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ARTICLES

Forced Displacement in the Former Yugoslavia: A Crime Under International Law?

Michael P. Roch*

Wer vor fremdem Druck flieht oder durch ihn vertrieben wird, ist aller Sicherungen ledig. Er rettet nur das nackte Leben. —
Theodor Heuss¹

I. Introduction

In the past several years, the global community has had the dubious privilege of witnessing many on-going conflicts in which one group of individuals forcibly displaces another group from allegedly disputed territories. In 1994, about eighteen million refugees were forced to leave their *patriae*, and about 24 million

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1. "He who flees from foreign pressure, or who is displaced because of it, is divorced from all security and safety. He only saves his naked life." Theodor Heuss, *Bundespräsident of the Federal Republic of Germany* (1949-1959), *Wegweiser für Heimatvertriebene*, Nov. 1955 (in Bundesinnenministerium für Vertriebene, Flüchtlinge und Kriegsgeschädigte, 10 JAHRE NACH DER VERTREIBUNG: ÄUßERUNGEN DES IN- UND AUSLANDES UND EINE ZEITTADEL 3 (1956) [hereinafter 10 JAHRE NACH DER VERTREIBUNG]). All foreign language texts used in this article are translated by the author unless indicated otherwise.

more were driven from their homes but did not leave their home country.²

For instance, the conflict within Angola, which began after Angola's independence from Portugal in 1975, has displaced about three million Angolans.³ During the past ten years, more than 500,000 Colombians have fled their homes in fear of persecution by their own government's militia.⁴ Iraq relocated many Kuwaitis to Iraq during the Persian Gulf conflict.⁵ Civil strife in Burma has caused the forced relocation and displacement of civilians during an on-going conflict.⁶ By the end of 1994, the Tutsi minority in Rwanda had been cut in half, mostly through flight effected by the Hutus.⁷ As of February, 1995, about 420,000 Chechnyans have

2. See Vitat Muntarbhorn, 'Prevention' as Key to the Refugee Problem, BANGKOK POST, Feb. 15, 1994, available in Westlaw, INT-NEWS Database; Report of Jacques Quenod on Refugees, Displaced Persons and Returnees, U.N. ESCOR, 2d Sess., 37th plen. mtg., para. 10, U.N. Doc. E/1991/109/Add.1 (1991) (cited in Maria Stavropoulou, *The Right Not To Be Displaced*, 9 AM. U.J. INT'L L. & POL'Y 689 (1994)).

3. Mario Paiva, *Angola May Talk to UNITA on Peace*, REUTER NEWSWIRE, Nov. 3, 1993, available in LEXIS, News Library, ARCNWS File. Since a new flareup in 1991, the conflict has claimed about 1,000 lives daily. *Id.* See also *Frieden in Angola wieder fraglich: Luanda meldet Eroberung Huambos — NITA und internationale Helfer widersprechen der Regierung*, SÜDDEUTSCHE ZEITUNG, Nov. 8, 1994, available in LEXIS, World Library, NEWS File.

4. Gilles Castonguay, *Half-million Refugees Flee Columbia*, REUTER NEWSWIRE, Oct. 11, 1994, available in LEXIS, News Library, CURNWS File.

5. United States: Department of Defense Report to Congress on the Conduct of the Persian Gulf War — Appendix on the Role of the Law of War, 31 I.L.M. 612 (1992).

6. *Thailand: Git Mon Incident Should Serve as Reminder in Handling Latest Flood of Refugees*, BANGKOK POST, Jan. 29, 1995, available in Westlaw, INT-NEWS Database; *Burma: A Sad Day for Burmese Democracy Movement and its People*, BANGKOK POST, Mar. 13, 1994, available in Westlaw, INT-NEWS Database.

7. Rudolph Chimelli, *Großmacht-Akkorde beim Disengagement. Frankreichs Präsident François Mitterand vor seinem Staatsbesuch in Südafrika*, SÜDDEUTSCHE ZEITUNG, July 4, 1994, available in, LEXIS, World Library, NEWS File. Of those, about 500,000 to 1,000,000 Tutsi have been systematically murdered. *UNO-Kommission bestätigt: Systematischer Mord an Tutsi. Internationales Tribunal soll den Genozid ahnden*. SÜDDEUTSCHE ZEITUNG, Oct. 5, 1994, available in LEXIS, World Library, NEWS File; Alan Nichols, *Rwanda: Why the World Must not Let Go of Rwanda*, AUSTL. FIN. REV., Aug. 12, 1994.

become refugees.⁸ As recently as March, 1995, the United Nations has condemned Sudan for forcibly displacing individuals.⁹

In addition, more than three million Bosnians have been displaced as a result of Serb efforts.¹⁰ These efforts began about six months after Bosnia-Herzegovina declared independence from the Socialist Federal Republic of Yugoslavia (hereinafter Former Yugoslavia) on October 15, 1991.¹¹ Bosnia-Herzegovina's declaration followed Slovenia's December 23, 1990, independence declaration, subsequent to which a brief period of fighting broke out in Slovenia. Slovenia achieved peace around July 5, 1991,¹² but Bosnia-Herzegovina did not escape prolonged war as easily as did Slovenia. Despite the fact that the new government of Bosnia-Herzegovina asked all Yugoslav National Army forces to leave Bosnia-Herzegovina on February 24, 1992, the Army had already transferred a massive amount of military artillery to the Bosnian-Serb fighters.¹³ On April 6, 1992, the European Union recognized Bosnia-Herzegovina under intense pressure from Germany. Today,

8. *Anklage wegen Landesverrats und Aufrufs zu Terrorakten Russland erläßt Haftbefehl gegen Präsident Dudajew. Kämpfe in Tschetschenien gehen unvermindert weiter / Nachbarrepublik Inguschien befürchtet Ausweitung des Krieges*, SÜDDEUTSCHE ZEITUNG, Feb. 2, 1995, available in LEXIS, World Library, NEWS File.

9. *U.N. Slams Sudan for Slavery and Torture*, REUTER NEWSWIRE, Mar. 8, 1995, available in LEXIS, News Library, CURNWS File.

10. See Human Rights Watch, I-II WAR CRIMES IN BOSNIA: A HELSINKI WATCH REPORT (1993) [hereinafter HELSINKI WATCH]; Marc Weller, *Current Development: The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86 A.J.I.L. 569 (1992).

While many sources refer to such forced displacement as "ethnic cleansing," this author prefers to abstain from this term's use as the Serbs themselves have coined the euphemism "ethnic cleansing" to describe the forced deportation of Muslim inhabitants of certain parts of Bosnia. See, e.g., ROY GUTMAN, *A WITNESS TO GENOCIDE* vii (1993) (a compilation of a reporter's accounts during his visits to the Former Yugoslavia during the early years of the conflict). This author does not wish to legitimize such activities by using the Serb term just as he does not want to belittle the Jewish Holocaust by using the National-socialistic terms of "Endlösung" or "Euthanasie" when referring to Germany's atrocities before and during World War II.

11. The historical reasons for this conflict are complex and intricate. For a more detailed historical analysis, see ROBERT D. KAPLAN, *BALKAN GHOSTS: A JOURNEY THROUGH HISTORY* (1993); Michael P. Roch, *Military Intervention in Bosnia-Herzegovina: Will World Politics Prevail Over the Rule of International Law?*, 24 DEN. J. INT'L L. & POL'Y (forthcoming Jan. 1996).

