Time of War 75 UNTS 287, 12 August 1949, entered into force 21 October 1950) and their Additional Protocols of 1977 (Protocol I, note 7 above and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II) 1125 UNTS 609, 8 June 1977, entered into force 7 December 1979) protect the sick, wounded and shipwrecked not taking part in hostilities, prisoners of war and other detained persons, as well as civilians (again, as long as they are not taking direct part in the hostilities). It has been noted that '[t]he original meaning of the notion of protected persons lies in the obligation of the parties to a conflict to grant humane treatment without adverse distinction' to all persons recognized as protected (L. Vierucci, 'Protected Persons', in A. Cassese (ed.), *Oxford Companion to International Criminal Justice* (Oxford: OUP, 2009) 473). In some circumstances, combatants may also be victims of war crimes, for instance when illegal weapons are used against them (see, among others, art.8(2)(b)(xx) ICC Statute on '[e]mploying weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering'). Since this sub-category of war crimes is not relevant to the present discussion, it will not be explored further here.

[11] According to the ICRC, for instance, '[c]ivilians are protected against attack unless and for such time as they take a direct part in hostilities' in both international and non-international armed conflicts (ICRC, *Customary International Humanitarian Law – Volume I: Rules* (Cambridge: CUP, 2005) 19). For crimes against humanity, which do not require an armed conflict, the definition of civilian victim is somewhat different.

military campaign. Although some borderline cases may create uncertainty, for the purposes of the present paper this clarification is sufficient.

Moreover, only *serious* violations of humanitarian law are considered to be war crimes and thus entail individual criminal responsibility of the perpetrator under international law. Less serious acts may of course still be crimes under domestic law or give rise to disciplinary sanctions. Serious violations – those that are in serious breach of a rule protecting important values, a breach that must involve grave consequences for the victim – can then be divided into two categories.

First, there are *violations of customary and treaty law applicable to armed conflicts*. This law evolved from the Hague Conventions of 1899 and 1907, which deal with means and methods of warfare and the treatment of persons who are no longer taking active part in the hostilities (*in primis*, prisoners of war), and the four Geneva Conventions of 1949 dealing with the sick, the wounded, civilians, and – again – prisoners of war. These four Conventions were complemented in 1977 by two Additional Protocols. Despite the importance of treaty law in this field, most conventional rules have now attained the status of custom.[12] In such cases, the applicable rules are binding regardless of the ratification by States of one specific convention, since customary law binds States regardless of express acceptance. Each State has the right to prosecute this type of war crimes, and international provisions are often integrated into the domestic legal systems through legislative acts. Most of these war crimes – and in particular the ones related to forced displacement – are by now undoubtedly applicable in both international and non-international armed conflicts.[13]

Second, there are *grave breaches*, a subset of the serious violations described above contained in specific provisions of the Geneva Conventions and in Additional Protocol I (Article 85).[14] A grave breach is a particularly serious violation of the Geneva Conventions or of Additional Protocol I, as opposed to so-called 'other breaches' of these instruments. The particular regime of grave breaches imposes on all States the *duty* to prosecute (or extradite) persons accused of having committed them. However, since the Geneva Conventions and Additional Protocol I only apply to *international* armed conflicts, the scope of this regime has historically been limited. Moreover, the first prosecutions for grave breaches only occurred in the 1990s, after the establishment of the ICTY and the ICTR and a few domestic attempts to enforce this branch of humanitarian law.

[12] T. Meron, 'Customary Law', *Crimes of War Project*, available online at http:// http://www.crimesofwar.org/a-z-guide/customary-law/ (last accessed 17 May 2011).
[13] *Tadić* Jurisdiction Appeals Decision, note 8 above, paras 96-137. See also T. Meron, 'Revival of Customary Humanitarian Law', (2005) 99 *AJIL* 817, in particular 823-828.
[14] J.-M. Henckaerts, 'The Grave Breaches Regime as Customary International Law', (2009) 7 *JICJ* 683. (See also the other contributions to this special issue of the *JICJ*).

2.2 War crimes and forced displacement

International case law established the requirements and definitions of both forcible transfer and deportation following World War II, with specific reference to the forced displacement of civilian populations for the purpose of forced labour. In the *Krupp* case, for instance, the US Military Tribunal found that:

> Deportation of civilians from one nation to another during times of war becomes a crime [i]f the transfer is carried out without a legal title, as is the case where people are deported from one country occupied by an invader while the occupied enemy still has an army in the field and is still resisting. (…) The second condition under which deportation becomes a crime occurs when the purpose of the displacement is illegal, such as deportations for the purpose of compelling the deportees to manufacture weapons for use against their homeland or to be assimilated in the working economy of the occupying country. The third condition under which deportation becomes illegal occurs whenever generally recognized standards of decency and humanity are disregarded.[15]

While most of these findings relate to the specific circumstances of the Nazi occupation of large swaths of Europe during World War II, which informed the drafting of Article 49 of Geneva Convention IV related to the displacement of civilians,[16] they provide the first glimpses of a coherent understanding of the elements of deportation, as well as of the differences between deportation and forcible transfer.

In the *High Command* case, the US Military Tribunal considered that:

> [t]here is no international law that permits the deportation or the use of civilians against their will for other than on reasonable requisitions for the need of the army, either within the area of the army or after deportation to rear areas or to the homeland of the occupying power'[17]

Thus, some types of forced transfer were deemed lawful, such as the ones strictly connected to military operations – in particular, transfers dictated by the need to safeguard the civilians themselves – or such as those allowed at the time by the rules on requisitions of workers. Today, this latter exception is provided for in Article 51 of Geneva Convention IV, although

[15] *US v. Krupp*, (1947) 9 LRTWC 30 (United States Military Tribunal) , 144 *et seq.* ('Krupp case')

[16] Art, 49 of Geneva Convention IV reads: 'Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.
Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.
The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated. The Protecting Power shall be informed of any transfers and evacuations as soon as they have taken place. The Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand. The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.'

[17] *US v. von Leeb*, (1948) 11 LRTWC 1 (United States Military Tribunal), 394 ('High Command case').

the Party effecting the transfer continues to be under certain obligations under Article 49, such as ensuring proper accommodation and satisfactory hygienic, health, and safety conditions.

One feature of the Military Tribunals' analysis warrants specific attention: the judges at the time appear to have used the term 'deportation' in a very general way, assuming that all deportations occurred beyond a national border and without really making any distinction between 'transfer', 'deportation' and other similar terms. This question will be analyzed in further detail below.

