

Delimiting Deportation, Unlawful Transfer, Forcible Transfer and Forcible Displacement in International Criminal Law

A Jurisprudential History*

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Abstract

The forced displacement of civilian populations is an issue of significant global concern and a subject of extensive legal debate. In international criminal law, forced displacement is criminalized by a complex network of distinct but overlapping offences. These include the Crimes Against Humanity of deportation, forcible transfer, persecution and other inhumane acts, and the grave breach of the Geneva Conventions of 'unlawful deportation or transfer'. International courts and tribunals have been inconsistent in the adoption of these crimes in their statutes and in their subsequent interpretation, making it all the more difficult to distinguish between them. The jurisprudential history of these crimes is lengthy and not without controversy, highlighted by inconsistent judicial approaches. In this article, we offer a critical jurisprudential history of these displacement crimes in international criminal law.

In particular, we focus on the case law emanating from the International Criminal Tribunal for the former Yugoslavia, a court that comprehensively addressed crimes associated with ethnic cleansing, a characteristic feature of that conflict, with the result that displacement was a central focus of that court. We set out our jurisprudential history in chronological order, beginning with the earliest inceptions of displacement crimes at the ICTY and then tracing their development toward the establishment of a consensus. Our hope is that the article sheds light on the development of these offences, informs future debate, and acts as a useful template for those seeking to understand how these crimes may have a role to play in future international jurisprudence.

Keywords: International criminal law, theory of international law, crimes against humanity, deportation, unlawful or forcible transfer.

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1 Introducing the Crimes

It is useful to begin by setting out the various displacement crimes that may be prosecuted as international offences. To do so, we sketch the legal bases for these crimes using the ICTY framework based on customary international law. However, we recall that the ICC statute and other instruments may view these offences slightly differently.

The ICTY Statute ('the Statute') allowed the Prosecutor to charge acts of illegal displacement in four different ways, either as grave breaches of the Geneva Conventions of 1949 pursuant to Article 2 of the Statute or as Crimes Against Humanity pursuant to Article 5 of the Statute. We address each in turn, then highlight the development of the hybrid term 'forced displacement' used as a label to describe all these offenses.

First, the ICTY provided for jurisdiction over the war crime called 'unlawful deportation or transfer.' In defining this offence, the Statute provides that

[t]he International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

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

This language incorporates aspects of Article 49 of Geneva Convention IV, which stipulates in relevant part that

[i]ndividual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.

Second, Article 5 of the Statute explicitly lists 'deportation' as a crime against humanity within the jurisdiction of the court, providing in relevant part,

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

...
(d) Deportation

Third, that same article lists persecution as a Crime Against Humanity, which may be established on the basis of acts of displacement. The ability to charge such acts as persecution derives from the fact that acts amounting to persecution may include crimes enumerated in other sub-clauses of Article 5 of the Statute, other

international crimes enumerated in the Statute, and other acts that are not independently criminalized provided that they are “of the same gravity or severity as the other enumerated crimes in Article 5”.¹ In such instances, the jurisprudence of the Tribunal clearly demonstrates that it is insufficient for the Prosecution to charge persecution in general – rather, it is necessary to charge specific acts alleged to have constituted the crime.² Thus, displacement has featured as a specifically articulated basis for persecution charges.

Fourth, a number of ICTY judgements have characterized what they describe as “forcible transfer” within the territory of a single state as “other inhumane acts”, prohibited under Article 5(i) of the Statute.³ Other inhumane acts denote a residual category of crimes against humanity that do not fall within any of the specifically enumerated crimes set out in Article 5 of the Statute but that are nevertheless sufficiently similar in nature and gravity.⁴ The prosecution of ‘forcible transfer’ as an ‘other inhumane act’ before the ICTY was necessary because, unlike in the ICC Statute, forcible transfer is not explicitly enumerated as a separate crime against humanity within the ICTY’s jurisdiction.⁵

Distinguishing between deportation, forcible transfer and unlawful transfer has been complicated by their significant legal and terminological overlap. Indeed, as will become clear, courts have disagreed as to the existence and extent

- 1 ICTY, Judgement of 2 November 2001 in *Prosecutor v. Kvočka et al.*, IT-98-30/1-T, para. 185. See also ICTY, Judgement of 14 January 2000 in *Prosecutor v. Kupreškić et al.*, IT-95-16-T, paras. 614 and 615; ICTY, Judgement of 26 February 2001 in *Prosecutor v. Kordić & Čerkez*, IT-95-14/2-T, paras. 208-210; Trial Judgement in *Prosecutor v. Krnojelac*, para. 445.
- 2 The Trial Judgment in *Prosecutor v. Kupreškić*, for example, stated that “in the light of its broad definition of persecution, the prosecution cannot merely rely on a general charge of ‘persecution’ in bringing its case. This would be inconsistent with the concept of legality. To observe the principle of legality, the Prosecution must charge particular acts ... These acts should be charged in sufficient detail for the accused to be able to fully prepare their defence”. Trial Judgment in *Prosecutor v. Kupreškić*, para. 626. For findings to the same effect, see also the Trial Judgment in *Prosecutor v. Krnojelac*, para. 433; ICTY, Judgement of 29 November 2002 in *Prosecutor v. Vasiljević*, IT-98-32-T, para. 246; ICTY, Judgement of 31 July 2003 in *Prosecutor v. Stakić*, IT-97-24-T, para. 735; ICTY, Judgement of 17 October 2003 in *Prosecutor v. Simić*, IT-95-9-T, para. 50; ICTY, Judgement of 1 September 2004 in *Prosecutor v. Brđanin*, IT-99-36-T, para. 944.
- 3 The Trial Judgement in *Prosecutor v. Kupreškić*, for instance, found that the term ‘other inhumane acts’ “undoubtedly embraces the forcible transfer of groups of civilians (which is to some extent covered by Article 49 of the IVth Convention of 1949 and Article 17(1) of the Additional Protocol II of 1977)”. Trial Judgment in *Prosecutor v. Kupreškić*, para. 566. See also the Trial Judgment in *Prosecutor v. Krstić*, para. 673 and ICTY, Judgement of 17 January 2005 in *Prosecutor v. Blagojević et al.*, IT-02-60-T, para. 629.
- 4 The Trial Judgment in *Prosecutor v. Vasiljević* clarified that the three criteria include “(i) the occurrence of an act or omission of similar seriousness to the other enumerated acts under the Article; (ii) the act or omission caused serious mental or physical suffering or injury or constituted a serious attack on human dignity; and (iii) the act or omission was performed deliberately by the accused or a person or persons for whose acts and omissions he bears criminal responsibility”. Trial Judgment in *Prosecutor v. Vasiljević*, para. 234. See also ICTY, Judgement of 31 March 2003 in *Prosecutor v. Naletilić & Martinović*, IT-98-34-T, para. 247; Trial Judgement in *Prosecutor v. Kupreškić*, para. 563; Trial Judgement in *Prosecutor v. Kordić*, para. 271; Trial Judgement in *Prosecutor v. Kvočka*, para. 206.
- 5 ICC Statute, Art. 7(1)(d) prohibits “[d]eportation or forcible transfer of population”, whereas Art. 5(d) of the ICTY Statute only contains the term ‘deportation’.

of any such differentiation. This lack of unanimity has been further complicated by the introduction of related concepts such as ‘forcible displacement’ as a means of describing the concepts more generically. Arguably, however, unlawful transfer, forcible transfer and deportation each retain autonomous legal meanings under customary international law, as apparent from a chronological exploration of these crimes’ development in the jurisprudence of the ICTY.

2 Early Attempts at Definitions

The ICTY Statute does not elaborate the requisite elements of the various displacement offences it references.⁶ Early judgements at the ICTY were therefore concerned with establishing the exact parameters of these crimes based on definitions inspired from other related international law instruments. In undertaking this task, the judges were restricted by the requirement that the definitions be based upon customary international law as it existed at the time the alleged offences took place. This restriction was set out in the Secretary-General’s Report of 1993, which stipulated,

In the view of the Secretary-General, the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise. This would appear to be particularly important in the context of an international tribunal prosecuting persons responsible for serious violations of international humanitarian law.⁷

The first ruling of the Tribunal to address such crimes, on 20 October 1995, was the *Nikolić* Rule 61 Decision.⁸ The Trial Chamber considered the alleged war crime of unlawful transfer against the factual background of the forced transfer of civilians between two prison camps (the Sušica and Butković camps) within Bosnia and Herzegovina. It found that these acts might amount to a grave breach of the Geneva Conventions and, in obiter, that “the same set of facts could be characterised as deportation, and accordingly, come under Article 5 of the Statute” as a crime against humanity.⁹ The Trial Chamber’s apparent conclusion that it was not necessary for a transfer to take place across a national border in order to constitute deportation initiated the debate on what subsequently became one of the

6 A situation that contrasts with the ICC Statute.

7 *S/25704, 3 May 1993; Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, para. 34. There is an issue whether treaty law would be sufficient to ground jurisdiction where it is proved that the states concerned were both bound by the terms of the treaties in question, but this is beyond the scope of this article.

8 ICTY, Review of an Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence of 20 October 1995 in *Prosecutor v. Nikolić*, IT-94-2-R61, para. 23. Rule 61 of the Statute provides for the public confirmation an indictment where the execution of an arrest warrant has not been possible.

9 Decision on Rule 61 in *Prosecutor v. Nikolić*, para. 23.

most controversial aspects of the definition of the crime. Although the Trial Chamber clearly found that no such cross-border transfer was required, it cited no authority to support its conclusion.

The *Kupreškić* Trial Judgement was the next judgement to address displacement-type crimes.¹⁰ The Trial Chamber found that “forcible transfer of groups of civilians” within or between national borders is included as an inhumane act under Article 5(i) of the Statute.¹¹ Beyond this finding, however, no attempt was made at defining the concept, or elaborating on its relationship with the notions of unlawful transfer or deportation.

In the *Blaškić* Trial Judgement of 3 March 2000, deportation and forcible transfer were considered as acts underlying the crime against humanity of persecution. For the first time, a Trial Chamber made a concerted attempt to define these acts based on previous legal authorities, concluding that deportation or forcible transfer of civilians were both defined as the “forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law”.¹² The Trial Chamber made clear that this definition derived from the wording of Article 7(2)(d) of the ICC Statute and the conclusions reached by the International Law Commission’s 1996 Articles on the Draft Code of Crimes Against the Peace and Security of Mankind (ILC Draft Code).¹³ However, a closer assessment of these authorities suggests that in and of themselves they were inadequate to conclusively establish the relevant definitions.

In relation to arguments based on the ICC Statute, an examination of the relevant sections of the treaty reveals the utilization of a single provision to encompass ‘deportation or forcible transfer of population’ as crimes against humanity. In reproducing the ICC definition of deportation and forcible transfer, the *Blaškić* Trial Chamber did not distinguish in any way between the two traditionally separate crimes. The need for such distinction may have been considered unnecessary as the acts then before the Trial Chamber involved a charge of persecution. Nevertheless, the wholesale adoption of standards defined in the ICC Statute would appear to be problematic because the ICC Statute was only signed in 1998 and does not purport to represent customary international law at the time of the Balkan conflict in the early 1990s. Moreover, the Commentaries to the ILC Draft Code cited in *Blaškić* expressly distinguish between the two offences, stating that

[w]hereas deportation implies expulsion from the national territory, the forcible transfer of population could occur wholly within the frontiers of one and the same State.¹⁴

10 Trial Judgement in *Prosecutor v. Kupreškić*.

11 Trial Judgment in *Prosecutor v. Kupreškić*, para. 566.

12 Trial Judgement in *Prosecutor v. Blaškić*, para. 234.

13 Trial Judgement in *Prosecutor v. Blaškić*, at n. 460.

14 Draft Code of Crimes Against the Peace and Security of Mankind with Commentaries, 1996, at Art. 18(g) and commentary at p. 49.

It is not clear whether in relying upon this dictum, the *Blaškić* Trial Chamber intended to endorse the view that deportation requires that a national border must be crossed whereas forcible transfer could occur within national borders. Even if it did, the 1996 ILC report post-dates the time period relevant to the judgement and, although clearly indicative of scholarly thinking at the time of its release, cannot be taken as representative of customary international law in the absence of other corroborative evidence. The Tribunal's first serious attempt to define the content of the crimes of deportation and forcible transfer was thus inadequate, leaving essential issues to be litigated in subsequent cases.

The *Krstić* Trial Judgement¹⁵ subsequently considered deportation both in its own right and as a constitutive element of persecution, as well as forcible transfer as an element of both persecution and other inhumane acts, all Crimes Against Humanity.¹⁶ The judgement represented a step forward in terms of clarity in the law as the Trial Chamber clearly addressed the definitions, as follows:

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.¹⁷

The *Krstić* Trial Judgement thus supported a distinction between deportation and forcible transfer on the basis of a cross-border requirement.¹⁸ However, as in the *Blaškić* case, the Trial Chamber supported this distinction by reference to the commentary to the 1996 ILC Draft Code. As noted above, this would appear to have been an insufficient basis on which to draw conclusions about the state of customary international law on the subject at the relevant time period.

Having drawn a distinction between deportation and forcible transfer, the *Krstić* Trial Chamber went on to note that "any forced displacement is by definition a traumatic experience which involves abandoning one's home, losing property and being displaced under duress to another location".¹⁹ While this conclusion would appear to be both logical and correct, it also appears to have been used as the basis for arguments in later judgements that no real distinction may be drawn between the two crimes.²⁰ As will be seen from the analysis that follows, it is not at all clear that this reasoning is consistent with customary international law.

