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# Internal Displacement: Is Prevention Through Accountability Possible? A Kosovo Case Study

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# Internal Displacement: Is Prevention Through Accountability Possible? A Kosovo Case Study

## **Keywords**

Kosovo, Yugoslav War, United Nations, Armed Conflict, International Law, Internal Displacement, International Criminal Tribunal

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## COMMENTS

### INTERNAL DISPLACEMENT: IS PREVENTION THROUGH ACCOUNTABILITY POSSIBLE? A KOSOVO CASE STUDY

CARLYN M. CAREY\*

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## INTRODUCTION

The phenomenon of internal displacement has reached crisis proportions.<sup>1</sup> Internally displaced persons, according to the Secretary-General of the United Nations, are “persons who have been forced to flee from their homes suddenly or unexpectedly in large numbers, as a result of armed conflict, internal strife, systematic violations of human rights or natural or man-made disasters; and who are within the territory of their own country.”<sup>2</sup> Although this

1. In 1982, 1.2 million persons were displaced in 11 countries. *See* THE FORSAKEN PEOPLE: CASE STUDIES OF THE INTERNALLY DISPLACED 1 (Roberta Cohen & Francis M. Deng eds., 1998) [hereinafter THE FORSAKEN PEOPLE] (calling internal displacement a global crisis, both “in dimension and magnitude”). In 1997, the number increased to more than 20 million in 35 countries. *See id.* The U.S. Committee for Refugees cited over 17 million internally displaced persons in 1998. *See* U.S. COMMITTEE FOR REFUGEES, WORLD REFUGEE SURVEY 1999 [hereinafter WORLD REFUGEE SURVEY 1999] (providing statistics and detailed country reports regarding refugees, asylum seekers, and internally displaced persons).

2. *Analytical Report of the Secretary-General on Internally Displaced Persons*, Commission on Human Rights, 48th Sess., Agenda Item 11(a), at 17, U.N. Doc. E/CN.4/1992/23 (1992) (explaining in detail the definition of internally displaced persons). Criticism of this definition focuses on its under-inclusiveness. *See* ROBERTA COHEN & FRANCIS M. DENG, MASSES IN FLIGHT: THE GLOBAL CRISIS OF INTERNAL DISPLACEMENT 17 (1998) (asserting that people who flee for the same reasons but in

definition has existed since 1992, it cannot be found in any internationally-binding treaty.<sup>3</sup> Currently, internal conflict is credited as the principle cause of the displacement of an estimated 10,000 people daily.<sup>4</sup> Burundi, Rwanda, the Sudan, Sri Lanka, Columbia, Tajikistan, and former republics of the Soviet Union, such as Azerbaijan and Chechnya, are just a few of the countries with internally displaced persons.<sup>5</sup> Despite the global prevalence of internal displacement, international efforts that have attempted to assist displaced persons have been conducted, for the most part, on an ad hoc basis entirely focused on providing humanitarian relief, rather than legal protection of human rights.<sup>6</sup>

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small numbers, or who do not flee "suddenly or unexpectedly," are not included in the definition). A broader definition was recently developed and presented by Francis Deng, representative to the Secretary-General on internally displaced persons:

Internally displaced persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violence of human rights, or natural or human-made disasters, and who have not crossed an internationally recognized state border.

*Report on Internally Displaced Persons*, Francis M. Deng, U.N. Doc. E/CN.4/1998/53/Add.2 (1998). For Deng's initial report, see U.N. Doc. E/CN/1996/52/Add.2 (1996).

3. Other definitions that exist include one utilized by the United Nations High Commissioner on Refugees that only includes persons who have fled their homes due to mass human rights violations and who do not receive their government's full protection. See COHEN & DENG, *supra* note 2, at 18 (noting the definition's inclusiveness and discussing other definitions of displaced persons) (citations omitted). An alternative definition is employed by the Permanent Consultation on Internal Displacement in the Americas that applies only to those persons who are internally displaced but would be refugees if they crossed their nation's border. See *id.*

4. See G.A. Res. 558, U.N. GAOR, 50th Sess., Agenda Item 112(c), ¶ 6, U.N. Doc. A/50/558 (1995) (asserting that in the post-Cold War era, internal conflicts are the principal cause of displacement); see also COHEN & DENG, *supra* note 2, at 21 (citing "conflict between a government and a minority" as one principal cause of internal displacement according to the U.S. Committee for Refugees); Corinne E. Lewis, *Dealing with the Problem of Internally Displaced Persons*, 6 GEO. IMMIGR. L.J. 693, 699 (1992) (asserting that of all armed conflicts, 97% are internal and are the major cause of internal displacement).

5. See THE FORSAKEN PEOPLE, *supra* note 1, at 2-3 (providing case studies of these countries and others). According to the U.S. Committee for Refugees, internal displacement, caused by persecution or armed conflict, is a current problem in the following countries: Afghanistan, Algeria, Angola, Armenia, Azerbaijan, Bangladesh, Bosnia and Hercegovina, Burma, Burundi, Cambodia, Colombia, Congo-Brazzaville, Congo-Kinshasa, Croatia, Cyprus, Ethiopia, Eritrea, Georgia, Ghana, Guinea-Bissau, Kenya, India, Iraq, Lebanon, Liberia, Mexico, Nigeria, Papua New Guinea, Peru, Philippines, Russian Federation, Rwanda, Senegal, Sierra Leone, Somalia, Sri Lanka, Sudan, Syria, Turkey, Uganda, and Yugoslavia. See WORLD REFUGEE SURVEY 1999, *supra* note 1, at 6.

6. See G.A. Res. 558, *supra* note 4, at Agenda Item 112(c), ¶ 8 (discussing the necessity of a comprehensive approach to meeting the many needs of the internally displaced). Humanitarian relief includes the provision of food, shelter, medicine,

Why should the international community respond at all? Aside from a sense of moral obligation, internal displacement causes internal instability, which could spill across borders, causing a “domino-effect” of regional instability.<sup>7</sup> The internally displaced often do not receive protection or assistance from the international community because they physically remain within the domestic jurisdiction of their nation and foreign sovereigns are reluctant to intervene in these “internal matters.”<sup>8</sup> Indeed, many times they do not receive protection or assistance from their own government, particularly when government action is the source of their displacement.<sup>9</sup> On multiple occasions, the United Nations Security Council has justified international involvement primarily based on the risk that an internal, refugee-creating environment will create a stream of refugees<sup>10</sup> seeking safe haven outside of their nation’s borders.<sup>11</sup> Since the end of the Cold War,<sup>12</sup> the decreasing hospitality

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and other basic necessities by other nations. See COHEN & DENG, *supra* note 2, at 9-10 (discussing how the international community has focused solely on providing humanitarian supplies to displaced populations). But providing humanitarian relief without protecting displaced persons from armed attack, disappearance, forcible conscription, and sexual assault could lead to situations in which the displaced population becomes the “well-fed dead.” See *id.* at 10; see also G.A. Res. 558, *supra* note 4, at Agenda Item 112(c), ¶¶ 7-8 (asserting that the internally displaced are vulnerable and should be protected from violence as well as supplied with humanitarian relief).

7. This phenomenon was, and arguably still is, possible in the Kosovo conflict, should the former Yugoslav Republic of Macedonia or Albania move to protect ethnic Albanian brethren in Kosovo, which in turn could spur the involvement of NATO allies Greece and Turkey. See Steven Woehrel & Julie Kim, *Kosovo and U.S. Policy*, CONGRESSIONAL RESEARCH SERVICE ISSUE BRIEF, Order Code IB98041, Sept. 4, 1998, at 11; *A Survey of the Balkans: Europe’s Roughest Neighborhood*, ECONOMIST, Jan. 24, 1998, at 3 (noting Western concerns of a “slow dance to disaster” in which conflict would spread to neighboring countries) [hereinafter *Europe’s Roughest Neighborhood*].

8. See G.A. Res. 558, *supra* note 4, at Agenda Item 112(c), ¶ 7.

9. In addition, a national government may be unable to help its displaced citizens due to a lack of resources. See Lewis, *supra* note 4, at 694 (asserting the lack of national protection of the internally displaced as the key issue that the international community must address). This group of persons unprotected by their government usually does not include those who are displaced due to environmental or man-made disasters. See *id.*

10. “Refugees,” as defined by the Convention Relating to the Status of Refugees, are persons living outside their country of nationality due to a “well-founded fear” of persecution based on “race, religion, nationality, or membership of a particular social group or political opinion” and who are unwilling to avail themselves to the protection of their nation or return to that country because of such fear. See Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, 152.

11. See S.C. Res. 670, U.N. SCOR, 46th Sess., 2943rd mtg., U.N. Doc S/RES/670 (1990) (condemning Iraq’s efforts at forcing Kuwaiti nationals to leave Kuwait); S.C. Res. 767, U.N. SCOR, 47th Sess., 3101st mtg., U.N. Doc. S/RES/767 (1992) (expressing alarm that human suffering and rapid deterioration of internal stability within Somalia constitute a threat to international peace and security); S.C. Res. 812, U.N. SCOR, 48th Sess., 3183rd mtg., U.N. Doc. S/RES/812 (1993) (expressing alarm at increasing number of refugees and displaced persons in Rwanda).

of some countries to accept refugees combined with the increasingly strict entry requirements have served as catalysts for the study and development of effective methods to prevent displacement.<sup>13</sup> Until such prevention occurs, displaced persons, who are not granted the hospitality of a border country, are forced to remain internally displaced within their home country.

Internally displaced persons are not included in the body of laws that protect refugees.<sup>14</sup> International laws that allegedly prohibit internal displacement have never been enforced.<sup>15</sup> Recent examples of internal displacement<sup>16</sup> prove that these laws lack effective

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12. Previously, countries were motivated to accept refugees, particularly those opposed to their home-country's national government, in order to gain political advantage with the United States or the Soviet Union. See COHEN & DENG, *supra* note 2, at 4. But along with diminished economic opportunities and "tensions between the haves and the have-nots," public opinion gradually favored increased restrictions on immigration and increased efforts to stem illegal immigration. See JAMES LEE RAY, *GLOBAL POLITICS* 72 (6th ed. 1995) (noting U.S. public opinion regarding, and Western European efforts at restricting, immigration in the early 1990s) (citations omitted).

13. See COHEN & DENG, *supra* note 2, at 3 (describing the impetus to clarify and create guidelines for assisting internally displaced persons).

14. In addition to the Convention Relating to the Status of Refugees, refugees' rights are protected expressly in the Protocol Relating to the Status of Refugees. See Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267; see also Declaration of Territorial Asylum, G.A. Res. 2312, U.N. GAOR, 22nd Sess., Supp. No. 16, at 81, U.N. Doc. A/6716 (1968); U.S. Refugee Act of 1980, 8 U.S.C. § 1101(a)(42) (1994 & Supp. IV 1998) (defining refugees as persons who are "unable or unwilling to return to [their countries' of origin]... because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion"); see also Arthur C. Helton, *The Legal Dimensions of Preventing Forced Migration*, 90 AM. SOC'Y INT'L L. PROC. 545, 546 (1996) (arguing for increasing responsibility of the international community for preventing population displacement through reformation of legal standards and institutions). Some have criticized the separate treatment of refugees and the internally displaced, noting that often both flee their homes because of human rights violations, yet the level of legal protection they receive is determined by whether the person chooses to flee to a different country. See Luke T. Lee, *Legal Status of Internally Displaced Persons*, 86 AM. SOC'Y INT'L L. PROC. 630, 631 (1992) (arguing that the international community still "ascrib[es] certain magical qualities to the crossing of national boundaries as the determinant of how we treat our fellow human beings in trouble").

15. The international laws that allegedly prohibit internal displacement will be discussed later in this Comment. See *infra* Part III.B. Recently, these laws were compiled and clarified in a cohesive document. See Francis M. Deng, *Guiding Principles on Internally Displaced Persons*, reprinted in COHEN & DENG, *supra* note 2, at app. Some scholars argue that there is a need for an express prohibition on population transfers. See Christa Meindersma, *Legal Issues Surrounding Population Transfers in Conflict Situations*, 41 NETH. INT'L L. REV. 31, 82 (1994) (advocating the development of an international legal instrument rendering population transfers per se illegal); Maria Stavropoulou, *The Question of a Right Not to be Displaced*, 90 AM. SOC'Y INT'L L. PROC. 549, 553 (1996) (observing that an explicit guarantee would clarify existing international law and contribute to an increased awareness of the human rights concerns implicated in population transfers).

16. See U.S. COMMITTEE FOR REFUGEES, *WORLD REFUGEE SURVEY 1998*, at 2 (citing Uganda, Burundi, Congo-Brazzaville, and Congo-Zaire as countries in which

implementation.<sup>17</sup>

One example of displacement occurred within the former Yugoslavia during 1998. Attempting to quell an armed insurgence in the province of Kosovo, the Federal Republic of Yugoslavia ("FRY"), led by President Slobodan Milosevic, used Ministry and special police forces to attack Kosovar villages in which suspected rebels resided.<sup>18</sup> Fearing government attack, tens of thousands of Kosovars fled their homes and were forced to live outdoors without shelter and away from their villages.<sup>19</sup>

Prior legal commentary has focused on the legal status, humanitarian needs, and protection of human rights of persons *after* they have been displaced.<sup>20</sup> This Comment does not address the legal protection of the needs of persons already displaced,<sup>21</sup> nor does it discuss State responsibility for internal displacement.<sup>22</sup> Instead, this Comment considers whether deterrence of individual criminal violations of international law can prevent internal displacement. In

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significant internal displacement occurred in 1997); Elizabeth E. Ruddick, Note, *The Continuing Constraint of Sovereignty: International Law, International Protection, and the Internally Displaced*, 77 B.U. L. REV. 429, 433 (1997) (citing Kurds fleeing oppression in Iraq, Cambodians expelled from Thailand, and Croatia's refusal to accept Bosnian refugees as recent examples of internally displaced groups).

17. See Ruddick, *supra* note 16, at 440 (asserting that "the problem then, is not a lack of rights, but a lack of compliance and implementation").

18. See R. Jeffrey Smith, *Talks Continue as Serbs Prepare for NATO Airstrikes: The Kosovo Crisis*, WASH. POST, Oct. 11, 1998, at A39 (providing synoptic, historical background of armed conflict in Kosovo).

19. See *id.* (describing current status of internally displaced ethnic Albanians in Kosovo); Woehrel & Kim, *supra* note 7, at 5 (recounting the Serbian offensive of late Spring 1998 that resulted in the flight of over 250,000 people from their homes to other parts of Kosovo, and of over 40,000 people who fled to Albania and the Former Yugoslav Republic of Macedonia).

20. See, e.g., Christopher M. Goebel, *A Unified Concept of Population Transfer*, 21 DENV. J. INT'L L. & POL'Y 29, 43-53 (1992) (reviewing effects of population transfers on those being moved and how these effects may rise to the level of violations of international human rights); Lewis, *supra* note 4, at 718-20 (discussing effects of internal displacement); Ruddick, *supra* note 16, at 439-49 (proposing that international laws may protect internally displaced persons during displacement).

21. See COHEN & DENG, *supra* note 2, at 92-122 (discussing the risks of discrimination, violence, and detention; needs of subsistence, documentation, education; and access to assistance). For a thorough and contemporary assessment of what protections are available in international law to displaced persons, and the provision of humanitarian assistance to those persons, see *id.*

22. Assigning a state responsibility for displacement can be accomplished through the passage of a United Nations General Assembly resolution or a resolution of another U.N. body. See Lewis, *supra* note 4, at 705-06 (noting difficulty in enforcing states' obligations to respect human rights). Compelling a state to remedy this internal problem, however, is a considerable challenge for the international community. See Nancy D. Arnison, *International Law and Non-Intervention: When Do Humanitarian Concerns Supersede Sovereignty?*, 17 FLETCHER F. WORLD AFF. 199, 199 (1993) (discussing state sovereignty as a "formidable obstacle" to meeting humanitarian needs of nationals).



other words, would holding leaders such as President Slobodan Milosevic criminally liable for underhanded attempts to remove citizens of a particular ethnic group prevent internal displacement in the future.

Part I of this Comment recounts the events leading up to the 1998 internal displacement crisis in Kosovo and the United Nations' response to that crisis. This case study does not include events in Yugoslavia beyond the first brokered cease fire between the Kosovo Liberation Army ("KLA") and Yugoslav forces in the Fall of 1998. Such events not included are the involvement of NATO military forces and the Serbs' commission of atrocities in March, 1999.<sup>23</sup> Part II explains the international laws applicable to internal displacement and how the International Criminal Tribunal for the Former Yugoslavia ("Tribunal") has an unprecedented opportunity to reinforce and to promote international humanitarian law and human rights by holding individuals criminally responsible for internal displacement. Part III analyzes the laws regarding internal displacement and whether the Tribunal could utilize them, while acknowledging that certain problems exist that hinder such utilization. This Comment concludes that existing international laws prohibiting internal displacement cannot be used successfully by the Tribunal to hold individuals criminally liable.

