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Criminal Justice and Forced Displacement in the Former Yugoslavia

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Transitional Justice and Displacement Project

From 2010-2012, the International Center for Transitional Justice (ICTJ) and the Brookings-LSE Project on Internal Displacement collaborated on a research project to examine the relationship between transitional justice and displacement. The project examined the capacity of transitional justice measures to respond to the issue of displacement, to engage the justice claims of displaced persons, and to contribute to durable solutions. It also analyzed the links between transitional justice and other policy interventions, including those of humanitarian, development, and peacebuilding actors. Please see: **www.ictj.org/our-work/research/transitional-justice-and-displacement** and **www.brookings.edu/idp**.

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Introduction

This paper is concerned with the relationship between criminal justice and displacement that has taken place as a result of serious violations of international humanitarian law.[1] It argues that in some transitional contexts, forced displacement can be so integral to the abuses committed in a conflict that the issue should be included in efforts to criminally prosecute perpetrators. The first section presents the international legal framework for prosecuting forced displacement as a war crime and a crime against humanity, drawing on the Geneva Conventions and the statutes and jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Court (ICC). The second section reviews the work of the ICTY in relation to the ethnic cleansing that was such a prominent feature of the Yugoslav conflict in the early 1990s. The next two sections examine some of the main challenges faced while investigating and prosecuting crimes related to displacement. The final section considers the extent to which criminal prosecutions can contribute to the resolution of displacement.

The Legal Basis for Prosecuting Forced Displacement[2]

It is worth emphasizing, as a large number of academic commentators have, that international criminal law—that is, the liability of individuals rather than states for crimes under international law—is still in the process of development and refinement.[3] However, its overriding general objectives are the same as those that govern domestic criminal law—namely, retribution, deterrence, incapacitation, and restitution.[4]

Deportation has been considered a crime against humanity since the Nuremberg trials that followed World War II.[5] However, Article 49 of the Fourth Geneva Convention (1949) has been the basis for the inclusion of crimes of forced displacement in the statutes of all the international criminal tribunals established since 1993.[6] It 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.” Additional Protocol I (1977) states:

> In addition to the grave breaches defined in the preceding paragraphs and in the Conventions, the following shall be regarded as grave breaches of this Protocol, when committed wilfully and in violation of the Conventions or the Protocol: (a) the transfer by the occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention.

The first of the ad hoc international criminal tribunals to be established, the ICTY incorporated the crime of grave breaches of the Geneva Conventions as Article 2 of its statute, which included "unlawful deportation or transfer . . . of a civilian."[7] Article 5 of the statute enumerated the crimes against humanity under the tribunal's jurisdiction, which include deportation.[8]

There are differences between the elements that need to be proved if the deportation or transfer is charged as a war crime or a crime against humanity. In the case of the former, there is no requirement that the transfer be "forcible," but the conduct must "take place in the context of and [be] associated with an international armed conflict."[9] In the case of the latter, the transfer has to be forcible, and the conduct must be "committed as part of a widespread or systematic attack directed against a civilian population."[10] Proving that the conflict was international in character may not be simple. In many of the earlier trials at the ICTY, it required obtaining and leading complex and heavily disputed evidence, thereby prolonging already lengthy trials.

The difference between "transfer" and "deportation" is, in essence, that the former may take place within national boundaries, whereas the latter requires some kind of cross-border removal. The elements of these two crimes were considered most fully in the ICTY case of *Prosecutor v. Milomir Stakic*,[11] in which the Trial Chamber concluded that "what has in the jurisprudence been considered two separate crimes . . . is in reality one and the same crime."[12] The Appeals Chamber, however, confirmed the distinction between the two types of displacement and decided that neither crime required that the perpetrator had the intent to remove persons permanently. In the ICTY case of *Prosecutor v. Radislav Krstic*, it was said that "Both deportation and forcible transfer relate to the involuntary and unlawful evacuation of individuals from the territory in which they reside. Yet, the two are not synonymous in customary international law. Deportation presumes transfer beyond State borders, whereas forcible transfer relates to displacements within a State. *However, this distinction has no bearing on the condemnation of such practices in international humanitarian law*."[13] In practice, it is the nature of the evidence that will dictate which of the crimes is charged.

The jurisprudence of the ICTY and the ICC Elements of Crimes make it clear that the term "forcible," when used in reference to these crimes, is not limited to physical force but also includes the threat of force or coercive circumstances that lead to fear of violence, detention, abuse of power, or inhumane acts that come within the definition of persecutions as a crime against humanity. Accordingly, in such circumstances, those who leave cannot be treated as having voluntarily departed. It does not have to be proved that a perpetrator intended to displace, but instead that he or she knew the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.[14]

The ICTY and Forced Displacement

The Yugoslav wars, which took place between 1991 and 1995, resulted in a massive displacement of the populace. This displacement began from the moment it became clear that some of the former republics of the Socialist Federal State of Yugoslavia (SFRY) wished for independence and were proposing nationalist states.[15] Evidence presented during the course of the Slobodan Milosevic trial estimated that from the 47 municipalities[16] covered by the indictment, 745,653 individuals had been internally displaced or were refugees. Of these, 403,566 were Muslims and 204,646 were Serbs.[17]