12. The exact date is in dispute. See Weller, *supra* note 10, at 573.

13. *Id.* at 585-597. Before the breakup of the Former Yugoslavia, the Yugoslav National Army represented the fifth largest army in the world. For the military capacities of the Yugoslav National Army, see YUGOSLAVIA: A COUNTRY STUDY (Glenn E. Curtis ed., 1990).

four years after the fighting began in Bosnia-Herzegovina, the bloodshed continues; nearly three-fourths of Bosnia-Herzegovina's pre-war population have become refugees due to the vast amount of human rights violations committed on the Bosnian-Muslim population by the Bosnian-Serbs.¹⁴

This war is especially tragic because it appears to have come at the wrong time, namely during a period of "compassion fatigue" for the disadvantaged.¹⁵ During favorable economic times of the post-World War Two period, nations have come together in an effort to protect refugees through international documents.¹⁶ Some nations even have found the benevolence to take in those displaced by ethnic strife and economic hardship, often having exceeded their responsibilities under the Refugee Convention and Protocol.¹⁷ As commercial competition among nations has become more fierce, even the most accommodating nations have begun to balk at the costs of caring for refugees;¹⁸ this trend has caused many nations to change their refugee laws in order to restrict the influx of asylum seekers.¹⁹

In order to reduce costs related to refugee management, nations have become less willing to accommodate large numbers of refugees but have instead focused on how to prevent refugee flows. One such prevention tool is to bring to justice those individuals who forcibly displace groups of people in order to deter future criminals and world leaders from repeating their predecessors' atrocities. One recent series of such efforts is the establishment of ad hoc international criminal tribunals which seek to try and punish individuals who have committed certain atrocities in the Former Yugoslavia and in Rwanda.

14. Roch, *supra* note 11.

15. See Carolyn Waller, *Confronting the Challenge of Realizing Human Rights Now: II. Refugees and Asylum in the United States: United States Asylum Law*, 34 HOW. L.J. 61 (1991).

16. See *infra* Refugee Convention and Protocol, notes 134-35.

17. The constitution of the Federal Republic of Germany, for instance, embodies the right of asylum to those who are politically persecuted. *Grundgesetz* of the Federal Republic of Germany of May 23, 1949, art. 16 (1949), before its amendment of June 28, 1993, per the *Gesetz zur Änderung des Grundgesetzes (Artikel 16 und 18)*, 1993 BGBl. I S. 1102 [Law on the Change of the Basic Law for arts. 16 and 18, as published in the Federal Gazette (1993)].

18. See *Weiter Streit um Kosten für Flüchtlinge*, SÜDDEUTSCHE ZEITUNG, Jan. 26, 1995, available in LEXIS, World Library, NEWS File. Germany has appropriated DM 400 million to provide humanitarian services to Bosnian asylees; the German portion of aid to Rwanda amounts to about DM 230 million. *Id.*

19. *Gesetz zur Änderung des Grundgesetzes (Artikel 16 und 18)*, *supra* note 17.

Most writers in this field appear to have focused their efforts on how these atrocities constitute crimes of genocide or fall within the definition of some other crime against humanity.²⁰ This article, however, focuses specifically on how international criminal law punishes those who have forcibly displaced groups of people,²¹ using various methods in pursuit of ulterior motives, such as territorial gain, as is the case in the Former Yugoslavia.²²

To accomplish this objective,²³ this article first briefly defines two types of forced displacement.²⁴ The article then focuses on forced displacement of groups of people as a crime under international criminal law, taking into consideration the differences in approach depending on whether the conflict is of international or civil nature.²⁵ Last, this article analyzes the applicability of various treaties with respect to forced displacement under international criminal law,²⁶ followed by conclusions and observations.²⁷

II. Forced Displacement: Intent or Effect?

Before commencing an analysis of forced displacement under international criminal law, it is important to define the meaning of forced displacement within the context of this article. Is an individual "displaced" when the circumstances of civil strife cause him to leave his residence, or is he only "forcibly removed" once members of an army physically move him onto a bus and cart him away?

20. See Jordan J. Paust, *Applicability of International Criminal Laws to Events in the Former Yugoslavia*, 9 AM. U.J. INT'L L. & POL'Y 499 (1994); Elizabeth L. Pearl, *Punishing Balkan War Criminals: Could the End of Yugoslavia Provide an End to Victor's Justice?*, 30 AM. CRIM. L. REV. 1373 (1993); John Webb, *Genocide Treaty — Ethnic Cleansing — Substantive and Procedural Hurdles in the Application of the Genocide Convention to Alleged Crimes in the Former Yugoslavia*, 23 GA. J. INT'L & COMP. L. 377 (1993).

21. See *infra* part II.

22. For further reference, see Jean-Marie Henckaerts, *Deportation and Transfer of Civilians in Time of War*, 26 VAND. J. TRANSNAT'L L. 469 (1993).

23. Twenty years ago, Alfred M. de Zayas provided a similar model for analysis of forced migration under international criminal law. See Alfred M. de Zayas, *International Law and Mass Population Transfers*, 16 HARV. INT'L L.J. 207, 209 (1975). De Zayas' model has been used in subsequent and recent analyses. See also Stavropoulou, *supra* note 2, at 718 *et seq.* This author has adapted and re-arranged de Zayas' model to facilitate the factual analysis of forced migration as it applies to the Bosnia-Herzegovinan conflict, especially with regard to the law of war.

24. See *infra* part II.

25. See *infra* part III.

26. See *infra* part IV.

27. See *infra* part V.

"Forced displacement" takes one of two forms.²⁸ In its direct form, an occupying force may merely round up specific groups of individuals, transport them to their nation's border, and force them across.²⁹ However, other, equally blatant methods, such as "voluntary" resettlement, are also carried out.³⁰

Forced displacement can also be practiced in a more indirect, less organized manner. This type of displacement can occur in a region where armed conflict is on-going or where systematic human rights violations are being committed.³¹ In the case of the Former Yugoslavia, both direct and indirect methods have contributed to the current flow of refugees.³² In the minds of the Bosnian Serbs, this type of "ethnic cleansing" presents an alternative to the mass execution of Bosnian Muslims; these mass executions are also well-documented.³³ Regardless of which method the perpetrator chooses, the effect is the same: individuals or groups of individuals are removed from their homes and *Heimatsländer*³⁴ against their

28. Stavropoulou, *supra* note 2, at 700.

29. This is one of the favored practices in Bosnia-Herzegovina. Consider, for instance, a 1992 account which reported that Bosnian-Serbs, forced at gun-point loaded an entire village of about 1,800 Bosnian-Muslims on to a train bound for Hungary. GUTMAN, *supra* note 10, at 20.

30. Stavropoulou, *supra* note 2, at 700. Such methods are also well documented. One account describes how the Serb militia took control of the governmental functions of Banja Luka, possible future capital of a Krajina Serbian enclave, and then "offered" Muslim inhabitants exit visas. Before the visa could be obtained, the Muslims had to sign their property over to the "state." For a \$200 transportation fee, they would be transported by bus to Vlasic Mountain, at which point the militia would rob the refugees, strip them naked, take away, rape, and kill the younger Muslim women ("... [t]hey could only hear the screams"), and then chase the remaining individuals across the narrow mountain pass into a Muslim enclave. Over several months in 1992, about 40,000 Bosnian and Croat civilians "volunteered" to leave their homes in this manner. See GUTMAN, *supra* note 10, at 120-125.

31. Stavropoulou, *supra* note 2, at 701. Development-induced relocation and environmental damage can also lead to indirect migration. *Id.*

32. Consider, for instance, how Bosnian-Serb military forces have instilled fear in the members of the Bosnian-Muslim population which, in turn, caused them to abandon their towns and villages. As an example of such indirect, forced expulsions, one report describes how, in at least one account, Bosnian-Serb militiamen entered a village, raped and tortured several women and men in the town square, and threatened the town's remaining population with similar treatment unless the individuals left the town. See HELSINKI WATCH, *supra* note 10 and accompanying text.

33. *Id.*

34. *Heimatsland*, pl. *Heimatsländer*, is a difficult concept to translate. A literal translation yields "land of one's home;" however, the literal translation does not do justice to the term's meaning. Germany, contrary to popular opinion, remains a very regionalized country yet today. In addition to the region where one was

own free will. It is irrelevant for the purposes of this analysis under which factual cloak individuals are displaced; this also submits that criminal liability attaches once such removal is effected no matter which methods are used to achieve this goal.

III. Forced Displacement of Bosnians under the Laws of War

The norms of criminality differ when applied to international war or civil war. Consider, for instance, the intent of the writers of the United Nations Charter prohibiting war across international boundaries, but not prohibiting "insurgency, terrorism, mixed civil-international conflict, conflict within nations divided by a cold war, wars of unification, wars to create states where none previously existed, and competition among various groups indigenous to the sovereign."³⁵ Therefore, before forced displacement during war can be considered, the preliminary question of whether the Bosnian conflict is one of international, civil, or mixed nature must be answered. The section immediately following addresses this question.

