

The Evolution of Forced Displacement in International Criminal Law

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This article examines how the evolution of jurisprudence can affect the role international criminal law plays in ensuring human rights protection for forcibly displaced persons. It argues that the increasing number of forcibly displaced persons worldwide requires a stronger effort towards international attention to the crime of forced displacement. The article first provides a contextual background to the crime of forced displacement, most notably the distinction between deportation and forcible transfer. Then it outlines how, amid recent developments in the scope of the crime, placing equal weight on deportations across state borders and the coerced movement of people within a state is crucial in pursuit of international criminal justice.

The Crime of Forced Displacement _

Considerable steps have been made in defining the elements of forced displacement. Convictions for deportation and forcible transfer have led to justice for many displaced persons, most especially those who fell victim to the Bosnian Serbs. Meanwhile, however, uncertainties surrounding elements of the crime have contributed to a higher threshold to convict for forcible transfer within a country than

deportation across state borders. The defining elements of forced displacement as they exist today can certainly evolve and improve, allowing more justice for forcibly displaced persons and less impunity for mass atrocities. If implemented consistently and properly, the prohibition on forced displacement has a substantial role to play in the international realm, most notably to help address the current migration crisis.

What is Forced Displacement?

Forced displacement is the coerced movement of people away from their homes. In international criminal law, committing the act of forced displacement entails individual criminal responsibility. Displaced persons endure widespread human rights violations before, during, and after the removal from their homes. They are often impoverished and malnourished. They encounter continuing abuse from governments and non-state actors. They lose their homes and property, family and community, security and safety, and cultural and traditional practices. Following displacement, victims face deep psychological trauma. The intense vulnerability of displaced persons often results in some of the highest civilian death tolls during a conflict. (See more information on the impacts of forced displacement here). The rampant human rights abuses and widespread vulnerable impacts that result from forced displacement necessitate protection of the victims on an international level.

Forced displacement may manifest itself as either deportation or forcible transfer. Both encompass the involuntary removal of persons from their homes. However, deportation is across state borders; forcible transfer is internally within a state. An individual victim of deportation becomes a refugee under the terms of the Refugee Convention (here); an individual victim of forcible transfer becomes an internally displaced person (IDP).

The fundamental core value protected by the crimes of both deportation and forcible transfer remains the right of all persons to remain undisturbed in their homes. Deportation contains broader implications in international law due to the violation of another states' sovereignty when a group is banished across a state border. However, the international community views both deportation and forcible transfer as mass atrocities. International jurisprudence has captured the central definitions of deportation and forcible transfer, but the specific elements of each continue to develop.

The decisions of international criminal tribunals, most especially the International Criminal Tribunal for Yugoslavia (ICTY), illustrate unresolved areas in the law that challenge the prosecution of the crime. Increasing compliance with the prohibition on forced displacement has the potential to reduce or prevent displacement in situations of armed conflict. Reconceptualising the approach to prosecuting forced displacement, by better defining unsettled areas of the crime, would increase accountability for perpetrators.

Placing a higher weight on deportation over forcible transfer may minimize the crime of displacement in international law

By emphasizing the atrocities that result from deportation across the state border, international criminal tribunals risk overlooking the impact of transferring people forcibly within the state itself. From an international law perspective, deportation affects other states' sovereignty and subsequently the global order in a way forcible transfer does not. From a human rights perspective, both deportees and internally displaced persons (IDPs) suffer. The effect on a population, whether deported or forcibly relocated, is the same. The coerced movement of people within a state is as severe as forcing them across a state border.

The development of the dichotomy between forced deportation and transfer at the ICTY highlights the consequences of minimizing the crime of forcible transfer. Between 1949 and 1975, international instruments recognized displacement without regard for the crossing of any boundary, as both war crimes and crimes against humanity. However, the ICTY Appeals Chamber launched a movement away from this historical interpretation by isolating the crime of deportation and relegating forcible transfer to a residual crime against humanity under "other inhumane acts." For example, in the *Staki?* Appeal Judgement (here), the ICTY Appeals Chamber explicitly designated the Trial Chamber's cross-border requirement for deportation as negligible, thus cementing displacement within a border as peripheral to the crime of forced displacement (paras 300-303).

As a result, requirements to prove forcible transfer go beyond those necessary to prove deportation. In the *Krajisnik* Appeal Judgement (here), the ICTY Appeals Chamber ruled that acts of forcible transfer **may be** sufficiently serious to amount to other inhumane acts. The ICTY's interpretation means a higher threshold for proving forcible transfer.