## I. HISTORICAL BACKGROUND

### A. *Kosovo Before and During the Yugoslav War, 1992-1995*<sup>24</sup>

Kosovo is a province of Serbia<sup>25</sup> and has a population consisting of over ninety percent ethnic-Albanians.<sup>26</sup> Prior to the break up of the Socialist Republic of Yugoslavia in 1992, Kosovo was an autonomous

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23. Acts committed in March, 1999 by Yugoslav forces against ethnic Albanians may fall within the gambit of crimes against humanity or genocide. This Comment serves to assess the status of a less clear-cut situation: people who flee their homes in fear of violence and as the indirect victims of governmental action.

24. See *Europe's Roughest Neighbourhood*, *supra* note 7, at 5 (detailing a chronology of important dates in the disintegration of the former Yugoslavia).

25. Serbia and Montenegro make up the Federal Republic of Yugoslavia. See *id.* at 3 (detailing the emergence of newly independent countries and republics within the territory of the former Yugoslavia).

26. Populated by descendants of an ancient Illyrian tribe, Kosovo was conquered by the Romans in 167 B.C. See Smith, *supra* note 18, at A39 (explaining the ethnic ancestry of parties to Kosovo conflict). Seven hundred years later in the sixth century, the population was pushed south into what is now Albania, only to return in the fourteenth century, after the expansion of the Ottoman Empire. See *id.* Today's Kosovars speak Albanian, and many practice the religion of Islam. See *id.*

province of that country.<sup>27</sup> Josip Broz Tito, President of the former Yugoslavia and leader of the Communist Party of Yugoslavia from the end of World War II until his death in 1980, maintained the Socialist Republic of Yugoslavia as a federal system of six republics.<sup>28</sup> Tito and the Communist leadership drew republic boundaries in order to limit the Serbian population in each republic and to decrease any attending risk of Serb nationalism.<sup>29</sup> Through Communist control of the military and monopoly of power, Tito maintained a decentralized, but controlled, federal system of government.<sup>30</sup> The 1974 Constitution of Yugoslavia described the country as “a federal republic of free and equal nations and nationalities,” with Kosovo being the latter, a “nationality” within the “nation” of Serbia.<sup>31</sup>

Tito’s death, in May of 1980, loosened the glue of repression that he and the Communist Party formerly provided.<sup>32</sup> Contributing to a rising tide of nationalism among previously disenfranchised Serbs, Serbian political leader Slobodan Milosevic alleged that ethnic Albanians in Kosovo, and their ancestors, had committed “genocide”<sup>33</sup> with respect to the Serbian population in Kosovo.<sup>34</sup>

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27. See MICHAEL P. SCHARF, *BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG* 23-24 (1997) (providing a condensed review of the historical demarcation of Yugoslavia’s national boundaries).

28. See *id.* (“After the war, Tito established a federal system in Yugoslavia consisting of six republics—Serbia, Croatia, Bosnia-Herzegovina, Macedonia, and Montenegro—and two autonomous provinces (Kosovo and Vojvodina) within the Republic of Serbia.”).

29. See *id.* at 24 (“The reordered internal boundaries were aimed at containing Serbian nationalism by stranding Serb minorities in each of the republics outside Serbia itself.”).

30. See ANTE CUVALO, *HISTORICAL DICTIONARY OF BOSNIA AND HERZEGOVINA* 232-33 (1997) (providing a capsule description of Josip Broz Tito and his place in the history of the former Yugoslavia).

31. A “nation” in Communist doctrine was an entity with potential to form a nation-state, while a “nationality” represented a “displaced bit of a nation” that was not included in the federation. See NOEL MALCOLM, *KOSOVO: A SHORT HISTORY* 314-33 (1998) (describing Kosovo under Tito’s rule of 1945 to 1980). For Kosovo, its excluded nation was considered to be Albania. See *id.*

32. See SCHARF, *supra* note 27, at 24 (noting that Tito’s death and collapse of the Soviet Union allowed “long-festered centrifugal forces” of ethnic-based conflict to break free and cause the disintegration of the former Yugoslavia).

33. Genocide is “the intentional attempt to destroy a national, ethnic, racial, or religious group” through murder, causing serious bodily or mental harm, deliberately inflicting conditions calculated to bring about physical destruction, preventing births within the group, or through forcibly transferring the children of the group to another group. See Convention on the Prevention and Punishment of the Crime of Genocide, art. II, adopted Dec. 9, 1948, art. IX, 78 U.N.T.S. 278 (1951), cited in M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL LAW* 319 (1992) (explaining that methods used must be deliberately directed at a particular group in order for such methods to be considered genocidal).

34. Intellectuals of the Serbian Academy of Arts and Sciences presented a Memorandum to the Yugoslav Assembly citing discrimination against Serbs throughout the former Yugoslavia and “physical, political, legal and cultural

From the mid to late-1980s, respected Serbian academics and historians contributed to a cultural war by publishing works describing the entire history of the Serbian population in Kosovo as “an unending chronicle of ethnic martyrdom.”<sup>35</sup> Milosevic transformed the Serbs into “victims” of ethnic Albanians.<sup>36</sup>

In March of 1989, Slobodan Milosevic became chief of the Socialist Party of Serbia and President of the Republic of Serbia.<sup>37</sup> With the acquiescence of other government officials, he abrogated Kosovo’s autonomy by secretly adopting a series of constitutional amendments that abolished Kosovo’s separate representation in the Yugoslav government.<sup>38</sup> Thereafter, Milosevic expelled over 800,000 ethnic Albanians from their jobs in Kosovo and replaced them with ethnic Serbs.<sup>39</sup> Significant governmental decisionmaking was moved from Pristina, the capital of Kosovo, to Belgrade, the capital of Serbia.<sup>40</sup> Through a series of independent elections held in reaction to losing their voice in government, Kosovo-Albanians established a parallel government consisting of a parliament and president,<sup>41</sup> a system of

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genocide against the Serb population in Kosovo.” See SCHARF, *supra* note 27, at 25; see also MALCOLM, *supra* note 31, at 340 (offering a more detailed description of the role of Serbian intellectuals in inciting Serb nationalism).

35. See MALCOLM, *supra* note 31, at 334-56. From this point of view, the defeat of valiant Prince Lazar and his Serbian forces by Ottoman Turks on June 28, 1389 began “an epoch of oppression” that ended only when Yugoslavia fell apart in the Yugoslav War. See *Europe’s Roughest Neighbourhood*, *supra* note 5, at 3 (providing historical context for the current Balkan conflict). Slobodan Milosevic capitalized on the myth associated with the Battle of Kosovo, using the “great defeat” to remind Serbs of their oppression and need to defend “their motherland, Kosovo.” See JULIE A. MERTUS, KOSOVO: HOW MYTHS AND TRUTHS STARTED A WAR 184-85 (1999) (noting that Serbian folklore portrays the battle as a great defeat of the Serbian Christian army by the Turkish Muslim army, even though the Turkish conquest did not occur until 70 years after Prince Lazar’s final battle).

36. For example, Serbian media and publications misreported a high rate of rape of Serb women in Kosovo by Albanian men, eventually creating the impression that Albanian men raped frequently and indiscriminately. See MALCOLM, *supra* note 31, at 339 (asserting that the only serious statistical study completed in 1990 showed that 71% of reported rape cases in the decade of the 1980s involved an assailant and victim of the same nationality).

37. The Serbian parliament elected Slobodan Milosevic to the Presidency of the Republic earlier in 1989. See CUVALO, *supra* note 30, at 168-69.

38. See MALCOLM, *supra* note 31, at 333-34 (recounting steps taken by Serbian assembly to officially reduce Kosovo’s autonomy).

39. See MALCOLM, *supra* note 31, at 346-47 (describing actions taken by the Serbian assembly in July 1990 in response to protests by ethnic Albanians); *A Survey of the Balkans: Albanian Angst*, ECONOMIST, Jan. 24, 1998, at 15-17 (reviewing historical events which contributed to ethnic-Albanians’ desire for independence for Kosovo) [hereinafter *Albanian Angst*].

40. See BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, DEP’T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1998, at 1474 (1999).

41. See MALCOLM, *supra* note 31, at 347 (describing steps taken by Albanian delegates in response to Serbian abrogation of Kosovo autonomy).

taxation, and an educational system.<sup>42</sup>

Little changed in the political status of Kosovo during the Yugoslav War.<sup>43</sup> Serbian nationalistic fervor contributed to a rapidly deteriorating human rights situation for the Albanian majority. According to one United Nations Report, Serbs committed serious discrimination and human rights violations against ethnic Albanians.<sup>44</sup> The Dayton Peace Accords, which officially ended the

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42. These efforts were in part funded by money sent from Kosovo Albanians living abroad in support of the Democratic League of Kosovo ("LDK"). *See Albanian Angst*, *supra* note 39, at 15.

43. The Balkan conflict began with the republics of Slovenia and Croatia declaring independence from Yugoslavia in June and July of 1991, respectively. *See* VIRGINIA MORRIS & MICHAEL P. SCHARF, 1 AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: A DOCUMENTARY HISTORY AND ANALYSIS 18-22 (1995) (providing a historical review of Yugoslav War). The first fighting occurred when irregular Serb forces, aided by the Yugoslav federal army, attempted to halt the secession of Croatia. *See id.* In October, 1991, Bosnia-Herzegovina's parliament declared its sovereignty and passed a referendum for independence in February, 1992. *See* EDGAR O'BALLANCE, CIVIL WAR IN BOSNIA: 1992-1994, at 21-22 (1995) (explaining that Croatia's declaration of independence triggered war with the "occupying" Yugoslav army). Indigenous Serbs in the region opposed the referendum and launched attacks aimed at taking control over Bosnian territory. Fierce fighting continued between Bosnians, many of them Muslim, and Bosnian Serbs, who were furnished with arms and military supplies from Serbia. *See id.* at 28.

The United States recognized Slovenia, Croatia, and Bosnia-Herzegovina on April 7, 1992. *See id.* The republics of Serbia and Montenegro declared themselves to be the "Federal Republic of Yugoslavia" later that month. *See id.* at 34. This resulted in the creation of five separate entities out of the original Socialist Federal Republic of Yugoslavia: Slovenia, Croatia, Bosnia-Herzegovina, and the Federal Republic of Yugoslavia ("FRY"), which consists of Serbia and Montenegro. *See id.* at 1-38 (explaining process of break-up of the former Yugoslavia into sovereign states). On November 21, 1995, the Republic of Bosnia-Herzegovina, Croatia, and the Federal Republic of Yugoslavia assented to the Dayton Peace Agreement. *See Survey: The Balkans: A Precarious Peace*, *ECONOMIST*, Jan. 24, 1998, at 6 (assessing how the Dayton Peace Agreement would be implemented). The signatories of each republic, including FRY President Slobodan Milosevic, agreed to "cooperate in the investigation and prosecution of war crimes and other violations of international humanitarian law." *See* Dayton Peace Accords, General Framework Agreement for Peace in Bosnia and Herzegovina, art. IX, *reprinted in* 35 I.L.M. 75, 90 (1996). The Dayton Peace Agreement included a provision to guaranty the right of expelled nationals to return voluntarily and to receive compensation for their transfer. *See* Dayton Peace Accords, Annex 7, Agreement on Refugees and Displaced Persons, *reprinted in* 35 I.L.M. 75, 137 (1996) (providing criteria for return of refugees and displaced persons); *see also* George E. Little, *Forced Movement of Peoples*, 90 AM. SOC'Y INT'L L. PROC. 545, 545 (1996) (introductory remarks by Jean-Marie Henckaerts) (noting inclusion of provisions in Dayton Peace Accords and creation of Commission for Displaced Persons and Refugees to supervise implementation of these provisions).

44. *See Report on the Situation of Human Rights in the Territory of the Former Yugoslavia*, Comm. on Human Rights, U.N. ESCOR, 49th Sess., U.N. Doc. E/CN.4/1993/50 (1993); MIRANDA VICKERS, BETWEEN SERB AND ALBANIAN: A HISTORY OF KOSOVO 273-78 (1998) (discussing deteriorated socio-economic conditions and violations of human rights, such as arbitrary arrest).

Slobodan Milosevic has yet to be brought to justice for crimes committed by individuals under his command during the Yugoslav war. *See generally* Paul Williams

Yugoslav War, included only one provision regarding Kosovo: economic sanctions against the FRY would continue as long as human rights abuses were prevalent.<sup>45</sup>

*B. After the Yugoslav War, Kosovo-Albanians and the Yugoslav Government Resorted to Armed Conflict, Causing the Internal Displacement of Thousands of People*

In an expression of increasing frustration and impatience with the continuing Serbian oppression, several shootings of Serb policemen took place during the summer of 1996,<sup>46</sup> for which the previously unknown KLA took responsibility.<sup>47</sup> Over a period of months, the KLA mounted regular assaults on police stations in Kosovo, gathering automatic weapons, and claimed responsibility for the assassinations of more than fifty Serbian officials, police officers, and suspected ethnic-Albanian collaborators.<sup>48</sup> On February 28, 1998, Serbian special police forces launched a large-scale, military attack on villages in Kosovo, as they suspected KLA members to be harbored therein.<sup>49</sup> In response, Kosovars attacked Serbian police.<sup>50</sup> Government attacks on Kosovar villages continued throughout the summer of 1998 in a reported effort to crush the KLA insurgency, forcing ethnic Albanians to flee their homes en masse.<sup>51</sup>

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& Norman Cigar, *War Crimes and Individual Responsibility: A Prima Facie Case for the Indictment of Slobodan Milosevic* (1997) (unpublished manuscript, on file with author) (proposing and detailing contents of an indictment of Yugoslav President Milosevic for war crimes committed during the Yugoslav war).

45. See Vickers, *supra* note 44, at 287 (hypothesizing that as long as a relative peace prevailed in Kosovo, there would be no international involvement as to the province's political status).

46. These terrorist-type acts included several shootings of Serb policemen, a bomb blast in Podujevo, and an attack on the Serb Rector of Pristina University. See MALCOLM, *supra* note 31, at 355 (describing violence as expression of ethnic Albanians' increasing frustration with the repressive, Serbian-led government).

47. See *id.*; see also R. Jeffrey Smith, *Kosovo's Warriors Not Ready for Peace*, WASH. POST, Oct. 30, 1998, at A29. Beginning in 1992, the predecessor to the KLA fought for independence from Yugoslavia and closer ties with Albania. See Chris Hedges, *In New Balkan Tinderbox, Ethnic Albanians Rebel Against Serbs*, N.Y. TIMES, Mar. 2, 1998, at A1 (speaking with KLA leadership). Some of its members fought alongside Muslim-led forces during the Bosnia war. See *id.*

48. See Hedges, *supra* note 47, at A1 (describing events leading up to the Serbian offensive against the KLA).

49. Some cities had no local police force because police officers reported directly to Milosevic's ruling party in Belgrade. See, e.g., R. Jeffrey Smith, *Serbian City Plots in Totalitarian Rut Misery: Fear Sap Reformist Zeal*, WASH. POST, Dec. 22, 1998, at A33 (describing increasing centralization of local governance to Belgrade).

50. See Smith, *supra* note 18, at A39.

51. See Mike O'Connor, *Kosovo Assault Steps Up, Making Thousands More Homeless*, N.Y. TIMES, Aug. 4, 1998, at A3 (reporting 20,000 to 30,000 ethnic Albanians fleeing Yugoslav Government forces). Examples of government attacks on villages are detailed in an October 1998 report completed by the nongovernmental organization

In the fall of 1998, both sides agreed to a cease fire after participating in intense negotiations led by the United States.<sup>52</sup> In September, Belgrade announced that its special police forces would pull out of the province and end what they had euphemized as "anti-terrorism activities," although their withdrawal did not begin significantly until after the threat of NATO airstrikes.<sup>53</sup> KLA rebels quickly filled the resulting void.<sup>54</sup> In the months after the cease-fire, both the KLA and Yugoslav government engaged in a series of violent clashes<sup>55</sup> and full-scale war seemed imminent.<sup>56</sup> War commenced

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Human Rights Watch. See Human Rights Watch, *Federal Republic of Yugoslavia: Humanitarian Law Violations in Kosovo* (visited Oct. 10, 1998) <<http://www.hrw.org/reports98/kosovo/Kos9810-07.htm>>. One such attack occurred in the Drenica region of Kosovo in September, 1998. See Holly Cartner, *Eighteen Civilians Massacred in Kosovo Forest: Thirteen Others Believed Executed*, Human Rights Watch Press Release (last modified Sept. 29, 1998) <<http://www.hrw.org/hrw/press98/sept/kosov929.htm>>. Approximately 18 ethnic Albanians were killed by Serbian police units. See *id.* The victims, all of whom wore civilian clothing, included children (the youngest being 18 months old), women, and elderly people (one being 95 years of age). See *id.* The victims were part of an extended family that had sought refuge in the forest after their village had been shelled. See *id.* This massacre allegedly followed a pattern in which Serbian forces singled out the largest family in a village for destruction, suspecting the male members to be involved in the KLA. See Guy Dinmore, *New Kosovo Massacre May Spur NATO to Act*, WASH. POST, Sept. 30, 1998, at A21 (hypothesizing why government forces targeted the Delija family).