A. *Bosnia-Herzegovina: Civil Strife, International War, or a Mixed Conflict?*

This author argues that, while there are several factors which do support the theory that the current conflict is of a civil nature, this war is indeed of international dimensions.³⁶ This argument is based on the fact that the Bosnian conflict is the type of war which the drafters of the United Nations Charter intended to prevent. Consider first that Bosnia-Herzegovina is a state recognized by the United Nations; recognition represents a key indicator of whether a conflict is of civil or international nature.³⁷

raised, *Heimatsland* refers to the culture of one's home town and the immediate surrounding area, to the varying degrees of friendliness of one's neighbors, and to the cuisine and dialect one associates with having grown up in a specific region. May it suffice to say that *Heimatsland* refers to everything one associates with the location in which one lived between birth and the age of majority, while encompassing the spirit of patriotism to the country as a whole.

35. John Norton Moore, *Legal Standards for Intervention in Internal Conflicts*, 13 GA. J. INT'L & COMP. L. 191, 194 (1983). See also U.N. CHARTER art. 2, para. 7: "... the United Nations [may not] intervene in matters which are essentially within the domestic jurisdiction of any state"

36. See Roch, *supra* note 11.

37. Theodor Meron, *War Crimes in Yugoslavia and the Development of International Law*, 88 A.J.I.L. 78, 81 (1994).

Second, it is clear that the successor to the Former Yugoslavia, namely the Federal Republic of Yugoslavia, comprised primarily of Serbia and Montenegro, has aided and continues to aid the Bosnian Serbs by providing personnel, arms, and other materials despite the strict embargo in place around the area of fighting.³⁸ Such an intrusion into the affairs of a recognized state is illegal under conventional international law.³⁹

Last, consider that limited multilateral intervention both from neighboring nations and from United Nations peacekeeping forces has provided this conflict with an international flavor.⁴⁰

The first two factors alone promote this conflict within the scope of international scrutiny. One may argue, on the other hand, that the Bosnian conflict is not an international war, but merely represents civil strife.⁴¹ Consider, for instance, that a small,

38. See Weller, *supra* note 10, at 596 and accompanying text. On May 11, 1993, Serb President Slobodan Milosevic admitted that Serbia was aiding Bosnian Serbs. Case Concerning Application of the Convention on the Prevention of the Crime of Genocide (Bosnia and Herzegovina [sic] v. Yugoslavia (Serbia and Montenegro)), Further Requests for the Indication of Provisional Measures, 1993 I.C.J. 325 [hereinafter Response to the Second Request] (Declaration of Vice-President Oda).

Much of the problem is enforcement of the embargo due to a lack of resources to adequately patrol the Drina river. Barbara Crossette, *U.N. Eases Curbs on Yugoslavia After Serbian Peace Concessions*, N.Y. TIMES, Sept. 24, 1994, at 1. In addition, Yugoslavia's neighbors lack the resources necessary to effectively check trucks crossing the borders around Yugoslavia. United States General Accounting Office, *Report to the Honorable Edward M. Kennedy, U.S. Senate, Serbia-Montenegro: Implementation of U.N. Economic Sanctions* 6 (Apr. 1993). Also, several officers of the Yugoslav National Army have transferred to the Bosnian Serb militia, both before and after recognition of Bosnia-Herzegovina as a nation state. In fact, some officers and soldiers rotate in a tour of duty between the Federal Yugoslav Republic's army and the Bosnian Serbs. David Binder, *Pariah as Patriot: Ratko Mladić*, N.Y. TIMES, Sept. 4, 1994, § 6 at 26.

39. Consider, for example, the definition of "Aggression" G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 142, U.N. Doc A/9631, art. 3, (1974) of which states:

Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of Article 2, qualify as an act of aggression:

(g) The sending by on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts [as listed in preceding subsections], or its substantial involvement therein.

Id.

40. See Paust, *supra* note 20, at 507.

41. For a more detailed analysis than can be afforded here, see Charles Lewis Nier III, Comment, *The Yugoslavian Civil War: An Analysis of the Applicability of the Laws of War Governing Non-international Armed Conflict in the Modern*

extremist Bosnian-Muslim faction, opposed to Bosnia-Herzegovina's current government, is fighting next to Bosnian-Serb Soldiers.⁴² Also important is the fact that most of such crimes have been committed within the borders of Bosnia-Herzegovina;⁴³ most media accounts, after close scrutiny, continue to focus on the atrocities committed by Bosnian-Serbs against the Bosnian-Muslim population.⁴⁴

It appears, then, that the war in Bosnia-Herzegovina is neither of international nor civil nature, but that it is a mixed conflict. Such a conflict has been defined as a conflict which "is internal in certain respects and international in others."⁴⁵ Considering, however, the impact that this war has had and continues to have on many of Bosnia-Herzegovina's neighbors in terms of refugee flows alone,⁴⁶ this author is convinced that Bosnia-Herzegovina's neighboring states have a right to intervene in this conflict and that international criminal law applies to this conflict, regardless of whether it is labeled "international," "civil," or "mixed."⁴⁷

This conclusion is based on some precedent. Consider, for instance, the Apartheid Convention, which declared punishable the "dissemination of ideas based on racial superiority."⁴⁸ As some have done before, this author agrees that:

World, 10 DICK. J. INT'L L. 303 (1992).

42. See, e.g., Renate Flottau, *Dies hier is kein Rambo-Film* ("This is not a Rambo movie"), DER SPIEGEL, July 4, 1994, at 118; Ruth Gordon, *United Nations Intervention in Internal Conflicts: Iraq, Somalia, and Beyond*, 15 MICH. J. INT'L L. 519, at n.294; Chuck Sudetic, *U.N.'s Forces Put on Alert As Serbs Advance in Bosnia*, N.Y. TIMES, Nov. 21, 1994.

43. This is notwithstanding the fact that early in the conflict similar complaints had surfaced from the Krajina, a Serb minority pocket within Croatia, and from other border regions between the Bosnian-Muslim and Croatian territories.

44. See, e.g., GUTMAN, *supra* note 10 and accompanying text.

45. Michel Veuthey, *Some Problems of Humanitarian Law in Noninternational Conflicts and Guerilla Warfare*, in 1 A TREATISE ON INTERNATIONAL CRIMINAL LAW 428 (M. Cherif Bassiouni & Ved P. Nanda ed., 1973) [hereinafter BASSIOUNI & NANDA TREATISE].

46. Slovenia has admitted in about 100,000 Bosnian refugees. This number represents five per cent of its post-independence population of two million and presents a large burden on Slovenia's economy. Interview with Joško Čuk, Deputy Director, Chamber of Economy of Slovenia (Aug. 1993).

47. See Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, in THE LAW OF ARMED CONFLICT (1968) (cited in BASSIOUNI & NANDA TREATISE, *supra* note 45, at 428) (arguing that the distinction between international and internal armed conflicts is an artificial one at best).

48. International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195 [hereinafter Apartheid Convention].

... if *apartheid* is no longer the exclusive concern of the state of South Africa, then surely massive displacements of population with attendant inhumanities and the high loss of life due to exposure and starvation are also the legitimate concern of the international community, even if such displacements occur wholly within the borders of a sovereign state.⁴⁹

In this case, the states in question are those of the Former Yugoslavia. In addition, it has already been recognized that "individuals have international duties which transcend the national obligations of obedience imposed by the individual State."⁵⁰ The discussion *infra*, therefore, considers both possibilities of the nature of this conflict that have been advanced *supra*.

B. *Forced Displacement Under the Assumption that the Bosnian Conflict is an International War*

While international law, especially with regard to what has been termed "crimes against humanity," enjoys a history which dates back to biblical times,⁵¹ it appears that it was the Fourth Hague Convention of 1907⁵² which first manifested the idea that states should serve the interests of humanity and conduct themselves according to the laws of civilized people and the laws of humanity during times of both war and peace.⁵³ While it does not specifically address forced migration, Hague IV, still in force today, did prohibit the infliction of punishment against populations as a whole.⁵⁴ Forcible migration arguably violates this provision.⁵⁵

49. de Zayas, *supra* note 23, at 253.