Today, grave breaches (a notion enshrined, for instance, in Article 2 ICTY Statute), include not just willful killing, torture or inhuman treatment, and extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly, but also *unlawful deportation or transfer*. Thus, these two crimes are included in the extremely important category of grave breaches discussed above applicable in *international* armed conflicts. However, Common Article 3, the provision on minimum guarantees in all four Geneva Conventions meant to apply to 'armed conflict *not of an international* character occurring in the territory of one of the High Contracting Parties',[18] does not explicitly mention unlawful deportation or transfer – although it covers cruel treatment and outrages upon personal dignity, types of conduct often associated with such forms of displacement. Because Common Article 3 was the only provision applicable to *non-international armed conflicts* before the adoption of Additional Protocol II in 1977 – this meant in practice that the protection against this type of conduct in non-international armed conflict between 1949 and 1977 was extremely limited.

Article 17 of Additional Protocol II (dealing with non-international armed conflicts) states that:

> [t]he displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand…Civilians shall not be compelled to leave their own territory for reasons connected with the conflict.

According to the ICRC, the latter provision also covers 'situations where the insurgent party is in control of an extensive part of the territory'. This means that insurgents as well as States, are bound by the obligation laid down therein.[19] This provision is now the basis for the corresponding crime under the ICC Statute (Article 8(2)(e)(viii)), applicable during an

[18] Common Article 3 provides, in part, that '[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. (…)'.

[19] ICRC, *Commentary on the Additional Protocols of 8 June 1977* (Geneva: ICRC, 1987), para. 4859.

'armed conflict not of an international character', of ordering displacement of a civilian population.[20] The expression 'displacement of a civilian population' appears to cover transfer both within and beyond a border.

In conclusion, the unlawful transfer of civilians during an armed conflict – when the required nexus between the transfer and the conflict itself can be shown – is a war crime. It now undoubtedly applies both in international and non-international armed conflicts.

An important aspect of the definition of these crimes in practice is that, as suggested above, international humanitarian law provides for limited circumstances under which the displacement of civilians during armed conflict is allowed, namely if it is carried out for the security of the individuals involved, or for imperative military reasons.[21] However, in such cases the displacement is temporary and must be carried out in such a manner as to ensure that displaced persons are returned to their homes as soon as the situation allows.[22]

3. Crimes against humanity

3.1 Origins of the notion

Despite earlier references to 'crimes against humanity', it is generally agreed that this expression was first used in relation to individual criminal responsibility in May 1915 only, when France, Great Britain and Russia declared with respect to the massacre of Armenians that they would hold personally responsible all persons implicated in these 'new crimes of Turkey against humanity and civilization'.[23] Even after this declaration, however, crimes against humanity did not find their way into the 1923 Treaty of Lausanne between the Allied Powers and Turkey.

During World War II, the Allied Powers decided that high-level enemy (Axis) officials should be tried for crimes committed during the conflict. They quickly realized that some of the worst acts perpetrated, in particular by German officials, had not been committed against foreign nationals, but rather against Germany's own citizens on racial, political or other discriminatory grounds. They could therefore not be considered criminal under the then-applicable laws or customs of war. To address the perceived insufficient breadth of

[20] On the specificity of this offence, see L. Moir, 'Displacement of Civilians as a War Crime Other Than a Violation of Common Article 3 in Internal Armed Conflicts', in J. Doria et al. (eds), *The Legal Regime of the International Criminal Court* (Leiden: Martinus Nijhoff, 2009) 639-641.

[21] Geneva Convention III, art.19; Geneva Convention IV, art. 49; Additional Protocol II, art. 17; ICTY, *Prosecutor v. Stakić*, Case No. IT-97-24-A, Judgment, 22 March 2006, paras 284-285 ('*Stakić* Appeals Judgment'); *Prosecutor v. Blagojević & Jokić*, Case No. IT-02-60-T, Judgment, 17 January 2005, paras 597-598 ('*Blagojević & Jokić* Trial Judgment'). However, if the humanitarian crisis was the result of the accused's own activity, the displacement for humanitarian reasons would of course still be unlawful. *Prosecutor v. Krajišnik*, Case No. IT-00-39-A, Judgment, 17 March 2009, para. 308. For a partial application of the principle under complex factual circumstances, see *Prosecutor v. Popović et al.*, Case No. IT-05-88 -T, Judgment, 10 June 2010, para. 920 ('*Popović* Trial Judgment').

[22] Geneva Convention IV, art. 49; *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgment, 2 August 2001, para. 524; *Blagojević & Jokić* Trial Judgment, note 21 above, para. 599.

[23] United States Department of State, [1915] *Papers relating to the Foreign Relations of the United States Supplement* 981.

international law, the London Agreement embodying the Charter for the International Military Tribunal ('IMT Charter') for the trial of major war criminals of the European Axis also included a provision on crimes against humanity.

In the IMT Charter, crimes against humanity were defined as 'murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated'.[24] The close link between this type of crime and the other crimes within the jurisdiction of the IMT effectively meant that crimes against humanity would be punished only if committed during the war or as part of its preparation and if they directly affected the interests of other States.[25]

While the Charter of the International Military Tribunal for the Far East follows the wording of the IMT Charter, the Allies abandoned the link between armed conflict and crimes against humanity when they enacted Control Council Law No. 10 in December 1945 for the trial of other war criminals in Europe subsequent to the IMT proceedings.[26]

The very concept of crimes against humanity was thus essentially introduced by the victorious powers of World War II in order to address crimes against civilians. Although originally considered necessary to ground the jurisdiction of the IMT in the prevailing circumstances of 1945, the requirement of a *nexus with an armed conflict* for crimes against humanity was thereafter gradually abandoned. At the ICTY, this nexus still exists to establish the jurisdiction of the Tribunal,[27] but the ICTY itself has recognized that such a nexus with an armed conflict is not *per se* necessary under customary law anymore.[28] This nexus is not present in the Statutes of the ICTR and ICC. On the basis of previous case law and their founding instruments, the judgments of the ICTY and ICTR have stressed that crimes against humanity must be committed as *part of a widespread or systematic attack* against the civilian population, that is a large-scale or organized attack the primary object of which is a civilian population.[29]

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[24] Art. 6 (c) of the IMT Charter.

[25] This was because of the perceived need to placate doubts about possible breaches of the principle of legality. On the issue of *nullum crimen* in relation to crimes against humanity in the Nuremberg Judgment, see G. Acquaviva, 'At the Origins of Crimes against Humanity – Clues to a Proper Understanding of the *Nullum Crimen* Principle in the Nuremberg Judgment', in (2011) *JICJ* (forthcoming).