The ICTY was established in 1993 by UN Resolution 827, the terms of which encapsulate the reasons for the ensuing prosecutions.[18] In this resolution, the term "ethnic cleansing" made its first appearance in an official document. It was defined by the Commission of Experts set up under UN Resolution 780 (1992) as "a purposeful policy designed by one ethnic or religious group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas."[19] It is interesting to note here that UN Resolution 955, which established the International Criminal Tribunal for Rwanda (ICTR), while reiterating the same pious hopes about the "restoration and maintenance of peace" and that the prosecutions would "contribute to ensuring that such violations are halted and effectively redressed," made no mention of any specific violations of international humanitarian law other than genocide. This reflects the main difference between the two most destructive conflicts of the last decade of the 20th century: the Rwanda conflict was nothing less than an attempt, based on a perceived racial difference, to eradicate a part of a populace; the Yugoslav conflicts had the object of creating ethnically pure territories.[20]

Current jurisprudence does not hold forcible removal of an ethnic group in itself to be a genocidal act:

> Neither the intent, as a matter of policy, to render an area "ethnically homogeneous", nor the operations that may be carried out to implement such policy, can *as such* be designated as genocide: the intent that characterizes genocide is "to destroy, in whole or in part" a particular group and deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement. This is not to say that acts described as "ethnic cleansing" may never constitute genocide, if they are such as to be characterized as, for example, "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part", contrary to Article II, paragraph (c), of the Convention, provided such action is carried out with the necessary specific intent (*dolus specialis*), that is to say with a view to the destruction of the group, as distinct from its removal from the region.[21]

In the ICTR trials, forcible displacement formed part of the evidence of genocidal intent and was not separately charged; in contrast, the displacement of persons was firmly placed at the forefront of the leadership trials at the ICTY. In the cases mounted against Bosnian Serbs, the allegation was made that a joint criminal enterprise took place, the object of which was "the permanent removal of Bosnian Muslims and Bosnian Croats from Bosnian Serb claimed territory in BiH through crimes charged in this indictment."[22]

In the cases against leaders such as Slobodan Milosevic, Momcilo Krajisnik, Radoslav Brdjanin, Milomir Stakic, and now Radovan Karadzic, the evidence shows that in the territories claimed by the Bosnian Serbs to form part of their newly created state (which became known as Republika Sprska), a campaign was instituted to drive out the non-Serb inhabitants. The methods used varied in their form and intensity, depending to a large extent on the demographic composition of the particular area subjected to the campaign. However, there was a clear pattern of activity, starting with a forcible seizure of power when necessary, followed by the imposition of discriminatory employment practices, which, as housing was largely linked to employment, rendered the non-Serbs homeless. These discriminatory practices in themselves instigated the beginnings of an exodus. Thereafter, an order was issued by the Serb authorities for the surrender of all weapons. An apparent failure by non-Serbs to comply with this order resulted in armed attacks on villages and parts of towns occupied by non-Serbs. Those who survived the attacks were imprisoned, sometimes for lengthy periods, in makeshift detention facilities in which further killings and beatings took place. The conditions in these facilities led to further deaths and severe illness. Men over the age of 65, women, and children were then taken from the detention facilities and transported from the territory of the Republika Srpska. In order to ensure they did not return, houses as well as religious and cultural facilities were looted and then destroyed. One of the most egregious manifestations of this campaign occurred in the municipality of Prijedor in northwest BiH.

In cases against accused who formed part of the Bosnian Croat leadership, the object of the criminal enterprise was characterized among others as "to politically and militarily subjugate, permanently remove and ethnically cleanse Bosnian Muslims and other non-Croats who lived in areas on the territory of the Republic of Bosnia and Herzegovina which were claimed to be part of the Croatian Community . . . by force, fear or threat of force, persecution, imprisonment and detention, forcible transfer and deportation."[23] The campaign waged by the Bosnian Croat leadership bore remarkable similarity to that of the Bosnian Serbs, as described above, but was geographically and numerically more limited in scope.[24]

Unlike the Nuremberg or Tokyo International Military Tribunals, which were established only after hostilities had ceased, Resolution 827 was passed while the conflict in BiH was ongoing. The practical reality of how the objectives of this resolution were to be achieved, as will be seen below, was not something that seems to have been considered.

Major Challenges Faced by Such Prosecutions

The challenges facing a prosecution concerned with forced displacement are—in many ways—those that generally affect all prosecutions for serious violations of international humanitarian law. The nature of the prosecutorial policy that is followed will influence the specific challenges that arise. As will be discussed, there is a conflict between a prosecutorial policy that may best facilitate the return of displaced individuals by targeting individuals directly responsible for specific crimes (thereby assisting in the creation of conditions conducive to return), and a policy that concentrates on prosecuting the

architects of the overall criminal activity. It is the latter policy that will, in the future, almost certainly govern prosecutions in trials before international courts.[25]

The first major challenge faced by any court charged with investigating allegations of "widespread or systematic" violations of international humanitarian law is deciding the class of persons to be prosecuted. By their very nature, such violations will have been committed by a large number of individuals, ranging, for example, from at the lowest level the persons who physically expelled the victims from their homes, to the mid-level persons who gave the orders, to at the highest level the persons who devised and set in motion the enterprise that resulted in the crimes. Economic factors dictate the resources available to a court, from the number of investigators and lawyers employed to investigate and conduct prosecutions, to the available physical courtroom space and the number of judges. Accordingly, the courts cannot prosecute every individual against whom there is evidence, no matter how compelling, that he or she committed a crime.[26]