50. THE NUREMBERG JUDGMENT (1946) (*reprinted in part in* L. C. GREEN, INTERNATIONAL LAW THROUGH THE CASES 707 (1978)).

51. Leslie C. Green, *Group rights, war crimes and crimes against humanity*, 1 INT'L J. GROUP RTS. 107, 107-115 (1993).

52. Regulations annexed to Convention No. IV of The Hague respecting the Laws and Customs of War on Land, 36 Stat. 2277 (Oct. 18, 1907) [hereinafter Hague IV].

53. Egon Schwelb, *Crimes Against Humanity*, 23 BRIT. Y.B. INT'L L. 178 (H. Lauterpacht ed., 1946).

54. Hague IV, *supra* note 52, art. 50, which reads:

No general penalty, pecuniary or otherwise, shall be inflicted upon the population

Id. (emphasis added). Not even the Project of an International Declaration Concerning the Laws and Customs of War recognized the illegality of the forced deportation of individuals. Project of International Declaration Concerning the Laws and Customs of War, 1 A.J.I.L. 96 (1907).

55. de Zayas, *supra* note 23, at 213.

After World War I, violations against these laws of humanity, both during armed conflict and during peace, were first considered punishable,⁵⁶ thereby first crystallizing in this century the concepts of war crimes and crimes against humanity.⁵⁷ By the beginning of World War II, "civilized" nations had recognized the Fourth Hague Convention as the authoritative document of the laws and customs of war.⁵⁸

Before the end of World War II, especially the United States called for punishment of Germany's offenses against the Jewish people and other minority groups and individuals.⁵⁹ Thereafter, the treaty which established the Nürnberg Tribunals⁶⁰ embodied the distinction between war crimes and crimes against humanity.⁶¹ War crimes, according to the Nürnberg Treaty, included the

56. Schwelb, *supra* note 53, at 179.

57. *Id.*

58. Secretary General's Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, U.N. Doc. S/25704, para. 42 (May 3, 1993) (*reprinted in* 31 I.L.M. 1159, 1171 (1993)). Consider also the Tripartite Conference in Moscow of November 1, 1943 (*reprinted in* 38 A.J.I.L. 3 (1944)):

The [signatories] [j]ointly declare:

1. That their united action, pledged for the prosecution of the war against their respective enemies, will be continued for the organization and maintenance of peace and security. . . .

Id. at 5.

59. Schwelb, *supra* note 53, at 186 (*citing* a statement made by U.S. State Department Under-Secretary Grew.). Many other states also denounced displacement at the signing of the Principles of the Atlantic Charter, 204 L.N.T.S. 381, E.A.S. No. 236, 55 Stat. 1600, Cmd. 6321; de Zayas, *supra* note 23, at 213.

60. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis between the United States, France, Great Britain, and the Soviet Union (*reprinted in* 39 A.J.I.L. 257 (1945)) [hereinafter Nürnberg Treaty]. For purposes of this article, the author, a native of Germany, will refer to the Treaty in its German spelling.

61. The Nürnberg Treaty also segregated crimes against peace, which encompassed essentially the crime of aggression. Nürnberg Treaty, *supra* note 60, art. 6(a); *see also* Green, *supra* note 51, at 129-130.

forcible deportation of civilian populations,⁶² and indictments included allegations of forcible deportation.⁶³

The 1948 Geneva Convention⁶⁴ was the next document relative to the protection of civilians in time of war. Geneva IV generally prohibited forcible transfers of individuals and groups.⁶⁵ The Geneva Convention gave bite to this prohibition by authorizing the contracting parties to criminally enforce this prohibition.⁶⁶

62. Nürnberg Treaty, *supra* note 60, art. 6(b), which reads in full: War crimes. Namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill treatment, or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

Id. (emphasis added).

63. 1 Trial of the Major War Criminals before the International Military Tribunal 57 (1947); de Zayas, *supra* note 23, at 215.

64. This Convention was actually the successor to a similar treaty enacted in 1929.

65. Geneva Convention Relative to the Protection of Civilian Persons in Time of War of Aug. 12, 1949, T.I.A.S. No. 3396, art. 49 (1950) [hereinafter Geneva IV] which 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 . . . Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.

[The Convention lays out minimum conditions for individuals so displaced.]

The Protecting Power shall be informed of any transfers and evacuations as soon as they have taken place.

[The Occupying Power must not detain protected persons . . .]

The Occupying Power *shall not deport or transfer parts of its own civilian population into the territory it occupies.*

Id. (emphasis added).

66. *Id.* arts. 146-47, providing in part as follows:

146. The High Contracting Parties undertake to *enact any legislation necessary to provide effective penal sanctions* for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in [art. 147]

147. Grave breaches . . . shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: . . . *unlawful deportation or transfer . . . of a protected person . . . not justified by military necessity and carried out unlawfully and wantonly.*

Id. (emphasis added).

In 1977, Protocol I to the Geneva Conventions applicable to international armed conflicts, was signed.⁶⁷ The Protocol reiterates the rule that intentional, forcible population transfers, within the spirit of Geneva IV, constitute a grave breach against the Convention.⁶⁸

It is interesting that Protocol I also requires state actors to "repress" grave breaches,⁶⁹ although the failure to repress such breaches is not a grave breach itself. Therefore, it appears that no criminal liability attaches to the failure to prevent movements of populations if these movements are voluntary and due merely to the general conditions of war. The language of Protocol I suggests, therefore, that indirect types of population transfers, as distinguished above,⁷⁰ do not fall within international criminal culpability.

Contrast this reading of Protocol I with its provision that an attack on a civilian installation is illegal if the installation is needed to sustain civilians and if the destruction of the installation would force the movement of the population.⁷¹ Again, it appears that

67. Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relative to the Protection of Victims of International Armed Conflicts (Protocol I), art. 1(3) (June 8, 1977) (*reprinted in* 31 I.L.M. 1396 (1977)) [hereinafter Protocol I].

Upon recognition, Bosnia-Hercegovina agreed to accede to all treaties to which the Former Yugoslavia was a party. See Weller, *supra* note 10 and accompanying text. This article only addresses whether these instruments form a basis for attaching criminal liability to certain conduct which occurred and continues to occur during this conflict. The difficult question of whether the Bosnian-Serb insurgents, who never recognized the new Bosnia-Hercegovina, are to be bound by this treaty, need not be answered at this time. The ultimate question in this article is selected criminal liability.

68. Protocol I, *supra* note 67, art. 85(4), which reads in part:

In addition to the grave breaches defined [above and in the Geneva Conventions], *the following shall be regarded as grave breaches of this Protocol*, when committed wilfully and in violation of the Conventions or the Protocol:

(a) the transfer by the occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or *the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory*, in violation of Article 49 of the Fourth Convention; . . .

Id. (emphasis added). For a discussion of such grave breaches see generally, L. C. Green, *Is There an International Criminal Law?*, 21 ALBERTA L. REV. 251, 256 *et seq.* (1983).

69. Protocol I, *supra* note 67, art. 86(1).

70. See *supra* notes 31-33 and accompanying text.

71. Protocol I, *supra* note 67, art. 54(2) and 54(3), which reads in part:

2. It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of [civilians], such as food-stuffs, [and

Protocol I did not intend to include this latter type of displacement in its provisions of conferring criminally culpable conduct. Consider also that Protocol I, unfortunately, does not recognize the right not to be displaced among the many fundamental rights of persons during war.⁷²

It is against this general background that the International Criminal Tribunal⁷³ has been conferred jurisdiction *res materiae* to prosecute individuals for grave breaches committed in violation of Geneva IV and the related Protocol I, including the displacement of civilians in an international conflict.⁷⁴ Returning to Part II of this article, it is clear that the first, direct type of forced displacement is punishable as a war crime.

related items].

3. [This prohibition does not apply if the object is used to support enemy troops].

(b) . . . however, that *in no event shall actions against these objects be taken which may be expected to leave [civilians] with such inadequate food or water as to cause its starvation or force its movement.*

Id. (emphasis added).

72. *Id.* art. 75(2). The provision reads as follows:

The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:

(a) violence to the life, health, or physical or mental well-being of persons, in particular [murder, torture, corporal punishment, and mutilation];

(b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault;

(c) the taking of hostages;

(d) collective punishments; and

(e) threats to commit any of the foregoing acts.