15 Trial Judgement in *Prosecutor v. Krstić*.

16 Trial Judgement in *Prosecutor v. Krstić*, paras. 519-532.

17 Trial Judgement in *Prosecutor v. Krstić*, para. 521.

18 On the facts of the case, the Trial Chamber concluded that "[s]ince the Srebrenica civilians were displaced within the borders of Bosnia-Herzegovina, the forcible displacement may not be characterised as deportation in customary international law", Trial Judgement in *Prosecutor v. Krstić*, para. 531.

19 Trial Judgement in *Prosecutor v. Krstić*, para. 523.

20 See discussion regarding the Trial Judgement in *Prosecutor v. Stakić*.

Another issue highlighted for the first time in the *Krstić* Trial Judgement is the ‘forcible’ nature of the transfer. On this issue, the Trial Chamber stated that

despite the attempts by the VRS [Bosnian Serb Army] to make it look like a voluntary movement, the Bosnian Muslims of Srebrenica were not exercising a genuine choice to go, but reacted to a certainty that their survival depended on their flight.²¹

The Chamber concluded that the forcible transfer of civilians may thus be distinguished from “mass movement of civilian populations [which is] a regular occurrence whenever enemy forces capture a territory”.²² As we will see, this issue too marked a recurring theme in this jurisprudential history.

Finally, the *Krstić* Trial Judgement agreed with the *Kupreškić* Trial Judgement that forcible displacement within or between national borders is included as an ‘other inhumane act’ under Article 5(i) defining crimes against humanity.²³ Although the initial caselaw identified important issues, such as the forcible nature of transfers and the possible distinction between cross-border and intra-state displacements, they did not articulate clear definitions.

3 Identifying Customary International Law

Following these earlier judgements, which had provided incomplete and at times contradictory findings regarding the elements of the crimes, the *Krnojelac* Trial Judgement²⁴ recognized the need for a comprehensive review of the definition in customary international law.²⁵ The *Krnojelac* Trial Chamber examined the status of the prohibition of deportation under international humanitarian law, focusing first upon post-war jurisprudence. To begin, it referenced the Nuremburg Judgment, in which

it was stated that ‘not only in defiance of well established rules of international law, but in complete disregard of the elementary dictates of humanity ... [w]hole populations were deported to Germany for the purposes of slave labour upon defense works, armament production and similar tasks connected with the war effort’ (p 227) and Von Schirach’s conviction for deportation as a crime against humanity was for his part in the deportation of Jews from Vienna to the ghettos of the East (pp 317-319).²⁶

21 Trial Judgement in *Prosecutor v. Krstić*, para. 530.

22 Trial Judgement in *Prosecutor v. Krstić*, para. 145.

23 Trial Judgement in *Prosecutor v. Krstić*, para. 523.

24 Trial Judgement in *Prosecutor v. Krnojelac*, IT-97-25-T.

25 In the *Krnojelac* Trial, acts of deportation were charged within the context of the crime of persecution under Art. 5(h). Although forcible transfer was not formally considered, it was used as a point of reference in arriving at a definition of deportation.

26 Trial Judgement in *Prosecutor v. Krnojelac*, at n. 1429.

In addition, the Chamber relied on the Control Council Law No. 10 cases, in particular the *United States of America v Erhard Milch* in which Judge Phillips stated that

International Law has enunciated certain conditions under which the fact of deportation of civilians from one nation to another during times of war becomes a crime.²⁷

The Chamber went on to note that deportation was prohibited in a number of international legal instruments, including the Nuremberg Charter,²⁸ the Tokyo Charter,²⁹ Control Council Law No 10,³⁰ Geneva Convention IV,³¹ Additional Protocol I,³² International Law Commission Draft Code of Offences against the Peace and Security of Mankind (1996)³³ and the ICC Statute.³⁴ With a final reference to authoritative academic commentary,³⁵ the Trial Chamber concluded that deportation was clearly prohibited under international humanitarian law, both as a war crime and as a crime against humanity, the content of the offence remaining the same under each.³⁶

Having established deportation as an offence recognized under international law at the time relevant to the indictment, the Trial Chamber endorsed the ICC standard applicable to crimes against humanity (and the definition set out previously in the *Blaškić* Trial Judgement), stipulating that

27 *United States of America v. Erhard Milch*, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No 10 (1952) Vol 2, Concurring Opinion by Judge Phillips, at p. 865. The Trial Chamber also relied upon *United States of America v. Alfried Krupp et al*, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No 10 (1952) Vol 9, part 2, at pp. 1432-1433; and *United States of America v. Friedrich Flick et al*, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10 (1952) Vol. 6, at p. 681.

28 Arts. 6(b) and (c).

29 Art. 5(c).

30 Art. II (1)(b) and (c).

31 Arts. 49 and 147.

32 Art. 85(4)(a).

33 Arts. 18 and 20.

34 Arts. 7(1)(d) and 8(2)(a)(vii).

35 Cited articles include J. M. Henckaerts, 'Deportation and Transfer of Civilians in Time of War', *Vanderbilt Journal of Transnational Law*, Vol. 26, 1993, p. 472, which states with respect to Art. 49 of Geneva Convention IV that "[p]resumably, a transfer is a relocation within the occupied territory, and a deportation is a relocation outside the occupied territory"; Bassiouni, *Crimes Against Humanity in International Criminal Law*, Leiden, Martinus Nijhoff Publishers, 1999, p. 312; C. K. Hall, 'Crimes against humanity – para. 1(d)', in O. Triffterer (Ed.), *Commentary on the Rome Statute of the International Criminal Court*, 1999, p. 136, with respect to the two terms used in Art. 7 of the Rome Statute: "Unfortunately, the Statute does not expressly distinguish between deportation and transfer. However, given the common distinction between deportation as forcing persons to cross a national frontier and transfer as forcing them to move from one part of the country to another without crossing a national frontier, and given the basic presumption that no words in a treaty should be seen as surplus, it is likely that the common distinction was intended."

36 Trial Judgement in *Prosecutor v. Krnojelac*, para. 473.

[d]eportation may be defined as the forced displacement of persons by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.³⁷

The assertion is unobjectionable insofar as it defines preliminary elements of the offence as a crime against humanity, although the idea that the same definition is equally applicable to the definition of a war crime seems problematic in that it ignores the explicit requirement that deportation as a war crime involves occupied territory.³⁸

As in the *Krstić* case, the *Krnjelac* Trial Chamber went further to draw a clear distinction between deportation, requiring the displacement of persons across a national border, and forcible transfer, which may take place within national boundaries.³⁹ Unlike *Krstić*, the Trial Chamber relied on jurisprudence and a number of international instruments, which indicated that such a conclusion was in fact customary international law at the time the offences were allegedly committed. In arriving at this conclusion, the *Krnjelac* Trial Judgement expressly rejected the more liberal approach initially adopted in the *Nikolić* Rule 61 Decision. The *Krnjelac* Trial Judgement declared that it

does not accept as persuasive the only previous decision of this Tribunal which states to the contrary, and it notes that this decision did not follow fully litigated trial proceedings.⁴⁰

The *Krnjelac* Trial Chamber further elaborated on other elements of the crime of deportation. In particular, the Chamber found that deportation is only illegal where it is forced,⁴¹ specifying that the term 'forced' is not limited to physical force but may also include the

threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment.⁴²

According to the Chamber, the essential element in establishing that deportation is forced is the involuntary nature of the displacement, where relevant persons

37 Trial Judgement in *Prosecutor v. Krnjelac*, para. 474.

38 See Art. 49 Geneva Convention IV, in relevant part: "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" (emphasis added).

39 Trial Judgement in *Prosecutor v. Krnjelac*, para. 474; Trial Judgement in *Prosecutor v. Krstić*, para. 521.

40 Trial Judgement in *Prosecutor v. Krnjelac*, para. 474.

41 Trial Judgement in *Prosecutor v. Krnjelac*, para. 475.

42 Trial Judgement in *Prosecutor v. Krnjelac*, para. 475, citing Trial Judgement in *Prosecutor v. Krstić*, para. 529.

had no real choice.⁴³ Finally, the Trial Chamber noted that forced displacement is only illegal when it takes place without grounds permitted by international law.⁴⁴ In all these respects, the *Krnjelac* case built a firmer foundation in custom and deepened understanding of this law.

4 Challenging Forcible Transfer as an ‘Other Inhumane Act’

Next, in the *Stakić* Rule 98bis Decision,⁴⁵ the Chamber reiterated the view that “the crime of deportation presumes transfer across State borders, whereas forcible transfer relates to displacement within a State”.⁴⁶ While this conclusion was not remarkable in view of the approach taken in preceding judgements, it represented a step backwards in terms of the sources on which it is based insofar as it relied simply on the 1996 ILC Report and the *Krstić* Trial Judgement.⁴⁷ As shown earlier, the ILC Report is insufficient on its own to reach a conclusion that this was in fact the state of customary international law at the time, and the *Krstić* Trial Judgement did not undertake a thorough analysis of relevant sources. The regression was perhaps unimportant, except that the failure to cite the more convincing evidence of customary international law contained in the *Krnjelac* Trial Judgement may have paved the way for future inconsistencies. Curiously, there is no indication in this decision of the approach to the cross-border issue that would eventually be adopted in the *Stakić* Trial Judgement, which we address in the following paragraphs.

While the *Stakić* Trial Chamber may have been prepared to follow the lead of other judgements with respect to the definition of deportation, it clearly staked out its own path with respect to charging forcible transfer as an ‘other inhumane

43 Trial Judgement in *Prosecutor v. Krnjelac*, para. 475, nn. 1434 and 1435. On the facts of the case, the Trial Chamber concluded that the majority of incidents alleged by the prosecution to constitute deportation did take place. However, it further concluded that the transfer of detainees from one prison camp to another within BiH did not fulfil the legal requirements of deportation because no national border was crossed (para. 478). The one instance in which a group of 35 men was moved across a national border (to Rozaj in Montenegro), the Chamber decided that this was not involuntary because “there is general evidence that detainees wanted to be exchanged, and that those selected for so-called exchanges freely exercised their choice to go and did not have to be forced” (para. 483). On the facts of the case, the Trial Chamber thus rejected the Prosecution submission that the mere fact that the detainees were taken out of the KP Dom, wherever else they may have been transferred to, constituted deportation. The Prosecution appealed regarding both the Trial Chamber’s interpretation of the law as well as the findings on these incidents.

44 Trial Judgement in *Prosecutor v. Krnjelac*, para. 475, n. 1436.

45 Decision on Rule 98bis Motion for Judgement of Acquittal of 31 October 2002 in *Prosecutor v. Stakić*, IT-97-24. Rule 98 bis of the ICTY Rules of Procedure and Evidence provided at the time that “(A) An accused may file a motion for the entry of judgement of acquittal on one or more offences charged in the indictment within seven days after the close of the Prosecutor’s case and, in any event, prior to the presentation of evidence by the defence pursuant to Rule 85 (A)(ii). (B) The Trial Chamber shall order the entry of judgement of acquittal on motion of an accused or proprio motu if it finds that the evidence is insufficient to sustain a conviction on that or those charges.”

46 Decision on Rule 98bis in *Prosecutor v. Stakić*, para. 130.

47 Decision on Rule 98bis in *Prosecutor v. Stakić*, n. 183.

act'. The Trial Chamber expressed its 'serious concern' with the use of 'other inhumane acts' as a crime against humanity to attach criminal liability to forcible transfers, reasoning that

Not every law can be defined with ultimate precision and it is for the jurisprudence to interpret and apply legal provisions which need, in part, to be formulated in the abstract. However, the description of a criminal offence extends beyond the permissible when the form of conduct prohibited cannot be identified. The crime of "other inhumane acts" subsumes a potentially broad range of criminal behaviour and may well be considered to lack sufficient clarity, precision and definiteness, that is to violate the "principle of certainty", to qualify as law in order to satisfy the principle of *nullum crimen sine lege*, a fundamental principle of criminal law. Furthermore, it appears clear that the concept of forcible transfer was familiar to the authors of the Statute, as it is mentioned in Article 4(2)(e) of the Statute in relation to children. The fact that forcible transfer is not explicitly mentioned in Article 5 (Crimes Against Humanity) provides additional support for not considering it as part of "other inhumane acts", as distinct from deportation, enumerated explicitly in Article 5(2)(d).⁴⁸

While this conclusion is not without merit, the logic that a residual clause such as 'other inhumane acts' should be interpreted as excluding acts not otherwise enumerated in Article 5 would appear to render the clause redundant and to raise the question why it was included in the Statute by the drafters. A large number of cases had applied 'other inhumane acts' in practice.⁴⁹ Perhaps most intriguingly, the *Stakić 98bis* Decision eventually concluded that a reasonable Trial Chamber could not dismiss a count at the *98bis* stage for legal reasons (vagueness), on the basis that the *Kupreškić* Judgement had previously applied the provision to forcible transfers.⁵⁰ This conclusion is difficult to reconcile with the Trial Chamber's

48 Decision on Rule 98bis in *Prosecutor v. Stakić*, para. 131.

49 E.g., the Trial Judgement in *Prosecutor v. Kvočka* stated that "[m]utilation and other types of severe bodily harm, beatings and other acts of violence, serious physical and mental injury, forcible transfer, inhumane and degrading treatment, forced prostitution, and forced disappearance are listed in the jurisprudence of the Tribunal as falling under this category." Trial Judgement in *Prosecutor v. Kvočka*, para. 208. According to the Trial Judgement in *Prosecutor v. Blaškić*, "serious physical and mental injury – excluding murder – is without doubt an 'inhumane act' within the meaning of Article 5 of the Statute". Trial Judgement in *Prosecutor v. Blaškić*, para. 239. See also ICTR, Judgement of 2 September 1998 in *Prosecutor v. Akayesu*, ICTR-96-4-T, para. 697 for forcing nudity in various public circumstances; ICTR, Judgement of 21 May 1999 in *Prosecutor v. Kayishema & Ruzindana*, ICTR-95-1-T, paras. 154 and 583; ICTR, Judgement of 16 May 2003 in *Prosecutor v. Niyitegeka*, ICTR-96-14-T, para. 465, for decapitation, castration, piercing of a victim's skull and sexual desecration of a corpse.

