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EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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CO-PROSECUTORS' RULE 92 SUBMISSION ON THE CRIME AGAINST HUMANITY OF OTHER INHUMANE ACTS IN RESPECT OF FORCED TRANSFER

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I. INTRODUCTION

1. Pursuant to the order of the Trial Chamber dated 8 October 2012, the Co-Prosecutors make the following submissions on the applicable law relevant to forced transfer as a crime against humanity (“other inhumane acts”).¹ In Case 002/01, the Accused have been charged with crimes against humanity (other inhumane acts) in regards to the forced transfer of portions of the population of Democratic Kampuchea. In this filing, the Co-Prosecutors address, in summary form, the elements of forced transfer, and the sharply-limited circumstances under which the compulsory movement of populations is permissible under international law.
2. This filing focuses on developments in the law of forced transfer up to the dates of the phase 1 and phase 2 transfers. Where this brief discusses legal developments that post-date that period they are either mentioned for context or, more commonly, discussed for the permissible interpretive and illuminative value they provide of concepts that already existed prior to 1975.²

II. THE CRIME AGAINST HUMANITY OF OTHER INHUMANE ACTS, AND FORCED TRANSFER AS SUCH

3. As the Pre-Trial Chamber has noted, “‘other inhumane acts’ is *in itself* a crime under international law”.³ Thus, under the principle of legality, the Co-Prosecutors need not prove that crimes qualifying “as ‘other inhumane acts’ were each criminalised as distinct crimes against humanity under customary international law from 1975-1979.”⁴ As the Pre-Trial Chamber explained: “To require that each sub-category of ‘other inhumane acts’ entails individual criminal responsibility under international

¹ **E163/5** Deadline for submission of applicable law portion of Closing Briefs, 8 October 2012. The filing deadline of 21 December 2012 was subsequently extended to 18 January 2013 by email communication from the Trial Chamber Legal Officer to the Parties dated 14 December 2012.

² The Supreme Court Chamber has cautioned that careful analysis of jurisprudence from the *ad hoc* tribunals is necessary to insure the principle of legality is respected, but has not disavowed the applicability of this jurisprudence in its entirety. See **F28** Appeal Judgment Case 001, 3 February 2012 at paras. 95-97. Keeping these principles in mind, the Supreme Court Chamber has approved of using *ad hoc* jurisprudence that is “grounded in part in the very post-World War II jurisprudence to which the Supreme Court Chamber turns for conclusive evidence of the state of customary international law during the period relevant to [Case 001].” *Ibid.* at para 146; *see also* para. 280 (allowing for use of *ad hoc* jurisprudence where the elements of the definition of a crime “were deduced from the reasoning and factual findings of the post-World War II tribunals that were part of customary international law applicable in Cambodia in 1975”).

³ **D427/2/15** Decision on Appeals by Nuon Chea and Ieng Thirith Against the Closing Order, 15 February 2011 at para. 156 (emphasis in original) (quoting *Prosecutor v. Blagojević and Jokić*, Case no. IT-02-60-T, Judgement (ICTY Trial Chamber I), 17 January 2005 at para. 624.)

⁴ *Ibid.* at para. 156.

law is to render the category of ‘other inhumane acts’ meaningless.”⁵ The Pre-Trial Chamber concluded that “the requirements of criminalisation solely attach to the category of ‘other inhumane acts’ and not the underlying conduct constituting other inhumane acts.”⁶ Other inhumane acts as a crime against humanity before the temporal jurisdiction period of the ECCC has already been established by the Pre-Trial Chamber.⁷

4. The Trial Chamber explained the law of Other Inhumane Acts in its Judgement in Case 001:

Other inhumane acts comprise a residual offence which is intended to criminalise conduct which meets the criteria of a crime against humanity but does not fit within one of the other specified underlying crimes. The act or omission must be “sufficiently similar in gravity to the other enumerated crimes” to constitute an inhumane act. The customary status of this crime is also well established [...] For an inhumane act to be established, it must be proved that the victim suffered serious harm to body or mind, and that the suffering was the result of an act or omission of the perpetrator. [...] The seriousness of the act is to be assessed on a case-by-case basis, taking account of individual circumstances. These circumstances may include “the nature of the act or omission, the context in which it occurred, the personal circumstances of the victim including age, sex and health, as well as the physical, mental and moral effects of the act upon the victim.” There is no requirement that the suffering have long term effects, although this may be relevant to the determination of the seriousness of the act.

Examples of inhumane acts which have been found to constitute crimes against humanity include forcible displacement and forcible transfer, severe bodily harm, detention in brutal and deplorable living conditions, as well as beatings and other acts of violence.

*The requisite intention to inflict inhumane acts is satisfied when the perpetrator had the intention to inflict serious physical or mental suffering or to commit a serious attack upon the human dignity of the victim, or knew that the act or omission was likely to cause serious physical or mental suffering or a serious attack upon the human dignity. This intention must be found to have existed at the time of the act or omission.*⁸

⁵ *Ibid.* at para. 156.

⁶ *Ibid.* at para. 156.

⁷ *Ibid.* at paras. 157, 159-165.

⁸ **E188** Case 001 Trial Judgement, 26 July 2010, paras. 367-371 (internal citations omitted) (emphasis added); *see also* ICTY cases holding forced transfer is an inhumane act: *Prosecutor v. Vidoje Blagojević & Dragan Jokić*, Case No. IT-02-60-T, Judgment (ICTY Trial Chamber I, Section A), 17 January 2005 at para. 629; *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Judgment (ICTY Appeals Chamber), 17 March 2009 at para. 331; *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Judgment (ICTY Trial Chamber II), 1 September 2004 at para. 544; *Prosecutor v. Vujadin Popović et al.*, IT-05-88-T, Judgment (ICTY Trial Chamber II) 10 June 2010 at paras. 887-962; *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-A, Judgement (ICTY Appeals Chamber), 22 March 2006 at paras. 313-21.

5. The Supreme Court Chamber has not yet ruled on the definition of other inhumane acts.⁹ Again, the focus of this filing is not on a complete elucidation of “other inhumane acts” as a crime against humanity. However, the Co-Prosecutors consider it worth making the following brief observations presently.
6. As noted by the Trial Chamber in the excerpt quoted above, there is no question that the forced movement of individuals is of sufficient gravity to qualify as an inhumane act. Indeed, as the ICRC Commentary to Article 49 of the Fourth Geneva Convention states, “‘unlawful deportation or transfer’ was introduced among the grave breaches, defined in Article 147 of the Convention as calling for the most severe penal sanctions.”¹⁰
7. Similarly, the Rome Statute allows for the crime against humanity of “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to the body or to mental or physical health.”¹¹ A Trial Chamber of the ICTY, in distilling “[l]ess broad parameters for the interpretation of ‘other inhumane acts’” than those delineated in the Rome Statute drew upon a number of legal sources adopted prior to the jurisdictional window of the ECCC, including the 1948 Universal Declaration on Human Rights and the two 1966 United Nations Covenants on Human Rights.¹² The ICTY Trial Chamber noted that “[d]rawing upon the various provisions of these texts, it is possible to identify a set of basic rights appertaining to human beings, the infringement of which may amount, depending on the accompanying circumstances, to a crime against humanity.”¹³ Through this process the Trial Chamber held that “the expression at issue [*i.e.*, 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 ...).”¹⁴
8. The ICTY Appeals Chamber in the *Stakić* case held that a conviction for the crime against humanity of “other inhumane acts” “cannot be regarded as a violation of the principle of *nullum crimen sine lege* as it forms part of customary international law.”¹⁵ In support of this, it cited to multiple sources that pre-date the temporal jurisdiction of

⁹ F28 Case 001 Appeal Judgement, 3 February 2012 at fn. 733.