52. See Jane Perlez, *Milosevic Accepts Kosovo Monitors, Averting Attack*, N.Y. TIMES, Oct. 14, 1998, at A1 (detailing accord reached between U.S. special envoy Richard C. Holbrooke and President Slobodan Milosevic).

53. Along with withdrawal of police forces, President Slobodan Milosevic also agreed to allow the deployment of 2,000 unarmed observers under the auspices of the Organization for Security and Cooperation in Europe to monitor the withdrawal and cease-fire. See William Drozdiak, *Accord Puts NATO in Unchartered Territory: New Plunge Into Balkan Peacekeeping Is Major Expansion of European Security Role*, WASH. POST, Oct. 14, 1998, at A23 (describing the threats to bomb Yugoslavia as the first time the NATO threatened the territory of sovereign).

54. See Guy Dinmore, *Resumption of Fighting Seen Likely in Kosovo: U.S. Official Arrives to Lead*, WASH. POST, Nov. 12, 1998, at A23 (noting KLA fighters returned to previously-held strongholds after Yugoslav government forces withdrew).

55. See Reuters News Service, *Opposing Kosovo Forces Tell Each Other to Quit*, WASH. POST, Dec. 31, 1998, at A35 (reporting three days of fighting in Lapastica in the north of Kosovo province); Mike O'Connor, *Rebels Attack Serb Police Post in Kosovo*, N.Y. TIMES, Dec. 28, 1998, at A16 (reporting ethnic Albanians attacked large police post, wounding three officers and destroying armored personnel carriers); Misha Savic, *Kosovo Forces Suspend Fighting to Remove Wounded*, WASH. POST, Dec. 28, 1998, at A17 (explaining temporary truce reached after four days of fighting between Serbian forces and "ethnic Albanian separatists" in Obranca); *Police Crack Down After Killing in Kosovo*, Dec. 22, 1998, WASH. POST, at A34 (stating Serbian police conducted sweep of Kosovar Albanian stronghold in retaliation for killing of Serbian police officer).

56. During the tenuous cease-fire that began in October 1998, the KLA grew in strength and sophistication with the infusion of more volunteers and arms shipments. See Peter Finn, *War Clouds Kosovo Adversaries' View of Future: Shattered Cease-Fire Signals New Year of Conflict for Ethnic Albanians and Serbs*, WASH. POST, Jan. 1, 1998, at A27 (describing local preparations by KLA for renewed fighting with government forces). By January 1999, 70% of KLA soldiers had prior military experience. See *id.*

when NATO bombs fell on Serbia on March 24, 1999.<sup>57</sup>

Although reported figures varied, between 770 and 2,000 civilians were killed in 1998, more than one hundred villages or towns containing 200,000 homes were destroyed, and more than 230,000 to 300,000 people were displaced.<sup>58</sup> By November, 1998, one in every six Kosovar inhabitants had been uprooted.<sup>59</sup> Although the majority of displaced persons were ethnic-Albanians, Serbian civilians living in the province also were uprooted, as some fled for fear of being killed by ethnic Albanians, and others fled simply to avoid being in the line of fire.<sup>60</sup> Some displaced persons did not return for fear of violence at the hands of government forces.<sup>61</sup>

*C. United Nations' Response to Internal Displacement and Armed Conflict in Kosovo*

The flow of refugees into northern Albania, Bosnia-Herzegovina, and other European countries and the increase in internally displaced persons from "the use of force" caused the United Nations Security Council, under its Chapter VII authority,<sup>62</sup> to recognize the

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57. See Charles Babington, *Clinton Goal is to Contain Milosevic: No Time Limit Set on NATO Airstrikes*, WASH. POST, Mar. 25, 1999, at A1 (reporting on President Clinton's announcement that a NATO military offensive would be the consequence of Yugoslav refusal to sign the Rambouillet peace agreement that included autonomy for Kosovo and 28,000 NATO peacekeepers).

58. See *Report of the Secretary General Prepared Pursuant to Resolution 1160*, ¶ 7, U.N. Doc. S/1998/834 (1998) (estimating 230,000 displaced and "numerous civilian casualties"); Adrian Dasclau, *Monitors Restore Cease-Fire in Kosovo*, WASH. POST, Dec. 29, 1998, at A11 (citing 2,000 deaths and 250,000 refugees); R. Jeffrey Smith, *Kosovo Plan Spells Out Local Powers: U.S. Proposal Outlines Power-Sharing*, WASH. POST, Nov. 10, 1998, at A31 (reporting 800 deaths and 300,000 refugees); R. Jeffrey Smith, *Holbrook, Milosevic Meet About Kosovo*, WASH. POST, Dec. 16, 1998, at A35 (citing killing of 35 members of Kosovo Liberation Army and of six Serbian teenagers) [hereinafter Smith, *Holbrook*]; Ismet Hajdari, *Milosevic Ally Makes Kosovo Vow*, A.P. ONLINE, Dec. 31, 1998, available in 1998 WL 25274919 (reporting approximately 1,000 people killed and tens of thousands uprooted). The variations in the numbers of displaced person could be attributed to the difficulty in gathering precise population statistics and the collection of data on different dates. See O'Connor, *supra* note 55 (implying same).

59. See Smith, *supra* note 47, at A29. For a field report evaluating the impact of internal displacement on women and children in Kosovo, see JULIE MERTUS, WOMEN'S COMM'N FOR REFUGEE WOMEN AND CHILDREN INTERNAL DISPLACEMENT IN KOSOVO: THE IMPACT ON WOMEN AND CHILDREN (1998) (on file with author) (assessing "emergency" of displacement and making recommendations for international humanitarian groups).

60. See O'Connor, *supra* note 55, at A16 ("As part of what appears to be a strategy of frightening [Serbian civilians] into leaving the area, rebels have abducted several Serbs from remote villages. The victims are thought to have been killed.").

61. The town of Malisevo, once a KLA stronghold in south-central Kosovo, remained a "ghost town" while its displaced residents feared returning due to the continued presence of Yugoslav police in the area. See Smith, *Holbrook*, *supra* note 58, at A35.

62. Chapter VII, Article 39 of the United Nations Charter reads:

The Security Council shall determine the existence of any threat to the

conflict in Kosovo as a threat to international peace and security.<sup>63</sup> Security Council Resolution 1160 recognized the Tribunal's jurisdiction over any war crimes or crimes against humanity that possibly could have occurred during the conflict in Kosovo,<sup>64</sup> and urged the Office of the Prosecutor of the International Tribunal to begin gathering information regarding the occurrence of possible

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peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

U.N. CHARTER art. 39, para. 1. Under the UN Charter, Member States are bound to abide by Security Council decisions. *See id.* art. 25, para. 1 ("The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.").

The establishment of the Tribunal as a valid exercise of Security Council powers has been affirmed by the Tribunal as well as many legal scholars. *See, e.g.*, Prosecutor v. Tadic, Case No. IT-94-1-AR72, paras. 32-48 (Int'l Crim. Trib. Former Yugo., App. Chamber, 1995), *reprinted in* 35 I.L.M. 32, 44-48 (1996) (holding that the establishment of the Tribunal falls within the powers of the Security Council and was established according to necessary procedures under the U.N. Charter); Payam Akhavan, *Punishing War Crimes in the Former Yugoslavia: A Critical Juncture for the New World Order*, 15 HUMAN RTS. Q. 262, 268-72 (1993) (citing Security Council authority to adopt measures not involving the use of armed force in order to restore international peace and security); M. Cherif Bassiouni, *Former Yugoslavia: Investigating Violations of International Humanitarian Law and Establishing an International Criminal Tribunal*, 18 FORDHAM INT'L L.J. 1191, 1202 (1995) (reviewing steps taken by the United Nations in establishing the Tribunal); James C. O'Brien, *The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia*, 87 AM. J. INT'L L. 639, 642-44 (1993) (asserting Security Council's approach to establishing the Tribunal as methodical and therefore appropriate).

63. S.C. Res. 1199, U.N. SCOR, 53rd Sess., 3930th mtg., ¶¶ 1-4, U.N. Doc. S/RES/1199 (1998) (demanding a cessation of hostilities, immediate entrance into peace negotiations, and immediate taking of steps to relieve humanitarian crisis). The internal conflict could have widened to include the neighboring province of Macedonia, if the province's population of ethnic Albanians joined the resistance against the Serb-led Yugoslav government. *See* Hedges, *supra* note 47, at A1 (referring to the risk of the conflict widening geographically). In addition, the Albanian government warned that it would "act as one nation" if "outright war" erupted between ethnic Albanians and Serbs. *See id.*

64. The temporal and territorial jurisdiction was established by the Security Council, at the recommendation of the Secretary-General of the United Nations, and is expressed in Article 1 of the Tribunal's statute: "The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute." Statute of the International Tribunal, art. 1, *reprinted in* SCHARF, *supra* note 27, at app. B [hereinafter Tribunal Statute]; *see also* S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., Annex, U.N. Doc. S/RES 827 (1993) (approving report of Secretary-General and establishing parameters of the Tribunal's jurisdiction). The "life span" of the Tribunal is tied to "the restoration and maintenance of international peace and security" as determined by the Security Council. *See* S.C. Res. 827, *supra*, at Annex; Tribunal Statute, *supra*, at arts. 41 & 42, *reprinted in* SCHARF, *supra* note 27, at app. B. Only the date upon which the Tribunal's jurisdiction began was defined because at the time of its formation, the Yugoslav conflict had yet to end. *See* MORRIS & SCHARF, *supra* note 43, at 119 (describing jurisdictional aspects of the Tribunal).



crimes.<sup>65</sup> As of September, 1999, no indictments were filed for human rights violations in Kosovo because Yugoslav authorities have limited the Prosecutor's ability to investigate alleged crimes in the province thoroughly,<sup>66</sup> despite Security Council demands.<sup>67</sup> But even if investigations are allowed and prosecutions do follow, the problem of prevention still remains: how can leaders be held individually criminally liable for internal displacement under the current body of international law when that law does not specifically prescribe internal displacement as an international crime?<sup>68</sup> The next section examines what existing law may serve to protect people from internal displacement if such law is enforced.

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65. See S.C. Res. 1160, U.N. SCOR, 53rd Sess., 3836th mtg., ¶ 17, U.N. Doc. S/RES/1160 (1998). The Prosecutor is one of the three "organs" which compose the Tribunal. See Tribunal Statute, *supra* note 64, at art. 11, reprinted in SCHARF, *supra* note 27, at app. B. The Prosecutor is responsible for investigating and prosecuting persons "responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991." See *id.* art. 16, reprinted in SCHARF, *supra* note 27, at app. B. The Prosecutor is nominated by the Secretary-General of the U.N. and appointed by the Security Council, and serves a term of four years. See *id.*, reprinted in SCHARF, *supra* note 27, at app. B. According to the Tribunal's Rules and Procedure, the Prosecutor initiates investigations *ex-officio* or after receiving information which the Prosecutor decides to be sufficient to warrant further investigation. See *id.* art. 18, reprinted in SCHARF, *supra* note 27, at app. B. Investigative powers include questioning suspects, victims, and possible witnesses; on-site investigations; and the collection of evidence. See *id.*, reprinted in SCHARF, *supra* note 27, at app. B. Once the Prosecutor has determined a *prima facie* case exists, the Prosecutor prepares an indictment, which is presented to a Trial Chamber judge for confirmation or dismissal, and the issuance of a subsequent arrest warrant, if applicable. See *id.*, reprinted in SCHARF, *supra* note 27, at app. B. The other two organs of the Tribunal are the two Trial Chambers and one Appeals Chamber, and a Registry that is responsible for all administrative tasks. See *id.* art. 11., reprinted in SCHARF, *supra* note 27, at app. B.

66. The Yugoslav government does not recognize the Tribunal's jurisdiction and has refused to grant visas to investigators from the Tribunal in the Hague. See Dinmore, *supra* note 51, at A1 (reporting Chief Prosecutor for Tribunal was turned away at FRY border because she was not granted a visa); Perlez, *supra* note 52, at A14 (stating recent effort to obtain testimonial evidence is a "test case" of how Tribunal can exercise jurisdiction). The Federal Republic of Yugoslavia pledged to cooperate in the investigation and prosecution of war crimes when it initialed the Dayton Peace Accords on November 21, 1995, on behalf of the Republic of Srpska. See Dayton Peace Agreement, General Framework Agreement for Peace in Bosnia and Herzegovina, art. IX, reprinted in 35 I.L.M. 75, 90 (1996).

67. On November 17, 1998, the Security Council called on the Yugoslav government to end its ban on Tribunal investigation in Kosovo. See John M. Goshko, *U.N. Council Pushes Kosovo Probe: 14-0 Vote Backs Resolution Opposing Ban on Tribunal Team*, WASH. POST, Nov. 18, 1998, at A34 (reporting that despite Milosevic's earlier promises to cooperate with the Tribunal, he has refused to do so with regards to Kosovo as he does not recognize the Tribunal's jurisdiction over a "purely internal" matter).

68. The principle *nullem crimen sine lege* bars the prosecution of an act that was not a crime under international law at the time it was committed. See *infra* note 152.

## II. INTERNAL DISPLACEMENT AND INTERNATIONAL LAW

A. *Defining Population Transfers*

The term “population transfer” has been subject to various interpretations.<sup>69</sup> Most broadly, and for purposes of this Comment, the phrase “involuntary population transfers” includes two categories of civilians: (1) those who are forced to leave their homes, cross national borders, and become refugees;<sup>70</sup> and (2) those who are displaced involuntarily from their homes, but remain in their own country.

1. *Persons who cross their nation’s borders: Expulsion*

In the first category, involuntary transfer commonly takes the form of mass expulsion, which entails a government’s action, or failure to act, with the intent to remove persons against their will from the territory of that state.<sup>71</sup> A traditional example is the mass deportation of civilians.<sup>72</sup> The “ethnic cleansing”<sup>73</sup> of the Bosnia War, in which areas were “cleansed” of ethnic minorities through the use of arrests

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69. See Meindersma, *supra* note 15, at 32-33 (asserting that varying definitions exists and acknowledging a need to establish a coherent definition for purposes of clarifying the rights of those transferred). According to one author, the point of population transfer occurs principally on the removal of people. See Alfred M. de Zayas, *International Law and Mass Population Transfers*, 16 HARV. INT’L L. REV. 207, 209 (1969) (categorizing transfers according to the type of transfer: deportation, expulsion, international agreements, and internal transfers). Another definition emphasizes the governmental rationale or motivation behind the transfer. See Protocol Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609, 16 I.L.M. 1442 [hereinafter Protocol II].

70. For a definition of “refugee,” see *supra* note 10.

71. See JEAN-MARIE HENCKAERTS, *MASS EXPULSION IN MODERN INTERNATIONAL LAW AND PRACTICE* 2 (1995). A modern theory of mass expulsion includes governmental action that has the effect of expelling large numbers of persons across national frontiers, e.g., persecution, economic policies, voluntary return policies, and population exchange. See *id.* at 108-34 (proposing that various methods governments employ result in indirect mass expulsion of civilian populations). For examples of population exchanges, see de Zayas, *supra* note 69, at 246-50, which discusses option agreements and population exchange treaties.

72. This type of mass expulsion is in clear violation of the Nuremberg Charter and constitutes crimes against humanity or war crimes. See Charter of the International Military Tribunal at Nuremberg, art. 6(b) (defining war crimes to include “deportation and other inhumane acts committed against any civilian populations” before or during a war); see also Goebel, *supra* note 20, at 32-33 (discussing when population transfer is a crime against humanity). For a brief explanation of the Nuremberg Charter and Trials, see *infra* note 79.

73. “Ethnic cleansing” is the employment of methods, such as killing or terrorizing, in order to destroy and disperse an entire ethnic group from a particular territory. See SCHARF, *supra* note 27, at 31 (noting the term was first coined during World War II and applied to efforts used to “cleanse” a territory of its Serbian population).

and subsequent expulsion across state boundaries, is a recent example of mass expulsion.<sup>74</sup> One author argues the method used to create population transfers across national borders is irrelevant: “criminal liability attaches once such removal is effected no matter which methods are used to achieve this goal.”<sup>75</sup> Whether there is criminal liability for population transfers that occur within a nation’s borders is not as clear.<sup>76</sup>

2. *Persons who remain within their nations’ borders: Forced relocation vs. internal displacement*

Civilian transfers that occur solely within a nation’s boundaries previously have been defined as either “forced relocation” or “internal displacement.”<sup>77</sup> Prior to the expansion of human rights in international law, internal population transfers were deemed to fall solely within the domestic jurisdiction of the state involved and outside the purview of international law.<sup>78</sup> With the recognition at the Nuremberg Trials<sup>79</sup> that some human rights transcend the principle of state sovereignty over domestic matters, many newly created international instruments stated that forced relocation within a nation’s territory is contrary to international law.<sup>80</sup> Forced relocation usually involves a forcible resettlement of nationals pursuant to a government policy, such as the United States’ relocation of Japanese-Americans to internment camps during World War II.<sup>81</sup> This phenomenon of forced relocation appears to require a

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74. See Alfred M. de Zayas, *The Right to One’s Homeland, Ethnic Cleansing, and the International Criminal Tribunal for the Former Yugoslavia*, 6 CRIM. L.F. 257, 262 (1995) (examining the use of mass expulsions to achieve ethnic cleansing).

