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Forced Migration in International Criminal Law

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Abstract

Deportation and forced transfer of civilians are quite common offences in the global context. The consequence of almost every armed conflict was the mass displacement of the population from the conflict zone. Accordingly, there was a need to determine the status of displaced persons and criminal liability for such acts.

Deportation and forced transfer of civilians can be qualified under several articles of the Rome Statute of the International Criminal Court – as a war crime and a crime against humanity. A study of international criminal tribunals' case law allows concluding that such factors influence the qualification of an act:

- 1) Existence or absence of a situation of international armed conflict;
- 2) Were the actions one-time, episodic – or, on the contrary, were part of systematic and targeted attacks;
- 3) During the movement of the civilian population, was the latter forced to cross de jure or de facto border, or did the displacement take place within the state without crossing state borders;
- 4) Were there any circumstances that determined the legality of the population displacement - for example, considerations of the safety of the civilian population or military necessity?

Taking into account the circumstances listed above will make it possible to carry out the most accurate qualification of the act of displacement of the civilian population according to the norms of international criminal law.

Keywords: forced migrants, refugees, deportation, forced transfer, international criminal law.

1. Introduction

Large-scale population movements of certain territories are not new phenomena in history. The so-called "great migration of peoples" proves that migration is an integral part of the formation of human society. However, such migration often is not voluntary. Military conflicts and disasters almost always lead to significant population migration. It seems understandable that people want to preserve their life, health or well-being by moving away from the line of contact of warring parties or the epicentre of an artificial or natural disaster. In 2022, according to the UN, the number of people who were forced to leave their homes and seek refuge abroad exceeded 100 million people (UNHCR, 2022). Unfortunately, the 100 million milestone became possible because of immigrants from Ukraine.

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It is probably quite obvious why the increase in the number of refugees and internally displaced persons is a negative phenomenon. In addition to the suffering experienced by displaced persons since they were forced to leave their homes, their usual circle of communication, and sometimes their profession or to be separated from their relatives, the arrangement of life and integration into the society of displaced persons requires significant resources. Therefore, in the case of *Prosecutor v. Tihomir Blaskic (IT-95-14-A)*, the appeals chamber noted that deportation, forcible transfer, and forcible displacement constituted crimes of equal gravity to other crimes listed in Article 5 of the [International Criminal Tribunal for the former Yugoslavia] Statute and therefore could amount to persecutions as a crime against humanity (§ 153) (*Case of Blaškić, 2004*).

In some armed conflicts, creating pressure on the civilian population to move them can be used as one of the strategies of the conflict side. In particular, Sanjula Weerasinghe and Elizabeth Ferris are convinced that displacement is more than an unintended consequence of armed conflict. Increasingly it is a deliberate objective of armed groups. For example, in the mid-1990s, warring parties in the Balkans deliberately sought to force members of particular ethnic groups to abandon their communities. Displacement was the military objective (*Ferris, Weerasinghe, 2011*). Some states knowingly or unknowingly resort to tactics of intimidating the civilian population during conflicts in order to provoke migration crises.

2. Materials and methods

The main sources for writing this paper became the acts of international law, case-law of International Criminal Court, International Criminal Tribunal for the former Yugoslavia and materials of the scientific publications.

The study used the basic methods of cognition: the historical and situational, formal-legal and the method of comparative law. The use of historical and situational method allows to understand the evolution of approaches forced displacement's legal qualification. The formal-legal method was used to analyze official documents and case law on the rights forced migrants. Method of comparative law defines the difference in models of qualification of deportation and forced transfer in international criminal law.

3. Discussion

Population movement during an armed conflict is subject to regulation, including international humanitarian and human rights laws. A large number of documents of both the UN and regional organizations, which direct their activities to protect human rights, are devoted to such situations. Among the researchers on the topic, it is worth noting Jan Willms, Rebecca Dickey, Matt Brown, Federico Andreu-Guzmán, Guido Acquaviva and others. They both raised the problems of qualification of forced displacement during the armed conflict and described specific cases in individual states and territories. In a global sense, forced displacement is well-researched. However, there is a lack of relevant research at the national level, mainly because most European countries have not faced situations of deportation and forced transfer since the Second World War. However, the study of this issue is gaining new relevance in view of both the ongoing armed conflicts and the migration crises that Europe is facing.