Id.

73. United Nations: Secretary-General's Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, U.N. Doc. S/25704 (May 3, 1993) (reprinted in 32 I.L.M. 1159 (1993) [hereinafter the International Criminal Tribunal].

74. Nürnberg Treaty, *supra* note 60, art. 2:

Grave Breaches of the Geneva Conventions of 1949. *The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of [Geneva IV], namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:*

(g) *unlawful deportation or transfer or unlawful confinement of a civilian;*

Id. (emphasis added).

The question that arises next is whether the latter, indirect type of forced displacement is included as a punishable crime in the language "committing or ordering to be committed . . . unlawful deportation or transfer of a civilian"⁷⁵ within the meaning of the statute of the ad hoc Tribunal. The prosecution must argue that the defendant knew or intended that the commission of other human rights abuses, such as rape and torture, would cause the local population to abandon its home village. Whether the latter, indirect displacement does indeed fall under the category of war crimes as envisioned by Geneva IV will be determined as a question of fact by the International Criminal Tribunal. This author argues that such indirect displacement should and does fall within the definition as intended by Geneva IV, because the language implies that the victim is moved involuntarily from his "area of habitual residence,"⁷⁶ regardless of whether he is physically moved or is chased away by fear.⁷⁷

C. Forced Displacement during Civil War and as a Crime Against Humanity

While neither the Fourth Hague Convention nor Geneva IV's Article 49 finds application in civil war, common Article 3 of the Geneva Convention does provide minimum humanitarian standards which must be followed during civil war.⁷⁸ Possibly because

75. *Id.* art. 2(g).

76. Stavropoulou, *supra* note 2, at 690. The term is used interchangeably with "flight," "involuntary migration," "forced movement" or "forced migration." *Id.* This author prefers and consistently applies the term "forced displacement" or "forcible migration."

77. *See supra* notes 31-33 and accompanying text.

78. Geneva IV, *supra* note 65, art. 3, which reads in part:

In 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 . . . 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 remain prohibited *at any time and in any place whatsoever* with respect to the above-mentioned persons:

(c) *outrages upon personal dignity, in particular humiliating and degrading treatment;*

Id. (emphasis added).

Article 3 is the result of compromise,⁷⁹ it does not specifically include forced displacement as a crime. However, one may consider whether forcible displacement of civilians falls within the wording of "outrages upon personal dignity, in particular humiliating and degrading treatment" as set forth by Article 3(1)(b) of Geneva IV.⁸⁰ In either case, other conflicts subsequent to the enactment of Geneva IV have shown that Article 3 does not attach criminal liability of any sort on actors who violate its provisions.⁸¹

More expressive is Protocol II of 1977 which supplements Article 3 of Geneva IV.⁸² Article 17 of Protocol II expressly prohibits the forcible displacement of civilians during civil war.⁸³ As applied to the Bosnian conflict, Article 17 provides interesting complications for the prosecution.

First, Bosnian Serb defendants, especially heads of local police, can make convincing arguments that the displacement of Bosnian Muslims is for the security of the civilians involved. Had they not been moved, so they might argue, the local militia or other civilians might have harmed them.⁸⁴ In addition, the provisions that the so moved individuals must be received under "satisfactory" conditions is subject to wide interpretation and will become a question of fact for the International Criminal Tribunal.

Second, Article 17 states that no such displacement shall be *ordered*. If strictly interpreted, this would mean that if a group of individuals leaves its home village because of other human rights abuses committed there, no punishable act on behalf of the

79. Charles Lysaght, *The Scope of Protocol II and its Relation to Common Article 3 of the Geneva Convention of 1949 and other Human Rights Instruments*, 33 AM. U.L. REV. 9, 11 (1983).

80. Geneva IV, *supra* note 65, art. 3(1)(b).

81. Veuthey, *supra* note 45, at 445.

82. Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the protection of victims in non-international armed conflicts (June 8, 1977), art 1(1) (*reprinted in* 16 I.L.M. 1442 (1977)) [hereinafter Protocol II].

83. *Id.* art. 17, which reads:

1. *The 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.* Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.

2. *Civilians shall not be compelled to leave their own territory for reasons connected with the conflict.*

Id. (emphasis added).

84. This argument has already been enunciated by local military and police commanders. See GUTMAN, *supra* note 10, at 121.

occupant has taken place because the occupant did not *order* the population to leave. In essence, only the first, direct type of displacement, as indicated earlier, would fall under the prohibitive scope of Protocol II.⁸⁵ If this is, indeed, the intent of the drafters of Protocol II, then the prosecutor of the International Criminal Tribunal would have to rely on Geneva IV's Article 1(2) and could only try those individuals whose violations against humanitarian law have caused Bosnian Muslims to flee. This is a causative link which will be factually difficult to establish: did the defendant's acts cause the victim's flight, or did the victim cross the border to escape the generally adverse conditions of war? Again, this represents a factual question for the Tribunal and leaves room for many of the defendants' explanations.

The third difficulty, however, is much more fundamental in nature than the two *supra*. Regardless of the strength of the language which prohibits forced displacement, the drafters never intended either Article 3 of Geneva IV or Protocol II to include criminal implications for the actors in question.⁸⁶ The only argument left for the prosecution is as follows: since Protocol II includes so many affirmative imperatives and "prohibits" certain types of behavior during civil war, criminal liability must attach in order to enforce the prohibitions contained in Protocol II.

If, thus, this conflict is determined to be one of civil nature and if Geneva IV and Protocol II cannot be used as means to prosecute the forced displacement of the Bosnian Muslim population, one must turn to a body of natural laws which is more general in application than the rules of war, namely the body of crimes against humanity.

During World War II, Germany's enemies, including Yugoslavia, after having recognized Germany's intent "to exterminate the Jewish people in Europe,"⁸⁷ *almost* declared that Germany's transport of Jews to Eastern Europe constituted a crime against humanity which deserved punishment.⁸⁸ Some writers of the time

85. Protocol II, *supra* note 82, art. 17, para. 2 is of no help, as the phrase "shall not be compelled" is not defined in the Protocol and is thereby open to the argument that no compulsion has taken place. *Id.*

86. See, e.g., Leslie C. Green, Lecture at the Univ. of Denver (April 24, 1995); see *supra* text accompanying note 81.

87. Schwelb, *supra* note 53, at 184.

88. Hansard, 385 PARL. DEB., H.C. (5th ser.) 2083 (1942) (*cited in* Schwelb, *supra* note 53, at 184); the declaration reads:

From all the occupied countries Jews are being transported . . . to Eastern Europe [The governments of Belgium, Czechoslovakia,

included crimes against humanity as a subpart of war crimes which served as a catch-all in case the defendant nation had committed acts which do not fall under the broader category of war crimes.⁸⁹

This author cannot agree that, in 1995, crimes against humanity, including the crime of forcible transfer of populations, are inherently non-separable from war crimes, i.e. that in order for the prosecution of a crime against humanity to be possible, a war of international dimension must either concurrently occur or subsequently have occurred. In reading the plain language of the Nürnberg Treaty, it is obvious that the Treaty condemned the crime of deportation,⁹⁰ if committed during war as a crime against humanity, practically in the same breath that it condemned such crime if committed *while at peace* before international war.⁹¹ Indeed, forcible displacement was included in the Nürnberg indictments: "the International Military Tribunal was unequivocal in its condemnation of mass expulsions as a crime against humanity."⁹² In addition, the United Nations has extended the application of crimes against humanity to crimes committed during

Greece, Luxembourg, the Netherlands, Norway, Poland, the United States of America, the United Kingdom, the Union of Soviet Socialist Republics, Yugoslavia, and the French National Committee] condemn in the strongest possible terms this bestial policy of cold-blooded extermination [and] reaffirm their solemn resolution that those responsible for *these crimes shall not escape retribution* and to press on with the necessary practical measures to this end.

Id. (emphasis added).