[26] Art. II (1) (c) of Control Council Law No. 10.

[27] Art. 5 of the ICTY Statute allows the Tribunal to 'prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population (…).'

[28] *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment, 15 July 1999, para. 249 ('*Tadić* Appeals Judgment'); *Kunarac et al.* Appeals Judgment, note 9 above, para. 83.

[29] *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgment, 29 July 2004, paras 103–116 and 135-139. See also *Kunarac et al.* Appeals Judgment, note 9 above, para. 100. As for the ICTR, its Statute requires that all crimes against humanity be committed 'as part of a widespread or systematic attack against any civilian population *on national, political, ethnic, racial or religious grounds*' (emphasis added). It has been recently noted that 'international criminal law's hierarchy of harm elevates crimes committed as part of a plan or pattern across political groups over equally serious forms of harm perpetrated randomly', thus creating a normative gap in relation to 'private and opportunistic harms enabled by situations of displacement' especially against women (female forced migrants). See J. Ramji-Nogales, 'Questioning Hierarchies of Harm: Women, Forced Migration, and International Criminal Law', *International Criminal Law Review* (2011, forthcoming).

Article 7 of the ICC Statute lists as crimes against humanity, with minor variations, the acts enumerated in the ICTY and ICTR Statutes. As for all crimes under the jurisdiction of the ICC, they are further elaborated upon in the 'Elements of Crimes' Commentary.[30] The ICC Statute, however, defines some aspects of crimes against humanity differently than the statutes of the *ad hoc* tribunals or customary international law. For the purpose of this paper, I will mention three. First, the ICC Statute requires the perpetrator to commit a crime against humanity in pursuit or furtherance of a State or organizational policy.[31] According to an ICC Pre-Trial Chamber, this aims at ensuring that, even if carried out over a large geographical area or directed against a large number of victims, [the attack] must be thoroughly organized and follow a regular pattern.'[32] Such wording undoubtedly makes the definition of the ICC harder to meet, since the threshold is higher than under customary law as interpreted by the *ad hoc* tribunals. It would appear that the present definition was devised in order to attract States to ratify the ICC Statute and, more generally, to accept the host of obligations flowing from international crimes, such as the duty to prosecute or to surrender.[33] The second difference is that the discriminatory grounds listed by the ICC Statute are not limited to political, racial, national, ethnic, or religious grounds, but encompass also cultural, gender, and 'other grounds that are universally recognized as impermissible under international law'.[34] Third, for the purposes of the ICC, persecution must be committed in connection with *other* acts or crimes within the jurisdiction of the Court.

3.2 Crimes against humanity and forced displacement: deportation, forcible transfer, other inhumane acts

In the experience of the *ad hoc* international tribunals, one of the most common examples of unwilling involvement of civilians in conflict is large scale and involuntary displacement. On the one hand, this phenomenon may be considered to a limited extent inevitable in any conflict, due to the humanitarian need to evacuate civilians from conflict zones and their natural tendency to seek refuge away from the battlefield. However, at least for the cases before the ICTY, it is fair to say that the findings of the judges also reflect the nature of many contemporary conflicts, which are often characterized by a specific plan on the part of the military and civilian leadership to displace substantial portions of a civilian population on ethnic, religious, national or political grounds.[35] Depending on the specific circumstances of the case, and apart from possibly amounting to a war crime, displacement of civilians might also give rise to individual criminal responsibility for one or more crimes against humanity.

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[30] Elements of Crimes, ICC-ASP/1/3, 11(part II-B, Adopted by the Assembly of States Parties, First session, New York, 9 September 2002.

[31] Art. 7(2) (a) ICC Statute ('a course of conduct involving the multiple commission of acts (…) against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack'). The Elements of Crimes specify that this policy actually requires that the State or the organization actively *promote or encourage* such an attack against a civilian population.

[32] *Prosecutor v. Katanga and Chui, Situation in the DRC,* Case No. ICC-01/04-01/07-717, Decision of the Confirmation of the Charges, 30 September 2008, para. 398.

[33] W. A. Schabas, *The International Criminal Court – Commentary on the Rome Statute* (Oxford: OUP, 2010) 150-152 and references therein.

[34] Art. 7(1)(h) of the ICC Statute.

[35] On this topic with particular reference to the wars in the former Yugoslavia, see F. Pocar, 'International Criminal Tribunals and Serious Violations of International Humanitarian Law against Civilians and Prisoners of War', in M. K. Sinha (ed.), *International Criminal Law and Human Rights* (New Delhi: Manok, 2010), 2-3.

The ICTY and ICTR Statutes list among crimes against humanity: murder, extermination, enslavement, *deportation*, imprisonment, torture, rape, persecutions on political, racial and religious grounds and other inhumane acts.[36] 'Deportation' is defined as the forced displacement of persons beyond a State (or State-like) border, even in the absence of the intent to displace the persons on a permanent basis.[37] In this context, deportation as a crime against humanity is substantially similar to the corresponding war crime – the general requirements discussed above (which in turn diverge slightly between ICTY and ICTR) constitute the main differences.

Moreover, 'other inhumane acts' is a general (residual) clause encompassing serious criminal acts not exhaustively enumerated in Article 5 ICTY Statute (or Article 3 ICTR Statute).[38] International case law has clarified that specific acts of forcible transfer may be sufficiently serious as to amount to other inhumane acts.[39] More importantly, however, crimes against humanity include persecution, which is a sort of 'umbrella' crime, encompassing an underlying act (which must deny a fundamental human right) coupled with a discriminatory intent.[40]

3.3 Crimes against humanity and forced displacement: persecution

Persecution as an international crime finds its origins in the Nuremberg Charter and is included, inter alia, in the ICTY Statute, ICTR Statute, and ICC Statute. As mentioned above, persecution's objective element (*actus reus*) is constituted by an underlying act, which must discriminate in fact and deny a fundamental human right laid down in international law.[41] While not every denial of a right will be serious enough to constitute persecution, this 'underlying act' itself need not constitute a crime in international law. However, considered in isolation or in conjunction with other acts, it must be of the same gravity as other crimes listed under Article 5 of the ICTY Statute (or the corresponding Article 3 ICTR Statute).[42] For the purposes of this paper, displacement of individuals – in particular when carried out unlawfully, breaching a fundamental human right – done on discriminatory grounds may amount to persecution and may therefore be prosecuted as such.