¹⁰ Oscar Hueter & Henri Coursier, *International Committee of the Red Cross Commentary on the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (1958) at p. 280.

¹¹ Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (17 July 1998), art. Article 7(1)(k).

¹² *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-T, Judgment (ICTY Trial Chamber) 14 January 2000 at para. 566.

¹³ *Ibid.* at para. 566.

¹⁴ *Ibid.* at para. 566; but see *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, Judgment (ICTY Trial Chamber II), 31 July 2003 at paras. 721, 722 (preferring not to use human rights instruments as a necessary or automatic source of norms of criminal law).

¹⁵ *Stakić*, ICTY Appeals Judgment, *ibid.* at para. 315.

the ECCC.¹⁶ Moreover, referring *inter alia* to Article 49 of the 1949 Geneva Convention IV, the Appeals Chamber held that forcible transfer had clearly been accepted as conduct criminalised at the time relevant to this case, and that acts of forcible transfer may be sufficiently serious as to amount to “other inhumane acts.”¹⁷

III. FORCED TRANSFER

9. As explained below, deportation and forced transfer as crimes against humanity are closely related. The latter grew out of the former, and they protect identical, or nearly identical, public interests. It is therefore appropriate to consider the development of the law related to deportation in addition to forced transfer.
10. Deportation has been prohibited as both a war crime and as a crime against humanity¹⁸. As the ICTY Appeals Chamber has noted, “deportation as a crime against humanity developed out of deportation as a war crime – as a way of extending the scope of the crime’s protection to civilians of the same nationality as the perpetrator.”¹⁹

i. The History of the Prohibition on Forced Movement

11. The principles underlying prohibitions on forced transfer can be traced back to international instruments that pre-date the First World War.²⁰ The Hague Conventions of 1899 and 1907 contained provisions that defined and limited the rights of belligerent occupants, strictures that would necessarily be breached by forced transfer.²¹ Leading Commentators have found that deportation was not explicitly

¹⁶ *Ibid.* at fn. 649.

¹⁷ *Ibid.* at para. 317.

¹⁸ See, e.g., London Charter of the International Military Tribunal (“Nuremberg Charter”), 8 August 1945, Article 6(b) & 6(c); Control Council Law No. 10 on the Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945, 3 Official Gazette Control Council for Germany 50-55 (1946), Article II (1)(b) & (1)(c); Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, 21 October 1950, Articles 49 & 147; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Article 85(4)(a); Charter of the International Military Tribunal for the Far East (Tokyo Charter), 19 January 1946, Article 5(c); *Baldur Von Schirach*, Judgment (International Military Tribunal, Nuremberg) 30 September-1 October 1946; Draft Code of Offenses Against the Peace and Security of Mankind, art. 2(11) in *Yearbook of the International Law Commission: 1954*, vol. I (1954); Draft Code of Crimes against the Peace and Security of Mankind, art. 20, in *Yearbook of the International Law Commission: 1996*, vol. II (1996); Rome Statute, *supra* note 11 at Article 8(2)(a)(vii).

¹⁹ *Stakić*, ICTY Appeals Judgment, *supra* note 8 at para. 289.

²⁰ Instructions for the Government of Armies of the United States in the Field (Lieber code), 24 April 1863, art. 23. (“Private citizens are no longer...carried off to distant parts...”).

²¹ See Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899, art. 46 and 50; Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907 at article 46 and 50.

prohibited in the Hague Conventions because deportations were “generally rejected as falling below the minimum standard of civilisation and, therefore, not requiring express prohibition [...] illegality was taken for granted.”²² Following the use of deportation during WWI, the 1919 Report of the Commission on the Responsibilities of the Authors of the War and on the Enforcement of Penalties formally categorized deportation as a crime.²³

12. World War II saw large numbers of forced movements under appalling conditions, and as a result spurred a variety of condemnations of the practice, including evidence of State practice and *opinio juris* of its prohibition under international law.²⁴ In the aftermath of World War II, the Charter of the International Military Tribunal (“Nuremberg Charter”) classified “deportation to slave labor or for any other purpose of civilian population of or in occupied territory” as a war crime,²⁵ and classified “deportation...against any civilian population, before or during the war” as a crime against humanity.²⁶ The prosecutions following WWII at the Nuremberg Tribunal included the charge of deportation²⁷, and the Nuremberg Judgment subsequently found the defendants guilty of “deportation to slave labour or for any other purpose” as a war crime and as a crime against humanity²⁸ for “deporting at least 5,000,000 persons to Germany to serve the German industry and agriculture.”²⁹ The principles of law contained in the Nuremberg Charter and Nuremberg Judgment were affirmed

²² Jean-Marie Henckaerts, *Deportation and Transfer of Civilians in Time of War*, 26 Vand. J. Transnat'l L. 469 (1993) p. 482; see also ICRC *Commentary on the Fourth Geneva Convention*, *supra* note 10 at pp. 279-280; Alfred De Zayas, *The Illegality of Population Transfers and the Application of Emerging International Norms in the Palestinian Context*, 6 Pal. Y.B. Int'l L. 17 (1990-91) at p. 21.

²³ *Report of Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties* 14 American Journal of International Law 95 (1920) at 114. Following the Commission Report, the 1920 Treaty of Sèvres also regarded deportation as a crime. See Treaty of Sèvres (10 August 1920), Article 142. There was a proposal for deportation to be included as a crime at the International Red Cross Conference of 1934 in Tokoyo. See Draft International Convention on the Condition and Protection of Civilians of enemy nationality who are on territory belonging to or occupied by a belligerent (1934), Article 19(b).

²⁴ See De Zayas, *Population Transfer in Palestinian Context*, *supra* note 29 at pp. 21-22 (discussing the 12 January 1942 adoption of the Allied Resolution on German War Crimes calling for punishment for mass expulsions perpetrated by Germany); M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (1999), p. 386 (discussing the 1943 London International Assembly draft convention for national courts to prosecute war crimes within their jurisdiction after WWII which designated deportation a punishable international offense).

²⁵ Nuremberg Charter, *supra* note 18 at Art. 6(b).

²⁶ *Ibid.* at art. 6(c). See *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-T, Judgement (ICTY Trial Chamber II), 15 March 2002 at para. 473 (explaining deportation was originally prohibited as a crime against humanity to extend jurisdiction to include perpetrators of the same nationality as the deportee).

²⁷ International Military Tribunal Indictment Count 3 (1945); see also Bassiouni, *supra* note 24 at p. 387.

²⁸ The Judgment describes the crimes as under article 6(b), which prohibits war crimes, but later states that the crimes were also crimes against humanity.