89. See Schwelb, *supra* note 53, at 206:

[The crime against humanity] is, as it were, a kind of by-product of war, applicable only in time of war or in connection with war and destined primarily, if not exclusively, to *protect the inhabitants of foreign countries against crimes committed in connection with an aggressive war*, by the authorities and organs of the aggressor state [and] *serves to cover cases not covered by norms forming part of the traditional "laws and customs of war."*

Id. (emphasis added). See also Green, *supra* note 51, at 131.

90. Nürnberg Treaty, *supra* note 60, art. 6(c), which reads in full:

Crimes against humanity. Namely, 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 domestic law of the country where perpetrated.

Id. (emphasis added).

91. *Id.* For a discussion of the difficulty faced by the tribunal to incorporate pre-war atrocities under its *res materiae*, see Green, *supra* note 51, at 130.

92. See, e.g., de Zayas, *supra* note 23, at 214-216.

peace.⁹³ If crimes against humanity can be committed during peaceful times and during international wars, then surely crimes against humanity must also be punishable if they are committed during civil war. Most significantly, the Nürnberg Treaty recognized that, given an international treaty to that effect, crimes against humanity are punishable despite the fact that such crimes might have been legal under municipal law.⁹⁴ Again this implies that, under certain conditions, the immunity of the sovereign may be pierced and that he may be punished if found guilty of egregious acts.⁹⁵

IV. Other International Instruments and Forced Displacement as an International Crime

A. *The Genocide Convention*

As an example of how certain acts are punishable during international war, civil war, or peace, consider, for instance, the Genocide Convention,⁹⁶ written immediately before the Geneva Conventions.⁹⁷ The Genocide Convention, unfortunately, does

93. Consider, for instance, the applicability of the Genocide Convention in this context, *see infra* note 96. The same applies to the Apartheid Convention, *supra* note 48.

94. Consider the last phrase of art. 6(c) of the Nürnberg Treaty, *supra* note 60: “. . . whether or not in violation of domestic law of the country were perpetrated.” *Id.*

95. *See, e.g.,* George A. Finch, *The Nuremberg Trial and International Law*, 41 A.J.I.L. 20 (1947):

It is accepted in international law, conventional, as well as customary, that a belligerent has authority to try and punish individuals for crimes which constitute violations of the laws and customs of war, as well as of the laws of humanity, when such persons fall within his power.

Id. at 21 (emphasis added). *But c.f.* Supreme Court Judgment in Cases Concerning Deportation Orders, 29 I.L.M. 140 (1990) (in which the Israeli Supreme Court rejected the application of Geneva IV, discussed below, in time of “peace”).

96. Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 (Dec. 9, 1948), art. I [hereinafter Genocide Convention], which reads:

The Contracting Parties confirm that genocide, *whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.*

Id. (emphasis added).

97. The Former Yugoslavia is a party to the Genocide Convention. *See supra* note 67 and accompanying text for a brief discussion on state succession and treaty obligations.

Even if the Former Yugoslavia were not party to the Genocide Convention, it is recognized that genocide is a crime under customary international law. *See* Report of the Secretary-General Pursuant to Paragraph 2 of Security Council

not specifically make the forced displacement of individuals a crime; instead, it focuses on the elimination and persecution of groups of individuals.⁹⁸

While some distinguished writers take the application of the Genocide Convention to the forced displacement of peoples as a given,⁹⁹ it is the author's opinion that application of the Genocide Convention to the crime of forced movement of people requires much closer scrutiny. It is respectfully submitted, therefore, that Judge Lauterpacht, in a recent opinion of the International Court of Justice, overlooks many of the problematic causative links given the indirect nature of the way in which forced displacement has often been effected in Bosnia-Herzegovina.

Resolution 808, U.N.S.C. Doc. S/25704, para. 35 (1993) (*reprinted in* 32 I.L.M. 1163 (1993)).

98. Genocide Convention, *supra* note 96, art. II, which reads:

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Id.

99. *See, e.g.*, Response to the Second Request, *supra* note 38, at para. 69 (Lauterpacht, J., separate opinion) which states:

... The evidence also indicates plainly that, in particular, the forced migration of civilians, more commonly known as "ethnic cleansing," is, in truth, *part of a deliberate campaign by the Serbs to eliminate Muslim control of, and presence in, substantial parts of Bosnia-Herzegovina. Such being the case, it is difficult to regard the Serbian acts as other than acts of genocide* in that they clearly fall within categories (a), (b) and (c) [sic] of the definition of genocide quoted above, they are clearly directed against an ethnical or religious group as such, and they are intended to destroy that group, if not in whole certainly in part, to the extent necessary to ensure that group no longer occupies the parts of Bosnia-Herzegovina coveted by the Serbs. . . .

Id. (emphasis added). *See also* Judge Ajibola's separate opinion, which provides even less analysis of the application of the genocide convention with regard to ethnic cleansing, the forced displacement of Bosnian Muslims:

[In the April 8, 1993, judgment, the Court] reaffirmed its condemnation of all "violations" of international humanitarian law and "ethnic cleansing" in particular. Both the Court and the Security Council have taken steps, I believe, to stop the ongoing genocide in Bosnia.

Response to the Second Request, *supra* note 38 (Ajibola, J., separate opinion). The author acknowledges that it is possible the Judge did so for purposes of expediency.

The first problem arises in the definition of a "group" within the meaning of the Genocide Convention. Most writers in this field rely on the plain meaning of the word "group;"¹⁰⁰ this author prefers to apply the definition of a "community" as set forth by Permanent Court of International Justice in 1930.¹⁰¹ Considering that the Bosnian Muslims practice their own religion, preserve their own tradition (for example food preparation), and are distinguishable by their last names from Bosnian Serbs, it is of little question that the Bosnian Muslims fall under the Permanent Court of International Justice's definition of community, and as such, should be considered a "group" within the meaning of the Genocide Convention.¹⁰²

Once that hurdle is overcome, the second arises as follows: does forced migration fall under any of the five factors set forth by the Genocide Convention? First, forced displacement surely cannot be equated with killing,¹⁰³ as is advanced by Judge Lauterpacht.¹⁰⁴ Second, while systematic rape with the intent to produce pregnancy should be construed as a measure intended to "prevent births within the group"¹⁰⁵ for the duration of the pregnancy, forcible displacement could not be considered such a measure, unless the prosecution could factually argue that the conditions imposed upon Bosnian Muslim women during the forced migration from their *Heimat* to other locations are so severe in

100. See, e.g., Webb, *supra* note 20, at n.99.

101. Interpretation of the Convention Between Greece and Bulgaria Respecting Reciprocal Emigration (Question of the "Communities"), Section B, No. 17 (July 31, 1930). Accordingly, "community" is defined as

... a group of persons living in a given country or locality, having race, religion, language and traditions of their own, and united by [those factors] in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, securing the instruction and upbringing of their children in accordance with the spirit and traditions of their race and mutually assisting one another.

Id.

102. Here, Judge Ajibola asks the correct question: "Who are the 'Bosnian people'?" Response to the Second Request, *supra* note 38 (Ajibola, J., separate opinion). He asks the question in the context which has been raised above, *supra* notes 93-95 with respect to the application of international law to an internal matter:

Furthermore, the questions whether the issue of genocide as provided for in Article I of the Convention is not exclusively a matter for the States which "undertake to prevent and to punish" it.

Id.

103. Genocide Convention, *supra* note 96, art II(a).

104. See *supra* note 99 and accompanying text.

105. Genocide Convention, *supra* note 96, art. II(d).

terms of lack of sanitation and food that no children can be carried to term. Third, some accounts exist of Bosnian Muslim children being transferred¹⁰⁶ to Serb orphanages in order to "spare" them from the horrors of war.¹⁰⁷ At this stage, however, such accounts are probably isolated and are not orchestrated on a scale sufficiently large to be considered genocide within the meaning of the Convention.

However, forced displacement is likely to represent a deliberately inflicted condition which is calculated to bring about the group's partial or entire physical destruction.¹⁰⁸ The difficulty of proof arises in questions of whether the forced displacement of individuals from areas which have a Bosnian-Serb and Bosnian-Muslim mix to enclaves which are entirely Muslim constitutes destruction of the *group*. In cases in which the Bosnian Muslims are joined with others of their faith in different parts of Bosnia-Herzegovina, such argument will be a difficult one for the prosecution to make because the procreation of the Muslim population is not impeded. However, when expelled into territories outside Bosnia-Herzegovina, which may or may not have large Bosnian-Muslim populations, such displacement could bring about the destruction of the group or parts thereof.¹⁰⁹ In either case, such displacement most certainly causes the destruction of the *community* as defined by the Permanent Court; whether a Muslim group within a mixed village constitutes a separate *group* will have to be determined by the International Criminal Tribunal as a question of fact.