The perceived wisdom is that courts dealing with such cases should concentrate on the leaders. The first trial at the ICTY[27] and many of the subsequent ones involved low-level perpetrators, an aspect of the proceedings that has been subjected to much criticism.[28] It should be noted here, however, that such criticism fails to take account of three major factors that impacted the decisions on whom to prosecute at the ICTY, and which are of general application to international criminal trials: first, the need for compelling evidence before a prosecution may be brought; second, the pressure exerted by those funding the court (often applied through judicial intervention), who wish to see tangible results in the form of trials for their money; and third, the ability to arrest alleged criminals.[29] The decision to prosecute low-level perpetrators during the earlier stages of the ICTY was dictated largely by the practicalities of available evidence[30] and the ability to arrest the accused, rather than by any specific policy seeking to reassure the displaced population that it was safe to return.

Additional challenges arise during investigations into the crimes committed. These can be hampered by any one or more of the following factors: lack of access to witnesses, documents, and crime scenes, particularly if the conflict is still continuing;[31] deliberate obstruction of the investigation by the government or organization under investigation; intimidation of potential witnesses or, even without intimidation, witnesses fearing consequences if they testify; and the potential unreliability of witness recollection.[32] In the absence of a clearly discernable pattern of activity or evidence that a population removal was forcible, such factors may have a severe impact on displacement cases, in that proof of their forced nature has to then come from direct witness testimony.[33]

Moreover, proving the criminal liability of leaders, who are far removed from the actual commission of the crimes, requires both establishing that the crime has been committed and then establishing the involvement of those leaders, either through documentation—if they were imprudent enough to leave a paper trail—or through testimony from persons with personal knowledge of their involvement. Such testimony often requires a court to use its coercive powers, such as witness summons. The evidence provided also has its own built-in indicia of unreliability, in that such persons themselves may well have been involved in the criminal activities under investigation and therefore have every motive to assign responsibility to others.

The necessity for witnesses who are victims of the crimes to testify in trials means that witness protection programs must be put into place. In theory, such programs will ensure that witnesses still residing in the area of the crimes, or indeed outside of it, will be enabled to travel and testify without their identity being revealed to those with a vested interest in hindering such testimony. In practice, given the prohibition on witnesses testifying anonymously, however sophisticated the program (including, for example, the option of relocation), it is almost impossible to prevent their participation in prosecutions from becoming known.[34] In theory, direct evidence from the victims of displacement could be replaced or assisted by evidence from members of humanitarian organizations who were present dealing with the refugee or internal displacement problem at the time of the events.[35] However, the International Committee of the Red Cross, for one, enjoys an absolute privilege from providing testimony.[36] Other humanitarian organizations, while not enjoying such a privilege, are reluctant to allow their present or past staff members to testify, whatever protective measures are granted. They are aware that the testimony will become known, and fear that this will hinder their provision of assistance to the displaced and bring danger to their staff in any future conflicts.

A further challenge is the selection of the crimes to charge in an indictment. Should the crimes merely be those of forcible transfer and deportation, or should crimes such as murder (which is rightly considered to be the most serious of crimes, particularly when committed on the scale and with the requisite intent to amount to the crimes of extermination or genocide) or denial of fundamental human rights, which have been the impetus for massive displacement, be additionally charged? To expand the indictment undoubtedly increases the complexity and therefore the length of trials; but to omit these crimes (evidence of which would have to form part of the testimony relating to the displacement) means that the indictment does not reflect the gravity of the events and limits the sentencing power of the judges.

The evidential aspect of proving even the specific crimes related to displacement has its own inherent problems. First, there is the difficulty of obtaining accurate figures of the numbers involved. Not all internally displaced persons (IDPs) or refugees are registered with organizations such as the Office of the UN High Commissioner for Refugees (UNHCR), which keep records of the displaced. Demographic evidence has been a feature of the trials at the ICTY against the Bosnian Serbs from the court's early days. It has formed an important aspect of these trials (on the basis that it is logistically impossible to call every displaced person to testify), but suffers from the problem that it is second-hand ("hearsay") information obtained from records maintained by various organizations—records that are constantly undergoing revision and have varying degrees of accuracy. The analysis of this information and resulting evidence is extremely dense in nature and therefore difficult to grasp. Second, it is difficult to prove when the displaced individuals actually left their homes and that their departures were specifically related to the crimes in question. In practice, this element has been dealt with by calling a number of representative witnesses to explain why they left, with demographic evidence being used to "plug the gap." Third, those who have been displaced (particularly internally) are naturally reluctant to give public evidence about the events that led to their displacement. The reasons for this reluctance, referred to above, are common to all victims of crimes contrary to international humanitarian law.