75. See Michael P. Roch, *Forced Displacement in the Former Yugoslavia: A Crime Under International Law?*, 14 DICK. J. INT’L L. 1, 7 (1995) (providing a preliminary look at the laws surrounding forced displacement in armed conflicts). For one author’s list of treaty provisions and declarations affecting mass expulsions, see HENCKAERTS, *supra* note 71, at app. II.

76. See *infra* Parts II.B-III.E.

77. See HENCKAERTS, *supra* note 71, at 2 (presenting terminology of internal civilian transfers).

78. See 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 422 (Rudolf Bernhardt et al. eds., 1995) [hereinafter ENCYCLOPEDIA] (providing a historical survey of “forced resettlement” and statement of its current legal status).

79. The International Military Tribunal at Nuremberg was created in the wake of World War II and was used to try and convict Nazi military commanders who were responsible for the commission of atrocities during the war. See LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 880-84 (3d ed. 1993) (reviewing the Nuremberg Charter and Trials as efforts to discourage or prevent war).

80. See ENCYCLOPEDIA, *supra* note 78, at 423 (describing evolution of legal prohibition against forced relocation by a national government).

81. See *id.* (noting that prior to international human rights law, most instances of forced relocation were governed by municipal law, and international legal issues would arise only if the persons affected were aliens and their state of origin

government taking a direct action for the purposes of relocating large numbers of citizens.

Forced relocation or purposeful expulsion of a group is a type of ethnic cleansing,<sup>82</sup> although it has not been prosecuted as such to date.<sup>83</sup> Defined as “a purposeful policy designed by one ethnic or religious group to remove by violent or terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas,”<sup>84</sup> ethnic cleansing was executed methodologically in the Bosnia War.<sup>85</sup> Although ethnic cleansing itself is not recognized as a crime under international law, this conduct often entails rape, mass killings, imprisonment, and shelling of cities, all of which constitute crimes against humanity or grave breaches of the Geneva Conventions.<sup>86</sup> The Yugoslav government did not appear to

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attempted to exercise diplomatic protection on their behalf).

82. See COHEN & DENG, *supra* note 2, at 24 (asserting that communities do not flee but rather government-sponsored ethnic cleansing campaigns force people from their homes). According to one author, ethnic cleansing contains particular characteristics. See Drazen Petrovic, *Ethnic Cleansing: An Attempt at Methodology*, 5 EUR. J. INT'L L. 342, 352 (1994) (attempting to dissect “ethnic cleansing” into elements). Ethnic cleansing consists of systematic, actual, or implied official sanction, and is perpetrated against a particular group defined by ethnic, national, religious, or other categories. See *id.* Actions that compose ethnic cleansing take different forms, ranging from economic discrimination to extermination of the group. See *id.* The form used depends upon what methods are available. See *id.* Those who advocate this policy “by definition cannot respect international humanitarian law.” *Id.*

83. Acts that compose “ethnic cleansing” have been prosecuted as violations of laws and customs of war, crimes against humanity, grave breaches, or genocide. See *id.* at 358-59.

84. *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, U.N. SCOR, 54th Sess., Annex, para. 265, U.N. Doc. S/1994/674 (1994) (confirming the Commission’s earlier definition of ethnic cleansing).

85. First, Bosnian Serb paramilitary forces, assisted by the Yugoslav Army under the control of Slobodan Milosevic, would seize control of an area and give Serb residents the opportunity to leave. See M. CHERIF BASSIOUNI & PETER MANIKAS, *THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 612 (1996) (describing the Serbian nationalist policy of ethnic cleansing). Homes of non-Serbs and cultural and religious monuments were targeted for destruction. See *id.* Next, paramilitary forces would terrorize the non-Serb residents of the seized area by randomly looting their homes, raping and killing them. See *id.* The government frequently and purposefully publicized the violence in order to encourage civilian flight. See *id.* The paramilitary forces required many non-Serb residents to sign documents relinquishing their property rights to municipal authorities. See *id.* at 613.

86. See *id.* at 48 (asserting that ethnic cleansing includes illegal acts such as killing and torturing civilians and forcibly relocating civilian populations); see also *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. GAOR, 48th Sess., U.N. Doc. S/25704 (1993), reprinted in 32 I.L.M. 1159, 1173 (1993) [hereinafter *Report on Establishing an International Tribunal*] (stating that acts such as willful killing, torture, or rape, systematically committed against civilians constitute crimes against humanity and are

utilize forced relocation of ethnic Albanians during 1998.<sup>87</sup> Although there was no specific government program or transfer policy, thousands of people were nevertheless expelled from their homes.<sup>88</sup> These people fall within the category of internal displacement, the second type of internal population transfer.

Internal displacement involves the uprooting of people because of civil war, ethnic tensions, environmental disasters, or other circumstances in which serious human rights violations occur.<sup>89</sup> This category does not require a purposeful, direct action by the government, but instead appears to emphasize the effect of a government's acts or policies. No internationally accepted definition of "internally displaced persons" exists,<sup>90</sup> and "no single legal principle is applicable to all population transfers wherever or whenever they occur."<sup>91</sup> This lack of clarity demonstrates the uncertainty in this area of the law, and poses a significant challenge to the international community to prevent such displacements in the future.

### 3. *United Nations' attempt to define displacement*

In recognition of this morass and the "international legal vacuum"<sup>92</sup> surrounding internal displacement, the United Nations sought to address the problem of internal displacement through a comprehensive approach.<sup>93</sup> First, the Secretary-General, at the

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an example of "ethnic cleansing"). According to the Commission of Experts, which apprised the Security Council of occurrences on the ground during the Yugoslav War, displacement and deportation of civilian populations are means of carrying out ethnic cleansing. *See Letter from the Secretary-General to the President of the Security Council*, Feb. 9, 1993, U.N. Doc. S/25274, *quoted in de Zayas, supra* note 74, at 294-95 (discussing process of ethnic cleansing as a means of forced relocation). These acts could also demonstrate the crime of genocide. *See de Zayas, supra* note 74, at 294-95 (proposing ethnic cleansing could fall under the rubric of crimes against humanity, war crimes, and genocide).

87. The author has not discovered any reports of government personnel rounding up ethnic Albanian civilians in 1998 and forcibly transporting the civilians away from their villages.

88. *See* text accompanying *supra* note 39 (describing how Milosevic expelled over 800,000 Albanians).

89. *See* HENCKAERTS, *supra* note 71, at 2 (distinguishing types of involuntary, internal movement of people from mass expulsion).

90. *See* Lewis, *supra* note 4, at 695 (recognizing that no clear definition of internal displacement exists, and therefore, categorizing internal displacement according to its identified causes of "forced displacement," persecution, and civil war).

91. *See* Meindersma, *supra* note 15, at 35 (providing an overview of international legal standards regarding population transfer in conflict situations).

92. Cohen & Deng, *supra* note 2, at 7.

93. The Commission on Human Rights hoped to create a framework for protecting and assisting internally displaced persons through more-responsive governments and a "systemic" international response. *See Analytical Report of the*

request of the U.N. Commission on Human Rights, appointed a representative to assess: (1) the causes and consequences of internal displacement; (2) the effect of international law on those persons internally displaced; (3) the extent to which existing international institutions, such as the World Health Organization and the United Nations Development Programme, currently address the needs of internally displaced populations; and (4) the ways in which protection and assistance of the displaced could be improved.<sup>94</sup> Francis Deng, the representative of the U.N. Secretary General, developed a set of guiding principles to serve as a cumulative source of various legal norms applicable to internal displacement and to supplement significant gaps and unclear areas in the law.<sup>95</sup> The purpose of these guiding principles is to “serve as an international standard to guide governments as well as international humanitarian and development agencies in providing assistance and protection” to internally displaced persons.<sup>96</sup> These guiding principles create a “normative framework” to demonstrate and reinforce already existing legal protections.<sup>97</sup> For example, the guiding principles establish that every person has a right to be protected from displacement,<sup>98</sup> and authorities are to “ensure that all feasible alternatives are explored in order to avoid displacement altogether.”<sup>99</sup> The guiding principles are not legally binding, but with a pattern of state utilization, eventually the principles could attain the status of international customary law.<sup>100</sup>

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*Secretary-General on Internally Displaced Persons*, *supra* note 2, at Agenda Item 9(d).

94. *See id.*

95. *See* COHEN & DENG, *supra* note 2, at 7-8 (describing the *Guiding Principles on Internal Displacement* as a first step in the development of a legally binding instrument for protection of, and assistance to, the internally displaced).

96. *See Analytical Report of the Secretary-General on Internally Displaced Persons*, *supra* note 2, para. 2 (presenting guidelines for a nation-state to use when faced with the risk or occurrence of population displacement).

97. *See* COHEN & DENG, *supra* note 2, at 75 (describing the purpose of preparing a document of guiding principles).

98. “Every human being shall have the right to be protected against being arbitrarily displaced from his or her home or place of habitual residence.” Deng, *supra* note 15, at Principle 6(1), *reprinted in* COHEN & DENG, *supra* note 2, at app.

99. *Id.* at Principle 7(1), *reprinted in* COHEN & DENG, *supra* note 2, at app. This principle allows displacement if “no alternative exist[s],” but notes that “all measures shall be taken to minimize displacement and its adverse effects.” *See id.*

100. *See* COHEN & DENG, *supra* note 2, at 258 (discussing role of *Guiding Principles* in the international community and the goal of preventing internal displacement through eventual acceptance of the principles as legally binding). International custom, one source of international law, is “a general recognition among States of a certain practice as obligatory.” *See* IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 4-11 (4th ed. 1990). The elements of an international custom include: a general practice among states, substantial uniformity in the practice of states, and *opinio uris* or the belief by states that international law requires the practice. *See id.* at 5-8. International and national judicial decisions, national legislation, diplomatic correspondence, national institutional manuals (e.g., manuals

Although these guidelines are intended to steer state actions without providing a source of criminal liability, the Tribunal may utilize the law upon which these guidelines are founded to impose individual accountability for internal displacement.

*B. International Laws Regarding Internal Displacement*

Unlike population transfers that occur during international armed conflicts, current international law does not guarantee the protection of civilians from internal displacement.<sup>101</sup> Instead, international humanitarian law potentially could be used in the prosecution of persons responsible for displacement.<sup>102</sup> This body of law can be utilized only during armed conflict,<sup>103</sup> and individuals may be held criminally responsible for violations of these laws.

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of military law) and General Assembly resolutions are a few of the many material sources that can be used to prove the existence of an international custom and, therefore, an international customary law. *See id.* at 5. A state can escape the binding authority of an international customary law only if it has "persistent objector" status. *See id.* at 10. A state is a persistent objector only if it has persistently objected to the particular practice at issue since the birth of said practice in the international community. *See id.* A presumption of a state's acceptance of the customary law can only be rebutted by clear evidence of that state's persistent objection to the practice. *See id.*

101. *See* COHEN & DENG, *supra* note 2, at 74 (citing the absence of an express right not to be unlawfully displaced as a weakness of international law). International humanitarian law clearly prohibits forced transfers that occur during an international armed conflict. *See* Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, arts. 47-49, 6 U.S.T. 3516, 75 U.N.T.S. 287. Article 49 of the Fourth Geneva Convention states: "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." *Id.* at art. 49, 6 U.S.T. at 3548, 75 U.N.T.S. at 318.

102. *See* COHEN & DENG, *supra* note 2, at 74 (recognizing the difficulties organizations and institutions have when attempting to determine which guarantees apply to the matter at hand).

103. Also called "humanitarian law of armed conflict," this body of law began as a merger of the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land and the 1929 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field, 27 July 1929. *See* M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 147-65 (1992)* (reviewing historical legal foundation of international humanitarian law and regulation of armed conflict).

1. *Common Article 3 of the 1949 Four Geneva Conventions*<sup>104</sup>

The principal source of humanitarian law that governs non-international, armed conflicts is common Article 3 to the four 1949 Geneva Conventions.<sup>105</sup> Common Article 3 applies to armed conflicts between a government's armed forces and organized, armed insurgents<sup>106</sup> and binds all parties to the conflict.<sup>107</sup> Even if a state has not yet ratified the Geneva Conventions, it is still bound to the terms of common Article 3 as this article is considered to be customary international law.<sup>108</sup> Common Article 3 does not address the question of population transfers and does not specifically include forced displacement as a crime.<sup>109</sup> It does prohibit, in non-derogable provisions,<sup>110</sup> "outrages against personal dignity" and "cruel treatment," which arguably occur during and as a result of internal displacement.<sup>111</sup> Despite no express provision in common Article 3 regarding criminal liability, the Tribunal recognized that individual criminal responsibility is not "barred" for violations of the article.<sup>112</sup>

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104. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 3, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, art. 3, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 3, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative To The Protection of Civilian Persons In Time of War, Aug. 12, 1949, art. 3, 6 U.S.T. 3516, 75 U.N.T.S. 287.

105. See John R. Crook, *Strengthening Legal Protection in Internal Conflicts*, 3 I.L.S.A. J. INT'L & COMP. L. 491, 491 (1997) (characterizing common Article 3 as the "most familiar" text applicable to internal armed conflicts).

106. See COHEN & DENG, *supra* note 2, at 81 (giving practical definition of non-international, armed conflict).

107. See *id.* at 82 (explaining application of common Article 3 to parties to an internal armed conflict as long as all parties meet specific criteria).

108. See Crook, *supra* note 105, at 491 (discussing the applicability of common Article 3 to signatory and non-signatory states).

109. See Roch, *supra* note 75, at 16 (hypothesizing that forced displacement was not included in common Article 3 of the Geneva Convention because the article was the result of compromise).

110. See COHEN & DENG, *supra* note 2, at 80 (arguing Common Article 3 is non-derogable as it is the only article of the four Geneva Conventions that applies to both international and internal armed conflicts).

111. Victims can be caught in the cross-fire of armed conflict, lack educational and health services, be subjected to sexual violence and harassment, live without food, shelter or proper sanitation. See COHEN & DENG, *supra* note 2, at 5-7, 12.

112. See Prosecutor v. Tadic, Case No. IT-94-1-AR72, para. 128 (Int'l Crim. Trib. Former Yugo., App. Chamber, 1995), *reprinted in* 35 I.L.M. 32, 70 (1996). Then-Ambassador to the United Nations Madeline Albright stated on record that the Tribunal's jurisdiction over internal conflicts included violations of common Article 3 and Additional Protocol II. See U.N. SCOR, 48th Sess., 215th mtg., U.N. Doc. S/PV.3217, at 15 (1993) (statement of Madeleine Albright, U.S. Ambassador to the U.N.), *quoted in* Theodor Meron, *War Crimes in Yugoslavia and the Development of International Law*, 88 AM. J. INT'L L. 78, 80 (1994) (referring to Ambassador Albright's affirmative statement as clarification of Tribunal's jurisdiction, but not to status of Additional Protocols as international customary law).



## 2. *Applying common Article 3 to the conflict in Kosovo.*

The International Committee of the Red Cross commentary to common Article 3 of the Geneva Conventions (“Official Commentary”) provides guidelines to determine if a situation is an internal armed conflict.<sup>113</sup> According to the Official Commentary, an internal armed conflict exists when parties possess organized military forces, act within a determinate territory, and have the means by which the parties can ensure respect for the Conventions.<sup>114</sup> A government’s use of regular military forces against an insurgency is another indication of an internal armed conflict.<sup>115</sup> Internal armed conflicts are more difficult to define because although the incidents of violence appear to be part of an orchestrated plan, they simply could be isolated acts or acts committed neither under the guidance of some central authority nor in a planned manner.<sup>116</sup>

The U.N. Security Council recognized the conflict in Kosovo as an “armed conflict” within the meaning of international humanitarian law.<sup>117</sup> Because Kosovo is a province of the Federal Republic of Yugoslavia, and all fighting occurred within its boundaries, the conflict can be classified as internal for purposes of applying common Article 3. Further, the Security Council condemned the use of force by the Yugoslav government and the KLA insurgency, and called on both parties to seek a peaceful resolution.<sup>118</sup> Clearly, this recognition indicates that the international community viewed the situation in Kosovo as more than isolated acts of violence, but rather an armed conflict between two distinct parties capable of a cease-fire.

Although internal displacement arguably results in “outrages against personal dignity,”<sup>119</sup> a stronger argument would include

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113. See ICRC COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, paras. 4446-79 (Yves Sandoz et al. eds, 1987).