50 The Trial Chamber stated that "[a]t this point in the proceedings this Chamber is not satisfied that a reasonable Trial Chamber could decline to enter a conviction for legal reasons (vagueness), and, therefore, will not dismiss the count on this basis. The Trial Chamber is fortified in its conclusion by the *Kupreškić Trial Judgement*, in which the same issue in relation to the imprecision of the crime of other inhumane act was raised, but the count was not dismissed for vagueness." Decision on Rule 98bis in *Prosecutor v. Stakić*, para. 131.

earlier view that charging forcible transfer as an ‘other inhumane act’ may amount to a violation of the principle of *nullem crimen sine lege*.

5 The First Substantive Treatment of Unlawful Transfer as a War Crime

Up until this point, all substantive debate about displacement-type crimes had focused on Crimes Against Humanity. In the *Naletilić* Trial Judgement,⁵¹ a Trial Chamber dealt for the first time with a charge of unlawful transfer of a civilian as a grave breach of the Geneva Conventions.⁵² This first ICTY articulation of the definition of this war crime was clearly influenced by caselaw that had interpreted deportation and forced transfer as Crimes Against Humanity.

With respect to the ‘unlawful’ nature of the transfer, the Trial Chamber noted that Article 49 of the Geneva Conventions does not prohibit transfers where motivated by the security of the population or imperative military reasons.⁵³ In addition, it stated that transfers that are “motivated by an individual’s own genuine wish to leave, are lawful”.⁵⁴ The Trial Chamber went on to cite the previous jurisprudence of the ICTY supporting the stance that the term ‘forcible’ should not be restricted to physical coercion. In particular the Trial Chamber adopted the *Kunarac* Trial Judgement’s pronouncement in relation to other consent-based crimes, that coercive circumstances made “true consent ... not possible”.⁵⁵ Along the same lines, the *Naletilić* Trial Judgement added that “the determination as to whether a transferred person had a ‘real choice’ has to be made in the context of all relevant circumstances on a case by case basis”.⁵⁶ Borrowing from Crimes Against Humanity caselaw, the Trial Chamber thus concluded that forcible transfer is “the movement of individuals under duress from where they reside to a place that is not of their choosing”.⁵⁷ Although the charge at issue was in fact one of ‘unlawful transfer’ pursuant to Article 2(g) of the Statute, the Trial Chamber stated that the term was often used as a synonym for forcible transfer. It opined that

[t]he Geneva Convention IV refers to unlawful transfer, but the term forcible transfer is often used interchangeably. However, the Chamber considers a transfer to be unlawful or forcible when it has determined that there is a lack of consent, provided that the transfer does not fulfil the requirements of an

51 Trial Judgement in *Prosecutor v. Naletilić & Martinović*.

52 Trial Judgement in *Prosecutor v. Naletilić*, para. 513.

53 Trial Judgement in *Prosecutor v. Naletilić*, para. 518.

54 In interpreting what amounts to an individual’s ‘own wish,’ the Trial Chamber had recourse to Art. 31 of Geneva Convention IV, which provides that “no physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties”. ... Trial Judgement in *Prosecutor v. Naletilić*, para. 519.

55 Trial Judgement in *Prosecutor v. Naletilić*, para. 519. The *Kunarac* Trial Chamber pronouncement was originally made in the context of the crime of rape. See ICTY, Judgement of 22 February 2001 in *Prosecutor v. Kunarac*, IT-96-23-T & IT-96-23/1-T, paras. 457-460.

56 Trial Judgment in *Prosecutor v. Naletilić*, para. 519.

57 Trial Judgment in *Prosecutor v. Naletilić*, para. 519.

evacuation. For this reason the Chamber prefers in this context the term unlawful transfer to that of forcible transfer.⁵⁸

The Chamber's analysis further noted that Article 49 prohibits transfers both from occupied territory and within occupied territory.⁵⁹ The conclusion that unlawful transfer need not take place across a border was based on the Commentary to the Additional Protocols, which reached this conclusion on the basis of the specific wording in the second paragraph of Article 49.⁶⁰ This aspect of the definition of unlawful transfer was distinguished from deportation. Even within the context of a separate charge of persecution, the Trial Chamber affirmed,

The jurisprudence of the Tribunal has found that deportation requires transfer beyond state borders, to be distinguished from forcible transfer, which may take place within national borders.⁶¹

Notably, the Trial Chamber interpreted the border requirement with respect to deportation to concern a national border, concluding that because there were no allegations of transfers across state borders, "there is no basis to find that persecution was conducted by means of deportation".⁶² The Trial Chamber thus arrived at the following definition of unlawful transfer:⁶³

- i the general requirements of Article 2 of the Statute are fulfilled [listing the category of war crimes known as grave breaches];
- ii the occurrence of an act or omission, not motivated by the security of the population or imperative military reasons, leading to the transfer of a person from occupied territory or within occupied territory;
- iii the intent of the perpetrator to transfer a person.

The definition is noteworthy for several reasons. First, it stresses that the transfer must take place from or within occupied territory. While it is true that unlawful transfer and deportation as referenced in Article 49 of Geneva Convention IV are limited by a connection to occupied territories, there is some evidence that this limitation may no longer be applicable as a matter of customary international law. A range of state practice positively dispenses with the need for a link to occupied territory in defining the war crimes of deportation and unlawful transfer and thus more closely approximates the definition of these war crimes to the ICC definition for crimes against humanity based on "expulsion or other coercive acts

58 Trial Judgment in *Prosecutor v. Naletilić*, at n. 1359.

59 Trial Judgment in *Prosecutor v. Naletilić*, para. 518.

60 Trial Judgment in *Prosecutor v. Naletilić*, at n. 1354, referring to Commentary on the Additional Protocols, p. 1000, n. 28, para. 3502. See also, G. Acquaviva, 'Unlawful Transfer, Unlawful Labour, Plunder and Persecution: The State of the Law in *Prosecutor v. Naletelic and Martinovic*', *The Global Community Yearbook of International Law and Jurisprudence*, 2003, at n. 25.

61 Trial Judgment in *Prosecutor v. Naletilić*, para. 670.

62 Trial Judgment in *Prosecutor v. Naletilić*, para. 670.

63 Trial Judgment in *Prosecutor v. Naletilić*, para. 521.

from the area in which [the individuals expelled] are lawfully present". For example, General Assembly Resolution 3318 (XXIX), adopted in 1974, proclaimed that "forcible eviction, committed by belligerents *in the course of military operations* or in occupied territories shall be considered criminal".⁶⁴ Other similar constructions can be found in military manuals,⁶⁵ domestic criminal codes,⁶⁶ and legislation implementing the Geneva Conventions' grave breach regime.⁶⁷ Whether these authorities are sufficient to constitute custom must be subject to some doubt given the plethora of practice insisting on the more traditional link to occupation.⁶⁸

Second, the *Naletilić* Trial Judgement does not expressly mention a forcible aspect to the transfer, despite the fact that the Chamber clearly considered this in its earlier analysis and it was expressly required in earlier jurisprudence addressing displacement within the context of crimes against humanity. It is not immediately clear why this element does not form part of the Chamber's definition when it took the position that transfers motivated by an individual's own genuine wish to leave are lawful. Regardless, considering the link to occupied territory and the absence of a forcible aspect, the definition of unlawful transfer would appear to differ from that of forcible transfer as defined by the ICC Statute.⁶⁹ As a result, this would seem to call into question the Trial Chamber's suggestion that unlawful transfer and forcible transfer are in fact interchangeable.

64 GA Res. 3318 (XXIX), 14 December 1974, § 5 (emphasis added).

65 Australia's Commanders' Guide provides that 'civilians should not be relocated'. It further provides that "unlawfully deporting, transferring ... a protected person" constitutes "grave breaches or serious war crimes likely to warrant institution of criminal proceedings": France's LOAC Summary Note provides that "deportation or illegal transfer of population" constitutes a grave breach, which is a war crime; The Military Instructions of the Philippines provides that emphasis should be placed on allowing the civilian population to remain in their homes, on the basis that the large-scale movement of civilians creates logistical and strategic difficulties for the military.

66 Azerbaijan's Criminal Code punishes the "driving away [of] the civilian population with other aims from the area where they legally live"; Colombia's Penal Code punishes "anyone who, during an armed conflict, without military justification, deports, expels or carries out a forced transfer or displacement of the civilian population from its own territory".

67 Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime. It also specifies that "war crimes: namely violation of law or custom of war include ... deportation to slave labour or for any other purpose of civilian population in the territory of Bangladesh"; Under the Criminal Code of the Federation of Bosnia and Herzegovina, "whoever in violation of rules of international law applicable in time of war, armed conflict or occupation ... orders displacement" of the civilian population commits a war crime. The Criminal Code of the Republika Srpska contains the same provision. China's Law Governing the Trial of War Criminals provides that "mass deportation of non-combatants" constitutes a war crime.

68 See practice identified in J.-M. Henckaerts & L. Doswald-Beck, 'Chapter 38 Displacement and Displaced Persons', in *Customary International Humanitarian Law* (Vol. 2), Cambridge, Cambridge University Press, 2005.

69 Art. 7(2)(d) of the ICC Statute provides that "[d]eportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts *from the area in which they are lawfully present*, without grounds permitted under international law" (emphasis added).

Third, the *Naletilić* Trial Judgement's definition of the *mens rea* requirement demands only "the intent of the perpetrator to transfer a person", even though the same Judgement had previously held that "the intent to have the person (or persons) removed [...] implies the aim that the person is not returning".⁷⁰ The difference is important since subsequent decisions adopted the requirement of intention to transfer permanently without further analysis. The sole authority provided by the *Naletilić* Trial Judgement to support the requirement for permanent transfer was contained in a footnote citing the Geneva Convention's Commentaries. The citation in question reads: "[unlike] deportation and forcible transfer, evacuation is a provisional measure."⁷¹ Understandably, the Trial Chamber perceived this statement as being "indicative ... that deportation and forcible transfer are not by their nature provisional, which implies an intent that the transferred persons should not return".⁷² Nevertheless, in practical terms, it is difficult to see why a temporary but otherwise unlawful transfer should be exempt from the definitions of deportation or forcible transfer. By requiring an intention that the transfer be permanent, the *Naletilić* Trial Judgement suggests that it would not be a crime for a civilian to be transferred or deported for a finite period of time (with the commensurate *mens rea*), no matter the length of that intended period. This issue too would spark further litigation.

6 Upending the Initial Definitions

Up until this point in time, the jurisprudential history of displacement crimes had sketched the broad outlines of a fairly consistent approach. The *Stakić* Trial Judgement sought to upend these initial foundations and with a novel interpretation of the relationship between deportation and forcible transfer. Nine months after the *Stakić* 98bis Decision, the same Trial Chamber rendered its final Judgement, reversing much that came before.⁷³

The *Stakić* Trial Judgement analysis commenced with the acknowledgement that both the *Krstić* and *Krnjelac* Trial Judgements had found that under customary international law a cross-border requirement distinguishes deportation from forcible transfer.⁷⁴ No reference was made to the *Naletilić* Trial Judgement, which also affirmed the same requirement,⁷⁵ or indeed to the Chamber's own 98bis Decision, which had adopted the same approach. Instead, the Trial Chamber declared the following:

[It] is aware of the jurisprudence developed by other Trial Chambers but must also review the merits of the Prosecution's submission which it addressed during the Rule 98 bis stage of the current proceedings when it determined

70 Trial Judgement in *Prosecutor v. Naletilić*, para. 520.

71 Trial Judgement in *Prosecutor v. Naletilić*, at n. 1362.

72 Trial Judgement in *Prosecutor v. Naletilić*, at n. 1362.

73 Trial Judgement in *Prosecutor v. Stakić*.

74 Trial Judgement in *Prosecutor v. Stakić*, para. 671.

75 Trial Judgement in *Prosecutor v. Naletilić*, para. 670.

that deportation should not be interpreted as being applicable to transfers across internationally recognized borders only.⁷⁶

This passage raised two immediate concerns. First, the Chamber appeared to suggest that it had determined in its *98bis* Decision that deportation should not be interpreted as being applicable to transfers across internationally recognized borders only, when this would not appear to have been the case.⁷⁷ Second, the Trial Chamber seems to have chosen to evaluate the prosecution submissions in isolation, disregarding the existing jurisprudence, which it had expressly acknowledged. Rather than considering the arguments and supporting references advanced in *Krstić* and *Krnjelac*, the *Stakić* Trial Judgement began its analysis by examining the definition of deportation in Black's Law Dictionary. The Trial Chamber concluded, based on its reading of the dictionary definition, that

[U]nder Roman law, the term *deportatio* referred to instances where persons were dislocated from one area to another area also under the control of the Roman Empire. A cross-border requirement was consequently not envisaged. Expressed in these terms, the concept of deportation seems to mean the removal of someone from the territory over which the person removing exercises (sovereign) authority, or to remove someone from the territory where the person could receive the "protection" of that authority.⁷⁸

Although the use of dictionaries is a fairly commonplace occurrence within the jurisprudence of the Tribunal, their use has generally been restricted to specific procedural terms. In the limited circumstances where they have been used to define crimes, their value is clearly auxiliary to or corroborative of a much wider analysis of more authoritative sources.⁷⁹ In this case, however, the Trial Chamber apparently disregarded reasoned judgements of the Tribunal based on wide-ranging sources evidencing customary international law for a definition from a dictionary. Furthermore, the Chamber skipped over the first dictionary definition it found, which provided that deportation is "the act or an instance of removing a

76 Trial Judgement in *Prosecutor v. Stakić*, para. 673.

77 As previously noted, the Decision on Rule *98bis* in *Prosecutor v. Stakić* concluded that "the crime of deportation presumes transfer across State borders, whereas forcible transfer relates to displacement within a State". Decision on Rule *98bis* in *Prosecutor v. Stakić*, para. 130.