How to Overcome Such Challenges

Overcoming the challenge of deciding whom to prosecute requires careful analysis of the crimes committed as a whole, applying a set of criteria in a uniform manner. Those criteria must not only be published, they must also be disseminated to the public through outreach activities along with a full explanation of the reasoning behind them.[37] The importance of such measures, in particular public dissemination of the operative criteria, for displacement cases is that if those who were displaced (whether or not they have returned) are to be persuaded to testify, they must understand the reasons for the prosecution in which they are being asked to participate and have full confidence in the judicial process. If they are to disregard the potential risks of testifying, they need to be assured that the process is not biased or corrupt, and that the actors responsible for carrying out the judicial process understand the circumstances that led to their displacement.

If it is accepted that leaders should be the focus of prosecutions, in order for such prosecutions to be expeditiously and effectively conducted, there must first be compelling evidence that the crimes took place. As referred to above, this is one of the advantages of building cases from the ground up. The trials of the camp guards at the Omarska and Keraterm camps in Prijedor and the rape camps in Foča, and of the paramilitary members such as Goran Jelišić (the self-styled "Serbian Adolf") in Brčko, Mitar Vasiljević in Višegrad, and Mladen Naletilić and Vinko Martinović in Mostar—all these provided the basic proof that crimes were committed, on which the later trials of leaders could be constructed. Moreover, it was the trials of these low-level perpetrators that gave many among the forcibly displaced the confidence to return.[38] However, in order to make trials of leaders more expeditious and effective, there must be increased acceptance among judges of the principle that findings of fact (which do not directly implicate the person on trial) made in judgments on previous trials may not be relitigated. It may truly be considered oppressive—and accordingly a further disincentive to testify—if witnesses are asked for a second, third, or fourth time to give evidence of traumatic events that may have taken place years before.[39]

The number of trials that may be held is dependent upon the efficiency of investigations and trials. While not all of the problems identified in the earlier section of this paper lend themselves to a generic solution, there are two linked reforms of present practice that can and should be instituted and have particular relevance to displacement cases if witness testimony continues to form a large part of the evidence. First, the criteria for the selection of judges, prosecutors, and defence counsel should reflect a bias toward experience in the conduct of criminal trials. Experienced advocates and judges are able to eliminate unnecessary testimony by witnesses, thereby reducing the hardship caused to the witnesses. Second, the procedure for such trials should not be rooted in an "adversarial" system but in a more "inquisitorial" system, which allows properly selected judges far more control over the nature and extent of the evidence called. These two reforms, it is submitted, would assist greatly not only in the efficiency of the trials themselves but also in making the experience of testifying a less traumatic one for witnesses. Furthermore, resolution of the problems relating to the availability of witness testimony cannot be achieved by witness protection programs, however well-funded and sophisticated. While such programs must be in place, there also has to be an additional element within the purview of law enforcement agencies and the courts—namely, that interference with witnesses, direct or indirect, will result in immediate investigation and, if proved, in severe penalties.

The specific difficulties of proving, evidentially, crimes relating to forced displacement—that is, the difficulty in obtaining accurate figures and demonstrating the co-relationship between the crimes and the displacement—are unlikely to be perfectly resolved. Proving the link between the crimes and the displacement can be partially achieved through demographic evidence, and by demonstrating the imbalance between changes in the populations before and after the crimes, but in the final analysis the strict proof presently required by the courts, as already suggested, can only be achieved by witness and documentary evidence.

Nevertheless, testimony from expert demographers is the only practical method of presenting the overall scale of displacement. In order to be effective for this purpose, as well as the allied one of using such evidence to replace witness testimony (save for a representative sample to add the "human element"), the following improvements in this type of evidence need to be made. First, the demographer must have access to the records of all humanitarian agencies that have dealt with the displacement and to all other relevant sources of information. This includes, for example, electoral rolls, voter registrations, NGO records, and prosecutors' offices. Second, the research into displacement conducted by the demographer must examine any stated official policy toward ethnic national or religious groups and the crimes that occurred at the time of the displacement. Third, demographic evidence (as with all expert evidence) has to be presented in a way that it can be understood by those who do not possess the specialized knowledge and training of a demographer. As already stated, the evidence contained in demographic reports is often dense, loaded with statistics, and difficult to grasp. Accordingly, demographic witnesses need to undergo training in how best to present their findings to a court in a way that can easily be comprehended. Fourth, there must be greater willingness on the part of judges, provided they are satisfied that the demographer is objective and has used all available source material in the compilation of his or her report, to accept the evidence contained in the report in lieu of eye-witness testimony.

Criminal Prosecutions and the Resolution of Displacement

The UN secretary-general's 2004 report on transitional justice and the rule of law defines "transitional justice" as "the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms . . . and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals or a combination thereof."[40] The trials[41] of those who committed crimes during the conflict in the former Yugoslavia go some way in achieving the first two of the overall goals of transitional justice—namely, ensuring accountability and serving justice.[42] This can potentially play a positive, if modest, role in the resolution of displacement.