114. See *id.* paras. 4446-70.

115. See *id.* para. 4460.

116. See *id.* paras. 4471-76.

117. See S.C. Res. 1199, U.N. SCOR, 53rd Sess., 3930th mtg., para. 5, U.N. Doc. S/RES/1199 (1998) (“Noting further the communication by the Prosecutor [of the Tribunal] . . . expressing the view that the situation in Kosovo represents an armed conflict within the terms of the mandate of the Tribunal . . .”).

118. See S.C. Res. 1160, U.N. SCOR, 53rd Sess., 3868th mtg., U.N. Doc. S/RES/1160 (1998) (“Condemning the use of excessive force by Serbian police forces against civilians . . . as well as all acts of terrorism by the Kosovo Liberation Army.”).

119. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 3(1), 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, art. 3(1), 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 3(1), 6 U.S.T. 3316, 75 U.N.T.S.

Additional Protocol II, which supplements common Article 3 and contains express provisions regarding the involuntary displacement of civilians.

### 3. *Additional Protocol II*<sup>120</sup>

Additional Protocol II provides more specific protections from forced movement or displacement. The Official Commentary describes Protocol II as a “mini-convention” and “the first real legal instrument for the protection of victims of non-international armed conflicts.”<sup>121</sup> This agreement provides that the civilian population should not be “the object of attack” and bars “acts or threats of violence, the primary purpose of which is to spread terror among the civilian population.”<sup>122</sup> Protocol II also explicitly prohibits anyone from ordering or compelling civilians to be displaced.<sup>123</sup> Article 17 of Protocol II states:

(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.<sup>124</sup>

According to the Official Commentary on Protocol II, the first provision includes the transfer of civilians by armed forces or groups “because of military operations.”<sup>125</sup> Article 17(1) allows for transfer to occur under two circumstances: when transfer is necessary in order to safeguard the security of the civilian population or when imperative military reasons exist.<sup>126</sup> Imperative military reasons

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135; Geneva Convention Relative To The Protection of Civilian Persons In Time of War, Aug. 12, 1949, art. 3(1), 6 U.S.T. 3516, 75 U.N.T.S. 287.

120. See Protocol II, *supra* note 69.

121. See ICRC COMMENTARY, *supra* note 113, para. 4337.

122. See Protocol II, *supra* note 69, at art. 13(2).

123. See *Analytical Report of the Secretary-General on Internally Displaced Persons*, *supra* note 2, para. 62, *construed in* Stavropoulou, *supra* note 15, 723 (reviewing international humanitarian law regarding forced displacement).

124. Protocol II, *supra* note 69, at art. 17 (emphasis added).

125. See ICRC COMMENTARY, *supra* note 113, para. 4861 (providing examples of cases contemplated by the Conference).

126. See *id.* paras. 4853-54 (discussing two exceptional circumstances in which forced displacement of civilians is permissible under Article 17). Article 17 does not include a right for displaced persons to return to their homes once the area is again inhabitable, nor does it prohibit the appropriation or destruction of property during displacement. See BASSIOUNI & MANIKAS, *supra* note 85, at 623 (discussing deficiencies

cannot entail political motives, and a “meticulous assessment of the circumstances” is required.<sup>127</sup> While Article 17(2) prohibits the compulsion of civilians to leave “their own territory,” “territory” is not clearly defined.<sup>128</sup> The Official Commentary acknowledges the possible translation of “territory” as “country,” but emphasizes a broader interpretation—to be that of territory under the control of an insurgent party.<sup>129</sup>

#### 4. *Applying additional Protocol II to the conflict in Kosovo*

In reality, applying Article 17 of Protocol II to the conflict in Kosovo is problematic.<sup>130</sup> If government forces specifically were not ordered to displace ethnic Albanians, or had made the necessary attempts at differentiating civilians and members of the KLA engaged in armed conflict, the Tribunal could find no violation of the Protocol.<sup>131</sup> More importantly, the drafters of Protocol II never intended individual actors to be held criminally liable under it.<sup>132</sup>

Protocol II also may be an ineffective tool to prevent internal displacement because state sovereignty is specifically preserved in Article 3.<sup>133</sup> Article 3 prohibits intervention in “legitimate” internal efforts to “re-establish law and order in the State or to defend the national unity and territorial integrity of the State.”<sup>134</sup> The threat

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of Article 17 when prosecuting ethnic cleansing as a grave breach of the Geneva Conventions).

127. See ICRC COMMENTARY, *supra* note 113, paras. 4853-54 (emphasizing that moving a dissident group cannot be justified by a need to control the group).

128. See *id.* para. 4859 (discussing the meaning of “territory” within Article 17).

129. See *id.* (stating a broader interpretation is “better suited to all the possible cases which might arise in a situation covered by Protocol II”).

130. See Sylvie Junod, *Additional Protocol II: History and Scope*, 33 AM. U. L. REV. 29, 29 (1983) (explaining the limited nature of the application of Protocol II).

131. See Protocol II, *supra* note 69, at art. 17(1) (stating that the displacement of civilians may not be ordered). Additionally, Protocol II serves to protect the “victims” of a non-international armed conflict, and not those individuals who are currently taking part in the armed conflict. See *id.* at Preamble (emphasizing “the need to ensure a better protection for the victims of armed conflicts”); see also Junod, *supra* note 130, at 29 (discussing to whom the protections of Protocol II apply and why).

132. See Roch, *supra* note 75, at 17 (arguing that the omission of forced displacement as a crime is indication of drafters’ intentions).

133. See Protocol II, *supra* note 69, at art. 3. Article 3 reads:

Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.

(2) Nothing in the Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs.

*Id.*

134. *Id.*

presented by an independence-seeking armed uprising can be considered a direct threat to "national unity and territorial integrity."<sup>135</sup>

A higher threshold than that required by common Article 3 must be met before Protocol II can be applied:<sup>136</sup> the conflict must occur between national armed forces and "dissident armed forces or other organized armed groups" that exercise control over part of the government forces' territory, that have responsible command, and that can "carry out sustained and concerted military operations."<sup>137</sup> Once these objective criteria are met, it reasonably can be expected that the parties will apply the Protocol's provisions because the needed infrastructure is in place.<sup>138</sup> In 1998, the KLA must have been an armed group sufficiently organized to adhere to the Protocol provisions.<sup>139</sup> Such organization would require a command structure.<sup>140</sup> Regular incidents of random killings by the KLA after the negotiated cease fire in October, 1998 could indicate a lack of such effective command control, without which Protocol II cannot be

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135. *See id.*

136. Protocol II's heightened threshold was in response to the fear of some states that there would be international intrusion into domestic matters. *See* Michael J. Matheson, *ASIL International Law Weekend: Panel on Internal Conflicts*, 3 I.L.S.A. J. INT'L & COMP. L. 523, 523 (1997) (explaining arguments used by nations' representatives during Geneva Diplomatic Conference before adopting the Additional Protocols to the Geneva Conventions). For example, some of the Soviet bloc countries were concerned that additional obligations for internal conflicts would give "enhanced political and legal status to insurgent groups" and would hold a state to a higher international standard than the insurgent group it fought. *See id.*; *see also* Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 554-55 (1995) (noting that states' historical insistence on non-interference by the international community in internal conflicts limits the reach of international humanitarian law).

137. Protocol II, *supra* note 69, at art. 1(1). Rebel forces must have sufficient control so as to be able to implement the Protocol, as evidenced by an ability to detain and provide humane treatment to prisoners and an ability to provide adequate care to the sick and wounded. *See* Junod, *supra* note 130, at 37 (describing elements of objective criteria that must be met for Protocol II to apply).

138. *See* Junod, *supra* note 130, at 38. This implies that insurgent armed groups must be organized, but need not have a rigid hierarchy. "Unconcerted actions of isolated individuals" will not suffice. *See id.* at 37.

139. *See* Protocol II, *supra* note 69, at art. 1(1) (describing parties to whom the Protocol is applicable).

140. *See* Junod, *supra* note 130, at 38 (asserting that insurgents must be capable of applying the Protocol, that they act under orders of a commander, and that they actually exercise control over part of the territory). Press reports indicate a command structure within the KLA. *See, e.g.,* Hedges, *supra* note 47, at A8 (recounting interview with KLA senior commander in farmhouse "headquarters" and witnessing giving of orders to guerrilla fighters); R. Jeffrey Smith, *A Turnaround in Kosovo*, WASH. POST, Nov. 18, 1998, at A34 (noting KLA checkpoints, commission of hit and run attacks on pockets of Yugoslav troops, and execution of high ranking traitors as indications of KLA organization and discipline).

applied effectively.<sup>141</sup>

Because there is no express law that prohibits internal displacement, the involuntary internal displacement of civilians is not a punishable crime within the Tribunal's prosecutorial jurisdiction. Therefore, before the Tribunal may prosecute such conduct, the civilian displacement must involve: (1) grave breaches of the Geneva Conventions; (2) war crimes; (3) crimes against humanity; or (4) genocide.<sup>142</sup> The next Part of this Comment will review each category of crimes within the jurisdiction of the International Criminal Tribunal for the Former Yugoslavia and determine whether it is possible to hold an individual criminally responsible for causing internal displacement.

### III. CREATION AND JURISDICTION OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA<sup>143</sup>

The Security Council created the Tribunal with "the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia" since 1991.<sup>144</sup> Though all sides involved in the Yugoslav conflict committed atrocities, the international community focused its concern on the Serbian armed forces.<sup>145</sup> Even after Security Council resolutions called for reports<sup>146</sup> and investigations<sup>147</sup>

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141. See Smith, *supra* note 140.

142. See Tribunal Statute, *supra* note 64, at art. 2-5, reprinted in SCHARF, *supra* note 27, at app. B (codifying subject matter jurisdiction of the Tribunal).

143. See generally SCHARF, *supra* note 27, at 51 (recounting the creation of the Tribunal and its first trial).

144. See S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., at para. 2, U.N. Doc S/RES/827 (1993).

145. See Christopher C. Joyner, *Enforcing Human Rights Standards in the Former Yugoslavia: The Case for an International War Crimes Tribunal*, 22 DENV. J. INT'L L. & POL'Y 235, 236 (1994) (noting that the Serbian practice of ethnic cleansing has "propelled international humanitarian concern to the forefront of these conflicts"). Regular media reports of continuing atrocities fueled the public's demand for an international response. See Dusan Cotić, *A Critical Study of the International Tribunal for the Former Yugoslavia*, 5 CRIM. L.F. 223, 231 (1994) (asserting that the "media war" had a critical influence in spurring the U.N. to take preventive measures, even though, in author's opinion, the media held an anti-Serb bias).

146. See S.C. Res. 771, U.N. SCOR, 47th Sess., 3106th mtg., para. 5, U.N. Doc. S/RES/771 (1992) (calling on all states and involved humanitarian organizations to collate "substantiated information" regarding violations of humanitarian law and make information available to Security Council).

147. See S.C. Res. 780, U.N. SCOR, 47th Sess., 3119th mtg., para. 2, U.N. Doc. S/RES/780 (1992) (requesting that the Commission of Experts be established for purposes of investigating violations of humanitarian law in the former Yugoslavia). See generally Bassiouni, *supra* note 62, at 1202 (discussing experiences and problems in investigating violations of humanitarian law and using the former Yugoslavia as an example); see also M. Cherif Bassiouni, *The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780*, 88 AM. J. INT'L L. 784, 789-92

of alleged violations of international humanitarian law, many commentators doubted whether national judicial systems within the former Yugoslavia could be effective and impartial.<sup>148</sup> Consequently, the Security Council passed Resolution 808 in February, 1993, which ultimately recognized the occurrence of serious violations of international humanitarian law.<sup>149</sup> The Security Council authorized the creation of a tribunal in order to “put an end to such crimes and to take effective measures and bring to justice the persons who are responsible for them” and to “contribute to the restoration and maintenance of peace.”<sup>150</sup> As of August, 1999, the International Tribunal publicly indicted eighty suspects for committing war crimes and crimes against humanity during the Bosnia war.<sup>151</sup>

In his report on the formation of the Tribunal, the Secretary-General recommended limiting the applicable law to the rules of customary international law governing war crimes and crimes against humanity.<sup>152</sup> The rules of customary international humanitarian law

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(1994) (describing Commission of Experts' unprecedented authority to investigate alleged atrocities in the former Yugoslavia compared with prior commissions formed after World War I and World War II).

148. See O'Brien, *supra* note 62, at 639.

149. See S.C. Res. 808, U.N. SCOR, 48th Sess., 317th mtg., para. 1, U.N. Doc. S/RES/808 (1993) (authorizing the establishment of an ad hoc international criminal tribunal).

150. See *id.* Security Resolution 808 also requested the Secretary-General to submit a report detailing “all aspects of th[e] matter, including specific proposals” for “expeditious implementation” of the Security Council’s decision to create an *ad hoc* international tribunal. *Id.* para. 2.

151. See Jennifer Hentz, *News from the International War Crimes Tribunals*, 6 HUM. RTS. BRIEF, Fall 1998, at 7, 7 (summarizing current status of matters pending before the Tribunal). The public indictments included 59 Serb defendants, three Muslim defendants, and 18 Croat defendants, but only 33 indictees were in custody. See *id.*

152. See *Report on Establishing an International Tribunal*, *supra* note 86, para. 34, reprinted in 32 I.L.M. 1159, 1170 (1993) (asserting that the choice of customary law, over the law of any particular state, avoids the problem of conflicting laws of the various states); see also International Crim. Tribunal for the Former Yugo., *List of Indictments and Indictees* (visited Aug. 2, 1999) <<http://www.un.org/icty/BLS/ind.htm>>. Limiting the applicable law to international customary law served a dual purpose. First, it avoided future challenges involving state succession to treaties. See MORRIS & SCHARF *supra* note 43, at 51-52 (discussing how the Secretary-General’s choice of law strengthens Tribunal decisions by providing firm legal standards). State succession occurs when there is a replacement of one state by another “in respect of sovereignty over a given territory.” Brownlie, *supra* note 100, at 654 (discussing issues that arise from state succession). When state succession occurs, questions arise regarding whether the new state has succeeded to treaties, or other international agreements, signed by the prior state. See *id.* But when such agreements or multilateral conventions are declaratory of international customary law, the successor state is automatically bound. See *id.* at 669.

Second, the Secretary-General’s recommendation of applying only customary law was in accordance with the legal principle *nullem crimen sine lege*, meaning “no one shall be tried for an act which was not forbidden by law at the time when it was committed.” See *Report on Establishing an International Tribunal*, *supra* note 86, para. 34, reprinted in 32 I.L.M. 1159, 1170 (1993) (explaining meaning of the principle and

were put forth, according to the Secretary-General,<sup>153</sup> in the Geneva Convention for the Protection of War Victims of August 12, 1949;<sup>154</sup> the Fourth Hague Convention Respecting the Laws and Customs of War on Land and annexed Regulations of October 18, 1907;<sup>155</sup> the Convention on the Prevention and Punishment of the Crime of Genocide of December 9, 1948;<sup>156</sup> and the Nuremberg Charter of August 8, 1945.<sup>157</sup> These documents provide the legal foundation on which the Tribunal determines whether war crimes or crimes against humanity occurred.<sup>158</sup> A prohibition against internal displacement must be found within one of these documents for the Tribunal to hold a head of state, such as Slobodan Milosevic, criminally responsible for the internal displacement of thousands of Kosovars.

After a brief discussion of the principle of individual criminal responsibility, each crime within the Tribunal's jurisdiction will be applied to the crisis of internal displacement in Kosovo during 1998 to determine whether individuals can be held criminally responsible.

#### A. *Individual Criminal Responsibility*

The Nuremberg Treaty and Judgment, which established the individual responsibility of Nazi leaders for acts committed during World War II, solidified the principle that an individual who orders the commission of a war crime is equally guilty for the offense as the

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its impact on choice of law to be applied by the Tribunal); *see also* MORRIS & SCHARF, *supra* note 43, at 71 (describing the applicable law used by the Tribunal as not solely limited to those crimes enumerated in the statute); Meron, *supra* note 112, at 79 (asserting the choice of law deemed applicable and incorporated into the Tribunal's statute solidified international humanitarian law as customary law).

153. *See Report on Establishing an International Tribunal, supra* note 86, para. 35, *reprinted in* 32 I.L.M. 1159, 1170 (1993) (concluding which rules constitute customary international law).

154. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention of the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative To The Protection of Civilian Persons In Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

155. Convention (IV) Respecting the Laws and Customs of War on Land, with Annex of Regulations, Oct. 18, 1907, 36 Stat. 2277, 207 Consol. T.S. 277.

156. *See* Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* Dec. 9, 1948, 78 U.N.T.S. 277 (commanding that genocide is a crime under international law and establishing individual criminal liability).

157. *See* Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

158. *See Report on Establishing an International Tribunal, supra* note 86, para. 37, *reprinted in* 32 I.L.M. 1159, 1170 (1993) (declaring that the Geneva conventions constitute the basis of the applicable international customary law for the tribunal).

one who directly committed the act.<sup>159</sup> To ensure the criminal responsibility of those in the chain of command who indirectly contributed to the commission of war crimes or crimes against humanity,<sup>160</sup> the Secretary-General, in proposing Article 7 of the Tribunal's statute, stated that "all persons who participate in the planning, preparation, or execution of serious violations of international humanitarian law" contribute to the commission of the crime and, therefore, are individually responsible for its commission.<sup>161</sup> Individuals in positions of authority, such as Slobodan Milosevic, can be criminally liable for acts committed by persons under his command.<sup>162</sup> Such acts, which must constitute crimes within the Tribunal's jurisdiction, are the subject of the following sections.