Applying the remaining factor of the Genocide Convention, the fact that forced migration causes "serious bodily or mental harm"¹¹⁰ is undisputed. The psychological harm of becoming a refugee alone satisfies the Convention's language, and need no further discussion here.

The largest difficulty for the prosecution will arise, however, when attempting to resolve the Genocide Convention's *mens rea* requirements which precede the provisions of Article 2 of the Convention as outlined here. The acts enumerated as crimes

106. *Id.* art. II(e).

107. Anna-Patricia Kahn, *Wo sind die bosnischen Kinder?* (Where are the Bosnian children?), FOCUS, May 16, 1994, at 108.

108. Genocide Convention, *supra* note 96, art. II(c).

109. Consider the attempted expulsion to Hungary, *supra* note 29 and accompanying text.

110. Genocide Convention, *supra* note 96, art. II (b).

therein must be committed *with intent to destroy, in whole or in part*, the group.¹¹¹ It is submitted that a sufficiently large part of the Bosnian Muslim population has been affected by the population transfer to constitute a "part" within the definition of the Genocide Convention,¹¹² thereby satisfying the *actus reus* component of the crime of genocide. The prosecution must, nevertheless, show that the defendants, when displacing the parts of the group, did so with the *intent to destroy* at least a part of the group. If the defendants can convince the Tribunal that they displaced certain Bosnian Muslims in order to gain territory, not in order to destroy this part of the group, the prosecution may not be able to meet its burden of proof as it applies to the *mens rea* requirement set out in the Genocide Convention. Again, Judge Lauterpacht's separate opinion appears to entirely ignore this *mens rea* requirement, unless the Judge in his mind "bootstrapped" an inferred intent based on the presently documented results while writing his opinion.

Consider additionally the complexity which arises from the earlier question of whether indirect forced displacement would be covered under any criminal provisions.¹¹³ In this case, the prosecution must prove that the defendants intentionally committed violations against human rights after full deliberation and expectation that such violations would result in the indirect flight of individuals from Bosnia-Herzegovina, the end objective of which remaining the physical destruction of the group. As is obvious from this construction, the Genocide Convention, as applied to forced displacement, provides a very difficult burden of proof for the prosecutors of the International Tribunal and again presents a very long causative link that may be difficult to establish at trial.

B. Other Treaties

Once the possibility for the attachment of criminal responsibility under the Genocide Convention is exhausted, one must turn to other documents. Consider, for instance, Protocol IV¹¹⁴ to the Convention for the Protection of Human Rights and Fundamental

111. *Id.* art. II.

112. For analysis of what constitutes a "part," see text accompanying note 40. See also GUTMAN, *supra* note 10, at 107.

113. See *supra* notes 31-33 and accompanying text.

114. Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Securing Certain Rights and Freedoms Other than Those Already Included in the Convention and in the First Protocol thereto, Sept. 16, 1963, E.T.S. 46 (May 2, 1968) [hereinafter Protocol IV].

Freedoms.¹¹⁵ Although the Former Yugoslavia is not a signatory, some believe that the Protocol's provisions are rapidly emerging as *jus cogens*.¹¹⁶ Protocol IV does provide for a right not to be expelled.¹¹⁷ Nonetheless, the Convention does not make conduct contrary to its intent criminal and, therefore, serves only as a limited means for prosecutorial purposes; it merely establishes, among the signatory nations, a person's right not to be displaced.

The Universal Declaration of Human Rights does provide that "[n]o one shall be subjected to arbitrary arrest, detention or [sic] exile."¹¹⁸ Similar problems arise with these provisions in regard to forced displacement. First, placement into "exile" typically means the physical and documentary expatriation from one's homeland, commonly in the context of punishment for a criminal act. "Exile" does not include a person's removal from his *Heimat* if his new habitat is within his *patria*. Second, no criminality attaches to the one who acts violating this directive.

No better is the International Covenant on Civil and Political Rights.¹¹⁹ This document merely recognizes a citizen's right to re-enter his home country.¹²⁰ While other specific provisions recognize a civil right of action, no guilt attaches to a state actor who denies a citizen entry. This analysis applies only when one overcomes the linguistic difficulties of equating the right to return with the right not to be expelled.

C. *The Proposed Draft Code of Crimes Against the Peace and Security of Mankind*

However, one document in draft form may be the first to directly address forced displacement. The Draft Code of Offenses

115. European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221 (Nov. 4, 1950) as amended [hereinafter *European Convention*].

116. See, e.g., de Zayas, *supra* note 23, at 245.

117. Protocol IV, *supra* note 114, art. 3, which reads:

1. No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national.

Id.

118. Universal Declaration of Human Rights, U.N. GAOR, 3rd Sess., art. 9, U.N. Doc. A/810, at 71 (Dec. 10, 1948) [hereinafter *Declaration*].

119. International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (1976).

120. *Id.* art. 12(4), which reads: "No one shall be arbitrarily deprived of the right to enter his own country."

against the Peace and Security of Mankind contains provisions against the forced displacement of persons¹²¹ and somewhat parallels the language of Article 6(c) of the Nürnberg Tribunal's statute.¹²²

Marginally better is the most recently proposed Draft Code of Crimes Against the Peace and Security of Mankind.¹²³ The Draft Code is, of course, part of neither conventional nor customary international law and, therefore, would not, even if agreed upon by all nations, be made applicable to the war in Bosnia-Herzegovina according to the principle of *nullum crimen, nulla poena sine lege*.¹²⁴ However, the Draft Code does provide for the crime of forcible transfer of populations.¹²⁵ On the other hand, the most severe flaw of the entire Draft Code rests in its vagueness and in its lack of definitions.¹²⁶ In addition, the relevant provision contains no temporal or contextual limitation.¹²⁷ It is, therefore, unlikely that any nation will agree to this very strict provision,¹²⁸ which would, under its narrow reading, include as a crime the evacuation of individuals from disaster areas if the evacuation is against the individual's will.

121. Draft Code of Offenses against the Peace and Security of Mankind, art. 2(10), 45 A.J.I.L. 123, 130 (Supp. 1951), which reads as follows:

2. *The following acts are offenses against the peace and security of mankind:*

...
(10) Inhuman acts by the authorities of a State or by private individuals against any civilian population, such as murder, or extermination, or enslavement or *deportation*.

Id. (emphasis added).

122. See *supra* note 90 and accompanying text.

123. [Hereinafter Draft Code] (*reprinted in* COMMENTARIES ON THE INTERNATIONAL LAW COMMISSION'S 1991 DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND (M. Cherif Bassiouni ed., 1993) [hereinafter COMMENTARIES ON DRAFT CODE]).

124. See, e.g., Finch, *supra* note 95.

125. Draft Code, *supra* note 123, art. 21, which reads:

Systematic or Mass Violations of Human Rights. An individual who commits or orders the commission of any of the following violations of human rights:

...
— deportation or forcible transfer of population shall, on conviction thereof, be sentenced [to ...].

Id.

126. See, e.g., Albin Eser, *The Need for a General Part*, in COMMENTARIES ON THE DRAFT CODE, *supra* note 123, at 43.

127. Paul Peters, COMMENTARIES ON THE DRAFT CODE, *supra* note 123.

128. *Id.*

In addition, this article only applies to transfers of populations. It does not address the transfer of groups or individuals, thereby imposing an even higher burden of proof on a prosecutor than does the Genocide Convention, under which mere partial destruction of a group must be proven.

V. Conclusions and Observations

Based on the above analyses, it appears that the crime of forced displacement has been accepted unconditionally only in circumstances of international warfare. A tribunal's ability to attach criminal culpability to actors who practice forcible migration in civil wars, on the other hand, is very context specific. Even under strongly worded instruments such as the Genocide Convention, prosecutorial possibilities of forced migration as an international crime are severely limited due to the Convention's limited factual application and its severely restrictive *mens rea* requirements.

