

FORCIBLE TRANSFER: ESSENTIAL LEGAL PRINCIPLES

A REFERENCE GUIDE FOR PRACTITIONERS AND POLICY-MAKERS



About BADIL

BADIL Resource Center for Palestinian Residency and Refugee Rights, located in Bethlehem in the occupied West Bank, is an independent, human rights non-profit organization which works to defend and promote the rights of Palestinian refugees and internally displaced persons (IDPs). Our vision, mission, programs and relationships are defined by our Palestinian identity and the principles of International Humanitarian and Human Rights Law. We seek to advance the individual and collective rights of the Palestinian people on this basis.

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Forcible Transfer: essential legal principles A reference guide for practitioners and policy-makers

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Cover Photo: Israeli forces destroy structures belonging to a Palestinian Bedouin family in the Beit Hanina neighborhood of East Jerusalem, November 2011. (photo by, Issam Rimawi, APA images)

The Significance of Forcible Transfer

The crime of forcible transfer is recognised as one of the heinous acts that can be committed in the context of international armed conflict. In addition to potentially constituting both a war crime and crime against humanity, the unlawful forced displacement of individuals and communities is typically accompanied by a multitude of grave rights abuses.

It is a crime which, first and foremost, invokes state responsibility. Article 29 of the Fourth Geneva Convention states that “The Party to the conflict in whose hands protected persons may be, is responsible for the treatment accorded to them by its agents, irrespective of any individual responsibility which may be incurred.” Thus, the primary duty bearer is the state party in question, but if this state party is unwilling or unable to prosecute those responsible then other bodies are required to assume responsibility. Classified as a grave breach of the Fourth Geneva Convention,¹ High Contracting Parties are obligated to search for individuals alleged to have committed – or to have ordered to be committed – forcible transfer, and to initiate extradition proceedings to bring such persons before a court of law.² These proceedings may be brought in domestic courts under the doctrine of universal jurisdiction, or referred to the International Criminal Court (ICC), which can prosecute both war crimes and crimes against humanity.

Given its gravity and deeply destructive potential, it is essential that practitioners and policy-makers possess an appreciation of the basic legal principles surrounding forcible transfer. Such an appreciation not only assists the identification of instances of forcible transfer and the prosecution of its perpetrators, but also helps combat misleading counter-narratives, particularly surrounding the area of consent. Accordingly, this improved understanding should directly translate into greater protection for individuals and communities at risk of this crime and increased accountability for international crimes. To this end, what follows is a concise break-down of the central tenets of forcible transfer, accompanied by key legal provisions and extracts of applicable case law.

Material Elements

In the context of international armed conflict, under Article 49 of the Fourth Geneva Convention³ and Rule 129 of Customary International Law,⁴ an occupying power is strictly prohibited from deporting and/or forcibly transferring⁵ the civilian population of an occupied territory. This provision is robust and unequivocal, prohibiting individual or mass forcible transfer regardless of motive, with contravention

¹ International Committee of the Red Cross (ICRC), “Fourth Geneva Convention”, Article 49. 146

² ICRC Commentary to the Fourth Geneva Convention (n54) 589

³ International Committee of the Red Cross (ICRC), “Fourth Geneva Convention”, Article 49.

⁴ International Committee of the Red Cross (ICRC), “Customary IHL - Rule 129. The Act of Displacement,” accessed July 24, 2014, http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter38_rule129.

⁵ ‘Forcible transfer’ pertains to the forced displacement of individuals of communities *within* a de jure or de facto national border. Article 49 also covers situations of deportation, characterized by the forced displacement of individuals *across* such borders.

constituting a grave breach under Article 147 of the Fourth Geneva Convention (and thus also a war crime under the *Rome Statute* of the International Criminal Court⁶) as well as being addressed more widely in the latter under Article 8 (2)(b)(viii), which prohibits:

*The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;*⁷

In this phrasing, “[t]he words ‘directly or indirectly’ are aimed at a situation where the occupying power does not actually organize the transfer of populations, but does not take effective measures to prevent this”.⁸ Accordingly, in order to satisfy a finding of the specific war crime of forcible transfer, the following material elements must be present:

- i. In the context of international armed conflict, there occur acts or omissions to forcibly remove civilians from their residence, or from areas where they were lawfully present,⁹ to a place outside of that area;
- ii. Involvement of protected persons (such as an occupied civilian population);
- iii. The removal being permanent in nature¹⁰ and not serving the security needs of the affected population, nor representing an imperative military necessity.

Moreover, under the Rome Statute, when committed as part of a widespread or systematic attack against a civilian population, forcible transfer can also constitute a crime against humanity either in its own right,¹¹ or as an underpinning inhumane act for the specific crimes of persecution¹² or apartheid.¹³

⁶ International Criminal Court, Rome Statute of the International Criminal Court, 1998, Article 8(2)(a)(vii)

⁷ International Criminal Court, Rome Statute of the International Criminal Court, 1998, Article 8(2)(b)(viii)

⁸ William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (New York: Oxford University Press, 2010), 235.