78 Trial Judgement in *Prosecutor v. Stakić*, para. 674.

79 See, e.g., the Appeal Judgement in *Prosecutor v. Furundžija's* reference to Black's Law Dictionary in defining "miscarriage of justice", ICTY, Judgement of 21 July 2000 in *Prosecutor v. Furundžija*, IT-95-17/1-A, para. 37; see also the Trial Judgement in *Prosecutor v. Blaškić's* use of a dictionary definition to confirm the meaning of the term "instigating", Trial Judgement in *Prosecutor v. Blaškić*, para. 280; or the Trial Judgement in the *Čelebići* case's reference to dictionary definitions in defining "serious", ICTY, Judgement of 16 November 1998 in *Prosecutor v. Delalić et al.*, IT-96-21-T, para. 510. Where the Tribunal has used a dictionary to assist in the definition of the offence of inhuman treatment, it has done so in conjunction with reference to state practice, a host of international instruments, the Commentaries to the Geneva Conventions and other relevant judicial material. See, e.g., ICTY, Judgement of Trial Judgement 16 November 1998 in *Prosecutor v. Mucić*, IT-96-21-T, paras. 516-542.

person to another country; esp., the expulsion or transfer of an alien from a country".⁸⁰ The Trial Chamber appears to ignore this first definition, which requires a cross-border element for deportation, in order to rely on an interpretation of the Latin word *deportatio* and its application in Roman law. The Trial Chamber thus appears to have reasoned inductively by allowing its conclusion regarding the absence of a cross-border element to drive its interpretation of the underlying law.

Other aspects of the Trial Chamber's reasoning also raise questions. In support of its interpretation that a cross-border element is not required in the crime of deportation, the Trial Chamber posited that, based on the Secretary General's Report and in particular its reference to 'ethnic cleansing,' the Tribunal "was established to attach criminal responsibility to those in the former Yugoslavia responsible for this practice".⁸¹ As a basis for dismissing the cross-border requirement, this reasoning would appear to be flawed, most notably because ethnic cleansing *per se* is not included as a crime in the Statute. Therefore, if the Tribunal were to attach criminal responsibility for the practice, it would need to do so pursuant to crimes that are included in the Statute and that reflect customary international law, such as deportation and forcible or unlawful transfer. It was therefore incongruous with the Trial Chamber's primary argument in favour of doing away with the cross-border element for deportation focused on reasons of policy, rather than custom. According to the Chamber,

The protected interests behind the prohibition of deportation are the right and expectation of individuals to be able to remain in their homes and communities without interference by an aggressor, whether from the same or another State. The Trial Chamber is therefore of the view that it is the *actus reus* of forcibly removing, essentially uprooting, individuals from the territory and the environment in which they have been lawfully present, in many cases for decades and generations, which is the rationale for imposing criminal responsibility and not the destination resulting from such a removal. The Trial Chamber believes that, should a definite destination requirement be specified, it would often be difficult to determine whether and when the crime occurred because the victims may have been transferred in several stages and therefore through several territories and across borders that may have changed every day. A fixed destination requirement might consequently strip the prohibition against deportation of its force.⁸²

It is not clear that this argumentation withstands close scrutiny. To begin with, it is premised upon the understanding that the rationale for imposing criminal responsibility is "the *actus reus* of forcibly removing, essentially uprooting, individuals from the territory and the environment in which they have been lawfully present, in many cases for decades and generations", independent of any destina-

80 Trial Judgement in *Prosecutor v. Stakić*, para. 674 (emphasis added).

81 Trial Judgement in *Prosecutor v. Stakić*, para. 676.

82 Trial Judgement in *Prosecutor v. Stakić*, para. 677.

tion requirement. The Trial Chamber failed to articulate how it reached this conclusion, which ignored and was inconsistent with extensive analyses of customary international law by other Chambers.

It was not clear either that the Trial Chamber's reliance on WWII caselaw supported its position. The Trial Chamber pointed out

that the International Military Tribunal at Nuremberg, on the basis of Article 6(c) of the Nuremberg Charter referring to 'deportations' as a crime against humanity, applied this provision *de facto* in cases where victims were displaced within internationally recognised borders.⁸³

The footnote to this assertion reads as follows:

Count Four (A) of the Nuremberg Indictment dealt with crimes against humanity "Murder, Extermination, Enslavement, Deportation, and other inhumane acts committed against civilian populations before and during the war" "*in Germany and in all those countries and territories occupied by the German forces since 1 September 1939 and in Austria and Czechoslovakia and in Italy and on the High Seas*" [emphasis added]. The Nuremberg Indictment contained the allegation that civilians who were, who were believed to be, or who were believed likely to become hostile to the Nazi Government were held in "protective custody and concentration camps", including the Buchenwald and Dachau concentration camps within the borders of Germany proper. The International Military Tribunal stated that "With regard to crimes against humanity there is no doubt whatever that political opponents were murdered in Germany before the war, and that many of them were kept in concentration camps in circumstances of great horror and cruelty".⁸⁴

The reasoning applied here appears to be somewhat unconvincing. While the indictment for the Nuremberg trial clearly dealt with crimes against humanity within Germany as well as other nations, this is not conclusive with respect to the definition of deportation. The additional fact that civilians were held unlawfully in concentration camps within Germany does not in any way support the conclusion that the Nuremberg Tribunal applied the law of deportation "de facto in cases where victims were displaced within internationally recognised borders". In fact, a closer analysis of references to deportation within the Nuremberg Judgement reveals that the majority unambiguously refer to transfers across borders. In particular, the Judgement cites deportations from Poland to Germany,⁸⁵ the

83 Trial Judgement in *Prosecutor v. Stakić*, para. 684 (footnotes omitted).

84 Trial Judgement in *Prosecutor v. Stakić*, n. 1344, p. 194 (emphasis in original).

85 The Nuremberg Judgement states that "[b]y the middle of April, 1940, compulsory deportation of labourers to Germany had been ordered in the Government General; and a similar procedure was followed in other eastern territories as they were occupied. A description of this compulsory deportation from Poland was given by Himmler". *Trial of Major War Criminals Before the International Military Tribunal*, Nuremberg, Vol I, 1947, Nuremberg, 14 November 1945-1 October 1946, p. 244.

deportation of “430,000 Jews from Hungary”,⁸⁶ and “the mass deportation of almost 120,000 of Holland’s 140,000 Jews to Auschwitz, deporting Jews from the Italian occupation zone of France”.⁸⁷ To the extent that the Judgement does make passing reference to “deportation of Jews from various Axis satellites”⁸⁸ and expulsion “to the East”⁸⁹ it is far from clear that such displacements did not involve a cross-border transfer.

Likewise, the *Stakić* Trial Judgement’s assertion that in *Attorney General v. Adolf Eichmann* the District Court of Jerusalem found Adolf Eichmann guilty of deportation for acts of internal displacement⁹⁰ is at best inadequately explained. The vast majority of events that appear in the section of the *Eichmann* District Court Judgement cited by the *Stakić* Trial Chamber were clearly identified elsewhere in the District Court Judgement as involving deportations to foreign territories.⁹¹ Where the Court did refer to transfers to territories annexed to the Reich such as Warthe District, East Prussia, Upper Eastern Silesia, and Western Prussia or deportations to areas under German control in the East,⁹² these nonetheless involved crossing national borders because the forcible annexure of territories has no effect on the status of borders in international law.⁹³ The *Stakić* Trial Chamber neither addressed this fact nor identified what were internationally rec-

86 *Trial of Major War Criminals*, at p. 259.

87 *Trial of Major War Criminals*, at p. 287.

88 *Trial of Major War Criminals*, at p. 271.

89 *Trial of Major War Criminals*, at p. 287.

90 See Trial Judgement in *Prosecutor v. Stakić*, para. 684, citing *Attorney General v. Adolf Eichmann* (1968) 36 ILR 18 (District Court, Jerusalem, Case No. 40/61).

91 According to the *Eichmann* District Court Decision, “[o]n 27 October 1938 the Germans for the first time carried out an act of mass expulsion against Jews. Thousands of Jews of Polish nationality living in German cities were arrested simultaneously, transported by rail to the Polish border in the region of Zbaszyn and cruelly expelled and forced to cross the border”, para. 57; “The final aim had not yet reached the stage of implementation, and these are the directives which Heydrich announced were to be acted upon within a short time: (c) the deportation of Jews from the Reich to Poland (the area of the Generalgouvernement) on freight trains”, para. 70; “From amongst these objectives, the Accused was to be charged with a central task of organizing transports from the Reich to Poland, as we shall see presently”, para. 71; “Nisko is situated on the San river in the Radom district of what was the area of the Generalgouvernement, not far from the border. The idea of the Accused, according to his Statement, was to set up a kind of Jewish state in the Radom district, after the evacuation of the Poles from that area. But from the very beginning his intention was not a permanent settlement, but a temporary concentration of the Jews, prior to their deportation to another place”, para. 72; “It is, therefore, likely that this concentration of Jews near the demarcation line was planned as the first step towards their expulsion across the lines,” para. 72.

92 The *Eichmann* District Court Decision states that “Himmler immediately began expelling the Jews, and part of the Polish population, en masse, from the areas annexed to the Reich in the East (the Warthe District, East Prussia, Upper Eastern Silesia, and Western Prussia)”, para. 72; “once again Jews were deported from Eastern Territories annexed to the Reich, and also from Vienna, to the Generalgouvernement area,” para. 75.

93 See GA Res 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, 24 October 1970. In particular, the resolution states that “[t]he territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal”.

ognized borders at the time. Consequently, the Chamber's reference to the *Eichmann District Court Judgement* was of dubious value in supporting its interpretation of the application of the law of deportation in practice.

The Trial Chamber advanced a further justification for its approach to deportation:

... a judicial term must be understood and defined in the context in which it is used. Bearing in mind both the protected interests underlying the prohibition against deportation and the mandate of this Tribunal, it would make little or no sense to prohibit acts of deportation, in the words of the Security Council, "regardless of whether they are committed in an armed conflict, international or internal in character" and at the same time to limit the possibility of punishment to cases involving transfers across internationally recognised borders only.⁹⁴

Having advanced these various but seemingly inconclusive arguments, the *Stakić* Trial Chamber eventually arrived at a definition of deportation as a crime against humanity. According to the Trial Chamber,

... Article 5(d) of the Statute must be read to encompass forced population displacements both across internationally recognised borders and *de facto* boundaries, such as constantly changing frontlines, which are not internationally recognised. The crime of deportation is therefore to be defined as the forced displacement of persons by expulsion or other coercive acts for reasons not permitted under international law from an area in which they are lawfully present to an area under the control of another party.⁹⁵

Intriguingly, despite its earlier stated opposition to a fixed destination requirement, the Trial Chamber ultimately required that the displacement must cross at a minimum a *de facto* boundary. Its definition was therefore somewhat at odds with the reasoning on which it was based. Conceivably it might have been argued that a definition in which the border crossed need not be internationally recognized was in fact consistent with the approach to nationality already taken by the Tribunal, notably with respect to the protected-person requirement under the grave breaches regime in Article 2. In that regard, it is clear that protected-person status is not defined strictly in terms of nationality, but rather by the effective allegiance of victims to a party to the conflict.⁹⁶ It would seem arguable that the same kind of flexible approach might have applied to the *Stakić* Trial Chamber analysis, requiring that *de facto* borders rather than formally recognized state borders be sufficient for the purposes of deportation because of evidence of effective control by parties of geographical areas.

94 Trial Judgement in *Prosecutor v. Stakić*, para. 678.

95 Trial Judgement in *Prosecutor v. Stakić*, para. 679.

96 See ICTY, Judgement of 15 July 1999 in *Prosecutor v. Tadić*, IT-94-1-A, para. 168.

Although the *Stakić* Trial Judgement did not consider these arguments, the Trial Chamber did note the approach taken by the ICC in this area of the law, concluding that the ICC Statute provides for a single category of “deportation or forcible transfer of the population”.⁹⁷ In particular, the Trial Chamber observed in *obiter dicta* that

the fact that the International Criminal Court has accepted the two terms ‘deportation’ and ‘forcible transfer’ in one and the same category only strengthens the view that what has in the jurisprudence been considered two separate crimes is in reality one and the same crime.⁹⁸

This conclusion overstated its case with respect to the value of the ICC as a reflection of customary international law, ignoring previous jurisprudence that found that the Rome Statute is not determinative as to whether the crimes enumerated in the treaty constituted customary international law before its promulgation, when the offences perpetrated in the former Yugoslavia are alleged to have been committed.⁹⁹ It was not at all clear that the drafters of the ICC Statute sought to equate the two offences, rather than simply to combine them for the sake of convenience. Indeed, the ICC later rejected this position,¹⁰⁰ finding that the Elements of Crimes maintain the elements that have been seen to belong to both of these traditionally separate crimes, confirming that the combination of these two offences into a single category does not blur the prior distinction in customary international law.¹⁰¹ Thus, both at the time and with the benefit of hindsight, the *Stakić* decision was not supported. From an historical perspective, it left the law governing deportation, forcible transfer and unlawful transfer unclear, the subject of considerable disagreement and in need of urgent clarification.