²⁹ See Judgment of the International Military Tribunal at Nuremberg for the Trial of German Major War Criminals, 30 September - 1 October 1946. In relation to war crimes, the Judgment states that “[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.” *Ibid.* at 450.

- by the UN General Assembly³⁰, and subsequently codified by the International Law Commission.³¹
13. Control Council Law No. 10³² and the Charter of the International Military Tribunal for the Far East³³ proscribed deportation as a crime against humanity. On the basis of Control Council Law No. 10, tribunals in the occupied zones of Germany entered convictions for deportation.³⁴ These cases, predominately before the U.S. Military Tribunal, affirmed that deportation was a crime, and clearly stated that the deportation of civilians for labour, even if labour was not used directly in connection with operations of war, has never been sanctioned under international law.³⁵ The domestic courts of China³⁶, Poland³⁷, the Netherlands³⁸ and Israel³⁹ have also held individuals guilty for crimes of deportation committed during the Second World War.
 14. Despite the condemnation and prosecution of deportation and forced transfer before, during, and after World Wars I & II, certain forms of deportation were condoned by

³⁰ UN General Assembly Resolution 95 (I), *Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal*, adopted 11 December 1946.

³¹ Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal in *Yearbook of the International Law Commission: 1950*, Vol. II at p. 374. See also Alfred de Zayas, "Forced Population Transfer" in *Max Planck Encyclopedia of Public International Law* (2012) at para. 20.

³² Control Council Law No. 10, *supra* note 25 at Article II(1)(c). Article II(1)(b) recognized deportation as a war crime.

³³ International Military Tribunal for the Far East ("Tokyo Charter"), 19 January 1946, Article 5(c).

³⁴ *Judgment in the case versus Hermann Roechling and Others Charged with Crimes Against Peace, War Crimes, and Crimes Against Humanity* (General Tribunal of the Military Government of the French Zone of Occupation in Germany), 30 June 1948, Appendix B at p. 1096, para. 6; *The Trial of Carl Krauch and Twenty-Two Others* ("The I.G. Farben Trial") (United States Military Tribunal, Nuremberg), 14 August 1947-29 July 1948 at pp.4-5, 57; *Trial of Erhard Milch* (United States Military Tribunal, Nuremberg), 20 December 1946- 17 April 1947 at pp. 27-28; *Trial of Alfried Felix Alwyn, Krupp von Bohlen, und Halbach and Eleven Others* ("Krupp Trial") (United States Military Tribunal, Nuremberg), 17 November 1947-30 June 1948 at p. 74; *Trial of Wilhelm List and Others* ("The Hostages Trial") (United States Military Tribunal, Nuremberg) Judgment, 19 February 1948 at p. 1305; *The United States of America v. Wilhelm von Leeb et al.*, (United States Military Tribunal, Nuremberg), Judgment, 27 October 1948 at p. 84; Flick et al., (United States Military Tribunal, Nuremberg), Judgment, 22 December 1947 in *Trials of War Criminals Before the Nuremberg Military Tribunals*, Vol. VI, pp. 1193, 1201.

³⁵ *Milch*, Judgment at IMT, *supra* note 41 at p. 849; *Krupp*, Judgment at IMT, *supra* note 41 at at pp. 84-87.

³⁶ *Trial of Takashi Sakai* (Chinese War Crimes Military Tribunal of the Ministry of National Defence, Nanking) 19 August 1946.

³⁷ *In re Greiser*, Judgment of the Supreme National Tribunal of Poland at Poznan, 7 July 1946, summarized in *Annual Digest and Reports of Public International Law Cases*, Vol. 13 (1946) p. 387; see also *Trial of Gauleiter Artur Greiser*, Supreme National Tribunal of Poland, summarized in *Annual Digest and Reports of Public International Law Cases*, Vol. 13 (1946) p. 86, 112, 113.

³⁸ *In re Zimmermann*, Judgment of the Special Court of Cassation, 21 November 1949, summarized in *Annual Digest and Reports of Public International Law Cases*, Vol. 16 (1949) p. 552.

³⁹ *Attorney General v. Adolf Eichmann*, Case No. 40/61, Judgment (District Court of Jerusalem), 11 December 1961.

the international community during and immediately after hostilities.⁴⁰ However, in the 1949 Geneva Conventions the international community categorically rejected deportations by adopting Article 49, which prohibits the transfer or deportation of civilians, although allowing for temporary movements of persons where required for the security of the population or “imperative military reasons.”⁴¹ The ICTY has recognised that although the prohibitions contained in Article 49 emanated from the events of World War II, “[T]he central elements of Article 49(1) such as the absolute prohibitions of forcible mass and individual transfers and deportations of protected persons from occupied territories stated in Article 49(1) are declaratory of customary law even when the object and setting of the deportations differ from those underlying German World War II practices...”⁴²

15. A number of regional and international instruments since the Geneva Conventions and prior to the relevant temporal period also prohibited, without criminalising, deportation and/or forced transfer (and protected related rights) in time of peace.⁴³ In addition, a number of military manuals published before the temporal period of the relevant forced transfers also prohibited forced movements.⁴⁴ More recent instruments have also dealt with prohibiting deportation and population transfer.⁴⁵ Deportation

⁴⁰ Turkey, Greece, and Bulgaria engaged in compelled transfers of civilians following WWI. In 1939, the Soviet Union deported eastern Poles to other parts of the Soviet Union. During WWII the United States and Canada transferred nationals of Japanese ancestry within those countries. Germans and minority populations were being forcibly removed from their homelands in a number of European countries based on tacit approval of the victorious powers after WWII. See Bassiouni, *supra* note 24 at p. 388; Alfred de Zayas, *International Law and Mass Population Transfers*, 16 Harv. Int'l. L. J. 207 (1975) at pp. 213 fn. 22, 222, 225-26.

⁴¹ Fourth Geneva Convention, *supra* note 24 art. 49. Unlawful deportation is also a “grave breach” of Article 147 of the Fourth Geneva Convention, and is likely a violation of Common Article 3 to the Geneva Conventions, which prohibits “violence to life and person” and “outrages upon personal dignity”. See *ibid.* at art. 147; de Zayas, *Mass Population Transfers*, *supra* note 47 at p. 221.

⁴² *Krnjelac*, ICTY Trial Judgment, *supra* note 33 at para. 473 fn. 1422.

⁴³ Bassiouni, *supra* note 24 at p. 392. See UN General Assembly Resolution 217A(III), *Universal Declaration of Human Rights*, adopted 10 December 1948, art. 3, 5, 12, 13(1); Convention for the Protection of Human Rights and Fundamental Freedoms (“European Convention on Human Rights”) 213 U.N.T.S. 221, 4 November 1950, art. 2; Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention in the first Protocol thereto, ETS 46, 2 May 1968, art. 2, 3, 4; Convention relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 150, art. 32; International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171, art. 12, 13; American Convention on Human Rights, 21 November 1969, 1144 U.N.T.S. 143, art. 22(5), 22(9); 1954 ILC Draft Code, *supra* note 24 at art. 11.