The question of whether a given act, such as harassment, humiliation or even forcible transfer, amounts to persecution is answered not with reference to its apparent cruelty but with reference to the discrimination with which the act is undertaken.[43] On this basis, international tribunals have for instance recognized conduct such as the denial of freedom of movement, the denial of employment, the denial of the right to judicial process, and the

[36] Art. 7(1)(d) of the ICC Statute includes as a crime against humanity '[d]eportation or forcible transfer of population'.
[37] *Stakić* Appeals Judgment, note 21 above, paras 276–308. See below for a more complete discussion of the border requirement.
[38] The ICC Statute enshrines these acts in art. 7(1)(k) as '[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health'.
[39] *Stakić* Appeals Judgment, note 21 above, para. 317.
[40] On persecution in general, see K. Roberts, 'The Law of Persecution before the International Criminal Tribunal for the Former Yugoslavia', (2002) 15 *LJIL* 623.
[41] *Krnojelac* Appeals Judgment, note 2 above, para. 185.
[42] *Prosecutor v. Kupreškić*, Case No. IT-95-16-T, Judgment, 14 January 2000, para. 621; *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, Judgment, 28 February 2005, para. 323; *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgment, 29 July 2004, para. 135.
[43] F. Pocar, 'Persecution as a Crime under International Criminal Law', in (2008) 2 *Journal of National Security Law and Policy* 355, 360.

denial of equal access to public services as constituting persecutory acts.[44] It is important in this respect to dwell on the type of conduct connected with forced displacement that has been regarded as persecutory over the past decades by international tribunals.

The IMT, where the origin of the law of crimes against humanity can be traced, stated in its judgment:

> The persecution of the Jews at the hands of the Nazi Government has been proved in the greatest detail before the Tribunal. It is a record of consistent and systematic inhumanity on the greatest scale (…). With the seizure of power, the persecution of the Jews was intensified. A series of discriminatory laws was passed, which limited the offices and professions permitted to Jews; and restrictions were placed on their family life and their rights of citizenship. By the autumn of 1938, the Nazi policy towards the Jews had reached the stage where it was directed towards the complete exclusion of Jews from German life. Pogroms were organized, which included the burning and demolishing of synagogues, the looting of Jewish businesses, and the arrest of prominent Jewish business men. A collective fine of 1 billion marks was imposed on the Jews, the seizure of Jewish assets was authorized, and the movement of Jews was restricted by regulations to certain specified districts and hours. The creation of the ghettos was carried out on an extensive scale, and by an order of the Security Police Jews were compelled to wear a yellow star to be worn on the breast and back.[45]

As examples of persecution, the IMT found Hans Frank, the Governor-General of occupied Poland, 'a willing and knowing participant' in the persecution of the Jews, who had been 'forced into ghettos, subjected to discriminatory laws, deprived of the food necessary to avoid starvation, and finally systematically and brutally exterminated.'[46] Constantin Von Neurath, Reich Protector for Bohemia and Moravia, 'instituted an administration in [that territory] similar to that in effect in Germany. (…) Nazi anti-Semitic policies and laws were (…) introduced. Jews were barred from leading positions in Government and business.'[47] Wilhelm Frick, Reichminister of the Interior, was held responsible for having drafted, signed, and administered many laws designed to eliminate Jews from German life and economy, for prohibiting Jews from following various professions, for confiscating their property, and for signing a decree in 1943 which placed them 'outside the law'.[48]

Some of the acts referred to here, which often go hand-in-hand with forced transfer of civilians or even of entire populations, have also been considered in the case law of the ICTY. The *Brđanin* Trial Chamber considered the denial of freedom of movement, the denial of employment, the denial of the right to judicial process, and the denial of equal access to public services and concluded that these acts constituted persecution only when taken in conjunction with each other since, taken in isolation, they were not of the same gravity as the other crimes listed in Article 5 of the Statute.[49] More generally, The ICTY Appeals Chamber has held that:

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[44] See in particular, A. Zahar and G. Sluiter, *International Criminal Law* (Oxford: OUP, 2008) 214-215.
[45] *United States et al. v. Hermann Göring et al.* ('Nuremberg Judgment'), International Military Tribunal (1 October 1946), in I TMWC 171, 247-299.
[46] Nuremberg Judgment, 298.
[47] Nuremberg Judgment, 335.
[48] Nuremberg Judgment, 300.
[49] *Prosecutor v. Brđanin* Case No. IT-99-36-T, Judgment, 1 September 2004, para. 1049.

> taking into account their cumulative effect, the acts of harassment, humiliation and psychological abuse ascertained [may be] acts which by their gravity constitute material elements of the crime of persecution.[50]

The ICTR, in the notorious '*Media*' case, has further considered that hate speech, when infringing on the right to security and human dignity by targeting a group, may under certain circumstances amount to a persecutory act rising to the level of required gravity, either on its own or when taken in conjunction with other similar infringements.[51] According to the Presiding Judge in that case, this judgment stands for the proposition that hate speech accompanied by incitement to commit genocide and as part of a massive campaign of other discriminatory acts – including acts of violence against property and persons – undoubtedly rises to the required level of gravity so as to amount to persecution.[52]

This notion of an 'underlying act' amounting to persecution (i.e., the discriminatory denial of a fundamental human right laid down in international law) undoubtedly applies to *forced displacement* – since the right to freedom of movement and to reside in a place is a protected right under international law.[53] In fact, '[t]he prohibition against forcible displacements aims at safeguarding the right and aspiration of individuals to live in their communities and homes without outside interference. The forced character of displacement and the forced uprooting of the inhabitants of a territory entail the criminal responsibility of the perpetrator (…)'.[54] On this basis, the ICTY concluded that:

> displacements within a State or across a national border, for reasons not permitted under international law, are crimes punishable under customary international law, and these acts, if committed with the requisite discriminatory intent, constitute the crime of persecution (…). The Appeals Chamber finds that the facts accepted by the Trial Chamber fall within the category of displacements which can constitute persecution.