97 The ICC Statute defines the crime of “deportation or forcible transfer of population” as the “forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law”: Art. 7(1)(d) as defined in 7(2)(d).

98 Trial Judgement in *Prosecutor v. Stakić*, para. 680.

99 The Appeals Chamber in the *Čelebići* case stated that “Mucić’s reliance on the ICC Statute in support of his arguments is thus not helpful in relation to the determination of the law as it stood at the time of the offences alleged in the Indictment”. ICTY, Appeal Judgement of 20 February 2011 in *Prosecutor v. Delalić et al.*, IT-96-21-A, n. 255, p. 58. Likewise the Trial Judgement in *Prosecutor v. Simić* was “mindful, however, that the ICC Statute was adopted on 17 July 1998, *i.e.* several years after the time period covered in the Amended Indictment”. Trial Judgement in *Prosecutor v. Simić*, n. 212, p. 41.

100 ICC Decision on Prosecution’s Request for a Ruling on Jurisdiction.

101 ICC Decision on Prosecutor’s Request for a Ruling on Jurisdiction, paras. 52-61. See also S. Ansari & J. G. Stewart, *Part 2 – Rohingya Deportation: Deportation is a Distinct Crime in the ICC Statute*, 2018, available at: <http://jamesgstewart.com/rohingya-deportation-post-2-deportation-is-a-distinct-crime-in-the-icc-statute/> (last visited 12 September 2018).

7 Avoiding the Challenge: The Emergence of ‘Forcible Displacement’ as a Generic Label

Mere weeks after the *Stakić* Trial Judgement rendered its decision, the Appeals Chamber was afforded an opportunity to review the Tribunal’s approach to the definition of deportation in the context of the *Krnjelac* Appeal Judgement, which considered charges of deportation as grounds for establishing the *actus reus* of persecution. By coincidence, the appeal bench included Judge Schomburg, who had presided on the *Stakić* Trial Judgement. Despite submissions from counsel for the prosecution imploring the Appeals Chamber to rule authoritatively on the definition of deportation given the lack of clarity in the jurisprudence,¹⁰² the Appeals Chamber expressly declined the invitation, declaring that “it is not necessary to express a view either supporting or rejecting the Trial Chamber’s definition of the terms ‘deportation’ or ‘expulsion’,”¹⁰³ because the crime at issue on appeal was persecution.

In his Separate Opinion, Judge Shahabuddeen agreed with the majority’s reasoning on this point, stating that “[t]here is not any connection between the indictment, as it is understood by the Appeals Chamber, and the references to ‘deportations’ in article 2(g) [governing war crimes] and in Article 5(d) of the ICTY Statute [governing crimes against humanity]”.¹⁰⁴ In contrast, this reasoning was expressly rejected by Judge Schomburg who, in his own Separate Opinion, clearly indicated that he perceived the approach to be an abdication of interpretative responsibility. After highlighting the confusion at trial level in relation to the crime, Judge Schomburg made reference to the specific terms of the Prosecution’s appeal, concluding that it was difficult to see how the Appeals Chamber could reach its conclusions “without discussing the correctness of the approach taken by the Trial Chamber”.¹⁰⁵

The majority’s finding on this issue suggested that the Trial Chamber had erred by disregarding that it was the crime of persecution that was charged, rather than the crime of deportation. However, it would seem from an examination of the *Krnjelac* Trial Judgement that this was not the case. Instead, the Trial Chamber had followed established jurisprudence in determining that the crime of persecution may be based upon an underlying act which is in itself a crime, as is

102 The trial transcripts in *Prosecutor v. Krnjelac* quote Prosecution attorney Norul Rashid as pleading that “[t]he Appeals Chamber must seize this opportunity to try and resolve this issue, because even at the trial level, the position is still unclear”. Transcripts of 14 May 2003 in *Prosecutor v. Krnjelac*, p. 89, available at: www.icty.org/x/cases/krnjelac/trans/en/030514ED.htm.

103 Appeal Judgement in *Prosecutor v. Krnjelac*, para. 224.

104 Appeal Judgement in *Prosecutor v. Krnjelac*, at Separate Opinion of Judge Shahabuddeen, para. 3.

105 Appeal Judgement in *Prosecutor v. Krnjelac* at Separate Opinion of Judge Schomburg, para. 9. The Judge retraced the key elements of the reasoning advanced in the *Stakić* Trial Judgement, concluding that while he concurred with the majority’s conclusion that the acts classified as forcible displacement amounted to persecution, he would have labelled them deportation and would have avoided the analysis of whether they rise to the same level of gravity as the other crimes listed in Art. 5 of the ICTY Statute: para. 17.

clearly the case with deportation.¹⁰⁶ Thus, in order to establish whether the crime of persecution occurred, it was necessary in the Trial Chamber's estimation to establish that the underlying act, in this instance a crime, actually took place. The Appeals Chamber rejected this approach, concluding that for the purposes of the crime of persecution it was preferable to qualify as 'forcible displacement' acts that, when charged independently, would be qualified as the crimes of deportation or forcible transfer. The Appeals Chamber set out its understanding as follows:

The Appeals Chamber considers that, in this case, the prosecution used the terms 'deportation' and 'expulsion' in the Indictment as general terms in order to cover acts of forcible displacement through which the prosecution alleges the crime of persecution was committed.¹⁰⁷

...
The Appeals Chamber notes that the terms 'deportation' and 'expulsion' in paragraph 5.2(f) of the Indictment were clearly used by the Prosecution as generic terms covering all the acts alleged here as acts constituting the crime of persecution. No reference was made in the Indictment to Article 5(d) of the Statute which covers deportation.¹⁰⁸

The approach on appeal gives rise to the question how deportation can be considered as a 'general' or 'generic' term. It was well established before the Tribunal at the time that an act underlying the crime of persecution can be either a crime in and of itself or an act that does not independently amount to a crime.¹⁰⁹ In a situation where the act does amount to a crime, as is the case with deportation, it is unclear why it should be interpreted as a general term rather than the crime that it is. Does the fact that it is not pleaded as a separate crime in a particular indictment necessarily entail that it is to be considered as a 'general' act? Such an approach was not consistent with prior Tribunal jurisprudence. Neither was it consistent with the pleading practice before the tribunal, pursuant to which (a)

106 The Trial Judgement in *Prosecutor v. Krnojelac* stated that "[w]hile a comprehensive list of such acts has never been established, it is clear that for the purposes of this Tribunal persecution may encompass acts which are listed in the Statute...". Trial Judgement in *Prosecutor v. Krnojelac*, para. 433 (footnotes omitted). For similar findings, see, e.g., Trial Judgement in *Prosecutor v. Kupreškić*, para. 605; Trial Judgement in *Prosecutor v. Kvočka*, para. 185; Trial Judgement in *Prosecutor v. Vasiljević*, para. 246; Trial Judgement in *Prosecutor v. Naletilić*, para. 635; Trial Judgement in *Prosecutor v. Stakić*, para. 735; Trial Judgement in *Prosecutor v. Simić*, para. 48; Trial Judgement in *Prosecutor v. Brđanin*, para. 994.

107 Appeal Judgement in *Prosecutor v. Krnojelac*, para. 214.

108 Appeal Judgement in *Prosecutor v. Krnojelac*, para. 224.

109 See K. Roberts, 'The Law of Persecution Before the International Criminal Tribunal for the Former Yugoslavia', *Leiden Journal of International Law*, Vol. 15, 2002, pp. 623-639. On its face, the Appeal Judgement in *Prosecutor v. Krnojelac* appears to be at odds with this established jurisprudence when it states in para. 219 that "the crime of persecution may take different forms. It may be one of the other acts constituting a crime under Article 5 of the Statute or one of the acts constituting a crime under other articles of the Statute", thus suggesting that the underlying act must be a crime. The context suggests that the Appeals Chamber was not actually taking this position from the very fact that it considered the underlying act of deportation not to be a crime.

specific act(s) must be pleaded as persecution. The Appeals Chamber effectively ignored this requirement of putting the accused on notice of the charges against him when it recharacterized the acts pleaded as persecution. Furthermore, is it appropriate that an international *criminal* tribunal ascribes a definition to deportation other than that of the crime? It seems doubtful that the same approach would be adopted in respect of other crimes that may underlie persecution, such as rape or torture.

The practical result of the approach adopted in *Krnojelac* Appeal appears to be that deportation may have one meaning when analysed as a crime under Article 5(d) of the Statute, and a different meaning within the context of the crime of persecution charged under Article 5(h). In particular, having established that ‘deportation’ was to be considered as a general term, the Appeals Chamber introduced the concept of forcible displacement,¹¹⁰ the origin of which is unclear. After stating that “acts of forcible displacement underlying the crime of persecution punishable under Article 5(h) of the Statute are not limited to displacements across a national border”,¹¹¹ the Appeals Chamber elaborated on the interests protected by the concept:

The prohibition against forcible displacements aims at safeguarding the right and aspiration of individuals to live in their communities and homes without outside interference. The forced character of displacement and the forced uprooting of the inhabitants of a territory entail the criminal responsibility of the perpetrator, not the destination to which these inhabitants are sent.¹¹²

This generic statement of legal interests seems incongruous with the then-developing view that deportation involves a cross-border transfer while forcible transfer does not. It further implies that there is no difference to the legal interests protected by the two offences, a debatable view later rebutted in a decision at the ICC.¹¹³

Further confusion was sown when, in determining the scope of the term ‘forcible displacements,’ the Appeals Chamber went on to conclude that “displacements both within a state and across a national border were crimes under customary international law. Consequently the principle *nullum crimen sine lege* has been respected”.¹¹⁴ Having expressly established that the Trial Chamber erred in analysing the underlying act of deportation as a crime, it is not clear why the Appeals Chamber felt compelled to treat the underlying act of forcible displacement as if it itself constituted a crime. The crime charged was that of persecution and it was *that* crime which needed to be examined in light of the *nullum crimen sine lege* principle, particularly in view of the fact that there is no requirement that the underlying act be a crime in and of itself.

110 Appeal Judgement in *Prosecutor v. Krnojelac*, para. 215.

111 Appeal Judgement in *Prosecutor v. Krnojelac*, para. 218.

112 Appeal Judgement in *Prosecutor v. Krnojelac*, para. 218.

113 ICC Decision on Prosecutor’s Request for a Ruling on Jurisdiction.

114 ICC Decision on Prosecutor’s Request for a Ruling on Jurisdiction, para. 223.

In sum, rather than providing needed clarity regarding the cross-border nature of displacement-type crimes, the *Krnojelac* Appeal Judgement skirted the issue by introducing a generic term of ‘forcible displacement.’ Quite apart from the dubious legal basis for reaching this conclusion, the introduction of more overlapping terminology muddied the waters further, creating new ambiguities subsequent decisions would need to wade through.

8 An Emerging Consensus

With the Appeals Chamber having declined the opportunity to introduce some much needed certainty into the legal notions of deportation and unlawful transfer, subsequent jurisprudence continued to wrestle with the same issues of definition and structure. A consensus gradually emerged within this caselaw, providing the clarity the Appeals Chamber was unable to deliver initially. That consensus sided with the earlier analysis that customary international law required forced displacement across a border to establish deportation. This reversion to pre-*Stakić* reasoning would make *Stakić* an outlier rather than a turning point towards a new legal approach. At the same time, the new consensus also incorporated the term ‘forcible displacement’ for persecution cases, even though the legal arguments for this view were contentious. Moreover, while the new consensus laid a bedrock for subsequent decisions, it did not resolve all problems.

The *Simić* Trial Judgement addressed deportation as a crime against humanity in its own right in addition to deportation and forcible transfer as acts underlying persecution. With the benefit of contradictory precedents, the Trial Chamber declared that “[T]he Trial Chamber is satisfied that deportation and forcible transfer share the same substantial elements, apart from deportation requiring that a national border must be crossed”.¹¹⁵ With respect to the unlawful character of displacement, the Chamber reiterated that the adoption of agreements, such as one concluded by the ICRC as a basis for exchange of prisoners, as well as the presence of ICRC or UNPROFOR members during the transfer of individuals, has no impact on whether the persons’ displacement was voluntary.¹¹⁶ The Trial Chamber agreed with earlier precedent that the necessary *mens rea* required for forced displacement is the intent of the perpetrator that the victim is not returning.¹¹⁷ In this regard, the Trial Chamber relied in particular on the *Krnojelac* Appeal Judgement’s use of the word ‘déracinement’ in its identification of the policy considerations protected by the prohibition against deportation. Once again, this does not appear to constitute an adequate analysis of the applicable standards on the basis of customary international law. The *Simić* Trial Judgement thus assisted in forming consensus concerning the relevance of a border require-

115 Trial Judgement in *Prosecutor v. Simić*, para. 123. Later, the Chamber also affirmed that “[t]o establish deportation under Article 5 of the Statute, the crossing of a national border needs to be shown”. Trial Judgement in *Prosecutor v. Simić*, para. 129.