⁴⁴ *United States of America Field Manual* (1956); *United Kingdom Military Manual* (1958); *Argentina’s Law of War Manual* (1969); International Committee for the Red Cross, *Customary International Humanitarian Law Volume I: Rules* (2009) p. xxxvii-xxxviii (discussing military manuals as a source of customary international law).

⁴⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 U.N.T.S. 609, 7 December 1978, art. 17; Draft Code of Crimes against the Peace and Security of Mankind, article 22(2)(a), in *Yearbook of the International Law Commission: 1991*, vol. I; ILC 1996 Draft Code, *supra* note 24 at art. 20(a)(vii); UN Commission on Human Rights, *Report of the Representative of the Secretary-General, Mr. Francis*

and forcible population transfer are crimes against humanity and war crimes under the ICTR⁴⁶, ICTY⁴⁷, and ICC statutes.⁴⁸

ii. *Analysis of Forced Transfer Appropriately Relies on Analysis of Deportation*

16. While the crimes of deportation and forced transfer are distinct, their joint analysis is appropriate based on their shared histories demonstrated above, almost identical elements⁴⁹, and their communal goal to protect the same rights and principles⁵⁰. “Both deportation and unlawful transfer relate to the involuntary and unlawful displacement, or movement, or relocation or removal of persons from the territory in which they reside.”⁵¹ An ICTY Trial Chamber, in finding deportation to have been established in international law, noted that although instruments at the time addressed “deportation”, the criminal application extended also to forced transfer “irrespective of whether the displacement occurred across an international border or not.”⁵² That same chamber noted that “in *Attorney General v. Adolf Eichmann* the District Court of Jerusalem found Adolf Eichmann guilty of deportation for acts of internal displacement.”⁵³
17. A common set of harms are inflicted by deportation and forced transfer, including violations of civil and political, economic, and social rights and physical abuses.⁵⁴ A commentator has stated that compulsory transfer “*constitutes a negation of the right to self-determination, since no person or community can exercise this fundamental right if subjected to expulsion.*”⁵⁵

M. Deng, submitted pursuant to Commission resolution 1997/39. Addendum: Guiding Principles on Internal Displacement, 11 February 1998, Principle 5; UN Sub-Commission on the Promotion and Protection of Human Rights, *Human rights and population transfer, Annex II: Draft declaration on population transfer and the implantation of settlers*, 27 June 1997, Article 3.

⁴⁶ Statute of the International Criminal Tribunal for Rwanda, U.N. Doc. S/RES/955 (8 November 1994), art. 3(d) (criminalizing deportation as a crime against humanity but not defining it).

⁴⁷ Statute of the International Criminal Tribunal for the former Yugoslavia, U.N. Doc S/RES/827 (25 May 1993), art. 2(g) (criminalizing “unlawful deportation or transfer” as a grave breach of the Geneva Conventions), art. 5(d) (criminalizing deportation as a crime against humanity but not defining them.)

⁴⁸ Rome Statute, *supra* note 11 at art. 7(1)(d), 7(2)(d), 8.2(a)(vii), 8.2(e)(viii).

⁴⁹ Bassiouni, *supra* note 24 at p. 393.

⁵⁰ *Prosecutor v. Blagoje Simić et al.*, Case No. IT-95-9-T, Judgment (ICTY Trial Chamber II), 17 October 2003 at para. 130.

⁵¹ *Ibid.* at para. 121 (internal citations omitted).

⁵² *Stakić*, ICTY Trial Judgment, *supra* note 14 at para. 685 (also supported principle with reference to section of Nuremberg Judgment addressing deportation).

⁵³ *Ibid.* at para. 685.

⁵⁴ De Zayas, *Max Planck Forced Population Transfer*, *supra* note 38 at para. 12 (quoting UN High Commissioner for Human Rights José Ayala Lasso statement at a conference on population transfer of 17 February 1997 in Geneva.)

⁵⁵ *Ibid.* at para. 13 (“Self-determination is enshrined in Arts. 1, 55, 73, and 76 Charter of the United Nations, in the Declaration on Principles of International Law and in Art. 1 International Covenant on Economic, Social and Cultural Rights (1966).”).

18. Three ICTY Trial Chambers have assessed the harms arising from forced movements, whether across States or within them, noting (1) “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;”⁵⁶ (2) that “among the legal values protected by deportation and forcible transfer are 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;”⁵⁷ and (3) “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.”⁵⁸ A fourth Trial Chamber has stated: “The prohibition against forcible displacements aims at safeguarding the right and aspiration of individuals to live in their communities and homes without outside interference.”⁵⁹
19. As the *Stakić* Trial Chamber has held, the destination, whether across an international boundary or within it, is of secondary concern to the movement itself, which causes the primary harm. While other ICTY Trial Chambers have disagreed with *Stakić* as regards the definition of deportation,⁶⁰ the principle that the underlying harm, shared by both forced transfer and deportation, takes primacy is still valid. As the ICTY stated in *Stakić*

*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 question of whether a border was internationally recognised or merely de facto is immaterial.*⁶¹

iii. *The Definition and Elements of Forced Transfer*

20. “Deportation and forcible transfer both entail the forcible displacement of persons from the area in which they are lawfully present, without grounds permitted under international law”.⁶² “Forced transfer”⁶³ applies to “compulsory movement of people

⁵⁶ *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T, Judgment (ICTY Trial Chamber), 2 August 2001 at para.523.

⁵⁷ *Blagoje Simić et al.*, ICTY Trial Judgment, *supra* note 57 at para. 130..

⁵⁸ *Stakić*, ICTY Trial Judgment, *supra* note 14 at para. 677.

⁵⁹ *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-A, Judgment (ICTY Appeals Chamber), 17 September 2003 at para. 218.

⁶⁰ *Brdanin*, ICTY Trial Judgment, *supra* note 8 at paras. 541-542 (noting *Prosecutor v. Stakić* is the only case in which transfer across national borders is not treated as a requirement of the crime of deportation). See also *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Motion for Judgement of Acquittal (ICTY Trial Chamber), 16 June 2004 at para. 64.

⁶¹ *Stakić*, ICTY Trial Judgment, *supra* note 14 at paras. 677, 678, 680, 685.

⁶² *Krajišnik*, ICTY Appeals Judgment, *supra* note 8 at para. 308 (internal citations omitted). See also *Milošević*, ICTY Decision on Acquittal, *supra* note 60 at para. 68 (finding a distinction between forced transfer and deportation in customary international law).

from one area to another within the same state.”⁶⁴ It is distinguished from the related crime against humanity of deportation only by the latter’s requirement that the transfer be across a State boundary.⁶⁵ In other words, “[t]he crimes of deportation and forcible transfer have the same elements, except in relation to destination.”⁶⁶ Thus, while “[b]oth deportation and forcible transfer relate to the involuntary and unlawful evacuation of individuals from the territory in which they reside..., the two are not synonymous in customary international law. Deportation presumes transfer beyond state borders, whereas forcible transfer relates to displacements within a state.”⁶⁷ Nonetheless, “this distinction has no bearing on the condemnation of such practices in international humanitarian law.”⁶⁸ Despite these prohibitions, “international humanitarian law recognises limited circumstances under which the displacement of civilians during armed conflict is allowed.”⁶⁹

21. The *material elements* of forcible displacement are (1) the displacement of persons by expulsion or other coercive acts, (2) from an area in which they are lawfully present, (3) without grounds permitted under international law.⁷⁰ The displacement must be involuntary in nature. The deportation is “forced” if the use or threat of physical force, or other types of coercion, create a reasonable belief that failure to relocate would put the person in more danger. It is the absence of “genuine choice” that makes a given

⁶³ Other names sometimes used for this crime include forcible transfer, forcible eviction, forced movement, and population transfer. See *Blagoje Simić et al.*, ICTY Trial Judgment, *supra* note 57 at para. 121 fn. 211.