The scale of the crimes committed in a context such as the former Yugoslavia makes some degree of criminal prosecution imperative if a post-conflict society is to return to a state of affairs in which individuals may live in security. This is particularly the case where individuals have been driven from

their homes: why and how should they return in the absence of any accountability for those responsible for this crime? The importance of accountability, in regard to the return of displaced persons, was suggested in two reports produced by the International Crisis Group (ICG) on the situation in BiH some years after the Dayton Accords. The first, in 2000, made the obvious point that "The continued presence in the municipalities of Republika Srpska of individuals suspected of war crimes . . . represents a significant obstacle to the return of ethnic minority refugees."[43] It went on to point out that "Bosnia will never achieve the rule of law and inter-ethnic reconciliation until many more suspected war criminals appear before ICTY or locally authorised courts."[44] In 2002, another ICG report specifically examined the issue of refugee return:

> Although the presence of putative war criminals in local administrations, police forces schools and informal municipal power structures continues to impede return throughout BiH, the removal of such people encourages return. . . . The relatively large number of public indictments issued by the ICTY against the commandants and guards of the several concentration camps around Prijedor . . . were *crucial to opening up the area for large-scale return*. . . . Yet arrests and removals from office will only have a lasting effect on the climate for return when local courts begin to follow them up with war crimes' prosecutions.[45]

Indeed, it is reasonable to think that accountability, including arrests and removals of perpetrators, can facilitate return. However, while a substantial number of persons have returned to their homes in BiH, there is little hard evidence to suggest that this is a direct, or even indirect, consequence of the prosecutions.

In a recent paper analyzing the rate of returns to two BiH municipalities—namely, Prijedor and Srebrenica (both of which have been the subject of a number of ICTY trials)—Monika Nalepa postulates the theory that the reason for the higher rate in Prijedor is that the trials concerned with that area dealt with a number of low-level perpetrators (thereby echoing the ICG report of 2002),[46] whereas those concerned with Srebrenica, with one exception, concerned high-level ones. She considers alternative explanations for the difference—one of which is the proximity of the Serbian border to Srebrenica—but dismisses them.[47] However, her conclusions do not consider the following factors. First, Srebrenica is not only close to the Serbian border but also surrounded by municipalities that form part of Republika Sprska—the Bosnian Serb state. It has no access to the municipalities that form part of the Federation of BiH. Although, as she points out, Prijedor borders the Krajina area,[48] it also has a border with the Federation via the municipality of Sanski Most. Second, as a result of the massacre at Srebrenica, there are few men left to return, and the women are obviously reluctant to return on their own.[49] Third, economic and political factors have made Prijedor a more attractive place for returnees.[50] Fourth, one of the major reasons for returns generally may well be the unwillingness of the countries that accepted refugees from the conflict to allow them to remain in the absence of overt conflict. For a number of years, refugees have been repatriated to their former places of residence in BiH.[51] Nonetheless, while there may not be a clear causal link between trials of low-level perpetrators and returns, the relative paucity of trials of leaders at a local "municipality" level, let alone actual perpetrators of specific crimes, is certainly a factor that needs to be taken into account.

In terms of achieving reconciliation, which in turn may also have implications for return processes, three major factors are responsible for the limited impact of the ICTY trials. First is the perception

among Serbs[52] that because the preponderance of trials have been conducted against defendants of their nationality, the ICTY is therefore a biased tribunal.[53] Second is the fact that plea bargains led to sentencing that was lower than victims had expected.[54] There has been an abject failure by the ICTY to explain to the public the rationale for the acceptance of such pleas. Nor have these pleas been used in subsequent trials as they might have in a domestic legal system—namely, as proof that the crime had been committed, so that the issue in future trials was not whether the crimes had been committed but whether the accused on trial was a party to the crimes. Third, the ICTY judges have never adopted an overall sentencing policy, which has led to sentencing inconsistencies, even where no plea bargain was involved.[55]

The truth-telling element of criminal trials may also have a bearing on the resolution of displacement. The often-criticized lengthiness of ICTY and ICTR trials is often ascribed to the overloading of indictments in an attempt to establish historical truth. While this perception of the reasons for the length of trials is not borne out by a close examination of the proceedings,[56] nonetheless, within the limitations of the trial process some kind of historical truth has been established, mainly through witness testimony and gathered documentation.[57] This is significant following a conflict in which massive displacement and destruction of cultural and religious edifices have taken place. The Chicago Principles on Post-Conflict Justice[58] state that the preservation of historical memory "ensures that history is not lost or re-written so that societies may learn from their past and prevent the recurrence of violence and atrocity."[59] In the context of displacement, it is vitally important for those who decide to return that there is a clear, unambiguous, and accessible written record available of what occurred, in the event that there is resistance to the return by those who were responsible for, or acquiesced in, or have benefited from the displacement.

Conclusion

Drawing primarily on the experience of the ICTY, this paper has explored the relationship between criminal justice and forced displacement in transitional contexts. After presenting the basis in international law for prosecuting forced displacement, the paper reviewed the centrality of ethnic cleansing campaigns in the Yugoslav conflicts and the ICTY cases addressing such crimes. The main challenges faced by prosecutions concerned with forced displacement include making difficult decisions about the class of perpetrator to charge and the selection of crimes, as well as dealing with evidentiary and witness problems throughout the investigations and trials. Overcoming such challenges, it is submitted, requires specific reforms to current practice aimed at making such trials more efficient and less traumatic for victims of displacement, as well as improvements in the presentation of evidence from expert demographers. The paper also considered the extent to which prosecutions can facilitate the resolution of displacement, particularly the return process. Accountability and reconciliation, it is suggested, can indeed be important factors in return, although empirical evidence of a direct relationship is lacking. The overall argument is that the offense of forced displacement, when it is integral to abuses committed in the past, should be included in indictments brought against those alleged to be responsible for serious violations of international humanitarian law.