116 Trial Judgement in *Prosecutor v. Simić*, para. 127.

117 Trial Judgement in *Prosecutor v. Simić*, para. 133.

ment, but in other respects, perpetuated previous reasoning that had reached unsubstantiated conclusions concerning the permanence of the transfer.

Subsequently, the *Milošević* 98 *bis* Decision undertook what was the most extensive Tribunal analysis of deportation's cross-border element. It noted,

[I]n the aftermath of the war, deportation was included in [Article 6(c) of] the Charter of the International Military Tribunal as a crime against humanity, giving the IMT jurisdiction over acts committed against persons of the same nationality as the principle offenders.¹¹⁸

Similarly, deportation was included as a crime against humanity in Control Council Law No. 10 and Principle VI of the Nuremberg Principles. The Chamber made further reference to the IMT Judgement¹¹⁹ and to *United States of America v. Milch*¹²⁰ in reaching the conclusion that the IMT dealt with deportation as a crime involving cross-border transfer.¹²¹ While the Chamber's analysis is probably correct, there is no express reference in the IMT judgement to Poland in respect of Von Schirach's conviction, thus making it impossible to conclude with certainty that there was a cross-border element to the crime in that case. Furthermore, while *Milch* generally supports the view that deportation requires a cross-border element, it was a Control Council Law No. 10 case with no impact on the IMT judgement.

In addressing displacement as a war crime, the *Milošević* Trial Chamber further noted Article 49 of Geneva Convention IV and Article 17 of Additional Protocol II to the Geneva Conventions, the latter building on the provisions of the former. It found that:

although Additional Protocol II does not deal with the crimes of deportation and forcible transfer in express terms, Article 17, paragraph 1 may be construed as referring to forcible transfer within the territory of a state, *i.e.*

118 ICTY, Decision on Motion for Judgment of Acquittal of 16 June 2004 in *Prosecutor v. Milošević*, IT-02-54-T, para. 49.

119 In particular Von Schirach's conviction for deportation as a crime against humanity for his part in the removal of tens of thousands of Jews from Vienna to the "Ghetto of the East", ghettos in Poland: Decision on Motion of Judgment of Acquittal in *Prosecutor v. Milošević*, para. 50.

120 Decision on Motion of Judgment of Acquittal in *Prosecutor v. Milošević*, para. 51. The Chamber cited the following passage from the concurring opinion of Judge Philips in this Control Council Law No. 10 case: "Displacement of groups of persons from one country to another is the proper concern of international law in as far as it affects the community of nations. International law has enunciated certain conditions under which the fact of deportation of civilians from one nation to another during times of war becomes a crime ... [D]eportation of the population is criminal whenever there is no title in the deporting authority or whenever the purpose of the displacement is characterised by inhumane or illegal methods."

121 Decision on Motion of Judgment of Acquittal in *Prosecutor v. Milošević*, para. 52.

internal displacement, and paragraph 2 may be interpreted as referring to deportation outside the territory of a state, *i.e.* external displacement.¹²²

The Chamber's interpretation of Article 17 seems to imply that forcible transfer is restricted to movements within the territory of a state, rather than applying to movements both within and outside a state. It is also noticeable that the Chamber did not declare that a violation of Article 17 of Additional Protocol II constitutes a crime in customary international law.

The Chamber's analysis continued with an acknowledgement of the cross-border requirement set out in the 1996 Draft Code, although without any reference as to the weight to be accorded to this source of law. Reviewing the jurisprudence of the Tribunal, the Chamber found that *Stakić* was the only case in which transfer across national borders was not a requirement of the crime of deportation.¹²³ Finally, the Chamber addressed Article 7(2)(d) of the ICC Statute and, despite coming to the conclusion that "the terms deportation and forcible transfer appear to be given the same meaning", noted that one commentator took the view that a distinction between the two crimes was intended, based on the cross-border element.¹²⁴ The Trial Chamber also cited two other commentators, involved in the preparatory work for the ICC Statute and Elements of Crimes, in support of the same assertion. The cited authors assert,

The fourth and fifth inhumane acts, "deportation" and "imprisonment", were clarified so as to exclude actions permissible under international law ... "*Forcible transfer of population*" was added as an alternative to "deportation" so as to encompass large-scale movements within a country's borders.¹²⁵

The Trial Chamber opined that the "correctness of this interpretation must be a matter of dispute, since it contradicts what appears to be the plain meaning of Article 7(2)(d)",¹²⁶ while concluding that, regardless, the conflation of the two crimes would not be consistent with customary international law.¹²⁷ In making the former statement, the Chamber appears to accept that Article 7(2)(d) makes

122 Art. 17 of Additional Protocol II reads in relevant part:

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

123 Decision on Motion of Judgement of Acquittal in *Prosecutor v. Milošević*, para. 64.

124 Decision on Motion of Judgement of Acquittal in *Prosecutor v. Milošević*, para. 66, referring to C. Hall in O. Triffterer (Ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, London, Bloomsbury T & T Clark, 1999, p. 136.

125 Decision on Motion of Judgement of Acquittal in *Prosecutor v. Milošević*, para. 66, referring to H. von Hebel & D. Robinson, 'Crimes Within the jurisdiction of the Court', in R. Lee (Ed.), *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results*, Leiden, Martinus Nijhoff Publishers, 1999, p. 99.

126 Decision on Motion of Judgement of Acquittal in *Prosecutor v. Milošević*, para. 67.

127 Decision on Motion of Judgement of Acquittal in *Prosecutor v. Milošević*, para. 68.

the two crimes interchangeable. This is not apparent from the text of the provision, or from the elements of the crimes that seek to provide it with greater precision.¹²⁸ It seems more plausible that two traditionally separate crimes have been combined to form a larger crime, without any effect on the traditional distinction for the purposes of customary international law, a view recently favoured before the ICC.¹²⁹

The *Milošević* Trial Chamber concluded following its analysis that there is a distinction under customary international law between deportation, which requires involuntary transfer across national borders, and forcible transfer, which relates to involuntary transfers within a state.¹³⁰ In addition, the Trial Chamber asserted that there is no detriment to the victim in drawing such a distinction between the two crimes because the values will be protected by one crime or the other regardless of whether a national border is crossed.¹³¹

While the Trial Chamber's conclusions concerning the border requirement and the definition of 'forcible' remained in line with previous jurisprudence, its treatment of the requisite *mens rea* was novel. The Chamber concluded that, for both forcible transfer and deportation,

There must be evidence of an intent to transfer the victim from his home or community; it must be established that the perpetrator either directly intended that the victim would leave or that it was reasonably foreseeable that this would occur as a consequence of his action.¹³²

The Chamber's inclusion of indirect intent (the reasonable foreseeability that deportation would occur as a consequence) as sufficient to constitute deportation marked the arrival of a new issue that would require further clarification. Given that deportation and forcible transfer merely require "threats or the use of force" and "fear of violence",¹³³ it is 'reasonably foreseeable' that deportation would occur as a consequence of almost all military operations carried out during armed

128 For a closer examination of these issues, see Ansari & Stewart, 2018.

129 ICC Decision on Prosecutor's Request for a Ruling on Jurisdiction.

130 Decision on Motion of Judgement of Acquittal in *Prosecutor v. Milošević*, para. 68 and 79.

131 Decision on Motion of Judgement of Acquittal in *Prosecutor v. Milošević*, para. 69. The Trial Chamber agreed with the reasoning in the *Simić* case, which asserted that the values protected by both crimes are substantially the same, namely, the "right of the victim to stay in his or her home and community and the right not to be deprived of his or her property by being forcibly displaced to another location". See Trial Judgement in *Prosecutor v. Simić*, para. 130. The Trial Chamber also referred to the same principle as expressed in the Appeal Judgement in *Prosecutor v. Krnojelac*, para. 218:

The prohibition against forced displacements aims at safeguarding the right and aspiration of individuals to live in their communities and homes without outside interference. The forced character of displacement and the forced uprooting of the inhabitants of a territory entail the criminal responsibility of the perpetrator, not the destination to which these inhabitants are sent.

132 Decision on Motion of Judgement of Acquittal in *Prosecutor v. Milošević*, para. 78.

133 Appeal Judgement in *Prosecutor v. Krnojelac*, para. 229; Trial Judgement in *Prosecutor v. Blagojević*, para. 596.

conflict. On the basis that such an interpretation would unreasonably widen the interpretation of the prohibition of deportation, the Ethiopia – Eritrea Claims Commission explicitly found that such ‘indirect deportations’ did not violate Article 49 of GCIV.¹³⁴ According to the Claims Commission,

the flight of civilians from the perceived danger of hostilities is a common, and often tragic, occurrence in warfare, but it does not, as such, give rise to liability under international humanitarian law....¹³⁵

Subsequent cases would address these concerns differently.

In a further example of an emerging consensus, the *Brđanin* Trial Judgement largely followed the conclusions set out in the *Milošević 98 bis* Decision. With respect to the issue of the cross-border requirement, the majority of the Trial Chamber supported the distinction that deportation requires a cross-border transfer whereas forcible transfer may consist of forced displacement within state borders.¹³⁶ The Trial Chamber considered the alternative approach supported in the *Stakić* case, but was “not convinced that this reflects customary international law as it stood at the relevant time. It is customary international law, and not policy, which the Trial Chamber is bound to apply”.¹³⁷ Moreover, the Trial Chamber affirmed the position that “displacement within the boundaries of a State constitutes ‘forcible transfer’, punishable as ‘other inhumane acts’ pursuant to Article 5(i) of the Statute”.¹³⁸

For both deportation and forcible transfer, the *Brđanin* Trial Judgement again found that the displacement must take place under coercion, a fact that may be established where the displacement is involuntary in nature and where the persons concerned had no real choice. In addition, it was again noted that the displacement must be unlawful¹³⁹ and that for both crimes the required intent is that the removal of the person or persons be permanent. At least in this latter sense, the *Brđanin* Trial Judgement was perhaps too deferential to precedents that had required intent to remove permanently based solely on previous and unpersuasive authorities.¹⁴⁰

The *Blaškić* Appeal Judgement’s contribution to bringing clarity to the area was limited to assessing deportation as an act underlying persecution, charged under Article 5(h) of the Statute. Following a cursory review of the basis for the *Blaškić* Trial Chamber’s conclusions, a survey of relevant provisions of Geneva Convention IV and the Additional Protocols, and reference to the *Krnjelac*

134 Partial Award – Western Front, Aerial Bombardment and Related Claims Eritrea’s Claims of 1, 3, 5, 9-13, 14, 21, 25 & 26, 19 December 2005, Ethiopia-Eritrea Claims Commission, paras. 134-136.

135 Partial Award by Ethiopia-Eritrea Claims Commission, para. 135.

136 Partial Award by Ethiopia-Eritrea Claims Commission, para. 540.

137 Partial Award by Ethiopia-Eritrea Claims Commission, para. 542.

138 Partial Award by Ethiopia-Eritrea Claims Commission, para. 544.

139 Trial Judgement in *Prosecutor v. Brđanin*, para. 543.

140 Trial Judgement in *Prosecutor v. Brđanin*, para. 545.

Appeal Judgement, which had introduced the generic term ‘forcible displacement,’ the Appeals Chamber concluded that

at the time relevant to the Indictment in this case, deportation, forcible transfer, and forcible displacement constituted crimes of equal gravity to other crimes listed in Article 5 of the Statute and therefore could amount to persecutions as a crime against humanity.¹⁴¹

While this conclusion added little to the debate, it was of note for its approach when considering deportation or forcible transfer as persecution. Although the *Krnjelac* Appeal Judgement had expressly avoided considering the underlying act of deportation as a crime, preferring instead the view that deportation had been charged in its ‘generic’ sense, the *Blaškić* Appeals Chamber expressly considered the underlying act of deportation as a crime. As such, the *Blaškić* Appeals Judgement’s reasoning was potentially significant in clarifying the precise role of the crimes of deportation, unlawful transfers and forcible transfers in defining persecution.

The *Blagojević* and *Jokić* Trial Judgement also contributed to this growing consensus by affirming the distinction between deportation and forcible transfer based on the cross-border requirement, while also adopting the *Krnjelac* Appeals Chamber’s term ‘forced displacement’ as a generic description of the two.¹⁴² The Judgement further accepted the position espoused in previous case law that ‘forcible’ describes a situation where individuals do not have a free or genuine choice to remain in the territory.¹⁴³ For the Chamber, the necessary coercive environment could be evidenced by threats or the use of force, fear of violence, and illegal detention.¹⁴⁴ Based on the facts before it, the Chamber found that the widespread knowledge among the Bosnian Muslim refugees of serious crimes committed by members of the Bosnian Serb forces in the areas; the organized, inhumane and frequently aggressive process of separating out and removing the male members of the population; together with threats of slaughter and related violence, all established that the transfer of civilians from Srebrenica enclave through Potočari could not have been voluntary.¹⁴⁵ In fact, as a result of the focus in the jurisprudence on assessing whether the person displaced was coerced to leave, the Chamber concluded that

[t]he trier of fact must consequently consider the prevailing situation and atmosphere, as well as all relevant circumstances, including in particular the victims’ vulnerability, when assessing whether the displaced victims had a genuine choice to remain or leave and thus whether the resultant displacement was unlawful.¹⁴⁶

141 Judgement of 29 July 2004 in *Prosecutor v. Blaškić*, IT-94-14-A, para. 153.

142 Trial Judgement in *Prosecutor v. Blagojević*, para. 595.

143 Trial Judgement in *Prosecutor v. Blagojević*, para. 596.

144 Trial Judgement in *Prosecutor v. Blagojević*, para. 596.

145 Trial Judgement in *Prosecutor v. Blagojević*, paras. 616-618.

146 Trial Judgement in *Prosecutor v. Blagojević*, para. 596.

The Trial Chamber also concluded that an exception to the general prohibition against forcible displacements exists for evacuations of civilian populations.¹⁴⁷ For the Chamber, this reasoning was supported by the perception that an evacuation will not involve the intent to *permanently* displace the individual concerned. As previously discussed, this approach later raised concerns insofar as it tends to support temporary but otherwise unlawful transfers.