### B. Grave Breaches of the Geneva Conventions

#### 1. What are grave breaches?

The first category of crimes within the Tribunal's jurisdiction is "grave breaches" of the Four Geneva Conventions of 1949. Article 2 of the Tribunal's statute gives it jurisdiction over such breaches.<sup>163</sup> According to the statute, grave breaches include willful killings, willful causation of great suffering, willful infliction of serious bodily injury, extensive unlawful and wanton destruction of property not justified by military necessity, and "unlawful deportation or transfer."<sup>164</sup> This would appear to provide the Tribunal with unquestioned ability to prosecute individuals for internal

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159. See Joyner, *supra* note 145, at 241 (reviewing principles emerging from the Nuremberg Military Tribunal).

160. See MORRIS & SCHARF, *supra* note 43, at 93 (noting the principle of individual criminal responsibility ensures that all individuals who contributed to a crime's commission are held accountable).

161. See *Report on Establishing an International Tribunal*, *supra* note 86, para. 54, reprinted in 32 I.L.M. 1159, 1174 (1993) (articulating the Secretary-General's belief that individuals must be held personally liable for their actions).

162. As stated by the Secretary-General,

[t]his imputed responsibility or criminal negligence is engaged if the person in superior authority knew or had reason to know that his subordinates were about to commit or had committed crimes and yet failed to take the necessary and reasonable steps to prevent or repress the commission of such crimes or to punish those who had committed them.

*Id.* para. 56, reprinted in 32 I.L.M. 1159, 1175 (1993). The Security Council affirmed this principle in its resolution regarding the conflict in the former Yugoslavia. See S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., para. 2, U.N. Doc. S/Res 827 (1993).

163. See Tribunal Statute, *supra* note 64, at art. 2, reprinted in SCHARF, *supra* note 27, at app. B.

164. See *id.*, reprinted in SCHARF, *supra* note 27, at app. B.



displacement. Upon evaluating the legitimacy of its jurisdiction, however, the Appeals Chamber of the Tribunal concluded, through an assessment of the current status of customary international law, that the crime of "grave breaches" only can apply to acts that occur within the context of an international armed conflict.<sup>165</sup> While recognizing a trend towards applying grave breaches of the Geneva Conventions to internal armed conflicts, the Appeals Chamber was reluctant to hold this application as *opinio juris* of States.<sup>166</sup>

2. *Does the internal displacement of Kosovar citizens constitute a grave breach?*

As previously stated, before an act can be considered a grave breach of the Geneva Conventions, the act in question must have occurred during an international conflict.<sup>167</sup> It is unlikely that the armed conflict in the Kosovo province will be considered by the Tribunal to be international in nature. According to common Article 2 of the Four Geneva Conventions, an international armed conflict must involve a declaration of war or an armed conflict between two or more states.<sup>168</sup> The conflict in Kosovo did not involve two states at war with one another. The fighting clearly was contained within the national boundaries of the Federal Republic of Yugoslavia. As a consequence, no suspect could be held responsible for grave

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165. See Prosecutor v. Tadic, Case No. IT-94-1-AR72, para. 84 (Int'l Crim. Trib. Former Yugo., App. Chamber, 1995), reprinted in 35 I.L.M. 32, 60 (1996) (noting that although there is a trend toward the application of grave breaches of the Geneva Conventions to internal conflicts, the current practice of states is insufficient to justify a finding that grave breaches occur in internal conflicts as well as international armed conflicts).

166. See *id.* *Opinio juris* generally refers to a general practice of states and the subjective belief by a state that it is following this general practice because of an international legal obligation. See North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.) (Feb. 20), 1969 I.C.J. 3, 46 (holding elements of *opinio juris* and significance of *opinio juris* in formation of international law). *Opinio juris* is one element of international customary law. See Brownlie, *supra* note 100, at 7 (explaining the concept of *opinio juris* as utilized in the statute of the International Court).

167. See Prosecutor v. Tadic, Case No. IT-94-1-AR72, para. 84 (Int'l Crim. Trib. Former Yugo., App. Chamber, 1995), reprinted in 35 I.L.M. 32, 60 (1996).

168. Common Article 2 of the Four Geneva Conventions reads, in part:

[T]he present Convention shall apply to all cases of declared war or of any other armed conflict that may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations.

Fourth Geneva Convention, *supra* note 101, at art. 2.

breaches of the Geneva Conventions for acts committed in Kosovo, particularly the grave breach of forced deportation or transfer.

### C. Crimes Against Humanity

#### 1. What are crimes against humanity?

The second category of crimes within the jurisdiction of the Tribunal is crimes against humanity.<sup>169</sup> According to the Tribunal's judges, crimes against humanity are "serious acts of violence [that] harm human beings by striking what is most essential to them: their life, liberty, physical welfare, health, and dignity. It is therefore the concept of humanity as victim which essentially characterizes crimes against humanity."<sup>170</sup> The offenses listed as crimes against humanity<sup>171</sup> in Article 5 of the Tribunal's statute are derived from Article 6 of the Nuremberg Charter, with the addition of rape<sup>172</sup> and torture.<sup>173</sup>

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169. See Tribunal Statute, *supra* note 64, at art. 5, *reprinted in* SCHARF, *supra* note 27, at app. B (establishing the Tribunal's power to prosecute persons for such crimes).

170. See Prosecutor v. Jean Kabmanda, Case No. ICTR 97-23-S, para. 15 (Int'l Crim. Trib. for Rwanda, 1997), *reprinted in* 37 I.L.M. 1411, 1417 (1998) (quoting the International Criminal Tribunal for the Former Yugoslavia) (citations omitted).

171. These offenses include "murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial or religious grounds, and other inhumane acts." Tribunal Statute, *supra* note 64, at art. 5, *reprinted in* SCHARF, *supra* note 27, at app. B. Examples of crimes against humanity in indictments thus far include: murder, torture, serious physical assault, imprisonment and persecution of more than 500 civilians, and endangering the health and welfare of detainees by providing inhumane living conditions. See Prosecutor v. Nikolic, Case No. IT-94-2, paras. 8.1-23.1 (Indictment, Nov. 7, 1994) (Int'l Crim. Trib. for the Former Yugo., 1994), *reprinted in* 34 I.L.M. 996, 1002-09 (1995) (charging Nikolic with multiple crimes against humanity, grave breaches, and violations of laws and customs of war). In addition, the Tribunal has included targeting of political leaders, intellectuals, and professionals; shelling and other attacks on civilians; destruction of homes, businesses, and places of worship; and appropriation and plunder of real and personal property. See Prosecutor v. Karadzic, Case No. IT-95-5 (Indictment, July 24, 1995) (Int'l Crim. Trib. for the Former Yugo., 1995), *available in* <<http://www.un.org/icty/indictment/english/ind-e.htm>> (charging Karadzic and Mladic with crimes against humanity as set out by Article 5 of Tribunal's statute).

172. Rape and sexual assault are crimes under municipal law and international criminal law. See BASSIOUNI & MANIKAS, *supra* note 85, at 557 (explaining historical and legal developments supporting the inclusion of rape as a crime against humanity within Tribunal's jurisdiction). Much legal analysis and commentary has been written regarding the prosecution of rape as a war crime. See *generally* MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA-HERZEGOVINA (Alexandra Stiglmyer ed., 1994) (providing factual accounts and essays about rape in time of war); Theodore Meron, *Rape as a Crime Under International Humanitarian Law*, 87 AM. J. INT'L L. 424 (1993) (advocating increased recognition of rape as war crime or grave breach under international humanitarian law); Diane Orentlicher, *Sexual Assault Issues Before the War Crimes Tribunal*, HUM. RTS. BRIEF, Winter 1997, at 8, 8-9 (recounting brief history of rape prosecutions and highlighting practical challenges of obtaining evidence and achieving arrest).

173. See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, 23 I.L.M. 1027 (1984), *modified*, 24

Crimes against humanity can occur domestically, within a country's borders, or internationally, across state lines.<sup>174</sup> The alleged acts must be aimed at a civilian population.<sup>175</sup> The acts also must be committed as part of a widespread or systematic attack<sup>176</sup> on national, political, ethnic, religious, or racial grounds.<sup>177</sup> Discriminatory intent is an essential element of these crimes.<sup>178</sup> Although the crimes in question must involve a "course of conduct," a single act can constitute a crime against humanity if it can be linked to a widespread or systematic attack against a civilian population.<sup>179</sup> There need not be a formal policy to commit crimes against humanity, as a "policy" may be inferred from the widespread and systematic nature of the acts.<sup>180</sup> In addition, "the perpetrator must have knowledge of the wider context in which his act occurs."<sup>181</sup> In other words, the act must be part of a

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I.L.M. 535 (1985) (prohibiting torture as a means to promote the U.N. principle of universal respect for human rights).

174. See *Report on Establishing an International Tribunal*, *supra* note 86, at para. 47 n.9, reprinted in 32 I.L.M. 1159, 1173 (1993) ("[P]rohibitions contained in common article 3 of the 1949 Geneva Conventions cannot be breached in an armed conflict, regardless of whether it is international or internal in character.") (citing *Nicaragua v. United States*, 1986 I.C.J. 14 (June 27, 1986)).

175. See *id.* para. 47 (defining fundamental characteristics of crimes against humanity). The Tribunal has given a broad interpretation as to who constitutes a civilian under this article. See Theodor Meron, *War Crimes Law Comes of Age*, 92 AM. J. INT'L L. 462, 464 (1998) (discussing Tribunal's broad interpretation of "civilian"). People "actively involved in a resistance movement" can qualify as victims of crimes against humanity, as shown in one matter in which resistance fighters put down their arms. See *Prosecutor v. Mile Mrksic, Radic & Sljivancanin*, Case No. 95-13-R61 (Int'l Crim. Trib. for the Former Yugo., 1996), cited in Meron, *supra*, at 464 (determining that resistance fighters not actively participating in an armed conflict can be considered "civilians" for purposes of the statute's article).

176. See *Secretary-General's Report*, *supra* note 86, para. 48, reprinted in 32 I.L.M. 1159, 1173 (1993) (defining scope of crimes against humanity). The "or" was strongly supported by the Tribunal in both the 1997 Tadic case and the 1996 Mrksic, Radic & Sljivancanin case. See Meron, *supra* note 175, at 464-65 (emphasizing Tribunal's role in clarifying definition of crimes against humanity).

177. See *Report on Establishing an International Tribunal*, *supra* note 86, at para. 48, reprinted in 32 I.L.M. 1159, 1173 (1993) (noting that "such inhumane acts have taken the form of so-called 'ethnic cleansing'" in the former Yugoslavia).

178. See *Prosecutor v. Tadic*, Case No. IT-94-1-T, para. 651 (Int'l Crim. Trib. for the Former Yugo., 1997), reprinted in 36 I.L.M. 908, 944 (1997) (adopting requirement of discriminatory intent for all crimes of humanity under Article 5 of the Statute).

179. See *id.* para. 649, reprinted in 36 I.L.M. 908, 943 (1997) (holding that a single act, as part of a widespread, systematic attack against a civilian population, may constitute a crime against humanity).

180. See *id.* para. 653, reprinted in 36 I.L.M. 908, 944 (1997) (finding that a policy pursued against a group of people can be "deduced from the way in which the acts occur"). In addition, the Tribunal does not require a state policy of committing crimes against humanity as did the Nuremberg Tribunal. See Meron, *supra* note 175, at 465 (explaining that customary law now includes organized groups that may have gained *de facto* control over defined territory).

181. *Prosecutor v. Tadic*, Case No. IT-94-1-T, paras. 624-659 (Int'l Crim. Trib. for the Former Yugo., 1997), reprinted in 36 I.L.M. 908, 937-46 (1997) (establishing the

widespread, discriminatory attack, and the perpetrator must be aware of his act as only one of many committed against similar victims.

2. *Does the internal displacement in Kosovo constitute a crime against humanity?*

Article 6(c) of the Nuremberg Charter included deportation as a crime against humanity, but did not include internal displacement.<sup>182</sup> Use of the word “deportation” appears to denote a purposeful governmental action and policy of transferring people across national boundaries. The Prosecutor of the Tribunal included forcible transfer of persons during the Yugoslav War in indictments for crimes against humanity, alleging persons were

systematically arrested and interned in detention facilities . . . and thereafter unlawfully deported or transferred to locations inside and outside of the [state] . . . civilians, including women, children, and elderly persons, were taken directly from their homes and eventually used in prisoner exchanges . . . these deportations and others were not conducted as evacuations for safety, military necessity, or for any other lawful purpose, and have . . . resulted in a significant reduction or elimination of Bosnia Muslims and Bosnia Croats in certain occupied regions.<sup>183</sup>

In other words, only if the Yugoslav government practiced forced relocation during 1998, could an individual be held criminally responsible for population transfer. Because no evidence existed that the Yugoslav government forcibly relocated or deported ethnic Albanians in Kosovo during the time period in question, the Tribunal could not convict Slobodan Milosevic for the internal displacement of Kosovo citizens as a crime against humanity.<sup>184</sup>

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Tribunal's conditions of applicability for crimes against humanity).

182. See de Zayas, *supra* note 69, at 221 (asserting that prohibition of mass deportations as crimes against humanity also would apply to civil wars).

183. Prosecutor v. Karadzic, Case No. IT-95-5, para. 25 (Indictment, July 24, 1995) (Int'l Crim. Trib. for the Former Yugo., 1995), available in <<http://www.un.org/icty/indictment/english/ind-e.htm>>.

184. The specific acts that created internal displacement might be successfully prosecuted as crimes against humanity, but not because they caused internal displacement, which is the focus of this Comment. The number of attacks on Kosovar civilians, and the proportion of the population that was displaced as a result of those attacks, demonstrates the widespread and systematic character of governmental actions. That the vast majority of internally displaced persons were of Albanian ethnicity shows a probable discriminatory intent on the part of the Serb-controlled Yugoslav government. Nevertheless, the number of displaced persons might include those who fled their homes in fear of being attacked, but who were not actually attacked.

### D. Genocide

#### 1. What is genocide?

The Tribunal has jurisdiction to investigate and prosecute individuals suspected of committing genocide.<sup>185</sup> In 1993, the Secretary-General declared the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”) to be customary international law, citing an advisory opinion by the International Court of Justice.<sup>186</sup> Although the Genocide Convention indicates that genocide can occur at any time during war or peace,<sup>187</sup> the Tribunal’s subject-matter jurisdiction for this crime is confined to genocidal acts during armed conflict.<sup>188</sup> Those who commit genocide can be held liable regardless of whether they are “constitutionally responsible rulers, public officials or private individuals.”<sup>189</sup> Two essential elements compose the crime of genocide: (1) a prohibited act,<sup>190</sup> and (2) the specific intent to destroy “in whole or in part, a national, ethnic, racial or religious group.”<sup>191</sup> Acts cannot be sporadic

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185. See Tribunal Statute, *supra* note 65, at art. 4, reprinted in SCHARF, *supra* note 27, at app. B (setting out acts that could constitute genocide). Article 4 of the Tribunal’s statute states:

2. 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. 3. The following acts shall be punishable: (a) genocide, (b) conspiracy to commit genocide, (c) direct and public incitement to commit genocide, (d) attempt to commit genocide, (e) complicity in genocide.

*Id.*

186. See *Report on Establishing an International Tribunal*, *supra* note 86, at para. 45, reprinted in 32 I.L.M. 1159, 1173 (1993) (citing Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 23 (May 28)). Article IX of the Genocide Convention provides for disputes involving interpretation or application of the Convention to be referred by a party to the dispute to the International Court of Justice. See *Convention on the Prevention and Punishment of the Crime of Genocide*, adopted Dec. 9, 1948, art. IX, 78 U.N.T.S. 278 (1951) [hereinafter *Genocide Convention*] (granting limited jurisdiction to International Court of Justice).

187. *Genocide Convention*, *supra* note 186, at art. I (confirming genocide as a crime under international law).

188. The Tribunal’s jurisdiction is limited because of its creation under the U.N. Security Council’s Chapter VII powers. See MORRIS & SCHARF, *supra* note 43, at 83-84 (discussing reasons why the Tribunal’s subject-matter jurisdiction over crimes against humanity is limited to armed conflicts).