Having discussed the *actus reus*, it must however be recognized that the distinctive feature of persecution as a crime against humanity lies in its subjective element (*mens rea*), i.e., the intent of the perpetrator to discriminate on one of the aforementioned grounds. While the jurisprudence of the *ad hoc* tribunals has found – as mentioned above – that the act must 'discriminate in fact', it has also suggested that the perpetrator's state of mind is essential in this determination.[55]

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[50] *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, Judgment, 28 February 2005, para. 324.
[51] *Prosecutor v. Nahimana et al.* Case No. ICTR-99-52-A, Judgment, 28 November 2007, para. 987.
[52] Pocar, 'Persecution as a Crime under International Criminal Law', note 43 above, 360.
[53] See, for instance, 'General Comment No. 27: Freedom of Movement (Art. 12)', UN Doc. CCPR/C/21/Rev.1/Add.9, 2 November 1999, para. 4 ('Everyone lawfully within the territory of a State enjoys, within that territory, the right to move freely and to choose his or her place of residence'). Furthermore, the Committee on Economic, Social and Cultural Rights has stated that forced evictions are *prima facie* incompatible with the obligations flowing from the Covenant on Economic, Social and Cultural Rights (General Comment 7, on the right to adequate housing (Art. 11.1 of the Covenant): Forced evictions, of 20 May 1997).
[54] *Krnojelac* Appeals Judgment, note 2 above, para. 218.
[55] *Krnojelac* Appeals Judgment, note 2 above, paras 184–185 (emphasis added). Interestingly, this was one of the reasons for early ICTY jurisprudence to discard refugee law as a basis for the legal definition of persecution applicable to international criminal proceedings. See *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T, Judgment, 14 January 2000, para. 589 ('(…) It would be contrary to the principle of legality to convict someone of persecution based on a definition found in international refugee law or human rights law. In these bodies of law the … emphasis is more on the state of mind of the person claiming to have been persecuted (or to be vulnerable to persecution) than on the factual finding of whether persecution has occurred or may occur. In

In *Naletilić and Martinović*, for instance, the Prosecution charged Mladen Naletilić and Vinko Martinović with persecution through a variety of acts, including forcibly transferring and deporting Bosnian Muslim civilians. At the time, as was widely noted by commentators, it was not clear whether the requirement that the acts be carried out 'on discriminatory grounds' related to the *actus reus* or to the *mens rea* of the crime. Following one interpretation, favoured by the *Krnojelac* judgement, 'the act or omission must *in fact have discriminatory consequences* rather than merely be done with discriminatory intention,' for interpreting the provision differently might have the effect of convicting a person without anyone actually having been persecuted. The specificity of the crime of persecution would lie in the fact that individuals are discriminated against *because* they are members of a targeted group. By contrast, the *Kvočka* Trial Chamber stated that 'persons suspected of being members of [the targeted] groups are also covered as possible victims of discrimination (…) even if the suspicion proves inaccurate' – apparently suggesting that persecution may exist even without an actual discriminatory act against (a member of) the targeted group; instead, the discriminatory intent in the mind of the perpetrator should be considered the relevant issue.

The *Naletilić* Trial Chamber recognized that the discriminatory act (or omission) is indeed a distinct element from the *mens rea*, to be proven in addition to the other elements of the crime; however, it held that 'the power to define the "targeted group" rests solely in the hands of the perpetrator. If a certain person is defined by the perpetrator as belonging to the targeted group, *this definition thus becomes discriminatory in fact* for the victim as it may not be rebutted, even if such classification may be incorrect under objective criteria.'[56] Thus, discrimination must in fact occur (within the *actus reus* of the crime in question – the act must discriminate in fact), but is also relevant for the *mens rea* of the accused, who must be found to have had the intent to discriminate on one of the listed grounds.

This legal finding raises interesting questions on the concepts of discrimination and persecution. Political, racial and religious groups are, in a sense, defined by the members of the group themselves; conversely, they may be defined by members of other groups, especially groups developing an opposition to the first. Since there often appears to be no objective way to define a political, ethnic/national, or religious group, in the case of a perpetrator who decides to target someone because he is, allegedly, a member of an opposing group, it seems reasonable to 'defer' to the perpetrator's definition of that group.

Indeed, contemporary societies are to a certain extent characterized by whole range of people with links to different groups – persons who may be labelled differently depending on the circumstances and the perspective from which they are considered. Examples include *former* members of a political party, *spouses* – or even *partners* or *friends* – of members of an ethnic group, *dissidents* of a religious group who have not joined another creed, or even former members of a political group who decided to join the opposing group. When these individuals

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addition, the intent of the persecutor is not relevant. The result is that the net of "persecution" is cast much wider than is legally justified for the purposes of imposing individual criminal responsibility. The definition stemming from international refugee law or human rights law cannot therefore be followed here.'(internal references omitted)).

[56] *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-T, Judgment, 31 March 2003, note 1572.

are targeted because the perpetrator considers them as members of a targeted group, in a sense constructing in his own mind what the contours of such a group are (and there is no issue of error of fact involved), it would be unfair to consider that this is not 'persecution' on the basis of an 'objectively' devised definition of the targeted group.[57]

4. Challenges in judicial enforcement of the law on forced displacement

4.1 The distinction between deportation and forcible transfer in ICTY case law

This brief overview of international crimes relevant to forced displacement leads to the following reflections on the challenges facing their judicial enforcement.

First, a question has been lingering amongst scholars about the distinction, if any, between the notion of deportation and that of forcible transfer. From the early developments of war crimes law, conventional instruments and judicial rulings have often conflated these two concepts. As the two acts are often mentioned together, doubts abound as to whether they should not be treated as a single crime. Interestingly, the ICC Statute does not appear to make a clear distinction between the two.[58]

In its case law, the ICTY has sought to distinguish between deportation, on the one hand, and forcible transfer, on the other. The ICTY Appeals Chamber held in *Stakić* that deportation requires 'the forced displacement of persons by expulsion or other forms of coercion from the area in which they are lawfully present, across a *de jure* State border or, in certain circumstances, a *de facto* border'.[59] In contrast, a forcible transfer exists where there is a forced displacement of persons within the territory of one State. As deportation had its origins as a war crime, but was later extended to crimes against humanity so as to protect civilians of the same nationality as the perpetrator, the distinction between the two acts applies to both war crimes and crimes against humanity.

The distinction between *de jure* Sate borders and *de facto* State borders is a fine one. The Appeals Chamber noted that 'under certain circumstances displacement across a *de facto* border may be sufficient to amount to deportation'.[60] This must be determined on a case by

[57] This approach was later endorsed by another Chamber in *Prosecutor v. Stakić*, Case No. IT-97-24-T, Judgment, 31 July 2003 (paras 734 and 819, stating that 'the victims of these crimes discussed above [underlying acts of persecution] were non-Serbs, or *those affiliated to or sympathising with them*'. Emphasis added.).

[58] Art. 7(1)(d) ICC Statute includes 'deportation or forcible transfer of population' as a crime against humanity; art. 8(2)(a)(vi) includes 'unlawful deportation or transfer' as a grave breach of the Geneva Conventions applicable to international armed conflicts; art. 8(2)(e)(viii) established 'ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand' as a violation of the laws of war applicable to non-international armed conflicts.

[59] *Stakić* Appeals Judgment, note 21 above, para. 278.