Finally, the *Blagojević* Trial Judgement concluded, like the *Kupreškić* and *Krstić* Trial Judgements before it, that forcible transfer could constitute other inhumane acts as a crime against humanity.¹⁴⁸ Although the Trial Chamber made a detailed analysis of possible concerns regarding the use of the category ‘other inhumane acts’, most notably the doctrine of *nullum crimen sine lege*, it did not cite the criticisms expressed in *Stakić*. This omission perhaps suggested that a true consensus was forming with respect to the treatment of displacement-related crimes under this provision of the Statute despite the unhelpful addition of new terminology in *Krnjelac*. At the same time, only trial chambers had developed this new consensus, so their emerging approach to this array of issues still awaited scrutiny from the Appeals Chamber.

9 Confirmation

In the *Stakić* Appeal Judgement,¹⁴⁹ the Appeals Chamber was presented with another opportunity to provide clarity with respect to the crimes of deportation and forcible transfer as an ‘other inhumane act’. In this instance, a differently constituted Appeals Chamber rose to the challenge. To begin, the Appeals Chamber found that the Trial Chamber had erred in convicting *Stakić* of deportation only as an act amounting to persecution and not separately for the crime of deportation. As a result, the *Stakić* Appeals Chamber concluded that the “question whether the Appellant should be liable for deportation as a crime against humanity is not moot”,¹⁵⁰ paving the way for a re-examination of the issue.

In its analysis, the Appeals Chamber majority clearly set out the definition of deportation as a crime against humanity, stating that:

[t]he *actus reus* of deportation is the forced displacement of persons by expulsion or other forms of coercion from the area in which they are lawfully pres-

147 Trial Judgement in *Prosecutor v. Blagojević*, para. 600.

148 Trial Judgement in *Prosecutor v. Blagojević*, para. 629.

149 ICTY, Judgement of 22 March 2006 in *Prosecutor v. Stakić*, IT-97-24-A.

150 Appeal Judgement in *Prosecutor v. Stakić*, para. 275.

ent, across a *de jure* state border or, in certain circumstances, a *de facto* border, without grounds permitted under international law.¹⁵¹

Consistent with the emerging consensus, the Appeals Chamber thus found that there was a requirement of a cross-border transfer. In coming to this conclusion, the Chamber examined WWII-related jurisprudence,¹⁵² the Geneva Conventions and Additional Protocols, the 1991 precursor to the 1996 ILC Draft Code of Crimes, the ICRC study on customary international law and the jurisprudence of the Tribunal.¹⁵³ Following this survey of relevant sources of law, the Appeals Chamber concluded,

In the view of the Appeals Chamber, the crime of deportation requires the displacement of individuals across a border. The default principle under customary international law with respect to the nature of the border is that there must be expulsion across a *de jure* border to another country, as illustrated in Article 49 of Geneva Convention IV and the other references set out above. Customary international law also recognises that displacement from ‘occupied territory’, as expressly set out in Article 49 of Geneva Convention IV¹⁵⁴ and as recognised by numerous Security Council Resolutions,¹⁵⁵ is also sufficient to amount to deportation. The Appeals Chamber also accepts that under certain circumstances displacement across a *de facto* border may be sufficient to amount to deportation. In general, the question whether a particular *de facto* border is sufficient for the purposes of the crime of deportation should be examined on a case by case basis in light of customary international law.¹⁵⁶

151 Appeal Judgement in *Prosecutor v. Stakić*, para. 278. Judge Shahabuddeen dissented on the issue of deportation. See Partly Dissenting Opinion of Judge Shahabuddeen, pp. 149-167, para. 21, in which he sets out the arguments that “(i) that customary international law did not confine ‘deportation’ to the crossing of a border – rather, the crossing of a front line was enough, whether or not it was a border; (ii) that, even if customary international law always used the term ‘deportation’ in relation to the crossing of a border, the term was reasonably capable of applying to a front line; (iii) that in any event the question is how the Security Council used the term ‘deportation’ in article 5(d) of the Statute; (iv) that there can be a deportation even across a constantly changing front line; (v) that this view does not conflict with the principle *nullum crimen sine lege*; and (vi) that it accords with the substance of customary international law”.

152 Notably making a number of references to the IMT Judgement and referring to the Control Council Law No 10 cases *United States of America v. Milch* and *United States of America v. Alfred Krupp et al.*; see Appeal Judgement in *Prosecutor v. Stakić*, paras. 290 and 291.

153 See Appeal Judgement in *Prosecutor v. Stakić*, paras. 288-299 for the Appeals Chamber’s survey of the relevant law on this issue.

154 “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” (emphasis added).

155 SC Res. 469, 1980, SC Res. 484, 1980, SC Res. 607, 1988; SC Res. 608, 1988; SC Res. 636, 1989; SC Res. 641, 1989; SC Res. 681, 1990; SC Res. 694, 1991; SC Res. 726, 1992; SC Res. 799, 1992 (concerning deportations to Lebanon). See also the following GA Res. 40/161 (D-E), 1985.

156 Appeal Judgement in *Prosecutor v. Stakić*, para. 300.

Thus the Appeals Chamber definitively ruled that a cross-border transfer is necessary for the purposes of the crime of deportation. It further found on the facts of the case that the ‘constantly changing frontlines’ at issue were not sufficient under customary international law to ground a conviction for deportation.¹⁵⁷ In finding that deportation requires a cross-border transfer and that the border in question must be established pursuant to customary international law, the Appeals Chamber found that any approach to the contrary would

... in fact expand[...] criminal responsibility by giving greater scope to the crime of deportation than exists under customary international law, and thus violate[...] the principle of *nullum crimen sine lege*. In the view of the Appeals Chamber, such an approach is not legally justified, nor is it necessary – the application of the correct definition of deportation would not leave individuals without the protection of the law. Individuals who are displaced within the boundaries of the State or across *de facto* borders not within the definition of deportation, remain protected by the law, albeit not under the protections afforded by the offence of deportation. Punishment for such forcible transfers may be assured by the adoption of proper pleading practices in the Prosecution’s indictments – it need not challenge existing concepts of international law.¹⁵⁸

While it is now clear that deportation as a crime against humanity requires that a border be crossed, the Appeals Chamber did not bring absolute clarity to the nature of such border. Clearly a *de jure* border is sufficient. With respect to *de facto* borders, borders of occupied territory are sufficient for the purposes of deportation, but all others must be examined on case-by-case basis in light of customary international law. While this ensured that there would be future debate in the jurisprudence regarding whether particular borders are sufficient for a finding of deportation, it considerably restricted the margins of such debate. In time, as different *de facto* borders are put to the test, the parameters of the border requirement for deportation as a crime against humanity may be expected to solidify.

The *Stakić* Appeal Judgement also addressed the requisite *mens rea* for deportation. In so doing, it questioned whether the ICRC Commentary on Article 49 of Geneva Convention IV should properly be interpreted as requiring intent to displace permanently.¹⁵⁹ On this issue, the Appeals Chamber departed from the majority of trial jurisprudence in finding that there is no requirement of intent to displace permanently:

157 Appeal Judgement in *Prosecutor v. Stakić*, para. 303.

158 Appeal Judgement in *Prosecutor v. Stakić*, para. 302.

159 The relevant passage in the Commentary states that “Unlike deportation and forcible transfers, evacuation is a provisional measure entirely negative in character, and is, moreover, often taken in the interests of the protected persons themselves”. See ICRC Commentary (GC IV), p. 280.

306. Article 49 of Geneva Convention IV itself, the underlying instrument prohibiting deportation regardless of the motive behind the act, contains no suggestion that deportation requires an intent that the deportees should not return. The Appeals Chamber is concerned that care should be taken not to read too much into the Commentary on Geneva Convention IV, and finds that the Commentary to Article 49 in particular is primarily an attempt to distinguish “evacuation”, a form of removal permitted by the Convention which is by definition provisional, from the crimes of deportation and forcible transfer.

307. The Appeals Chamber therefore chooses to follow the text of Article 49 and concludes that deportation does not require an intent that the deportees should not return. The Trial Chamber therefore erred when it reached a contrary conclusion on the basis of the ICRC commentary. Because the Trial Chamber found that the Appellant intended to permanently displace the deportees, however, the Trial Chamber’s error proved harmless in this case. The Appeals Chamber only corrects this error so that, in future cases, Trial Chambers will not require proof of intent to permanently displace deportees (*internal footnotes omitted*).

While not raised as a ground of appeal, the Appeals Chamber seized itself *proprio motu* of the issue whether a conviction could be entered for acts of forcible transfer charged as other inhumane acts.¹⁶⁰ The Chamber first rejected concerns raised at trial that this notion could be regarded as a violation of the principle of *nullum crimen sine lege*.¹⁶¹ Subsequently, with respect to the underlying act of forcible transfer, the Chamber stated,

Forcible transfer has been defined in the jurisprudence of the Tribunal as the forcible displacement of persons which may take place within national boundaries.¹⁶² The *mens rea* does not require the intent to transfer permanently. The Appeals Chamber notes that Article 2(g) of the Statute, Articles 49 and 147 of Geneva Convention IV, Article 85(4)(a) of Additional Protocol I, and Article 18 of the 1996 ILC Draft Code all condemn forcible transfer.¹⁶³ The notion of forcible transfer had therefore clearly been accepted as conduct criminalised at the time relevant to this case, such that it does not violate the principle of *nullum crimen sine lege*. Furthermore, acts of forcible transfer have been accepted in other cases before the Tribunal as specifically substantiating

160 This issue had been raised by the Trial Chamber: “...the crime of ‘other inhumane acts’ subsumes a potentially broad range of criminal behaviour and may well be considered to lack sufficient clarity, precision and definiteness [which] might violate the fundamental principle *nullum crimen sine lege certa*.” See Trial Judgement in *Prosecutor v. Stakić*, para. 719.

161 Appeal Judgement in *Prosecutor v. Stakić*, para. 315.

162 Trial Judgement in *Prosecutor v. Krnojelac*, para. 474; Trial Judgement in *Prosecutor v. Krstić*, para. 521. See also Decision on Rule 98bis in *Prosecutor v. Stakić*, in which the Trial Chamber found that forcible transfer relates to displacement within a State.

163 Art. 17 of Protocol II similarly prohibits the ‘displacement’ of civilians.

the notion of other inhumane acts pursuant to Article 5(i).¹⁶⁴ In view of the foregoing, the Appeals Chamber finds that acts of forcible transfer may be sufficiently serious as to amount to other inhumane acts.¹⁶⁵ Accordingly, the Appeals Chamber finds that the Trial Chamber erred in finding that a conviction based on Article 5(i) for acts of forcible transfer could not be entered.

It is noteworthy that, consistent with its findings regarding deportation, the Appeals Chamber did not require intent to forcibly transfer permanently. In addition, no cross-border transfer was required, distinguishing the crime of forcible transfer from that of deportation.¹⁶⁶

Thereafter, the *Stakić* Trial Judgment's approach conflating deportation and forcible transfer was abandoned. In the *Martinović and Naletilić* Appeal Judgment, the Appeals Chamber declined the opportunity to re-open the discussion whether deportation as a crime against humanity requires a transfer across a state border.¹⁶⁷ In response to the Prosecution's suggestion that this issue was a matter of general significance to the jurisprudence, the Appeals Chamber found that "the issue has been settled by the *Stakić* Appeal Judgement".¹⁶⁸ Similarly, with respect to deportation amounting to persecution, the Appeals Chamber stated its view that this point had been settled in the *Krnjelac* Appeal Judgement, finding that

the question whether "deportation" encompasses a border element is irrelevant for the purposes of liability under Article 5(h) of the Statute, because acts of forcible displacement are equally punishable as underlying acts of persecutions whether or not a border is crossed. It is moreover not necessary, for the purposes of a persecutions conviction, to distinguish between the underlying acts of "deportation" and "forcible transfer"; the criminal responsibility

164 See Trial Judgement in *Prosecutor v. Krstić*, para. 523; Trial Judgement in *Prosecutor v. Kupreškić*, para. 566.

165 See the definition of other inhumane acts set out in the ICTY, Judgement of 17 December 2004 in *Prosecutor v. Kordić*, IT-95-14/2-A, para. 117: "the victim must have suffered serious bodily or mental harm; the degree of severity must be assessed on a case-by-case basis with due regard for the individual circumstances."

166 Although forcible transfer was analysed by the Appeals Chamber as an act underlying the crime of Other Inhumane Acts, this was seemingly done on the understanding that such acts also may amount in and of themselves to crimes.

167 ICTY, Judgement of 3 May 2006 in *Prosecutor v. Martinović & Naletilić*, IT-98-34-A, para. 151.

168 Appeal Judgement in *Prosecutor v. Martinović & Naletilić*, para. 152. This point was disputed by both Judge Shahabuddeen (Declaration of Judge Shahabuddeen, para. 3) and Judge Schomburg (para. 6 of the Separate and Partly Dissenting Opinion of Judge Schomburg).

of the accused is sufficiently captured by the general concept of forcible displacement.¹⁶⁹

Thus, the Appeals Chamber stood by its earlier judgements in providing what amounted to a definitive ruling with respect to deportation within the jurisprudence of the Tribunal. In fact, following the *Stakić Appeal Judgement*, the Tribunal shifted to applying the now-established framework, giving rise to a set of further issues discussed in the following section.