189. See *Genocide Convention*, *supra* note 186, at art. IV.

190. See *id.* art. II (listing prohibited acts).

191. Tribunal Statute, *supra* note 64, at art. 4(2), reprinted in SCHARF, *supra* note 27, at app. B. Article 4 of the International Tribunal’s statute was taken verbatim from Articles 2 and 3 of the *Genocide Convention*. See *Report on Establishing an*

or coincidental, and must be carried out by an organized group controlled by an official policy.<sup>192</sup> At this writing, the Tribunal has yet to convict anyone of genocide.<sup>193</sup>

## 2. *Does the internal displacement in Kosovo constitute genocide?*

The Genocide Convention contains no specific provision regarding internal displacement or forced transfer of civilians.<sup>194</sup> Thus, a factual, rather than legal, assessment of the displacement of ethnic Albanians controls the Tribunal's determination of whether acts were committed with the intent to destroy the ethnic Albanian population. The fact that ethnic Albanians constitute a large majority within the province of Kosovo<sup>195</sup> makes the number of people displaced in 1998 significant. Arguably, the condition of internal displacement can prevent births, cause serious bodily or mental harm, and bring about a group's physical destruction.<sup>196</sup> Genocide, however, requires a "specific invidious intent"<sup>197</sup> to destroy a group, not simply an intent

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*International Tribunal*, *supra* note 86, at paras. 45-46, *reprinted in* 32 I.L.M. 1159, 1173 (1993) (referring authoritatively to the Genocide Convention).

192. See MORRIS & SCHARF, *supra* note 43, at 87 (citing an example where evidence of organized, non-sporadic ethnic cleansing sufficiently established systematization).

193. Milan Kovacevic, Vice President of the Serbian Democratic Party's Crisis Staff of Prijedor, became the first suspect tried for genocide. His trial began July 6, 1998. See *generally* Prosecutor v. Kovacevic, Case No. IT-97-24 (Initial Indictment March 13, 1997) (Int'l Crim. Trib. for the Former Yugo., 1997), *available in* <<http://www.un.org/icty/indictment/ind-e.htm>>; Prosecutor v. Kovacevic, Case No. IT-97-24 (First Amendment June 23, 1998) (Int'l Crim. Trib. for the Former Yugo., 1997), *available in* <<http://www.un.org/icty/indictment/ind-e.htm>>.

The first judgment by an international court for the crime of genocide occurred September 2, 1998, when the International Criminal Tribunal for Rwanda found Jean-Paul Akayesu guilty of nine counts of genocide. See Prosecutor v. Akayesu, Case No. ICTR-96-4-T, paras. 51-55 (Int'l Crim. Trib. for Rwanda 1998), *reprinted in* 37 I.L.M. 1399, 1408 (1998). The Trial Chamber found that Akayesu intended to eradicate the Tutsi group as a whole, since even newborn babies were victims of the killing. *Id.* para. 17. The majority of victims were non-combatants. *Id.* para. 19. The Trial Chamber also found that Akayesu incited genocide in a public gathering by calling on those in attendance to work together to eliminate the sole enemy, Tutsis. *Id.* para. 29. Akayesu also was found guilty of superior criminal responsibility. *Id.* paras. 26, 32, 34. For a summary of the judgment, see International Criminal Tribunal for Rwanda, Press Release, *Rwanda Int'l Crim. Trib. Pronounces Guilty Verdict in Historic Genocide Trial* (Sept. 2, 1998) <<http://www.un.org/icty/english/pressrel/PR138.htm>>.

194. See Genocide Convention, *supra* note 186, at arts. I-XIX (stating provisions for prosecution of crime of genocide).

195. See O'Connor, *supra* note 51, at A3 (reporting that 90% of the population of Kosovo is ethnic Albanian).

196. See *id.* (quoting U.N. officials regarding the serious health problems confronting the ethnic Albanian refugees).

197. Christopher L. Blakesley, *Atrocity and Its Prosecution: The Ad Hoc Tribunals for the Former Yugoslavia and Rwanda*, in *THE LAW OF WAR CRIMES: NATIONAL AND INTERNATIONAL APPROACHES* 189, 209 (Timothy L. H. McCormack & Gerry Simpson eds., 1997).

to kill.<sup>198</sup> If Tribunal defendants can demonstrate that armed efforts were made in 1998 to regain territory that KLA forces previously seized, and not to destroy ethnic Albanians, the requisite mens rea would not be present.<sup>199</sup> Without clear proof of the requisite intent, the internal displacement of Kosovo civilians does not constitute genocide.

### *E. Violations of Laws and Customs of War*

#### *1. What is a violation of laws and customs of war?*

Article 3 of the Tribunal Statute provides the Tribunal jurisdiction over war crimes<sup>200</sup> involving acts committed in violation of the laws or customs of war.<sup>201</sup> This article is grounded in international humanitarian law and the laws of armed conflict, both of which are in part embodied in the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land and Annexed Regulations.<sup>202</sup> The Nuremberg Tribunal recognized the 1907 Hague Convention as declaratory of international customary law.<sup>203</sup> The Nuremberg Tribunal also determined that violations of these laws constituted crimes for which persons could be held individually responsible.<sup>204</sup>

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198. *See id.* (discussing difficulties in proving genocide in Rwandan and Former Yugoslav Tribunals).

199. *See* O'Connor, *supra* note 51, at A3 (reporting a government-led offensive was announced as "a fairly limited operation to reclaim major roads from rebel control").

200. The term "war crime" refers both to the specific crime of violating the laws and customs of war, as well as to the general category of international crimes encompassing violations of the four Geneva Conventions. *See* 3 INTERNATIONAL CRIMINAL LAW 5 (M. Cherif Bassiouni ed., 1987) (explaining that differentiation of the specific term "war crimes" from the general category of war crimes was a necessary outgrowth of Nuremberg once the new crime of "crimes against humanity" was created).

201. *See* Tribunal Statute, *supra* note 64, at art. 3, *reprinted in* SCHARF, *supra* note 27, at app. B (listing violations of the laws or customs of war). Article 3 states that:

Such violations shall include, but not be limited to: (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering; (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity; (c) attack or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings; (d) seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; (e) plunder of public or private property.

*Id.*

202. Hague Convention (IV) Respecting the Laws and Customs of War on Land and annexed Regulations, Oct. 18, 1907, 36 Stat. 227, T.S. No. 539.

203. *See Report on Establishing an International Tribunal, supra* note 86, at para. 42, *reprinted in* 32 I.L.M. 1159, 1171 (1993) (explaining that the Nuremberg Tribunal recognized provisions of Hague Regulations as declaratory of current laws and customs of war).

204. *See* MORRIS & SCHARF, *supra* note 43, at 69-70 (describing legal precedents supplied by Nuremberg Charter and subsequently applied by the Nuremberg

Violations of the laws and customs of war are acts that violate the rules of armed conflict established by international customary law.<sup>205</sup> Alleged crimes must be committed during an internal or international armed conflict.<sup>206</sup> Article 3 of the Tribunal's Statute can be used to address violations of international humanitarian law that do not fall under the other articles of the Tribunal's subject-matter jurisdiction, i.e., genocide, crimes against humanity, and grave breaches of the Geneva Conventions.<sup>207</sup>

Common Article 3 of the Four Geneva Conventions and Additional Protocol II also fall under Article 3 of the Tribunal Statute.<sup>208</sup> Examples of acts committed during the Yugoslav War determined to be violations of the laws or customs of war, as recognized by common Article 3 of the Geneva Conventions, include the following: torture and physical beatings as punishment<sup>209</sup> and during interrogations,<sup>210</sup> physical assaults,<sup>211</sup> willful killing,<sup>212</sup> enslavement,<sup>213</sup> plunder of civilian private property,<sup>214</sup> destruction of sacred sites,<sup>215</sup> use of civilians as human shields,<sup>216</sup> and deliberate civilian attacks,<sup>217</sup> through sniper

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Tribunal).

205. See Joyner, *supra* note 145, at 238 (defining war crimes).

206. See Prosecutor v. Tadic, Case No. IT-94-1-AR72, para. 86 (Int'l Crim. Trib. for the Former Yugo., App. Chamber, 1995), *reprinted in* 35 I.L.M. 32, 60 (1996) (noting that "violations of the laws or customs of war" originally was a term of art referring to the previously prevailing "laws of warfare" concept; today, however, the phrase refers to armed conflict and the idea of an international law of armed conflict).

207. See *id.*, *reprinted in* 35 I.L.M. 32, 60 (1996) ("Article 3 may be taken to cover all violations of international humanitarian law other than the 'grave breaches' of the four Geneva Conventions falling under Article 2 (or, for that matter, the violations covered by Articles 4 and 5 [of the Tribunal Statute]).").

208. See Tribunal Statute, *supra* note 64, at art. 3, *reprinted in* SCHARF, *supra* note 27, at app. B (identifying violations of laws and customs of war).

209. See Prosecutor v. Krnojelac, Case No. IT-97-25-I, paras. 5.13-5.16 (Indictment, June 17, 1997) (Int'l Crim. Trib. for the Former Yugo., 1997), *available in* <<http://www.un.org/icty/indictment/english/60697-25.htm>> detailing Krnojelac's offenses and citing relevant authority for their prosecution).

210. See *id.* paras. 5.17 - 5.26 (citing eight instances of such torture).

211. See Prosecutor v. Nikolic, Case No. IT-94-2-R61, paras. 3.4, 8.4, 9.2, 11.2, 14.2, 15.2, 16.2, 17.2, 18.2, 19.2 (Int'l Crim. Trib. for the Former Yugo., 1994), *reprinted in* 34 I.L.M. 996, 999, 1002-07 (1995) (citing multiple physical assaults as violations of the laws or customs of war).

212. See Prosecutor v. Krnojelac, Case No. IT-97-25-I, paras. 5.27-5.29 (Indictment, June 17, 1997) (Int'l Crim. Trib. for the Former Yugo., 1997), *available in* <<http://www.un.org/icty/indictment/ine-e.htm>> (finding Krnojelac guilty of willful killing).

213. See *id.* paras. 5.36-5.41 (charging Krnojelac with crimes of forced labor during the Yugoslav War).

214. See Prosecutor v. Karadzic, Case No. IT-95-5, paras. 27-28 (Indictment, July 24, 1995) (Int'l Crim. Trib. for the Former Yugo., 1995), *available in* <<http://www.un.org/icty/indictment/english/ine-e.htm>>.

215. See *id.* paras. 36-39.

216. See *id.* paras. 47-48 (recounting examples of using humans as shields).

217. See Prosecutor v. Blaskic, Case No. IT-95-14, para. 8 (Second Amended



fire, mortars, rockets, and artillery.<sup>218</sup> At this writing, the Tribunal Prosecutor has not filed charges for violations of the laws and customs of war based on Additional Protocol II.<sup>219</sup>

The Appeals Chamber of the Tribunal enumerated conditions that must be fulfilled for an act to constitute a violation of the laws and customs of war under Article 3.<sup>220</sup> First, the act must be in violation of a rule of international humanitarian law.<sup>221</sup> Second, the rule violated must be “customary in nature” or belong to a treaty to which the State of the accused is a party.<sup>222</sup> Third, the violation must be a breach of a rule “protecting important values” and involve “grave consequences for the victim.”<sup>223</sup> Fourth, customary or conventional law must provide for individual criminal responsibility if an individual violates the rule.<sup>224</sup>

2. *Is the internal displacement in Kosovo a violation of laws and customs of war?*

The International Criminal Tribunal has held that Article 3 is a “catch-all” for violations of international humanitarian laws that do not fall within the ambit of other statutory provisions dealing with grave breaches, genocide, or crimes against humanity.<sup>225</sup> This includes violations of common Article 3 and appears to include violations of Additional Protocol II.<sup>226</sup> In supporting inclusion of

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Indictment, April 25, 1997) (Int'l Crim. Trib. for the Former Yugo., 1997), *available in* <<http://www.un.org/icty/indictment/english/ine-e.htm>> (accusing Blaskic of planning and ordering civilian attacks).

218. *See* Prosecutor v. Karadzic, Case No. IT-95-5, para. 36 (Indictment, July 24, 1995) (Int'l Crim. Trib. for the Former Yugo., 1995), *available in* <<http://www.un.org/icty/indictment/english/ine-e.htm>> (alleging the shelling of civilian gatherings and the terrorizing of Sarajevo civilians through the use of sniper fire).

219. *But see* Prosecutor v. Akayesu, Case No. ICTR-96-4-T, paras. 49 (Int'l Crim. Trib. for Rwanda, 1998), *reprinted in* 37 I.L.M. 1399, 1407 (1998) (holding that Additional Protocol II supports and complements common Article 3, which is part of international customary law and, therefore, relevant in similar decisions).

220. *See* Prosecutor v. Tadic, Case No. IT-94-1-AR72, paras. 94-95 (Int'l Crim. Trib. for the Former Yugo., App. Chamber, 1995), *reprinted in* 35 I.L.M. 32, 62 (1996) (stating the requirements that must be met for a violation to be subject to Tribunal prosecution regardless of whether the armed conflict is international or domestic in nature).

221. *See id.*, *reprinted in* 35 I.L.M. 32, 62 (1996).

222. *See id.*, *reprinted in* 35 I.L.M. 32, 62 (1996) (requiring that if the rule is in a treaty it must be “unquestionably binding” on the party and not a derogation from international customary law in order for conviction to hold).

223. *Id.*, *reprinted in* 35 I.L.M. 32, 62 (1996).

224. *See id.*, *reprinted in* 35 I.L.M. 32, 62 (1996).

225. *See id.*, *reprinted in* 35 I.L.M. 32, 62 (1996) (stating Article 3 of the Tribunal statute covers violations of humanitarian law not covered by other articles of the statute).

226. *See id.*, *reprinted in* 35 I.L.M. 32, 61 (stating Article 3 is a “general clause” that

Protocol II, then-Ambassador to the United Nations Madeline Albright stated on record that the Tribunal's jurisdiction over internal conflicts included violations of common Article 3 and Additional Protocol II.<sup>227</sup> The Tribunal must assess the status of each applicable provision of Protocol II to determine if the Protocol in its entirety has attained the status of customary international law.

As stated above, the Appeals Chamber established the requirements that an international rule must satisfy before a breach of that rule would violate the law and customs of war. First, the international humanitarian law or rule allegedly violated must be customary law or belong to a treaty to which the state is a party.<sup>228</sup> To address this requirement, the FRY has asserted succession to the Socialist Federal Republic of Yugoslavia ("SFRY").<sup>229</sup> Assuming this is legally valid, Protocol II could be binding on FRY in light of the SFRY Parliament's ratification of both Additional Protocols in 1978<sup>230</sup> and the SFRY constitutional provision, which dictates the application of international treaties in domestic courts.<sup>231</sup>

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covers "violations of common Article 3 [of the Geneva Conventions] and other customary rules on internal conflicts").

227. See U.N. SCOR, 48th Sess., 215th mtg., U.N. Doc. S/PV.3217, at 15 (1993) (statement of Madeleine Albright, U.S. Ambassador to the U.N.), *quoted in* Meron, *supra* note 112, at 80 (referring to Ambassador Albright's affirmative statement as clarification of Tribunal's jurisdiction, but not to status of Additional Protocols as international customary law).

228. See *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, para. 94 (Int'l Crim. Trib. for the Former Yugo., App. Chamber, 1995), *reprinted in* 35 I.L.M. 32, 62 (1996).

229. See *Final Report of the Commission of Experts Established pursuant to Security Council Resolution 780* (1992), U.N. SCOR, 54th Sess., Annex, U.N. Doc. S/1994/674 (1994) (noting FRY's assertion of succession to SFRY).

230. See *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, paras. 94-95 (Int'l Crim. Trib. for the Former Yugo., App. Chamber, 1995), *reprinted in* 35 I.L.M. 32, 62 (1996) (noting ratification as evidence toward conclusion that "customary international law imposes criminal liability for serious violations of common Article 3").

231. This constitutional provision has the effect of incorporating international treaties into the former Yugoslavia's domestic criminal law, thereby creating individual criminal responsibility. See YUGO. CONST. art. 210, *reprinted in* THE CONSTITUTIONS OF THE COMMUNIST WORLD 427, 510 (William B. Simons ed., 1980) ("International treaties which have been promulgated shall be directly applied by the courts of law."); see also Meron, *supra* note 112, at 82-83 (asserting that Tribunal could prosecute for violations of common Article 3 even if international criminalization of violations were not well-established in international law because of incorporation of common Article 3 into Yugoslav municipal law). In addition, the SFRY is a signatory of the U.N. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. See U.N. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, art. I(b), *adopted and opened for signature* Dec. 16, 1968, U.N. GAOR, 23rd Sess., Agenda Item 55, U.N. Doc. A/RES/2391 (XXIII), *reprinted in* 8 I.L.M. 68, 70 (1969). This Convention, which went into effect November 11, 1970, states that an individual will be held criminally responsible for:

*eviction by armed attack* or occupation and inhuman acts resulting from the policy of *apartheid* [sic], and the crime of genocide as defined in the 1948

If the Tribunal determines that the Federal Republic of Yugoslavia is not a party to Additional Protocol II, the first element of this crime could still be met if Article 17(2) of Additional Protocol II, which prohibits “compelling displacement,” attains the level of international customary law. The Official Commentary on Protocol II states that the Protocol is based on “rules of universal validity to which States can be held.”<sup>232</sup> The Appeals Chamber of the Tribunal declared that “many provisions” of Protocol II are presently “declaratory of existing rules or as having crystallized emerging rules of customary law.”<sup>233</sup> The Appeals Chamber did not expressly include Article 17(2) in a list of provisions that had attained the status of customary law, but also did not indicate the list was exhaustive.<sup>234</sup> The Security Council, in establishing the International Criminal Tribunal for Rwanda shortly after the creation of the Tribunal, expressly included serious violations of common Article 3, the Geneva Conventions, and of Additional Protocol II as prosecutorial crimes, arguably indicating its acknowledgment of Protocol II as customary law. In a recent report, however, the UN Secretary-General admitted that, in creating the Rwanda Tribunal, the Security Council used “a more expansive approach to the choice of applicable law” by including violations of Additional Protocol II, “which, as a whole, has not yet been universally recognized as part of customary international law”

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Convention on the Prevention and Punishment of the Crime of Genocide, even if such acts do not constitute a violation of the domestic law of a country in which they were committed.