[60] *Stakić* Appeals Judgment, note 21 above, para. 300. For an application of the principle to the border between Montenegro and Kosovo in 1999, albeit without a proper discussion of the nuances involved, see *Prosecutor v. Đorđević*, Case No. IT-05-87/1-T, Judgment, 23 February 2011 (*Đorđević* Trial Judgment), paras 1646 and 1683.

case basis. Where the *de facto* border is akin to a legal border it will amount to deportation. Alternatively, the conduct would be defined as forcible transfer. Since neither the ICTY nor other tribunals have really elaborated this point, it is hard to clearly state when – in the case of an armed conflict between two parties – an episode of displacement would fall under the definition of deportation or of forcible transfer, although some hypotheses can be made.

On the one hand, there is deportation when an officially recognized border is crossed; on the other, forcible transfer would undoubtedly occur according to the ICTY definition whenever a person is simply displaced to a different village, on the same side of the confrontation line between the warring parties. What about the situations not clearly falling into either of these two cases? At one end of the spectrum, one could place a situation such as the one of the Democratic People's Republic of Korea (North Korea) and the Republic of Korea (South Korea): both these countries are internationally recognized as independent States and are members of the United Nations, although there never was a formal peace treaty between them at the end of the hostilities, but merely an Armistice Agreement. Such a situation would seem to fall under 'deportation' because the *de facto* border is akin to a *de jure* one and the international community has been acting on such an assumption for decades.

More difficult are the cases, for instance, of the border between two former federated republics that are seceding from a federation, or when a country is splitting into two new States through a civil war: should the (yet unrecognized) border between the two entities be considered a *de facto* State border? Who is to establish the existence of a *de facto* border so similar to a *de jure* one so as to warrant a finding of deportation under the present jurisprudence of the ad hoc tribunals? Only time, and case law, will tell.

4.2 Forced displacement charged as a war crime or as a crime against humanity?

In sum, *deportation and forcible transfer* essentially exist as both war crimes and crimes against humanity. One of the main differences between charging them as war crimes as opposed to charging them as crimes against humanity is that under the former category, prosecuting authorities need to show the existence of the required *nexus with an armed conflict*, while under the latter, deportation must be part of a *widespread and systematic attack* against a civilian population – there is no need to establish even the existence of an armed conflict.[61] Whether charged under one or the other type of crime, the constitutive elements of deportation and forcible transfer as crimes under international law do not differ much, so in effect – apart from the contextual elements just discussed – prosecuting authorities will have to prove essentially the same elements regardless of the qualification as war crimes or crimes against humanity. Prosecuting authorities may actually be able to charge the same conduct under both counts (as a war crime *and* a crime against humanity), the ICTY and the ICTR having repeatedly held that an accused can indeed be convicted for both offences, due to the distinctive elements contained in each category of crimes.[62]

[61] In the case of an ICC prosecution, deportation as a crime against humanity must also have been perpetrated in pursuit or furtherance of a 'State or organizational policy to commit' an attack against the civilian population.
[62] *Prosecutor v. Mučić et al.*, Case No. IT-96-21-A, Judgment, 20 February 2001, paras 414 *et seq.*; *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgment, 17 December 2004, paras 1035-1038.

The most important practical differentiation in terms of prosecutorial policy relates to the potential *victims* of deportation/forcible transfer. In the case of war crimes, victims can only be 'protected persons' under the applicable Geneva Conventions or the Additional Protocols. Since this limitation does not apply to crimes against humanity – which, as seen above, may even occur in peace time, and the notion of 'protected persons' under international humanitarian law is inapplicable – deportation and forcible transfer as crimes against humanity appear to protect a potentially broader range of victims.[63]

More concretely, deportation and forcible transfer as war crimes may only be committed during a military occupation by an occupying power (in an international armed conflict) or when a party to a non-international conflict controls a portion of territory and displaces protected persons living there. A mass exodus caused by the threat of advancing enemy forces and by the bombing of cities and dwellings might therefore not constitute a war crime, because civilians and other persons not taking active part in the hostilities might not enjoy the status of protected persons under humanitarian law for the purpose of deportation. In relation to the war crimes of deportation and forcible transfer, only persons in occupied territories receive such protection, and therefore persons fleeing beyond the (moving) border created by an advancing army appear to be beyond the scope of the protection. In other words, under the laws of war, the crime of deportation applies to civilians or other protected persons in the hands of a party to the conflict and not to displacement of civilians during the conduct of hostilities but *prior to* occupation.[64]

This same conduct could however constitute a crime against humanity, because looking at the conduct through the lens of crimes against humanity, any civilian whose fundamental rights are breached can – if all other elements are met – be a victim of this type of crime.[65] For crimes against humanity, it is irrelevant whether the civilian in question falls under the precise definition of 'protected person' under international humanitarian law.

In a broader context, it could therefore be said that – where possible on the basis of available evidence – prosecution authorities have an incentive to try and charge the relevant conduct underlying deportation and/or forcible transfer as crimes against humanity. As discussed above, acts of deportation and forcible transfer may actually also constitute persecutory acts. For persecution to constitute a crime, the general elements of crimes against humanity must in any case be fulfilled. These are found in the words 'directed against any civilian

[63] On the broadening of the category of victims of crimes against humanity, see also A. Cassese, *International Criminal Law* (2nd edn, Oxford: OUP, 2008) 122-123.

[64] Art. 49 of Geneva Convention IV provides that: 'Individual or mass forcible transfers, as well as deportations of protected persons *from occupied territory* to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive' and art. 17 of Additional Protocol II as interpreted by the ICRC Commentary (*supra*, fn. 19 and accompanying text). Similarly, art. 85(4)(a) of Protocol I prohibits 'deportation or transfer of all or parts of the population *of the occupied territory* within or outside this territory, in violation of art. 49 of the Geneva Convention'. Rule 129 of the ICRC Study on Customary International Humanitarian Law also contains a requirement that persons deported be initially situated in occupied territory. (J.-M. Henckaerts and L. Doswald-Beck (eds), *Customary International Humanitarian Law, Vol. I: Rules* (Cambridge: CUP, 2005) 459.)