⁹ The elements of ‘lawful presence’ have never been thoroughly examined by international criminal tribunals however, in *Popovic*, the ICTY Trial Chamber opined that “[t]he clear intention of the prohibition against forcible transfer and deportation is to prevent civilians from being uprooted from their homes and to guard against the wholesale destruction of communities. In that respect, whether an individual has lived in a location for a sufficient period of time to meet the requirements for residency or whether he or she has been accorded such status under immigration laws is irrelevant. Rather, what is important is that the protection is provided to those who have, for whatever reason, come to “live” in the community—whether long term or temporarily. Clearly the protection is intended to encompass, for example, internally displaced persons who have established temporary homes after being uprooted from their original community. In the view of the Trial Chamber, the requirement for lawful presence is intended to exclude only those situations where the individuals are occupying houses or premises unlawfully or illegally and not to impose a requirement for “residency” to be demonstrated as a legal standard; *Prosecutor v. Popović et al.*, Case Number. IT-05-88 -T, Judgment, ICTY, 10 June 2010, para. 900; *Prosecutor v. Đorđević*, Case No. IT-05-87/1-T, Judgment, ICTY, 23 February 2011, paras 1616 and 1640.

¹⁰ Although in order to satisfy the element of intent (*mens rea*) it need not be shown that the transfer or deportation was intended to be permanent; See ICTY, *Prosecutor v. Milomir Stakić*, 2006. Case number, IT-97-24-A, Appeal Judgement

¹¹ International Criminal Court, Rome Statute of the International Criminal Court, 1998. Article 7(1)(d)

¹² *Ibid.* Article 7(1)(h)

The Concept of 'Force'

It is crucial to note that the forcible dimension in the term forcible transfer is interpreted broadly, and:

*[...] is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment.*¹⁴

The vital element is that the displacement in question be *involuntary*; that is to say that the “relevant persons had no real choice.”¹⁵ The bulk of case law which has developed this concept is derived from the International Criminal Tribunal for the former Yugoslavia (ICTY). For instance, in the case of Simić, it was deemed that:

*[...] in assessing whether the displacement of a person was voluntary or not, [the Court] should look beyond formalities to all the circumstances surrounding the person's displacement, to ascertain that person's genuine intention.*¹⁶

As such, context is essential in determining the extent to which the displacement of individuals or communities is ‘forced’. Specifically, the Simić ruling held that:

*A lack of genuine choice may be inferred from, inter alia, threatening and intimidating acts that are calculated to deprive the civilian population of exercising its free will*¹⁷

Thus, understanding of ‘force’ for the purpose of establishing forcible transfer must not be limited to acts already committed, but should extend to threats - or a reasonably perceived likelihood - of future acts. Similarly, jurisprudence from the ICTY also demands that we consider the effects of a coercive living environment upon the free will of the affected individual or community. For example, In Krajišnik, the Court held that measures including “dismissals from employment, house searches, and the cutting off of water, electricity, and telephone services” all contributed to the intentional creation of an environment in which it was “practically impossible [for Muslims and Croats] to remain.”¹⁸ Accordingly, genuine choice was absent from the decision-making process, and the court arrived at a finding of forcible transfer.

¹³ Ibid. Article 7(1)(j)

¹⁴ The Rome Statute Elements of Crimes, Article 6(e)

¹⁵ ICTY, Prosecutor v Krnojelac. 2002. Case number IT-97-25-T. Trial Judgement, para. 475; Case number IT-97-25-A. Appeal Judgement, para.233

¹⁶ ICTY, Prosecutor v Simić et al, 2003. Case number IT-95-9-T. Trial Judgement, para.126

¹⁷ Ibid., para.126

¹⁸ ICTY, Prosecutor v. Krajišnik, 2006. Case number IT-00-39-T, Trial Judgement, para.729

The Question of Consent

Context is also crucial in cases of so-called ‘consent’ of the victim to leave, and such consent may be rendered “valueless” given the nature of the environment in which it is given.¹⁹ This logic was developed further in the case of Blagojević & Jokić:

Even in cases where those displaced may have wished – and in fact may have even requested – to be removed, this does not necessarily mean that they had or exercised a genuine choice. The trier of fact must consequently consider the prevailing situation and atmosphere, as well as all relevant circumstances, including in particular the victims’ vulnerability, when assessing whether the displaced victims had a genuine choice to remain or leave and thus whether the resultant displacement was unlawful.²⁰

When considering the validity of consent, then, full consideration must be given to the wider environment in which this ‘consent’ was given. Specifically, were any factors operating at the time which served to deprive the giver of their free will? If so, this ‘consent’ was obtained under duress, and thus rendered entirely without value.

It is therefore essential, when faced with competing narratives surrounding the issue of consent in relation to specific allegations of forcible transfer, that practitioners and policy-makers be mindful of the sources and motivations of such narratives. In such scenarios, best practice dictates that direct dialogue be established with the affected individuals/communities so as to fully comprehend the operating environment and thus verify the validity of any such claims.

Requisite Distance of Transfer

An additional consideration is the question of what distance from their usual place of residence must an affected person be displaced in order to satisfy a finding of forcible transfer. This was clarified by the ICTY in Simić, in which the Court held that the requisite distance is met if the victim is prevented from effectively exercising their right to stay in their home and community, and their right not to be deprived of their property.²¹ Accordingly, arguments which assert that forcible transfer has not taken place on account of the displaced having been moved ‘only a short distance’ have no legal basis.

¹⁹ ICTY, Prosecutor v. Krstić, 2001. Case number. IT-98-33-T, Trial Judgement, para.529

²⁰ ICTY, Prosecutor v. Blagojević, 2005. Case number IT-02-60, Trial Judgement, para.596

²¹ ICTY, Prosecutor v Simić et al, 2003. Case number IT-95-9-T. Trial Judgement, para.130