Notes

1 The paper is based on the author's experience of prosecuting cases at the International Criminal Tribunal for the former Yugoslavia (ICTY) and her involvement in the establishment of the War Crimes Department of the Prosecutor's Office of Bosnia and Herzegovina (BiH). The opinions expressed in this paper are those of the author alone and do not necessarily reflect the views of the ICTY or the United Nations in general. There is now a wealth of publications that have dealt individually—and therefore in far more detail—with many of the matters discussed below. It should also be noted that some of these matters have a wider application than that of displacement simpliciter but are discussed here in order to show the framework into which prosecutions for the relevant crimes must fit.

2 The term "forced displacement" will hereinafter be used to cover the crimes of both forcible transfer and deportation.

3 See, for example Antonio Cassese, *International Criminal Law*, 2nd ed. (Oxford: Oxford University Press, 2005).

4 Samuel Huntington set out the reasons for and against such prosecutions in his book *The Third Wave, Democratization in the Late Twentieth Century* (Norman, OK: University of Oklahoma Press, 1993).

5 Charter of the International Military Tribunal (Nuremberg Charter), August 8, 1945, *entered into force* August 8, 1945, Art. 6(c). It also appeared as Article 5(c) of the International Military Tribunal for the Far East Charter, January 19, 1945.

6 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), August 12, 1949, 75 U.N.T.S. 287, *entered into force* October 21, 1950. Grave breaches of these conventions have come to be generally defined within the category of offences described as "war crimes." See Article 8 of the Rome Statute of the International Criminal Court (ICC), July 17, 1998, UN Doc. A/CONF. 183/9 of July 17 1998, *entered into force* April 10, 2002. The term "protected persons" is defined in Article 4 of the Fourth Geneva Convention.

7 Ibid., Art. 2(g).

8 Ibid., Art. 5(d).

9 See International Criminal Court Elements of Crimes, September 9, 2002, UN Doc. PCNICC/2000/1/Add.2 (2000), *entered into force* September 9, 2002, Art. 8(2)(a)(vii)-1.

10 See Ibid., Art. 7(1)(d).

11 Judgment, *Milomir Stakic* (IT-97-24-A), Appeals Chamber, March 22, 2006.

12 Judgment, *Milomir Stakic* (IT-97-24-T), Trial Chamber, July 31, 2003, para. 679.

13 Judgment, *Radislav Krstic* (IT-98-33-T), Trial Chamber, August 2, 2001, paras. 521–522 (emphasis added).

14 See ICC Elements of Crimes, Art. 7(1)(d).

[15] The first concrete demonstration of this came on December 22, 1990, when the Croatian Parliament ratified a new constitution. The preamble altered the previous wording of the description of the Republic of Croatia as the "national state of the Croatian people, a state of the Serbian people and any other people living in it" to the "national state of the Croatian nation and a state of other nations and minorities who are citizens; Serbs, Moslems, Slovenes."

[16] In BiH, in 1991 (the year of the last census prior to the conflicts), there were 109 municipalities.

[17] Ewa Tabeau, Marcin Zoltkowski, Jakub Bijak, and Arve Hetland, "Ethnic Composition, Internally Displaced Persons & Refugees from 47 Municipalities of Bosnia and Herzegovina 1991 to 1997-8: Expert Report for the Case of Slobodan Milosevic (IT-02-54)," in *Conflict in Numbers: Casualties of the 1990s Wars in the Former Yugoslavia (1991-1999)* (Belgrade: Helsinki Committee for Human Rights in Serbia, 2009), 661–875.

[18] "Expressing once again its grave alarm at continuing reports of widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia, and especially in the Republic of Bosnia and Herzegovina, including reports of mass killings, massive, organized and systematic detention and rape of women, and *the continuance of the practice of "ethnic cleansing",* including for the acquisition and the holding of territory, Determining that this situation continues to constitute a threat to international peace and security . . . the prosecution of persons responsible for serious violations of international humanitarian law . . . *would contribute to the restoration and maintenance of peace* . . . the prosecution of persons responsible for the above-mentioned violations of international humanitarian law will *contribute to ensuring that such violations are halted and effectively redressed"* (emphasis added). S.C. Res. 827, UN Doc. S/RES/827 (1991).

[19] Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), May 27, 1994, UN Doc. S/1994/674, Part (III)(B). It should be said, however, that there is no universally accepted, let alone legal definition of "ethnic cleansing." A U.S. State Department report on Kosovo, produced in May 1999, gave the following definition: "The term 'ethnic cleansing' generally entails the systematic and forced removal of members of an ethnic group from their communities to change the ethnic composition of a region." *Erasing History: Ethnic Cleansing in Kosovo* (Washington, DC: U.S. Department of State, May 1999).

[20] With the exception of the ICTY cases against those involved in the Srebrenica massacres, attempts to prove genocidal actions or intent in the context of the conflict in Bosnia have so far proved wholly unsuccessful.

[21] *Application of Convention on Prevention & Punishment of Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007 (Feb. 26), para. 190. See also *Prosecutor v. Krstic*, para. 562: "there are obvious similarities between a genocidal policy and the policy commonly known as 'ethnic cleansing'"; and *Prosecutor v. Stakic*, Trial Judgment, para. 519: "[a] clear distinction must be drawn between physical destruction and mere dissolution of a group. The expulsion of a group or part of a group does not in itself suffice for genocide."