⁶⁴ Bassiouni, *supra* note 24 at p. 381.

⁶⁵ See ICTY decisions noting a distinction between deportation which crosses international boundaries and forced transfer, which is internal: *Prosecutor v Mllomir Stakić*, Case No. IT-97-24-T, Decision on Rule 98 *BIS* Motion for Judgement of Acquittal (ICTY Trial Chamber II), 31 October 2002 at para. 130; *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-T, Judgment (ICTY Trial Chamber I), 27 September 2006 at para. 723; *Blagojević et al.*, ICTY Trial Judgment, *supra* note 8 at para. 595; *Krnjelac*, ICTY Trial Judgment, *supra* note 33 at paras. 476, 474 fn. 1429; *Krstić*, ICTY Trial Judgment, *supra* note 56 at paras. 531-32; *Brđanin*, ICTY Trial Judgment, *supra* note 8 at paras. 540, 544; *Blagoje Simić et al.*, ICTY Trial Judgment, *supra* note 57 at paras. 122, 123. See also *Prosecutor v. João Sarmiento*, Case No. 18A/2001, Judgment (Special Panel for Serious Crimes in the District of Dili), 12 August 2003 at para. 95 (discussing distinction of status refugees versus internally displaced people). See also commentary on the requirement of crossing international boundary: Bassiouni, *supra* note 24 at p. 381; Kriangsak Kittichaisaree, *International Criminal Law* (2001) p. 109; Henckaerts, *supra* note 22 at p. 472; Christopher Hall, “Article 7: Crimes against humanity” in Otto Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court* (1999), p 136.

⁶⁶ *Milošević*, ICTY Decision on Acquittal, *supra* note 60 at para. 79.

⁶⁷ *Krstić*, ICTY Trial Judgment, *supra* note 56 at para. 521. See also *Prosecutor v. Dragan Nikolic*, Case No. IT-94-2-R61, Review of Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence (ICTY Trial Chamber), 20 October 1995 at para. 23 (transfer of detainees from one detention camp to another “could be characterized as deportation”). See *contra Krnjelac*, ICTY Trial Judgment, *supra* note 33 at para, 474, 478, & fn. 1430.

⁶⁸ *Krstić*, ICTY Trial Judgment, *supra* note 56 at para. 522 (internal citations omitted).

⁶⁹ *Krajišnik*, ICTY Appeals Judgment, *supra* note 8 at para. 308 (internal citations omitted). See also *Milošević*, ICTY Decision on Acquittal, *supra* note 60 at para. 68.

⁷⁰ *Brđanin*, ICTY Trial Judgment, *supra* note 8 at para. 540; *Blagoje Simić et al.*, ICTY Trial Judgment, *supra* note 57 at para. 124. See also Bassiouni, *supra* note 24 at p. 395 (listing the elements of deportation or forcible transfer as a crime against humanity)

act of displacement unlawful.⁷¹ As a Trial Chamber at the ICTY has stated: “It is essential for both ‘deportation’ and ‘forcible transfer’ that the displacement takes place under coercion. The essential element in establishing coercion is that the displacement be involuntary in nature, where the persons concerned had no real choice. In addition, the displacement must be unlawful.”⁷²

22. The *mental element* for the offence is the intent to displace (permanently or potentially otherwise), the victims within the relevant national border.⁷³ This encompasses both intent (*dolus directus* in the first or second degree) and advertent recklessness (*dolus eventualis*).⁷⁴ In the *Milošević* case, the Prosecution submitted that “all that is required is that the perpetrator...acted in the awareness of the *substantial likelihood that this would occur as a likely consequence of their action*.”⁷⁵ Despite this, the ICTY Trial Chamber ruled that a less stringent mental element would apply, stating “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*.”⁷⁶

⁷¹ See commentary Bassiouni, *supra* note 24 at p. 393; Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice* (2009) p. 296; Clair de Than and Edward Shorts, *International Criminal Law and Human Rights* (2003) p. 101. See ICTY decisions noting the broad definition of force for unlawful displacement that is not limited to physical force, includes threats, duress, psychological oppression, coercion, coercive environment or any situation where there is no genuine choice, even if there is apparent or formal consent: *Stakić*, ICTY Trial Judgment, *supra* note 14 at para. 682; *Blagojević et al.*, ICTY Trial Judgment, *supra* note 8 at para. 596; *Brđanin*, ICTY Trial Judgment, *supra* note 8 at paras. 543, 549; *Krstić*, ICTY Trial Judgment, *supra* note 56 at paras. 529, 530; *Prosecutor v. Mladen Naletilic et al.*, Case No. IT-98-34-T, Judgment (ICTY Trial Chamber), 31 March 2003 at para. 519; *Blagoje Simić et al.*, ICTY Trial Judgment, *supra* note 57 at paras. 125, 126, 128; *Krajišnik*, ICTY Appeals Judgment, *supra* note 8 at para. 319; *Krnojelac*, ICTY Trial Judgment, *supra* note 33 at para. 475. See also *Sarmiento*, SPSC Judgment, *supra* note 65 at para. 103.

⁷² *Brđanin*, ICTY Trial Judgment, *supra* note 8 at para. 543; *Blagoje Simić et al.*, ICTY Trial Judgment, *supra* note 57 at para. 125. See also *Naletilic*, ICTY Trial Judgment, *supra* note 71 at para. 521.

⁷³ The Co-Investigating Judges have found that virtually all persons alleged to have been forcibly transferred were unable to return home “after the fall of the regime” (Closing Order at para. 1464). On whether intent must be of permanent removal and whether the ultimate return of victims impacts criminal responsibility, the jurisprudence remains unsettled: for the position that intent does not require permanent removal see *Stakić*, ICTY Appeals Judgment, *supra* note 8 at paras. 30, 306; *Krajišnik*, ICTY Trial Judgment, *supra* note 73 at para. 726; Bassiouni, *supra* note 24 at p. 393. For the view criminal responsibility does require intent of permanent removal see *Stakić*, ICTY Trial Judgment, *supra* note 14 at paras. 686-687; *Blagoje Simić et al.*, ICTY Trial Judgment, *supra* note 57 at paras. 132, 134, 974 (With regards to intent, the TC noted that the ICRC commentary to Geneva Convention IV, as well as previous TCs of the ICTY, required that the displacement be permanent.); Cassese, *supra* note 80 at p. 296. Whether victims ultimately return of their own volition does not have an impact on criminal responsibility in regard to intent. See *Blagojević et al.*, ICTY Trial Judgment, *supra* note 8 at para. 596; *Brđanin*, ICTY Trial Judgment, *supra* note 8 at paras. 545, 555, 601; *Naletilic*, ICTY Trial Judgment, *supra* note 80 at para. 520; *Stakić*, ICTY Trial Judgment, *supra* note 14 at paras. 686, 687.