[65] See *Prosecutor v. Gotovina et al.*, Case No. IT-05-87-PT, Decision on Several Motions Challenging Jurisdiction, 19 March 2007, paras 24, 26 (confirmed on appeal). *Cf.*, P. Akhavan, 'Reconciling Crimes Against Humanity with the Laws of War', (2008) 6 *JICJ* 21-37. On this issue, see also J. Doria, 'Whether Crimes against Humanity are Backdoor War Crimes', in J. Doria *et al.*, note 20 above, 656-660.

population'. The ICTY has interpreted this phrase to include a number of elements, in particular that the attack against the civilian population must be 'widespread or systematic' and that the perpetrator must have had knowledge of this context as well as of his act being part of the widespread or systematic attack.[66]

The complexity stems from the fact that, often, the underlying acts constituting persecution are also crimes on their own – if murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts are committed on discriminatory grounds, they amount to persecution as well. Be that as it may, it is pivotal to understand that deportation and forcible transfer may be proven to amount to persecution if, in addition to the contextual elements proper of crimes against humanity (discussed above), they were carried out on discriminatory grounds. Apart from this specific requirement, deportation and forcible transfer as underlying acts of persecution do not differ from the corresponding 'stand-alone' crimes as a matter of prosecution. Why, then, would anybody try and charge these crimes as persecution, considering the need to prove the additional element of discriminatory intent?

An explanation might lie in the following considerations. In its attempt to find a definition for the crime of persecution, the international *ad hoc* tribunals have clarified that the crime is meant to encompass more than simply an existing offence coupled with the distinctive discriminatory intent.[67] The ICTY Appeals Chamber has characterized the crime of persecution as an 'umbrella crime' encompassing a wide variety of acts, including other crimes against humanity, other crimes under the ICTY Statute, and acts that are not in themselves crimes.[68] The underlying acts should not be considered in isolation, but rather in the context of other acts and crimes, by looking at their cumulative effect. This, in combination with references to persecution as implying a series of acts (rather than a single act), reflects the *collective* and *multifaceted* nature of crimes against humanity under international criminal law, which aims to capture a range of acts or patterns, rather than isolated behaviour. Thus, charging certain conduct as a crime against humanity of persecution is not necessarily justified by legal reasons or by the desire for higher sentencing only, but also by the 'policy' need to consider the acts in question within a broader context, namely, a persecutory pattern which would otherwise go unnoticed.

4.3 Unlawful transfer: borderline cases

Some cases of transfer of civilians, despite not being voluntary, should not be considered to amount to deportation or forcible transfer. With respect to the *mens rea* of the crimes in question, whether they be characterized as war crimes or as crimes against humanity, the

[66] *Kunarac et al.* Appeals Judgment, note 9 above, para. 85. Not all victims of each single crime against humanity must be civilians, however – it is enough that the attack is generally directed against civilians, while persons *hors de combat* and others can be comprised among the victims (as long as the overall attack targets civilians). See *Prosecutor v. Martić*, Case No. IT-95-11-A, Judgment, 8 October 2008, paras 313-314.

[67] See in particular, J. Nilsson, 'The Crime of Persecution in the ICTY Case Law – between an Extraordinary Legal Response to "Ethnic Cleansing" and the Requirements of the Principle of *Nullum Crimen Sine Lege*', in B. Swart et al. (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford: OUP, forthcoming 2011).

[68] *Prosecutor v. Kupreškić*, Case No. IT-95-16-T, Judgment, 14 January 2000, para. 98. See also *Prosecutor v. Brđanin*, Case No. IT-99-36-A, Judgment, 3 April 2007, para. 296.

perpetrator of deportation or forcible transfer must intend to forcibly displace the persons. However, the intent need not be to displace these people on a permanent basis.[69]

The Prosecution in the *Naletilić* case discussed above had charged unlawful transfer of a civilian under Article 2(g) of the Statute as a grave breach of the Geneva Conventions of 1949. The Prosecution had relied on Article 49 of Geneva Convention IV, which provides, in part: '[i]ndividual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.'

The Chamber made two preliminary findings. First, according to Geneva Convention IV, it found that transfer is warranted only in three instances: (i) transfers motivated by an individual's own genuine wish to leave; and (ii) evacuation motivated by concern for the security of the population or (iii) by imperative military necessity. Second, unlawful transfer did not need to occur beyond a border, but could be within occupied territory itself. This is quite clear and follows ICTY and ICTR jurisprudence. This definition appears to reflect customary international law on the subject.

However, in one instance, the Chamber found that moving Bosnian Muslim civilians to a detention centre, albeit amid great stress and fear, did not amount to unlawful transfer because the aim was to detain them rather than permanently remove them from a given geographical area.[70] While, as seen above, the aim of permanently removing civilians is not an element of the crime of deportation and forcible transfer according to the most recent ICTY case law,[71] the finding in this case is interesting and deserves to be commended. The intent of the perpetrators in transferring the prisoners to a detention centre is clearly not to remove them from the place where they lawfully reside, but rather to detain them. The forced movement only occurs as a necessary step towards detention, not as a consequence of the *actus reus* of the crime of forcible transfer or deportation. Of course, the conduct in question might not go unpunished and can amount to 'unlawful detention', both as a crime on its own and as an underlying act of persecution, but it can hardly be said to be deportation or forcible transfer.

This finding draws attention to the fact that when individuals are forcibly removed from one location to another, this does not necessarily amount to deportation or forcible transfer – but the conduct in question might still be part and parcel of another criminal conduct. It falls to the judges to carefully assess the most appropriate characterization depending on the circumstances of the case.

4.4 Removal of persons 'lawfully' present

It is now assumed that deportation and forcible transfer both entail the forced displacement of persons, without grounds permitted under international law, from the area in which they are lawfully present. The notion that persons should be 'lawfully' present in the area from which

[69] *Stakić* Appeals Judgment, note 21 above, paras 278; 304-7; 317.
[70] *Prosecutor v. Naletilić et al.*, Case No. IT-98-34-T, Judgment, 31 March 2003, para. 537.
[71] *Stakić* Appeals Judgment, note 21 above, paras 278; 304-307; 317.

they are forcibly transferred or deported has never been carefully scrutinized by international criminal tribunals. One recent judgment has helpfully remarked that:

> [t]he clear intention of the prohibition against forcible transfer and deportation is to prevent civilians from being uprooted from their homes and to guard against the wholesale destruction of communities. In that respect, whether an individual has lived in a location for a sufficient period of time to meet the requirements for residency or whether he or she has been accorded such status under immigration laws is irrelevant. Rather, what is important is that the protection is provided to those who have, for whatever reason, come to "live" in the community—whether long term or temporarily. Clearly the protection is intended to encompass, for example, internally displaced persons who have established temporary homes after being uprooted from their original community. In the view of the Trial Chamber, the requirement for lawful presence is intended to exclude only those situations where the individuals are occupying houses or premises unlawfully or illegally and not to impose a requirement for "residency" to be demonstrated as a legal standard.[72]

The issue is not so much that of ensuring compliance with local (domestic) immigration laws, residence permits or registration duties but rather not to hinder expulsions that would be legitimate under international and domestic laws. Since a crime against humanity can only occur as part of a widespread and systematic attack on a civilian population, the caveat about the lawfulness of the presence does not actually have consequences for this category of offences – unless the expulsion of an illegal immigrant forms part and parcel of such an attack (and, in case persecution is alleged, if the expulsion is made on discriminatory grounds).