[22] Third Amended Indictment, *Radovan Karadzic* (IT-95-5/18-PT), October 19, 2009, para. 6.

[23] Second Amended Indictment, *Jadranko Prlic & others* (IT-04-74-T), June 11, 2008, para. 15.

[24] It should also be noted that during the conflict in Croatia in 1991 and later in 1995, large numbers of non-Croat individuals were also displaced.

[25] This can be seen in the indictments and warrants for arrest recently issued by the ICC, such as against the presidents of Sudan and Libya.

[26] This can be illustrated by a recent report on the Cambodia Tribunal:

> Judges investigating a new Khmer Rouge case at Cambodia's UN-backed war crimes tribunal said Monday they had "serious doubts" about whether the suspects fall under the court's jurisdiction.
>
> The statement appeared to support observers' predictions that the court is likely to drop its fourth and final case, thought to involve three mid-level cadres, in the face of political opposition.

> The judges also revealed details about the scope of the case, saying they were investigating some two dozen prisons and security centres across the country as well as allegations of mass killings and forced labour. "So far, the office of the co-investigating judges did not notify the public of the crime sites in case four, because . . . *there are serious doubts whether the suspects are 'most responsible*,'" their joint statement said.

Agence France-Presse, "Judges have 'serious doubts' about new Khmer Rouge case," *Radio Netherlands Worldwide*, August 8, 2011, http://www.rnw.nl/international-justice/article/judges-have-serious-doubts-about-new-khmer-rouge-case; emphasis added.

[27] Judgment, *Duško Tadic* (IT-94-1-A), Appeals Chamber, July 14, 1997.

[28] See, for example Paul Williams and Michael Scharf, *Peace with Justice? War Crimes and Accountability in the former Yugoslavia* (Lanham, MD: Rowman & Littlefield, 2002).

[29] Until the establishment of the Special Tribunal for Lebanon, no international tribunal has permitted trial in absentia. The ICTY was able to call upon the services of the occupying forces in BiH (SFOR), but the ICC has no such assistance.

[30] Documentary evidence of the involvement of leaders only began to emerge after document search and seizure operations were carried out from 1997 onward.

[31] Investigators from the ICTY were unable to get access to many areas in BiH until after the Dayton Accords of 1995 ended the hostilities. In the earlier stages of the ICTY, therefore, the starting point for investigations was the UN Commission of Experts report, which concentrated on testimony from those who had fled or been expelled from the Prijedor municipality (Final Report of the Commission of Experts, S/1994/674/Add.2). The majority of the early indictments issued by the prosecutor were solely concerned with the events of that municipality. While, as already stated, the crimes committed there were of the most egregious kind, similar events occurred in other areas, which, owing to time and funding constraints, were never properly investigated and accordingly have not been the subjects of prosecution.

[32] For a more detailed discussion see Eric Stover, *The Witnesses: War Crimes and the Promise of Justice in The Hague* (Philadelphia: University of Pennsylvania Press, 2005).

[33] The allegation often made by defense counsel in the ICTY cases is that the reasons for the "voluntary" departure of non-Serbs were economic.

[34] While there are many publications dealing with the methods by which witnesses may be protected—see, for example, Leigh Toomey, "Witness Protection in Countries Emerging From Conflict (INPROL Consolidated Response (07-008), International Network to Promote the Rule of Law, December 5, 2008, www.inprol.org/files/CR07008.pdf)—it appears that no comprehensive analysis of their success rate has been carried out.

[35] See, for example: Kate Macintosh, "How Far Can Humanitarian Organizations control Co-operation with International Tribunals," *The Journal of Humanitarian Assistance*, May 2005; Anne-Marie La Rosa, "Humanitarian Organizations and International Criminal Tribunals, Trying to Square the Circle," *International Review of the Red Cross* 88, no. 861 (March 2006): 169–186; and Françoise Bouchet-Saulnier and Fabien Dubuet, *Legal or Humanitarian Testimony? History of MSF's Interaction with Investigations and Judicial Proceedings*, Cahiers du Crash (Paris: CRASH/Fondations Médecins Sans Frontières, April 2007).

[36] See Decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness, *Blagoje Simic et al* (IT-95-9-PT), Trial Chamber, July 27, 1999.

[37] While the "Orientation Criteria" for prosecutions of war crimes by the BiH Prosecutor's office were made public, in the view of the author, insufficient attention was paid to ensuring that, in particular, victims of crimes were made aware of those criteria and the reasons for their establishment. For a criticism of those criteria, see Zekerija Mujkanovic, "The Orientation Criteria in Bosnia and Herzegovina," in *Criteria for Prioritizing and Selecting Core International Crimes Cases*, ed. Morten Bergsmo, 2nd ed. (Oslo: Torkel Opsahl Academic EPublisher, 2010).

[38] See, *The Continuing Challenge of Refugee Return in Bosnia & Herzegovina*, Europe Report No. 137 (Brussels: ICG, 2002).

[39] One of the displaced witnesses in the BiH conflict first testified in 1996 in the trial of *Prosecutor v. Tadic*. Since then he has testified in seven further trials, the last of which took place this year—19 years after the events.