⁷⁴ *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Judgment (ICTY Appeals Chamber), 29 July 2004 at para.42.

⁷⁵ *Milošević*, ICTY Decision on Acquittal, *supra* note 60 at para. 77

⁷⁶ *Ibid.* at para. 78.

23. There is no minimum number of individuals that must be affected by the forced transfer in order for liability to attach.⁷⁷

iv. Permissible grounds for forced population movements

24. As stated in Article 49 of the Fourth Geneva Convention⁷⁸:

Individual or mass forcible transfers [...] are prohibited, regardless of their motive. Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. [...] Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.⁷⁹

25. The Commentary to Article 49 emphasizes that *no other grounds of exception* are permissible.⁸⁰ ICTY Chambers and other internationalised tribunals have confirmed that permissible exceptions are limited to these grounds,⁸¹ as have recent international legal instruments.⁸²
26. Such is the concern for sharply limiting not only the *grounds* of permissible exception, but also the *circumstances* under which those permissible grounds may be applied, that Article 49 itself builds into its provisions a number of restrictions on these exceptions. As summarised by one commentator, even when evacuation is permissible for the security of the population or imperative military reasons, it still is subject to a number of conditions:

*First, displacement is not permitted outside the territorial boundaries of the occupied State unless impossible to avoid “for material reasons”.
Second, on the cessation of hostilities evacuees should be returned home.
Third, occupying powers are obliged to provide “to the greatest*

⁷⁷ Stakić, ICTY Trial Judgment, *supra* note 14 at para. 685.

⁷⁸ Henckaerts, *supra* note 22 at p. 471 (referring to Article 49 as the “cornerstone provision.”)

⁷⁹ Both Article 49(2) Geneva Convention IV and Article 17(1) Additional Protocol II contain provisions providing for exceptions when “the security of the civilians involved or imperative military reasons so demand.” Cassese, *supra* note 80 at p. 295; Fourth Geneva Convention, *supra* note 24 at art. 49(2). See also *Blagoje Simić et al.*, ICTY Trial Judgment, *supra* note 57 at para. 127; Henckaerts, *supra* note 28 at p. 473.

⁸⁰ Fourth Geneva Convention, *supra* note 24 Commentary on Article 49.

⁸¹ *Krstić*, ICTY Trial Judgment, *supra* note 56 at para. 524, fn. 1175; *Naletilic*, ICTY Trial Judgment, *supra* note 71 at para. 518; *Sarmiento*, SPSC Judgment, *supra* note 65 at paras. 102, 105.

⁸² This set of allowable exceptions is also reflected in more recent documents, both international and domestic. See Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines, 16 March 1998, art. 3(7); 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina, 22 May 1992, para. 2.3; UNTAET Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction Over Serious Criminal Offences, 6 June 2000, Section 6(1)(a)(vii), 6(1)(e)(viii); UN Commission on Human Rights, Minimum humanitarian standards, 3 March 1995, art. 7; ICCPR, *supra* note 50 at art. 12; UDHR, *supra* note 50 at Art. 13; International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, 4 January 1969, art. 5; UN Sub-Commission on the Promotion and Protection of Human Rights, *Human rights and population transfer, Annex II: Draft declaration on population transfer and the implantation of settlers*, 27 June 1997, art. 4.

practicable extent” proper accommodation for those evacuated and evacuations should be carried out “in satisfactory conditions of hygiene, health, safety and nutrition”. Fourth, family members should not be separated and finally, protecting powers should be informed of transfers.⁸³

27. On this basis, the Special Panels for Serious Crimes have held that “the standard is the same for international or internal conflicts: if civilians have to be moved for either of those two reasons—safety or military imperatives—their evacuations are to be under protected, hygienic, and humane conditions, and as short-lived as possible.”⁸⁴ Also, “[i]n each case real necessity must exist; the measures taken must not be merely an arbitrary infliction or intended simply to serve in some way the interests of the Occupying Power.”⁸⁵
28. It is important to note that when done on a permissible basis, the movement is legally a different action from a forced transfer entirely—it is an “evacuation”, “which is by definition a temporary and provisional measure.”⁸⁶ “A genuine evacuation, as described in [Article 49], constitutes the exclusive justification for a deportation or a transfer of enemy civilians. This deviation is logical since its aim coincides with the aim of the basic prohibition of Article 49, and indeed the aim of Geneva IV in its entirety, namely, the protection of civilians.”⁸⁷ As a result, whether done for the security of a civilian population, or for imperative military reasons, permissible transfer is in part defined by the circumstance that “persons thus evacuated [are] transferred back to their homes as soon as the hostilities in the area in question have ceased.”⁸⁸ This requirement to facilitate return may be of an even more immediate nature than other repatriation requirements contained in the Geneva Conventions: “[T]he evacuated civilians have to be repatriated in any event, as soon as the hostilities in the area of ceased. As a result, unlike the repatriation of prisoners of war, the repatriation of evacuees may have to take place before the end of all hostilities.”⁸⁹ Where civilians are not returned to their homes as soon as hostilities in the area have ceased, or the justification for their evacuation is no longer extant, this may be

⁸³ Emily Haslam, “Population, Expulsion and Transfer,” in *Max Planck Encyclopedia of Public International Law* (2012) para. 20 (internal citations omitted). See also *Naletilic*, ICTY Trial Judgment, *supra* note 71 at para. 519 fn.1357.

⁸⁴ *Sarmiento*, SPSC Judgment, *supra* note 65 at para. 99.

⁸⁵ *ICRC Commentary on the Fourth Geneva Convention*, *supra* note 10 at p. 281 (commenting on the two acceptable reasons to prohibit the right of protected persons to move from place to place.)

⁸⁶ *Stakić*, ICTY Appeals Judgment, *supra* note 8 at para. 284; *Blagojević et al.*, ICTY Trial Judgment, *supra* note 8 at paras. 597-598. See also *ICRC Commentary on the Fourth Geneva Convention*, *supra* note 10 at p. 280.

⁸⁷ Henckaerts, *supra* note 22 at p. 473.