Forced displacement means that people are moved against their will or without a genuine choice.[73] Under international criminal law, it is the act of the accused that must contribute to the displacement. Fear of violence, duress, detention, psychological oppression, and other such circumstances may create an environment where there is no choice but to leave, thus amounting to the forced displacement of people.[74] For instance, shelling of civilian objects, burning of civilian property and threats of criminal conduct calculated to terrify the population may suffice, depending on the circumstances.[75] This is an important factor and, although it is more a matter of evidence required to prove lack of consent, it has interesting implications for all actors and stakeholders concerned with the protection of civilians during armed conflicts or other major humanitarian crises. One ICTY Trial Chamber has, for

[72] *Popović* Trial Judgment, note 21 above, para. 900; for specific examples of such an approach, see further *Đorđević* Trial Judgment, paras 1616 and 1640.

[73] *Krnojelac* Appeals Judgment, note 2 above, paras 229 and 233; *Stakić* Appeals Judgment, note 21 above, para. 279; see also *Đorđević* Trial Judgment, paras 1631, 1636, and 1650.

[74] *Stakić* Appeals Judgment, note 21 above, para. 281. Interestingly, this type of findings is not limited to international criminal tribunals, but has found echoes in national courts applying crimes against humanity. For instance, in the case against Neđo Samardžić brought before the State Court of Bosnia and Herzegovina (Appellate Division Panel of Section I for War Crimes), the court found that when a population (not single individuals) are exposed daily to terror, mental and physical abuse, rape and looting, then their decision to board buses to be moved elsewhere may not amount to genuine choice. *See* Case No. X-KRZ 05-49, 13 December 2006, p. 20.

[75] *Prosecutor v. Simić*, Case No. IT-95-9-T, Judgment, 17 October 2003, para. 126; *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Judgment, 26 February 2009, para. 165. See also Darfur Report, para. 331 ('The forced dislodgement of civilians from the area where they traditionally and legally live, resulting from unlawful indiscriminate attacks on their dwellings and the scorching of their villages, falls within the scope of the prohibition at issue.')

instance, stated that if civilians are put before the choice of either fleeing or taking up arms to defend themselves, this is not 'genuine' choice, and therefore should be considered forcible transfer.[76]

As the ICTY has repeatedly held, even the presence of international (or even national) personnel when transferring people from conflict zones on humanitarian grounds does not of itself render an otherwise illegal transfer lawful. Such forced displacements, if of sufficient gravity, may clearly amount to persecution regardless of the role of international agencies. Displacement of persons carried out pursuant to an agreement among political or military leaders does not necessarily make it voluntary – since these actors do not have the authority of expressing genuine consent on behalf of the individuals.[77]

5. Forced displacement in international criminal law: an appraisal

The analysis above shows the complexities of subsuming the atrocious crimes related to forced displacement into clear-cut legal categories for the purpose of international criminal prosecution. These difficulties unquestionably stem from the historical origins of the crimes in question but also from the complexity of identifying the most appropriate approach to legally characterize widespread violations of fundamental human rights amounting to forcible transfer and deportation.

Especially when committed with a discriminatory intent and as a part of a widespread or systematic attack against civilians, this type of conduct tends to rise to the level of a humanitarian emergency and, often, forms part and parcel of a conflict between two (or more) fighting groups. For this reason, prosecuting authorities may be able to consider them both as crimes against humanity and as war crimes. The case law from the international criminal tribunals has undoubtedly provided some clarity in this area, establishing beyond any doubt the criminal nature of certain types of forced displacement and the need to prosecute those responsible for forced displacement situations. Despite the relatively extensive jurisprudence, however, several thorny legal and policy questions remain, and will need to be further analyzed in light of future legal practice and developments.

Some of these questions are linked to broader discussions on crimes against humanity (and persecution in particular), given their vaguely defined elements and the need for full respect of the principle of legality when dealing with them.[78] Other relate to the already mentioned policy of charging and sentencing, such as the appropriateness of cumulative charging (both as war crimes and as crimes against humanity) of deportation and forcible transfer for the same underlying conduct. These are very interesting areas of discussion, which would, however, require a focus different from the one adopted in this paper. I will instead limit myself to briefly mention for further research and analysis three issues specifically linked to

[76] *Popović* Trial Judgment, note 21 above, paras 928-930.
[77] *Popović* Trial Judgment, note 21 above, para. 286; *Prosecutor v. Simić* Case No. IT-95-9-T, Judgment, 17 October 2003, para. 127.
[78] See in particular Nilsson, note 67 above.

the interplay between international criminal law and international law related to the protection of UNHCR's persons of concern.

On the basis of ICTY and ICTR case law, one of the main issues raised by mass transfers of populations during armed conflict remains the question of assessing whether people have chosen to leave conflict zones of their own free will – or at least as much free will as can be expected under war circumstances. Thus, what really counts as 'genuine choice' in each particular case can hardly be established once and for all *a priori*; a careful consideration of the specific circumstances must be carried out before reaching any conclusion.

Second, international criminal law would benefit from further insights into the meaning of the clause 'displacement of persons from the area in which they are *lawfully* present' as one of the constitutive elements of the crimes of deportation and forcible transfer. While the reading of the term *lawfully* suggested by the ICTY is reasonable, especially in the context of a conflict where different national groups and political parties confront each other in what effectively amounts to a civil war which tends to generate a large amount of internally displaced persons who often lack proper residency permits or registrations, there might be 'penumbral' situations that are not as straightforward as the international criminal tribunals appear to believe. This is an area where greater cross-fertilization between international refugee law and international humanitarian law may lead to a better understanding of how international criminal law should apply in these specific situations.

Despite the legal nuances and complexities discussed in this paper, one should not forget the bottom line, established over 70 years of legal developments (since the first war crimes trials after World War II). Acts of forced displacement, whether in international armed conflict, in civil wars, or even in peace time (if the other requirements for crimes against humanity are met) amount to international crimes. Even the difference established by the ICTY between deportation and forcible transfer – should it be accepted by other tribunals in the future – does not change the basic point that all of these acts are criminal, and that forcibly transferring people within a country is as serious as deporting them across a State border.