[40] UN Security Council Report of the Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, U.N. Doc. S/2004/616 (2004), p. 4.

[41] While the ICTY has virtually come to the end of its trials, Serbia, Croatia, and BiH are continuing to try alleged war criminals in their national courts.

[42] The impact of the trials at the ICTY on post-conflict BiH has been extensively examined by Lara Nettlefield in her book: *Courting Democracy in Bosnia & Herzegovina: The Hague Tribunals Impact in a Postwar State* (Cambridge: Cambridge University Press, 2010).

[43] *War Criminals in Bosnia's Republika Sprska: Who are the People in Your Neighbourhood?*, Europe Report No. 103 (Brussels: ICG, 2000), Executive Summary, para. 1.

[44] Ibid., para. 8.

[45] *The Continuing Challenge of Refugee Return*, ICG, Part C: "Security," paras. 10–11 (emphasis added).

[46] *The Continuing Challenge of Refugee Return*, ICG.

[47] Monika Nalepa, "Reconciliation, Refugee Returns, and the Impact of Criminal Justice," in *NOMOS LI: Transitional Justice*, ed. Melissa Williams, Rosemary Nagy, and Jon Elster (New York: New York University Press, forthcoming).

[48] Ibid., para. 3.2. She appears to believe it is the Croatian Krajina area which could be perceived as the threat by returnees. However, it is in fact the Krajina area within BiH that is relevant. Prijedor is situated in the latter area and borders not only Banja Luka (the capital of Republika Sprska), but also other municipalities that are controlled by the Bosnian Serb state.

[49] It should not be forgotten that the events of Srebrenica have been characterized both at ICTY and the International Court of Justice as genocidal. The Trial Chamber, in giving judgment in the case of *Prosecutor v. Krstic*, stated: "By killing all the military aged men, the Bosnian Serb forces, effectively destroyed the community of the Bosnian Muslims in Srebrenica as such and eliminated all likelihood that it could ever re-establish itself on that territory." Para. 597 (see n. 14). Moreover, the killings were committed by persons who were part of the Bosnian Serb armed forces, and were therefore not for the most part local people.

[50] See Rights-based Municipal Assessment and Planning Project (RMAP), *Municipality of Prijedor: Republika Srpska: October 2003-February 2004*, (UNDP, 2004).

[51] Many of the ICTY victim witnesses, particularly those from Prijedor, were accepted as refugees by Germany. It is a common occurrence for these witnesses to seek written confirmation from the Office of the Prosecutor that they are still required as witnesses so that they retain the right to reside in Germany.

[52] The term "Serbs" is used here to include those who are natives of both Serbia and BiH.

[53] The reason for this apparent imbalance is directly related to the nature of the conflict. Attempts by the ICTY Prosecutor to show even-handedness by conducting trials against accused of Bosniak (Muslim) and Croat nationality have not been markedly successful, and accordingly have increased the belief of the Serbs that the tribunal was biased. On perceptions of the ICTY, see Laurel E. Fletcher and Harvey M. Weinstein, "A World Unto Itself? The Application of International Justice in the Former Yugoslavia," in *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, ed. Eric Stover and Harvey M. Weinstein (Cambridge: Cambridge University Press, 2004), 29–48.

[54] Biljana Plavsic, one of the Bosnian Serb leaders, was the first person to enter into a plea bargain. She received a sentence of 11 years imprisonment, less than would be imposed for a domestic murder in most national systems. The whole topic of the effect of plea bargains has been considered at length in a number of academic papers; see, for example, Janine Clarks, "Plea Bargaining at the ICTY: Guilty

Pleas and Reconciliation" *European Journal of International Law* 20, no. 2 (April 2009): 415–436.

55 Perhaps the most glaring inconsistency is shown by comparing the sentence imposed on the ex-mayor of Prijedor, Milomir Stakic, who was convicted among others of crimes against humanity, and that passed on General Krstic, who was convicted of aiding and abetting the crime of genocide at Srebrenica. The former received a sentence of life imprisonment (reduced on appeal to 40 years), the latter a sentence of 35 years.

56 The Slobodan Milosevic trial is nearly always cited as the example of this problem, on the basis that it began in February 2002 and had not been concluded upon his death in March 2006. However, a totalling of the actual days sat (as a result of his health and court scheduling) would show that the period was considerably less. The fact that he was self-represented meant that the judges gave him far more leeway in his questioning than they would to counsel, with consequent further lengthening of the proceedings.

57 One simple example of the establishment of historical truth is how the Bosnian Serbs planned to seize power in the areas of Bosnia which they claimed as theirs. Their method for so doing was set out in a seized document entitled "Instructions for the Organisation and Activities of the Organs of the Serb People in Bosnia & Herzegovina" (commonly known as the "Variant A & B" document). The Office of the Prosecutor produced this document as evidence in a number of leadership trials. Until quite recently, the authenticity of this document was hotly contested, even in the face of overwhelming evidence that not only was it authentic, but that its contents had been referred to in other documents acknowledged to be authentic. It is now accepted as an authentic document.

58 International Human Rights Law Institute, *The Chicago Principles on Post-Conflict Justice* (Chicago: International Human Rights Law Institute, 2007).

59 Ibid., principle 6.