*Id.* (emphasis added). The amount of emphasis placed on the word “or” in this passage will determine if the eviction by armed attack must be committed in the context of apartheid.

232. ICRC COMMENTARY, *supra* note 113, at para. 1340. Protocol II “contains virtually all the irreducible rights of the Covenant on Civil and Political Rights . . . . These rights are based on rules of universal validity to which states can be held, even in the absence of any treaty obligation or any explicit commitment on their part.” *Id.*

233. Prosecutor v. Tadic, Case No. IT-94-1-AR72, para. 117 (Int’l Crim. Trib. for the Former Yugo., App. Chamber, 1995), *reprinted in* 35 I.L.M. 32, 67 (1996). *But see* Final Report of the Commission of Experts Established pursuant to Security Council Resolution 780 (1992), U.N. SCOR, 54th Sess, Annex, U.N. Doc. S/1994/674 (1994), *cited in* BASSIOUNI & MANIKAS, *supra* note 85, at 508 (asserting probability that common Article 3 was a statement of customary international law, but expressing doubt that Additional Protocol II would be similarly viewed).

234. The provisions noted by the Tribunal included prohibitions on violence against persons who are not taking an active part in hostilities, punishment in the absence of due process, and the taking of hostages. *See* Prosecutor v. Tadic, Case No. IT-94-1-AR72, para. 117 (Int’l Crim. Trib. for the Former Yugo., App. Chamber, 1995), *reprinted in* 35 I.L.M. 32, 67 (1996) (referring to comments made by Deputy Legal Advisor of U.S. Department of State regarding status of provisions of Additional Protocol II as international customary law) (quoting Michael J. Matheson, *Humanitarian Law Conference*, 2 AM. U. J. INT’L L. & POL’Y 419, 430-31 (1987)).

entailing individual criminal responsibility.<sup>235</sup>

The second condition that must be fulfilled for an act to constitute a violation of the laws and customs of war is that the violation must cause grave consequences for the victim and breach a rule that protects important values.<sup>236</sup> Values held collectively by the international community arguably are reflected in international human rights law,<sup>237</sup> and specifically, the Universal Declaration of Human Rights<sup>238</sup> ("Universal Declaration") and the International Covenant of Civil and Political Rights ("ICCPR").<sup>239</sup>

The Universal Declaration "'proclaims' a comprehensive set of rights as a 'common standard of achievement for all peoples and all nations,'"<sup>240</sup> and its provisions codify existing international customary law.<sup>241</sup> It is widely considered to be an "authoritative interpretation" of the obligations of Member States under the United Nations Charter.<sup>242</sup> The Universal Declaration specifically provides for the right of "freedom of movement and residence within the borders of

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235. See *Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 995 (1994)*, U.N. SCOR, 59th Sess., U.N. Doc. S/1995/134, para. 12 (1995) (stating common Article 3 is criminalized for the first time), *quoted in* Meron, *supra* note 136, at 558 (advocating for international criminalization of common Article 3 and Additional Protocol II).

236. See *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, para. 94 (Int'l Crim. Trib. for the Former Yugo., App. Chamber, 1995), *reprinted in* 35 I.L.M. 32, 62 (1996). The Appeals Chamber provided this example: the stealing of a loaf of bread, which technically violates the Hague and customary rule that "private property must be respected," does not constitute a violation of international humanitarian law because it does not produce grave consequences for the victim. See *id.*, *reprinted in* 35 I.L.M. 32, 62 (1996).

237. See R. J. VINCENT, *HUMAN RIGHTS AND INTERNATIONAL RELATIONS* 9 (1986) ("The subjects of human rights are not members of this or that society, but of the community of humankind.").

238. G.A. Res. 217A(III), U.N. GAOR, 3d Sess., U.N. Doc. A/810, at 71 (1948) [hereinafter *Universal Declaration*].

239. See *International Covenant on Civil and Political Rights*, *adopted* Dec. 16, 1966, art. 1, 999 U.N.T.S. 171, 6 I.L.M. 368 [hereinafter *ICCPR*].

240. de Zayas, *supra* note 74, at 267 (reviewing *Universal Declaration* provisions that are implicated in forced displacement).

241. For commentary on the status of the *Universal Declaration* as customary law, see Theodor Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT'L L. 1, 5-7 (1986), which discusses language used in the *Universal Declaration*, how it has been duplicated in other human rights documents, and whether the language and attached meaning have attained status of customary international law, and Jonathan L. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 549 (1993), which notes the *Universal Declaration* as an example of international customary law.

242. The Charter of the United Nations provides the foundation upon which the body of international human rights laws are based: all Members "pledge themselves" to promote and achieve "universal respect for, and observance of, human rights and fundamental freedoms." See UNITED NATIONS CHARTER arts. 55, 56, *quoted in* COHEN & DENG, *supra* note 2, at 78-79 (discussing human rights laws that apply to internally displaced persons).

each [Member] State.”<sup>243</sup> The ICCPR, ratified by 132 nations, grants the right to liberty of movement and freedom to choose one’s residence.<sup>244</sup> From both of these documents, one can infer a collectively-held value of freedom of movement.<sup>245</sup> Although these human rights documents relate to the behavior of states and not to the behavior of individuals,<sup>246</sup> Article 17 of Additional Protocol II can be considered a “rule protecting important values.” Internal displacement can produce “grave consequences” for victims, including separation from family members, lack of basic necessities for life, and the disorganization of community structures.<sup>247</sup> In sum, the second element of a violation of the laws and customs of war could be met.

As the last condition for a violation of the laws and customs of war, the Tribunal dictated that custom or conventional law must provide for individual responsibility for violations of that law, in this case, Article 17 of Additional Protocol II. There is precedent for holding individuals responsible for the forcible deportations of civilians. “Article 6(b) of the Nuremberg Charter defined ‘war crimes’ to

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243. See Universal Declaration, *supra* note 238, at art. 13(1); see also COHEN & DENG, *supra* note 2, at 78 (“[A]n individual right against forced displacement arguable inheres in the freedom of movement and residence set forth, *inter alia*, in Article 13 of the Universal Declaration of Human Rights.”). The Universal Declaration also provides for the right to “life, liberty, and security of person” in Article 3 as well as the right to be free from arbitrary interference with privacy, family, home, or correspondence in Article 12. See Universal Declaration, *supra* note 238, at arts. 3, 12.

244. See ICCPR, *supra* note 239, at art. 12(1) (“Everyone lawfully within the territory of a state shall, within that territory, have the right to liberty of movement and freedom to choose his residence.”). However, restrictive clauses contained in the ICCPR serve to limit human rights guarantees for internally displaced persons, as a state may derogate from some provisions “in time of public emergency which threatens the life of the nation,” to protect public safety, or in order to restore public order. See *id.* art. 4(1) (providing that government measures are not discriminatory on the basis of race, color, sex, religion, language, or “social origin”). Although the determination of a state of emergency is made by a national government, international standards have developed that provide procedural and substantive requirements that must be met before a derogation from the ICCPR is considered justifiable. See COHEN & DENG, *supra* note 2, at 87 (noting derogation from the ICCPR must be in response to an important public or social need, in pursuit of a legitimate governmental aim, and must be proportionate to that aim). Every derogation requires a “precise balancing” of the right to freedom of movement and the government’s interests in interfering with that right. See *id.*

245. Some argue these provisions indicate a human right to be free from forced displacement. See COHEN & DENG, *supra* note 2, at 78 (asserting rights against forcible displacement are inherent in rights to freedom of movement and residence).

246. See INTERNATIONAL LAW: CASES AND MATERIALS 610 (Louis Henkin et al. eds., 3d ed. 1993) (noting that states are held responsible for maintaining a policy that encourages or condones violations of human rights).

247. See COHEN & DENG, *supra* note 2, at 24-26 (describing the significant impact of displacement).

include 'murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory.'<sup>248</sup> The forced mass deportations and expulsions across national boundaries were prosecuted as war crimes for which individuals were criminally liable.<sup>249</sup> Yet, if a population transfer is a crime in an international context, it logically would follow that the same transfer would be a crime in an internal conflict.<sup>250</sup> The Tribunal itself stated, "[W]hat is inhuman and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife."<sup>251</sup>

The internal displacement of ethnic Albanians during 1998 does not easily meet the necessary criteria for a violation of the laws and customs of war. It is not clear whether the Tribunal's Prosecutor could convict Slobodan Milosevic for causing the displacement if such conviction would require an "expansive interpretation of its jurisdiction."<sup>252</sup>

#### CONCLUSION

The Tribunal was created because of a "moral imperative" to prosecute persons responsible for egregious violations of international humanitarian law.<sup>253</sup> The Tribunal recognized its

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248. 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, Aug. 8, 1945, 82 U.N.T.S. 279, 59 Stat. 1544, art. 6(b) (defining war crimes); *see also* de Zayas, *supra* note 74, at 283-84 (describing the jurisprudence that emerged from the Nuremberg Trials).

249. *See* de Zayas, *supra* note 74, at 283-84 (explaining that the Nuremberg suspects were charged with forced expulsions and mass deportations of civilian populations).

250. *See id.* at 221 (asserting that the act of transferring should be dispositive rather than the act of crossing national boundaries).

251. Prosecutor v. Tadic, Case No. IT-94-1-AR72, para. 119 (Int'l Crim. Trib. for the Former Yugo., App. Chamber, 1995), *reprinted in* 35 I.L.M. 32, 68 (1996) (referring to means and methods of warfare).

252. As one author noted:

There is an important reason for the Tribunal to exercise greater caution in construing its jurisdiction: States will not have faith in the integrity of the Tribunal as a precedent for other ad hoc tribunals and for a permanent international criminal court if the Tribunal is perceived as prone to expansive interpretations of its jurisdiction.

Michael P. Scharf, *A Critique of the Yugoslavia War Crimes Tribunal*, 25 DENV. J. INT'L L. & POL'Y 305, 307 (1997) (discussing how the concept of individual responsibility for violations of Geneva Conventions and the additional Protocols could constitute progressive development of international law).

253. The Tribunal was intended to serve the purposes of educating the general public as to events that occurred, providing a record of atrocities, and, most importantly, deterring future commission of similarly brutal crimes. *See* Theodor Meron, *The Case for War Crimes Trials in Yugoslavia*, 72 FOREIGN AFF. 122, 122 (1993) (emphasizing the awesome importance of criminally prosecuting individuals

“primary purpose” as “not to leave unpunished any person guilty of any serious violation, whatever the context within which it may have been committed.”<sup>254</sup> Suspects have been prosecuted for forced expulsion in compliance with a purposeful government policy.<sup>255</sup> Based on the above analysis, however, successfully prosecuting individuals such as Slobodan Milosevic for causing the internal displacement of thousands of ethnic-Albanians during 1998 probably will be unsuccessful. At that time, Milosevic was not relying on the previously utilized method of forced relocation as was utilized during the Yugoslav War, possibly because he knew to avoid legally indefensible acts.<sup>256</sup> Through the government’s use of limited armed

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responsible for atrocities in order to deter the future commission of similar crimes). One could argue that the goal of deterrence has not been met, in light of the Yugoslav government leaders’ decisions to use armed force against ethnic Albanians in the province of Kosovo despite indictments and convictions of war criminals. See *supra* notes 46-61 and accompanying text.

254. Prosecutor v. Tadic, Case No. IT-94-1-AR72, para. 92 (Int’l Crim. Trib. for the Former Yugo., App. Chamber, 1995), *reprinted in* 35 I.L.M. 32, 61 (1996); see also Meron, *supra* note 253, at 122 (“The credibility of international humanitarian law demands a war crimes tribunal to hold accountable those responsible for gross violations in the former Yugoslavia.”). For a discussion of broad reasons why continued impunity for international crimes continues, see generally Madeline H. Morris, *Accountability for International Crime and Serious Violations of Fundamental Human Rights: International Guidelines Against Impunity: Facilitating Accountability*, 59 L. & CONTEMP. PROB. 29, 30 (1996) (citing political constraints, lack of resources, and lack of national and international will as reasons why full, international accountability does not occur).

255. See, e.g., *supra* text accompanying note 72.

256. Julie Mertus, Remarks at the Conference entitled Myths & Realities About Ethnic Conflict in Kosovo (Dec. 17, 1998). There was no evidence of extensive civilian roundups or forced population transfers as had occurred during the Yugoslav war. See Associated Press, *Fleeing Ethnic Albanians Tell of Kosovo Offensive*, N.Y. TIMES, June 4, 1998, at A4 (reporting fears that Kosovo conflict will develop into “another Bosnia”). But see Perlez, *supra* note 52, at A1 (stating that two alleged massacres of ethnic Albanians which occurred on September 26, 1998, are of particular import to the Tribunal). The numbers of victims during the Yugoslav war were considerably larger, although perhaps simply due to the size of the population relative to the territory in which the armed conflict took place. Compare Prosecutor v. Drazen Erdemovic, Case No. IT-96-22, para. 23 (Sentencing Judgment, March 5, 1998) (Int’l Crim. Tribunal for the Former Yugo. 1996) available in <<http://www.un.org/icty/erdemovic/trialc/judgment/erd-tsj980305e.htm>> (convicted for taking part in the mass execution of hundreds of Bosnian Muslim civilians), and Prosecutor v. Mrksic, Radic, Sljivancanin, Case No. IT-95-13a, para. 9, 13 (Indictment, Nov. 7, 1995) available in <<http://www.un.org/icty/indictment/ind-e.htm>> (charged with seizure of 300 men and the beating and killing of 200 men), with Guy Dinmore, *Villagers Slaughtered in Kosovo ‘Atrocity’*, WASH. POST, Jan. 17, 1998, at A1 (reporting mutilated bodies of 46 ethnic-Albanians found in mass grave and included a young woman, a 12-year-old boy, and many older men).

At one point during 1998, Serbian military tactics responded to foreign criticism. After much criticism from the West for allowing approximately 50,000 displaced people to live in the outdoors, Serbian police invited residents of Vranici, who had fled after warning shots were fired on their village the previous day, to return to their homes, emphasizing their safety upon doing so. See Perlez, *supra* note 52, at A14 (detailing potential testimonial evidence that could be used for prosecution of war

attacks under the guise of ferreting out rebels, civilians preferred to flee the area rather than surrender themselves to the government forces and forcibly be transported to another location.<sup>257</sup>

Clearly, an express prohibition of internal displacement must be constructed in light of the inadequacy of existing laws. "Prohibition would be more meaningful if the prohibition came from positive law in a rule explicitly about transfer."<sup>258</sup> Although Yugoslav government leaders could not be held criminally responsible for internal displacement under *nullem crimen sine lege*, the problem of internal displacement continues to persist globally.<sup>259</sup> If enforcement of an express prohibition against internal displacement existed, government leaders such as Slobodan Milosevic would be deterred in the future from pursuing actions that result in internal displacement.

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crimes). The villagers were bused back to their village, only to find their vehicles and farm equipment burned or vandalized. *See id.* This police operation appeared to be "designed to create chaos and fear," but also to insure those who fled did not remain in the forest. *See id.*

257. At times, Yugoslav government forces subsequently entered the area and destroyed property, possibly in order to render the area uninhabitable. *See* Mike O'Connor, *Kosovo Assault Steps Up, Making Thousands More Homeless*, N.Y. TIMES, Aug. 4, 1998, at A3 (quoting foreign monitor's concerns of the use of "ethnic cleansing" by government forces against ethnic Albanians). If such tactics by the Yugoslav government are proven to be intentional methods to thwart civilians' efforts to return home, then these governmental acts could fall under the rubric of ethnic cleansing.

258. Goebel, *supra* note 20, at 41 (asserting a positive law regarding internal population transfers would decrease effectiveness of "state sovereignty" defense). One recommendation made by Francis Deng, author of *Guiding Principles on Internal Displacement*, is for an international criminal court to reinforce a right not to be arbitrarily displaced by issuing judgments against unlawful displacement. *See* COHEN & DENG, *supra* note 2, at 251 (proposing strategies and methods to prevent displacement). But such a court would need to resolve the difficulty raised here of the inadequacy of current international law.

259. *See supra* notes 1-7 and accompanying text.