⁸⁸ Bassiouni, *supra* note 24 at p. 394; *Krstić*, ICTY Trial Judgment, *supra* note 56 at para. 524

⁸⁹ Henckaerts, *supra* note 22 at p. 475.

evidence that the justification provided was merely pretext.⁹⁰ Additionally, the requirement to allow for the return of transferred civilians is so strong that even when an evacuation is carried out on permissible grounds, that evacuation *becomes* illegal when the population is not allowed to return as soon as possible.⁹¹

29. When the authority forcing the evacuation of the population takes measures that would prohibit or be at odds with the return of the population, this indicates that the mental element of forcible transfer is satisfied. As an ICTY Trial Chamber noted: “When a genuine evacuation takes place, there is an obligation to bring the population back when the hostilities have ended. No attempts to return [the victims] were made. In fact, most of their houses were torched after [the day they were rounded up].”⁹² Likewise, another Trial Chamber of the ICTY noted that the victims’ “homes, their business premises and their religious buildings were destroyed” and that their property had been confiscated or they were forced to relinquish it without compensation.⁹³ Thus, the Trial Chamber held that “[t]here is no doubt that in the mind of the Bosnian Serb authorities, the ethnic cleansing campaign could only be successful if the Bosnian Muslims and Bosnian Croats were to be *permanently* removed.”⁹⁴
30. Even permissible justifications for evacuation are only allowable in the strictest and narrowest of circumstances. “[I]n view of the drastic nature of a forced displacement of persons, recourse to such measures would only be lawful in the gravest of circumstances and only as measures of last resort.”⁹⁵ The Commentary to Article 49 further emphasizes the strict interpretation of the exceptions.⁹⁶
31. Relatedly, it is unlawful to use evacuation measures as a pretext to forcibly dislocate a population and seize control over a territory.⁹⁷ Pretext can be indicated by the cruelty of the manner in which the evacuation is carried out.⁹⁸
32. An evacuation premised on the need to ensure the security of the population will also indicate pretext where “active hostilities” in the area where the civilians have been

⁹⁰ *Krstić*, ICTY Trial Judgment, *supra* note 56 at para. 525; *Brđanin*, ICTY Trial Judgment, *supra* note 8 at para. 556; *Blagojević et al.*, ICTY Trial Judgment, *supra* note 8 at para. 601; *ICRC Commentary on the Fourth Geneva Convention*, *supra* note 10 at p. 280-281.

⁹¹ *Than & Shorts*, *supra* note 80 at p. 100; see also *Krajišnik*, ICTY Trial Judgment, *supra* note 73 at para. 725.

⁹² *Naletilic*, ICTY Trial Judgment, *supra* note 80 at para. 526.

⁹³ *Brđanin*, ICTY Trial Judgment, *supra* note 8 at para. 555.

⁹⁴ *Ibid.*

⁹⁵ *Blagoje Simić et al.*, ICTY Trial Judgment, *supra* note 57 at para. 125 fn. 526.

⁹⁶ *ICRC Commentary on the Fourth Geneva Convention*, *supra* note 10 at p. 280.

⁹⁷ *Bassiouni*, *supra* note 24 at p. 394.

⁹⁸ *Krstić*, ICTY Trial Judgment, *supra* note 56 at para. 527.

transferred from have ceased by the time of the transfer.⁹⁹ Furthermore, “displacement for humanitarian reasons ‘is not justifiable [under international law] where the humanitarian crisis that caused the displacement is itself the result of the accused’s own unlawful activity’”.¹⁰⁰

33. A Trial Chamber of the ICTY found a transfer justified on the grounds that it was necessary to secure the safety of the population in only one limited factual scenario.¹⁰¹
34. A justification based on military necessity will also indicate mere pretext where no military threat is apparent¹⁰², and where other actions by the authority do not indicate the same military necessity¹⁰³. Additionally, not every possibly beneficial objective is a permissible justification as a military necessity. For example, transfers done in order to prevent troops being overrun by “overwhelming” enemy forces may be justified, but transfers for the purposes of “the military necessity of preventing espionage and depriving the enemy of manpower” will not.¹⁰⁴ A number of sources indicate that a claim based on military necessity must also be essentially directed to the security of the population, and that therefore “[t]he defense of military necessity is therefore restricted to situations where the army commanders judge that the safety of the civilian population requires that they be removed from the battle zone, and not when the same army commanders decide that military advantage would be gained by removing the population and scorching the earth behind them.”¹⁰⁵ A chamber considering a claim of military necessity might also consider whether there is any other evidence of preparation for adverse military consequences in addition to the evacuation of the population that would corroborate that claim.¹⁰⁶

⁹⁹ *Ibid.* at para. 525.

¹⁰⁰ *Krajišnik*, ICTY Appeals Judgment, *supra* note 8 at para. 308 fn. 739.

¹⁰¹ *Brđanin*, ICTY Trial Judgment, *supra* note 8 at para. 556 fn. 1422 (After a series of attacks on Bosnian Croat and Bosnian Muslim villages, a group of approximately 500 Bosnian Muslims and Bosnian Croats asked the Bosnian Serb military police to allow them to leave Čelinac. The group was originally told to line up in order to leave, but for security reasons they were ordered not to proceed, and the accused ordered they be taken by bus to an elementary school where they were kept under the protection from danger and retaliation for seven to fifteen days. After their release they returned to their homes.)

¹⁰² *Krstić*, ICTY Trial Judgment, *supra* note 56 at para. 527.

¹⁰³ *Naletilic*, ICTY Trial Judgment, *supra* note 71 at para 526 (Holding transfer was not a lawful because the civilians were held in the town for a number of days before being transferred, indicating “[n]o imperative military reasons existed.”).

¹⁰⁴ *Krstić*, ICTY Trial Judgment, *supra* note 56 at para. 526 (internal citations omitted).

¹⁰⁵ de Zayas, *Mass Population Transfers*, *supra* note 48 at p. 219. See also Than & Shorts, *supra* note 80 at p. 100; *Blagojević et al.*, ICTY Trial Judgment, *supra* note 8 at para. 598.

¹⁰⁶ See “Trial of Wilhelm List and Others (the Hostages Trial),” in *Law Reports of Trials of War Criminals, Selected and Prepared by the United Nations War Crimes Commission* (Volume VIII 1949) p. 68 (Noting evidence that a Russian attack was anticipated.).

35. Military necessity was defined by the United States Military Tribunal at Nuremberg in the *Hostages Trial*¹⁰⁷, when addressing claims of military necessity as a defence in reaction to charges of violations of the Hague Convention of 1907 prohibiting destruction of civilian property. The definition highlights the restrictions that apply to military necessity even when it is properly applied, stating that military necessity will never permit the killing of civilians for purposes of “revenge or the satisfaction of a lust to kill” and or “destruction [of property] as an end itself.” Military necessity “does not admit of wanton devastation of a district or the willful infliction of suffering upon its inhabitants for the sake of suffering alone...”¹⁰⁸
36. The British Military Court at Hamburg also addressed a claim of military necessity in *In re von Lewinski*¹⁰⁹ in defence of a claim of destruction of property in violation of Article 23(g) of the Hague Convention of 1907, which states that it is forbidden “[t]o destroy or seize enemy property, unless such destruction or seizure be imperatively demanded by the necessities of war.” In assessing this claim, the Tribunal began by emphasizing that the imperative necessity exception is narrow, and does not allow destruction of property when it may be merely advantageous because leaving a path of devastation.¹¹⁰
37. The ICRC commentary to Article 49 of the Fourth Geneva Conventions echoes this view succinctly: “Evacuation is only permitted ... when overriding military considerations make it imperative; if it is not imperative, evacuation ceases to be legitimate.”¹¹¹ This commentary also reiterates the imperative, temporary nature of evacuations. The normative circumstances of a valid evacuation are an “improvised evacuation of a temporary character when urgent action is absolutely necessary in order to protect the population effectively against imminent and unforeseen danger.”¹¹² Thus, where it is shown that the decision for evacuation was made long before the evacuation, or before the necessities of the moment arise, this will show

¹⁰⁷ *Ibid.*; see also *Krstić*, ICTY Trial Judgment, *supra* note 56 at para. 526 (internal citations omitted) (discussing and comparing The Hostages Trial judgment with the von Lewinski judgment).