As Rebecca Dickey notes, forced displacement is the coerced movement of people away from their homes (*Dickey, 2019*). Movement of the population during an armed conflict should be considered the activity of one of the parties to the conflict, aimed at the civilian population leaving their permanent residence. Such actions may include the direct detention and deportation of the people and the creation of conditions that are impossible for the civilian population to live in a particular territory. Customary international humanitarian law contains rule 129, which provides:

A. Parties to an international armed conflict may not deport or forcibly transfer the civilian population of an occupied territory, in whole or in part, unless the security of the civilians involved or imperative military reasons so demand.

B. Parties to a non-international armed conflict may not order the displacement of the civilian population, in whole or in part, for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand (*Customary..., 2022*).

This norm was formed on the basis of previous law and practice. For example, Article 6 of the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis

(Nuremberg Tribunal Statute) calls "deportation to slave labor or for any other purpose of civilian population of or in occupied territory" a war crime ([Agreement..., 1945](#)).

Likewise, Article 49 of the Convention (IV) relative to the Protection of Civilian Persons in Time of War prohibits, regardless of their motives, "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." ([Convention..., 1949](#)). At the same time, international humanitarian law allows "evacuation" if it is required by "the security of the population or imperative military reasons".

The Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (International Tribunal for the Former Yugoslavia) provided for responsibility for the following acts:

- Gross violations of the 1949 Geneva Convention, including unlawful deportation or transfer or unlawful confinement of a civilian (Article 2);
- Crimes against humanity, including deportation (Article 5) ([Statute of the International..., 1993](#)).

The Statute of the International Tribunal for Rwanda provided for liability only for deportation as one of the types of crimes against humanity (Article 3) ([Statute..., 1994](#)).

In turn, the International Criminal Court uses the term "Deportation or forcible transfer of population", which 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. Later, Article 8 (2) (e) (viii) of the Rome Statute of the International Criminal Court also calls "Ordering the displacement of the civilian population for reasons related to the conflict" a war crime ([Rome Statute..., 1998](#)), and Article 7 (1) (d) provides for a crime against humanity in the form of deportation or forcible population transfer. According to the Elements of Crimes, a war crime of displacing civilians includes such elements:

1. The perpetrator ordered a displacement of a civilian population.
2. Such order was not justified by the security of the civilians involved or by military necessity.
3. The perpetrator was in a position to effect such displacement by giving such order.
4. The conduct took place in the context of and was associated with an armed conflict not of an international character.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict ([Elements of Crimes, 2010](#)).

On the other hand, the crime provided for in Article 7 (1) (d) of the Rome Statute of the International Criminal Court provides for the person's awareness of the following facts:

- 1) the civilian population resides in a particular territory legally, and there are no legal grounds for its relocation;
- 2) the displacement of the civilian population is part of a broader policy of widespread or systematic attacks on the civilian population ([Elements of Crimes, 2010](#)).

4. Results

Therefore, it follows from the above that the civilian population's displacement in armed conflict conditions may constitute an international crime. However, previous law enforcement practice indicates that in the case of criminal prosecution for the displacement of the civilian population, several nuances should be taken into account.

1) According to modern international criminal law norms, acts of displacement of the civilian population may have several qualifications. According to Victoria Colvin and Phil Orchard, forced displacement itself can constitute an atrocity crime, with both forced deportations across borders and forcible transfers within them now viewed potentially as crimes against humanity ([Colvin, Orchard, 2022](#)).

The elements of crimes of the International Criminal Court allow a clear distinction between forced transfer and deportation and forced displacement of the civilian population. The first two are prohibited by the IV Geneva Convention and considered war crimes if committed during an

international armed conflict. Instead, forced displacement of civilians is prohibited by Article 17 of the Additional Protocol. It takes place in the conditions of a non-international armed conflict.