10 Applying the Framework

Displacement-type offences have been among the most litigated international crimes since the re-emergence of international criminal justice with the *ad hoc* tribunals, in part due to the need to delimit the scope of these offences from one another. In this respect, the *Stakić Appeal Judgement* finally brought a degree of clarity about the scope and intersection of deportation, unlawful transfer, forcible transfer, and forced displacement, setting what became an accepted framework. However, this did not mark the end of interpretative controversies.

After *Stakić*, the Tribunal handed down approximately 25 additional judgements on deportation and forcible transfer. These cases systematically upheld the cross-border requirement as the element distinguishing between deportation and forcible transfer, relying on the *Stakić Appeal Judgment* as authority for this proposition.¹⁷⁰ While this primary issue was thus resolved, ambiguities remained related to identifying the protected interests underlying the crimes, the requisite extent of removal from an area, and the ambit of *de facto* borders.

Addressing the interests protected by the crimes, the *Martić Trial Judgement* held that deportation and forcible transfer are similar precisely because they both

169 Appeal Judgement in *Prosecutor v. Martinović & Naletilić*, para. 153. In Judge Schomburg's Separate and Partly Dissenting Opinion, he reiterates his opposition to the approach taken by the Appeals Chamber in the Appeal Judgement in *Prosecutor v. Krnojelac*, stating that "A more systematic approach to Article 5(h) of the Statute would have been preferable. In accordance with the principle '*lex specialis derogat legi generali*,' it should first have to be considered whether one of the offences listed under Article 5 of the Statute was committed. Consequently, deportation would need to be discussed and defined before turning to offences not expressly listed in Article 5 of the Statute. Recourse to the latter would only be necessary and admissible if the facts did not support a conviction for persecutions by means of deportation. It would then have to be decided whether an offence of the same gravity was committed."

170 See, e.g., ICTY, Judgement of 10 June 2010 in *Prosecutor v. Popović*, IT-05-88-T, para. 892; ICTY, Judgement of 22 November 2017 in *Prosecutor v. Mladić*, IT-09-92-T, para. 3118; ICTY, Judgement of 15 April 2011 in *Prosecutor v. Gotovina*, IT-06-90-T, para. 1738; ICTY, Judgement of 15 April 2011 in *Prosecutor v. Martić*, IT-95-11-T, para. 107; ICTY, Judgement of 26 February 2009 in *Prosecutor v. Milutinović*, IT-05-87-T, para. 164; ICTY, Judgement of 27 March 2013 in *Prosecutor v. Zupljanin*, IT-08-91-T, para. 61; ICTY, Judgement of 26 March 2016 in *Prosecutor v. Karadžić*, IT-95-5/18-T, para. 488; ICTY, Judgement of 30 May 2013 in *Prosecutor v. Stanišić & Simatović*, IT-03-69-T, para. 992; ICTY, Judgement of 12 December 2012 in *Prosecutor v. Tolimir*, IT-05-88/2-T, para. 793. See also ICTY, Judgement of 23 February 2011 in *Prosecutor v. Dordević*, IT-05-87/1-T, compare paras. 1604 on deportation and 1613 on forcible transfer.

protect “the right of victims to stay in their home and community and the right not to be deprived of their property by being forcibly displaced to another location”.¹⁷¹ The *Prlić* Appeal Chamber held that not only did deportation and forcible transfer protect the same interests, but that criminal liability attached solely to the fact that the victim was uprooted from his or her home, and not to his or her final destination.¹⁷² This reasoning was unsubstantiated and seemingly challenged the core distinction between the two crimes as set out in the framework put in place by the *Stakić* Appeal Judgement. The view that the interests protected by the two crimes are the same has subsequently been rejected in a case before the ICC.¹⁷³

With respect to the required extent of removal from an area, the *Prlić* Trial Chamber held that “[g]iven that the prohibition on forcible removals seeks to protect the right of individuals to live in their communities and in their homes and not be deprived of their property”,

there is a ‘removal from an area’ within the meaning of Article 5 of the Statute when the location to which the victims are sent is so remote that they are no longer able to effectively enjoy these rights.¹⁷⁴

The Appeals Chamber in this same case further specified that there is no distance requirement such that even transfers between detention centres might constitute forced displacement. Furthermore, it clarified that there is no size requirement for deportation or forcible transfer; even one victim suffices.¹⁷⁵

With respect to *de facto* borders, most subsequent judgements confirmed the holding from the appeal judgment in *Stakić* that deportation may take place “in certain circumstances, which must be examined on a case-by-case basis and in light of customary international law, [across] a *de facto* border”. For example, the Appeals Chamber in *Dorđević* held that a *de facto* border suffices, depending on the facts of the case and customary international law.¹⁷⁶ However, not all judgements agreed on the type of *de facto* border that would fall into this category. In *Tolimir*, the Trial Chamber added an additional requirement that the *de facto* border be between states.¹⁷⁷ The *Prlić* Trial Chamber, on the basis that “By ‘*de facto* border’, the Appeals Chamber [in *Stakić*] had in mind forcible removal beyond

171 Trial Judgement in *Prosecutor v. Martić*, para. 106. Id.

172 ICTY, Judgement of 29 November 2017 in *Prosecutor v. Prlić*, IT-04-74-A, para. 491 (“[t]he prohibition against forcible displacements aims at safeguarding the right and aspiration of individuals to live in their communities and homes without outside interference. The forced character of displacement and the forced uprooting of the inhabitants of a territory entail the criminal responsibility of the perpetrator, not the destination to which these inhabitants are sent,” citing the Appeal Judgment in *Prosecutor v. Krnojelac*, para. 218). See also Trial Judgement in *Prosecutor v. Župljanin*, para. 60.

173 ICC Decision on Prosecutor’s Request for a Ruling on Jurisdiction, para. 17.

174 Trial Judgement in *Prosecutor v. Prlić*, para. 49, Vol. 1.

175 Appeal Judgement in *Prosecutor v. Krajisnik*, para. 333.

176 Appeal Judgement in *Prosecutor v. Dorđević*, para. 532.

177 Trial Judgement in *Prosecutor v. Tolimir*, para. 793.

occupied territory”,¹⁷⁸ found that the frontline between East and West Mostar constituted a *de facto* border for purposes of the war crime of unlawful deportation of civilians, without elaborating further.¹⁷⁹

The most significant subsequent refinement on this issue took place in the *Dorđević* case, in which the Appeals Chamber examined whether the accused could be convicted of deportation from Kosovo to Montenegro.¹⁸⁰ At the relevant time, Kosovo was an autonomous province of the Republic of Yugoslavia, and Montenegro a constituent republic. Therefore, the Appeals Chamber held that at most there was a *de facto* border between Kosovo and Montenegro. After considering various sources, the Appeals Chamber concluded that the border between Kosovo and Montenegro did not constitute a *de facto* border for purposes of deportation, reasoning that the sources in question only discuss deportation from occupied territory or across disputed borders, neither of which were at issue in *Dorđević*.¹⁸¹ While not definitely resolving the question, the decision of the Appeals Chamber clearly narrowed the scope for what might constitute a *de facto* border for the purposes of deportation.

With respect to the crime of persecution, post-*Stakić* jurisprudence has retained the concept of ‘forcible displacement’ to characterize all types of displacement charged as underlying acts. For example, the *Simić* Appeal Judgment found that:

for the purposes of a persecutions conviction, it is not necessary to distinguish between the underlying acts of ‘deportation’ and ‘forcible transfer’ because the criminal responsibility of the accused is sufficiently captured by the general concept of forcible displacement.¹⁸²

Most recently, the trial judgment in *Milutinović* held that “[a] number of elements of these offences are the same and are discussed herein under the heading ‘forcible displacement’”.¹⁸³ While the logic behind this approach is questionable and it remains to be seen whether this approach will be carried over to other international courts, forcible displacement is a confirmed feature of the ICTY’s interpretation of the customary international law framework for displacement-type crimes.

Subsequent caselaw has further explored the limits of the forced nature of displacement, solidifying the previous approach. In *Krajišnik*, the Appeals Chamber confirmed that coercive acts need not be physical and may include threats, psychological duress and abuse of power, and exploitation of an environment that

178 Trial Judgement in *Prosecutor v. Prlić*, para. 54, Vol. 1.

179 Trial Judgement in *Prosecutor v. Prlić*, para. 813, Vol. 3.

180 Appeal Judgement in *Prosecutor v. Dorđević*, para. 533-537.

181 Appeal Judgement in *Prosecutor v. Dorđević*, para. 535.

182 Appeal Judgment in *Prosecutor v. Simić*, para. 173.

183 Trial Judgement in *Prosecutor v. Milutinović*, para. 163.

is already coercive.¹⁸⁴ The *Milutinović* Trial Judgement confirmed that a lack of genuine choice may be inferred from:

threatening and intimidating acts that are calculated to deprive the civilian population of exercising its free will, such as the shelling of civilian objects, the burning of civilian property, and the commission of or the threat to commit other crimes ‘calculated to terrify the population and make them flee the area with no hope of return’.¹⁸⁵

The same Trial Chamber found that alleged consent does not render the displacement voluntary if it is found that the circumstances surrounding the consent “deprive [it] of any value”.¹⁸⁶ The Trial Chamber has further specified that non-physical coercion also includes making an area so inhospitable to live in that people have no choice but to leave.¹⁸⁷

With respect to the *mens rea* element of displacement-type crimes, subsequent cases followed the holding in the *Stakić* Appeal Judgement that deportation does not require an intent to displace permanently.¹⁸⁸ In a further development, the *Milutinović* Trial Chamber expressly held that the relevant *mens rea* accords with the cross-border requirement in the crime, requiring “intent to displace ... the victims within the relevant national border (as in forcible transfer) or across the relevant national border (as in deportation)”.¹⁸⁹

Factual findings in different cases suggest that there may yet be room for discussion about the practical application of various elements of these crimes. For example, in *Stanisić*, the Trial Chamber concluded that several incidents of forcible displacement were not accompanied with the requisite intent because Serb forces did not intend to displace victims. Rather, they were forced to flee because of heavy combat in the area. In relation to one incident in particular, the Trial Chamber found that it “allows for the reasonable possibility that the attack was solely directed at the Croatian forces and was not intended to forcibly displace the inhabitants [in the area]”.¹⁹⁰ In other cases, it was found that intent to displace

184 Appeal Judgement in *Prosecutor v. Krajišnik*, paras. 759, 319. See also Trial Judgement in *Prosecutor v. Dordević*, para. 1605 (holding that non-physical types of coercion, such as threats and exploitation of an already coercive environment suffice, and finding that whether consent is ‘real’ and ‘voluntary’ has to be assessed in light of the circumstances); ICTY, Judgement of 26 September 2011 in *Prosecutor v. Perišić*, IT-04-81-T, para. 114 (holding “[f]ear of violence, duress, detention, psychological oppression, and other such circumstances may create an environment where there is no choice but to leave, thus amounting to the forced displacement of persons”).

185 Trial Judgement in *Prosecutor v. Milutinović*, para. 165, citing the Trial Judgement in *Prosecutor v. Simić*, para. 126.

186 Trial Judgement in *Prosecutor v. Milutinović*, para. 165, citing the Trial Judgement in *Prosecutor v. Simić*, para. 126.

187 Trial Judgement in *Prosecutor v. Krajišnik*, paras. 729, 732.

188 See, e.g., Trial Judgement in *Prosecutor v. Đorđević*, para. 1604; Trial Judgement in *Prosecutor v. Milutinović*, para. 164, citing Trial Judgement in *Prosecutor v. Martić* Trial Judgement, para. 111 and Trial Judgement in *Prosecutor v. Stakić*, paras. 278, 307, and 317.

189 Trial Judgement in *Prosecutor v. Milutinović*, para. 164.

190 Trial Judgement in *Prosecutor v. Stanisić*, para. 1001.

did not exist because the forcible displacement in question was carried out with an intent to commit a different crime. In *Popović*, Serb forces transferred men who were separated and detained in Potočari or captured from the column of civilians and combatants who fled from detention centre to detention centre before they were killed in the ensuing massacre. According to the Trial Chamber, Serb forces at most intended to kill the men in question because they were transferred pursuant to a plan to commit murder. Therefore, “the VRS’s intent at that point was to murder the Bosnian Muslim men and not to forcibly transfer them”.¹⁹¹ The Trial Chamber in that case identified a need for a ‘causal connection’ between coercive acts and victims leaving an area.¹⁹²

In sum, the cases since the *Stakić* Appeal Judgment have raised some important new normative issues, but have largely applied the established framework governing the relationship between deportation, deportation and unlawful transfer, forcible transfer and forced displacement.

11 Review

International crimes that address displacement include the war crime of unlawful deportation or transfer and the crimes against humanity of deportation, forcible transfer (as the crime of ‘other inhumane acts’), and forcible displacement (underlying the crime of persecution). This article has offered a critical jurisprudential history of the initial development of these offences, highlighting how a clear framework developed after many years of litigation. The article has also provided an outline of how this framework has been applied in practice since its inception, pointing to a new set of issues that will animate this area of law in years to come. In writing this jurisprudential history, we hope to have set out the parameters of the core international crimes that might address forcible displacement in future international jurisprudence at other international courts.

191 Trial Judgment in *Prosecutor v. Popović*, para. 933.

192 Trial Judgment in *Prosecutor v. Popović*, para. 893 (holding that the coercive acts must lead to the border-crossing in the case of deportation).