¹⁰⁸ *Hostages Trial*, IMT Judgment, *supra* note 106 at p.66.

¹⁰⁹ *In re von Lewinski (called von Manstein)* (British Military Court at Hamburg, Germany), December 19, 1949, summarized in H. Lauterpacht, Q.C. (ed.), *Annual Digest and Reports of Public International Law Cases, Year 1949* (1955) p. 509; see also *Krstić*, ICTY Trial Judgment, *supra* note 56 at para. 526.

¹¹⁰ *Ibid.* p. 522 (“For a retreating army to leave devastation in its wake may afford many obvious disadvantages to the enemy and corresponding advantages to those in retreat. That fact alone, if the words in the article mean anything at all, cannot afford a justification. Were it to do so, the article would become meaningless.”)

¹¹¹ *ICRC Commentary on the Fourth Geneva Convention*, *supra* note 10 at p. 280. See also Nobuo Hayashi, *Requirements of Military Necessity in International Humanitarian Law and International Criminal Law*, 28 Boston University International Law Journal 39 (2010) at p. 68 (noting [v]arious expressions, such as ‘indispensable,’ ‘need,’ ‘requirement,’ ‘necessary,’ and so on, have been used to emphasize the exception circumstances that would require an evacuation).

¹¹² *ICRC Commentary on the Fourth Geneva Convention*, *supra* note 10 at p. 281.

that the transfer was the result of a policy, as opposed to a genuine and necessary solution to circumstances.¹¹³

38. Additional requirements that are necessary to establish a “military necessity” include that:
- i. The measure was taken primarily for some specific military purpose;
 - ii. The measure was required for the attainment of the military purpose;
 - iii. The military purpose for which the measure was taken was in conformity with international humanitarian law; and
 - iv. The measure itself was otherwise in conformity with international humanitarian law.¹¹⁴

These requirements are cumulative, thus “should a given measure fail to satisfy any one of them, the measure would be ‘militarily *unnecessary*’ within the meaning of exceptional military necessity clauses.”¹¹⁵ Each of these requirements necessitates brief additional explanation.

39. The requirement that a measure be taken for a specific military purpose requires “(i) that there was, in fact, a specific purpose for which the measure was taken; and (ii) that this purpose was primarily military in nature.”¹¹⁶ A “military” purpose is characterised by “sound strategic, operational or tactical thinking in the planning, preparation and execution of belligerent activities.”¹¹⁷
40. Based primarily on interpretation of WWII-era jurisprudence, in order for a measure to be “required for the attainment of the military purpose,” it must be shown:
- i. That the measure was materially relevant to the attainment of the military purpose;
 - ii. That, of those materially relevant measures that were reasonably available, the one taken was the least injurious; and
 - iii. That the injury that the measure would cause was not disproportionate to the gain that it would achieve.¹¹⁸

¹¹³ *Krstić*, ICTY Trial Judgment, *supra* note 56 at para. 526 (quoting von Manstein case) (plan was preconceived and accused planned to implement regardless of military necessity).

¹¹⁴ Hayashi, *supra* note 111 at p. 62.

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.* at p. 63.

¹¹⁷ *Ibid.* at p. 64.

¹¹⁸ *Ibid.* at p. 69 (reviewing *The Peleus Trial*, UN War Crimes Commission, 1 Law Reports of Trials of War Criminals 1-21 vol. 1, 1947).

A given measure need not be the only reasonable available course of action for the attainment of a given military purpose, but military necessity demands the measure must be the “one that causes the least injury to objects and interests otherwise protected by these rules,” and “military necessity is inadmissible where, in relation to the stated military purpose, at least one materially relevant yet less injurious measure was reasonably available to the belligerent other than the one taken.”¹¹⁹

41. One commentator observes, “Military necessity is inadmissible where the purpose for which the measure was taken was itself contrary to international humanitarian law.”¹²⁰ In regards to the requirement that the measure must otherwise conform with international humanitarian law, “where the belligerent must choose between measures which are relevant to his lawful purpose but involve unlawful acts, on the one hand, and measures which amount to abandoning that purpose but involve no unlawful act, on the other, military necessity would demand that he choose the latter.”¹²¹
42. In evaluating whether an accused’s claim that he acted under one of the two permissible justifications is reasonable, a court must analyse the situation from the viewpoint of the individual at the time he or she committed the forced transfer. A *dual subjective/objective analysis* is required: the Court must view the facts as they were viewed from the subjective view of the accused at the time, but then determine whether that set of facts objectively supported a reasonable interpretation that the security of the civilian population or military necessity justified the evacuation.¹²² As explained in the *Hostages* judgment, “We are concerned with the question whether the defendant at the time of its occurrence acted within the limits of honest judgment on the basis of the conditions prevailing at the time.”¹²³ The court held that although there was ultimately no military necessity, when the situation was judged as the conditions appeared to the defendant the time, the defendant could not be held criminally liable.¹²⁴
43. The British Military Court at Hamburg took the same approach in the *In re von Lewinski* decision, stating in determining culpability “You must judge [...] whether the accused having regard to the position in which he was and the conditions prevailing at the time acted under the honest conviction that what he was doing was

¹¹⁹ *Ibid.* at pp. 72-73.

¹²⁰ *Ibid.* at p. 87.

¹²¹ *Ibid.* at p. 92.

¹²² *Krstić*, ICTY Trial Judgment, *supra* note 56 at para. 526 (Discussing *Rendulic* case from US Military Tribunal at Nuremburg where Court judged military necessity based on the information the Accused had at the time).

¹²³ *Hostages Trial*, IMT Judgment, *supra* note 106 at p. 69. See also Hayashi, *supra* note 118 at p. 96.

¹²⁴ *Hostages Trial*, IMT Judgment, *supra* note 106 at p. 69.

legally justifiable.”¹²⁵ In deciding the question, the court must consider objective facts as disclosed by the documents, as well as the scale upon which the destruction was carried out.¹²⁶

44. The corollary to the principle that the decision must be viewed from the perspective of the Accused at the time he or she made the decision is that an Accused may not claim necessity on the basis of hindsight. “[M]ilitary necessity pleas must be assessed in the light of the purposes that the belligerent had in mind when he took the measure. The mere fact that an aimless measure happens to fulfil military purposes afterwards does not, retroactively, turn it into military necessity.”¹²⁷

IV. RELIEF REQUESTED

The Co-Prosecutors request that the Trial Chamber consider this legal submission in ruling on the charges in Case 002/01.

Respectfully submitted,

Date	Name	Place	Signature
17 January 2013	CHEA Leang Co-Prosecutor	Phnom Penh	
	Andrew CAYLE Co-Prosecutor		

¹²⁵ *von Manstein, supra* note 109 at pp.522-523.

¹²⁶ *Ibid.*

¹²⁷ Hayashi, *supra* note 111 at pp. 94, 97.