The question which remains to be answered is the following: given its limited application, is compulsory migration a *delictum juris gentium*?¹²⁹ One treatise presents the evolution of a crime under international law in the following five steps.¹³⁰ First, internationally shared values emerge. Second, such values are declared as specific human rights in an international document. Third, the right manifests itself in a binding convention. Fourth, means to enforce the right are enunciated, prohibiting conduct which runs afoul of the right. Last, international penal law is prescribed to punish acts contrary to the right.¹³¹

By applying these factors to the forcible displacement of individuals and of groups of people, it appears that the values as described under the first criterion have clearly emerged, considering their recognition in instruments such as Geneva IV. The fourth criterion also appears to be met in that Geneva IV and its two Protocols positively prohibit the forced deportation of civilians. Geneva IV and Protocol I even satisfy the fifth and final element

129. In the sense as used in Attorney General of Israel v. Eichmann, 36 Int'l. L. Rep. 5 (Israel, Dist. Ct. Jerusalem 1961) (reprinted in part in M. Cherif Bassiouni, *Genocide and Racial Discrimination*, 1 TREATISE ON INTERNATIONAL CRIMINAL LAW 528 (M. Cherif Bassiouni ed., 1986)).

130. M. Cherif Bassiouni, *Characteristics of International Criminal Law Conventions*, in 1 TREATISE ON INTERNATIONAL CRIMINAL LAW, *supra* note 129, at 16.

131. *Id.*

of the developmental process of international crimes as described above,¹³² in that both instruments seek to criminally punish those engaging in forced migration.

However, it appears that the drafters of such instruments have disregarded steps two and three of the framework outlined above. In none of the international documents discussed in this article has the right not to be displaced ever been formally recognized.¹³³ Even the Refugee Convention of 1951,¹³⁴ as amended by its Protocol,¹³⁵ while it recognizes the plight of displaced peoples,¹³⁶ does not recognize an individual's right not to become a refugee. Similar appear the provisions of the Declaration,¹³⁷ in which its drafters have chosen imperative language instead of expressing a right not to be placed in exile, as compared to, for instance, the right to movement within a state's borders,¹³⁸ the right to leave and to return to one's country,¹³⁹ and the right to nationality.¹⁴⁰ The same applies to the International Covenant on Civil and Political Rights.¹⁴¹

In this failure to recognize such a right rests the basic difficulty of forced displacement as a crime. Consider, for instance, that while the Allied Powers quickly included forced deportation of German nationals as a crime against humanity for the purposes of the Nürnberg trials, these same Powers contracted with Poland and Czechoslovakia to remove ethnic Germans from Polish and Czechoslovakian territories.¹⁴² Again, this author does not

132. Although not all conduct which is unlawful is also criminal. See Krypton Weiss, *The Limits for the Prosecution of Crimes against International Law*, 1982 BRIT. Y.B. INT'L L. 171, 172 (Brownlie and Bonett eds., 1982).

133. After sixty pages of analysis, one advocate of the recognition of such a right finally acknowledges that the right not to be displaced is merely "implicit" under current international law. Stavropoulou, *supra* note 2, at 749.

134. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 (1951) [hereinafter Refugee Convention].

135. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 (1967).

136. Refugee Convention, *supra* note 134, at preamble.

137. Compared with other provisions within the Declaration which specifically provide rights to individuals, such as art. 13 (1), "[e]veryone has the right to freedom of movement and residence within the borders of each state." Declaration, *supra* note 118, art. 13(1).

138. *Id.*

139. *Id.* art. 13(2).

140. *Id.* art. 15(1).

141. International Covenant on Civil and Political Rights, *supra* note 119.

142. Protocol of Proceedings of the Berlin Conference, art. 12 (Aug. 2, 1945) (reprinted in G. C. PAIKERT, *THE GERMAN EXODUS 8* (1962)) [hereinafter Potsdam Agreement].

attempt to equate Germany's atrocities against Jews, gypsies, and other groups with the *post-bellum* displacement of ethnic Germans; however, the point is clear: the unconditional right not to be displaced is not manifested in international law; its criminal punishment depends on the party in power who carries out the punishment of the criminal.

In addition, the example of the ethnic Germans may be transposed to the war in Bosnia-Herzegovina. Assuming, *arguendo*, that the Bosnian Muslims succeed and win the war against the Bosnian Serbs, may the Bosnian Muslims, under the eyes and with the blessings of the United Nations, move the Serbian populations back to the new Serbia to be united with their own kind in order to satisfy desires of retribution as was the case in Germany?¹⁴³ Surely the answer must be negative.

Perhaps the right not to be displaced has not been recognized in international law because an individual's true origin cannot be defined. Where is the home from which expulsion takes place; which should be recognized as the native land of a man? Does *Heimat* refer to an individual's village, to his property, to the physical, cultural, and religious setting in which he was born, grew up, or lived for most of his life, or to his *patria*?¹⁴⁴

If such preliminary questions of rights which underlie international criminal law cannot be answered, is it facile to conclude that international criminal law itself does not exist.¹⁴⁵ The application of criminal law to the Bosnian situation with respect to forced displacement of people does appear to be limited.

Such limitations become apparent when one examines the indictments issued so far by the prosecutor of the International Criminal Tribunal.¹⁴⁶ None of these indictments includes charges of the forcible transfer of Bosnian Muslims; most of the charges concentrate on murder, torture, and rape.¹⁴⁷ A related question

143. See ZOLTAN MICHAEL SZAZ, GERMANY'S EASTERN FRONTIERS 109-110 (1960) (cited in PAIKERT, *supra* note 142, at 19).

144. PAIKERT, *supra* note 142, at 51.

145. See *The Problem of an International Criminal Law*, 3 CURRENT LEGAL PROBLEMS 263, 295 (1950) (cited in John Murphy, *International Crimes* (2 UNITED NATIONS LEGAL ORDER 993 (Oscar Schachter & Christopher C. Joyner eds., 1995))).

146. Indictments against Tadić, Borovnica, Meakić, Kvočka, Prać, Radić, Kos, Gruban, Govedarica, Gruban, Kostic, Paspalj, Pavlic, Popvić, Predojević, Savić, Babić, Jajic, Knezević, Saponja, Zigic, and Nikolić, The International Criminal Tribunal for the Former Yugoslavia (Nov. 8, 1994) (on file with author).

147. *Id.*

concerns enforcement.¹⁴⁸ So far, only one of the named defendants, namely Duško Tadić, is in the international prosecutor's custody, after a month-long battle with Germany for his extradition. It is questionable whether the others will ever be arrested to stand trial.¹⁴⁹

While these limitations are inherent in global efforts to bring about justice in retribution for acts of forced displacement committed in the past and in deterrence of future acts, this author submits that the present law with respect to forced migration is better than no law at all. Such crimes should be recognized soon, because crimes of the nature of World War II, i.e. full-scale, international wars, are, in this age of nuclear devices, wars of the past. On the other hand, civil wars, such as the ones on-going in Bosnia-Herzegovina, Rwanda, and many other locations, are the wars of today and of the future. All nations must recognize, prevent, and punish the crime of forcible displacement of individuals, groups, and peoples in order to deter "small" parties, fighting civil wars, from committing this crime. The Refugee Convention of 1951 addresses states' obligations to the victims of forced migration; the international legal community must find means with which to punish the victims' tormentors.

148. Thomas J. Murphy, *Sanctions and Enforcement of the Humanitarian Law of the Four Geneva Conventions of 1949 and Geneva Protocol I of 1977*, 103 MIL. L. REV. 3 (1984). Yet another question is that of jurisdiction of the Tribunal. On general principles, see Geoff Gilbert, *Crimes sans Frontieres: Jurisdictional Problems in English Law*, 1992 BRIT. Y.B. INT'L L. 415 (Brownlie and Bonett eds., 1982).

149. Notwithstanding the "super-indictment" procedure of Article 61 of the Tribunal's statute. On multi-national enforcement, see M. Cherif Bassiouni, *Policy Considerations on Interstate Cooperation in Criminal Matters*, 4 PACE Y.B. INT'L L. 123 (1992).