The issue of distinguishing between deportation and forced transfer of population is also debatable. Guido Acquaviva, in this regard, observes that from the early developments of war crimes law, conventional instruments and judicial rulings have often conflated these two concepts. As the two acts are often mentioned together, doubts abound as to whether they should not be treated as a single crime. Interestingly, the ICC Statute does not appear to make a clear distinction between the two (Acquaviva, 2011).

However, the practice of international courts and tribunals shows that judges distinguish between these concepts. For example, in the case of Prosecutor v. Milomir Stakic (by the International Criminal Tribunal for the former Yugoslavia), the appeals chamber noted the following: 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 (§ 300) (Case of Prosecutor..., 2006).

At the same time, the Appeals Chamber established that deportation could potentially be considered both the movement of persons across a de jure border and across a border that exists de facto. In the latter case, it may be about the border between controlled and occupied territory with an established character. However, the case of Prosecutor v. Milomir Stakic was about a moving line, the location of which constantly changed depending on the course of hostilities. Accordingly, in this case, it was not about deportation but about forced transfer (Case of Prosecutor..., 2006).

The International Criminal Court continued a similar practice. In particular, in the previous decision in the case ICC-RoC46(3)-01/18 (the case of the deportation of the Rohingya people), the court emphasized: in this regard, the Chamber agrees with the Prosecutor that article 7(1)(d) of the Statute sets forth two separate crimes, namely deportation and forcible transfer (§ 53) (Decision..., 2018). Therefore, the court explains «this means that, provided that all other requirements are met, the displacement of persons lawfully residing in an area to another State amounts to deportation, whereas such displacement to a location within the borders of a State must be characterised as forcible transfer (§ 55) (Decision..., 2018).

2) There are cases where population displacement may be justified from the point of view of international law. In particular, such considerations, under the IV Geneva Convention, are:

- a) safety of the civilian population;
- b) imperative military reasons (Convention..., 1949).

In particular, in the case of The Prosecutor v. Jovica Stanisic and Franko Simatovic the court emphasized that international humanitarian law recognizes limited circumstances under which the displacement of civilians during armed conflict is allowed, namely if it is carried out for the security of the persons involved, or for imperative military reasons. In such cases the displacement is temporary and must be carried out in such a manner as to ensure that displaced persons are returned to their homes as soon as the situation allows. Whether a forcible displacement of people is lawful is, however, more appropriately dealt with when considering the general elements of crimes against humanity (§ 994) (Case of Stanisic..., 2015).

The security of the civilian population is one of the central requirements during an armed conflict. According to Article 51(3) of the 1977 Additional Protocol I civilians shall enjoy protection against the dangers arising from military operations «unless and for such time as they take a direct part in hostilities» (Protocol..., 1977). Although there are some discussions in the literature and law enforcement practice regarding recognising the status of combatants for individuals who formally do not belong to the parties of the conflict but participate in hostilities, the minimal possible harm to the civilian population-rule is irreplaceable. The security requirements of the civilian population must be taken into account both when planning and during the implementation of military operations. At the same time, even persons who sporadically participate in an armed conflict should not be subject to forced displacement. Moreover, in the appeal in Prosecutor v. Milomir Stakic, the appellant emphasised that displacement – even if involuntary – does not constitute the crime of deportation when done in pursuit of humanitarian efforts to evacuate civilians from an area of hostilities, and there may even be a duty to assist such displacement (Case of Prosecutor..., 2006).

Military necessity is another factor that can justify the displacement of civilians. Military necessity is an evaluative concept determined in each specific case, considering the military situation, available intelligence, etc.

3) The method of committing the crime of deportation and forced transfer may differ. In particular, in the case *Prosecutor v. Vlastimir Đorđević* (International Criminal Tribunal for the former Yugoslavia), the court emphasized that "the transfer must be forced, carried out using expulsion or another form of coercion, which makes the transfer involuntary in nature, and the persons concerned have no choice about their transfer (§ 1605). At the same time, the court determines the methods of forced relocation:

- Use of force;
- The threat of use of force;
- Coercion created by the threat of violence, imprisonment, psychological oppression or abuse of power, etc. (§ 1605) ([Case of Đorđević, 2014](#)).