The differentiation between deportation and forcible transfer centers on whether the destination is determinative of the offense. An overemphasis on the destination can discount the fundamental violations resulting from the removal of victims from their homes. The powerful partial dissent of Judge Shahabuddeen in the *Staki?* Appeal Judgement emphasizes the dangers of the dismissal of forcible transfer (beginning at page 144 of Judgement). He recognized that the effect of the majority judgement meant that it was now more difficult to prove an intra-state transfer, such as across a front line in a conflict situation, than it was to show a transfer across an international boundary. Judge Shahabudden wrote:

To the victim, the consequences of either act are not distinguishable. To him, the legally recognized lines on a map mean no more than a front line enforced at the point of a gun. (para 70)

In sum, the ICTY jurisprudence creates a premise that cross-border deportation is inherently severe and does not need to be independently proven. In contrast, a forcible transfer must be shown to be substantially serious to constitute a crime under international law.

Forced transfer within a state may have a more serious impact on a population than deportation outside a state, and *vice versa*. Minimizing the importance of the crime of forcible transfer and maximizing the importance of a "more serious" offence of forced deportation weakens accountability

for perpetrators of those intra-state atrocities, which is contrary to the fundamental purpose of international criminal law.

Despite recent interpretations by the ICTY, successful convictions for forcible transfer have materialized at the international level. For example, at the Extraordinary Chambers in the Courts of Cambodia, the defence team in Case 002/01 (here) argued that acts of forced transfer are not as serious as other crimes against humanity and therefore cannot amount to the standard of "other inhumane acts." (para 453) In the judgement, the Extraordinary Chambers rejected the defence argument and recognized the importance of forced displacement within national boundaries, emphasizing that internal displacement was of "the utmost gravity." (para 453)

All persons have a right to remain undisturbed in their homes, as indicated by Article 12 of the ICCPR. (here) In the name of adequately prosecuting the perpetrators of violence, deportation and forcible transfer can take different forms under the umbrella of forced displacement. Nevertheless, recognizing the risks of differentiation to the internally displaced, it is important that both forcible transfer and deportation be prosecuted with equal force.

Recent developments surrounding the crime of forced displacement

The scope of the crime of forced displacement is taking on new forms in international criminal law. Most notably, the Pre-Trial Chamber for the International Criminal Court (ICC) weighed in on the Rohingya crisis last September. (here) Since August 2017, over 700,000 Rohingya Muslims, an ethnic and religious minority in the Rakhine state of Myanmar, have been displaced from their homes to neighbouring Bangladesh by Myanmar government forces in addition to other atrocities.

In a precedent-setting decision, the ICC held that the Court has jurisdiction over the Rohingya situation as it relates to the crime of deportation, despite Myanmar not being a party to the Rome Statute. (here) To reach this conclusion, the Court examined the scope of Article 7(1)(d) of the Rome Statute, and the firm embedment of the prohibition against forced displacement in international law, to conclude that acts of deportation initiated in a State not Party to the Statute that are completed in a State Party to the Statute (i.e., by victims crossing the border to a State) brings the crime within the jurisdiction of the Court under Article 12(2)(a) of the Rome Statute. (para 73) Therefore, the ICC has jurisdiction over the crime of deportation in Myanmar through Bangladesh, which is a State Party to the Rome Statute. When the deportation forced Rohingya to cross into Bangladesh, part of the crime then occurred within Bangladesh's sovereign territory.

Consequentially, and significantly for the nature of the crime itself and the ICC's ability to bring an action, only one element of the forced displacement must now be committed on State Party territory for the crime to fall under the Court's jurisdiction. This precedent set by the Court has already had an impact on the international stage. In March 2018, Syrian refugees asked the Prosecutor to exercise jurisdiction over Syria to bring government officials before the Court through the territorial jurisdiction of Jordan, the temporary home of many Syrian refugees, which is a State Party to the Rome Statute. (

here) This jurisdictional shift has important implications as, despite the scale of mass atrocities committed, the perpetrators have so far evaded accountability. The Rohingya precedent allows the potential for the millions of Syrian refugees and victims to pursue justice through international courts.

Indeed, the Rohingya case demonstrates how international criminal law can evolve and create new avenues for sanctioning widespread and systematic abuses against migrants and refugees. However, the emphasis on deportation as placed by the Court to properly prosecute the atrocities committed against the Rohingya people should not negate the forcible transfer recorded as taking place within the Rakhine state, nor the other atrocities committed.

Conclusions and Recommendations

Overall, there is growing international awareness of the connections between human rights violations, forced displacement of civilian populations, and national and international security. A “cross-fertilization” between these issues may lead to the proper application of forced displacement in international criminal tribunals. (here) However, better defining and understanding forced displacement as a crime of international law is a prerequisite for introducing that application.

Casualties from war and conflict are declining. Instead, global displacement is increasing at an exponential rate. Over 25.4 million people fled their homes to escape conflict and persecution in 2017, 2.9 million more than in 2016. (here) With this increasing displacement comes growing concerns of human rights violations. The mass movements of populations such as the Rohingya calls for expanded regional and international intervention in the situations that cause displacement, but with attention to all those affected. The ICC is well placed to influence the way states recognize the human rights of forcibly displaced persons, whether they are the states that the perpetrating act originates from or the states that receives the displaced group. This influence demands that the international community ensures increased accountability for the crime of forced displacement.

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