The court says the same considerations in the case *Prosecutor v. Jovica Stanišić and Franko Simatović*: «Fear 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 forcible displacement of people. Displacement of persons carried out pursuant to an agreement among political or military leaders, or under the auspices of the ICRC or another neutral organization, does not necessarily make it voluntary» (§ 993) ([Case of Stanisić..., 2015](#)).

Describing the modus operandi of the Serbian armed forces, the court emphasized that the crime of deportation consisted of such repeated and systematic actions: in the early morning hours, VJ and MUP forces would approach a village, town or other location. The VJ, using tanks, armoured vehicles and other heavy weapons, would shell the residential area causing the Kosovo Albanian population to flee from their homes. Serbian forces, in most cases police, would then enter the area on foot, typically setting houses on fire and looting valuables. Many residents and displaced persons, who witnessed heavy property destruction and damage, as well as killings, by Serbian forces, by their own decision left their town, village or city in large numbers out of fear for their lives and welfare ([Case of Đorđević, 2014](#)).

4) The status of persons who have become victims of forced displacement must also be taken into account when qualifying for the offence. So, some researchers emphasize that deportation or forced transfer should be directed against any civilian population ([Acquaviva, 2011](#)). At the same time, reasonably rarely, such crimes are not associated with specific characteristics of the victims. Mainly, forced transfer and deportation are part of hate crimes, ethnic cleansing, religious hostility, etc. For example, in ICC-RoC46(3)-01/18, the International Criminal Court declared that acts committed against the Rohingya people fall under its jurisdiction. According to the supporting material, an estimated 600,000 to one million Rohingya were forcibly displaced from Myanmar to neighbouring Bangladesh as a result of the alleged coercive acts ([ICC judges..., 2019](#)). The reason for the forced displacement was the ethnic origin of the victims.

In the case *Prosecutor v. Tihomir Blaskić* (IT-95-14-A), the Appeals Chamber observed that displacements within a state or across a national border, for reasons not permitted under international law, are crimes punishable under customary international law, and these acts, if committed with the requisite *discriminatory intent*, constitute the crime of persecution under Article 5(h) of the Statute (§ 152) ([Case of Blaškić, 2004](#)).

The discriminatory purpose or motives of racial, ethnic, religious, etc. hatred also characterise this crime's subjective side.

5. Conclusion

In summary, we can point to the following conclusions:

1) Forcible displacement of the civilian population is a crime under international criminal law. Although the previous practice of international tribunals has not been consistent, the statutes of the Nuremberg Tribunal and the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda have included the crime of forced displacement of civilians. Currently, under the Rome Statute of the International Criminal Court, the acts punishable are the deportation or forcible transfer of a civilian population as part of a widespread or systematic attack against a civilian population (crime against humanity, Article 7 (1) (d); the deportation or forcible transfer of persons who protected by at least one of the Geneva

Conventions (war crime, Article 8 (2) (a) (vii) – 1); deportation or forcible transfer from the occupied territory (war crime, Article 8 (2) (b) (viii)). Forcible population displacement within the framework of a non-international armed conflict is prohibited by customary humanitarian law.

2) Per the norms of the Statute of the International Criminal Court, the term "forcibly" is not restricted to physical force but may include a threat of force or coercion, such as that caused by fear of violence, intimidation, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment.

3) Judicial practice distinguishes between the concepts of "deportation" and "forced transfer". The first involves crossing a state border or, at least, a permanent dividing line (de facto border). Movement within the same state or across a volatile battle line does not constitute deportation. It is the distinction between deportation and forced transfer that has led to appeals in several cases to the International Criminal Tribunal for the former Yugoslavia, whose statute provides for responsibility only for deportation.

4) The displacement of the civilian population can be justified from the point of view of international law if it is carried out to protect the civilian population or due to military necessity.

5) Victims of deportation or forced transfer are most often, but not necessarily, persons of race, ethnicity, religion, etc., different from the relevant characteristics of the attackers. Deportation or forced transfer may be the ultimate goal of attackers or part of a broader strategy to attack civilians. Victims of deportation and forced transfer in the host country receive the status of refugees or internally displaced persons.

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