



Grave Breaches and Justifications: The War Crime of Forcible Transfer or Deportation of Civilians and the Exception for Evacuations for Imperative Military Reasons

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Abstract

The Fourth Geneva Convention prohibits the forcible transfer or deportation of civilian populations and classifies this action as a grave breach of the laws of war. However, attempts to prosecute this grave violation are hindered by an exception for evacuations of the civilian population for imperative military reasons, which has yet to be satisfactorily defined, either in scholarly literature or in the law. This Article analyses the drafting history of the Geneva Convention provisions, the practice of international tribunals, the practice of States, and the practice of international and regional human rights organizations to establish a concrete definition of this exception so that international criminal prosecutors can prosecute confidently this grave war crime and defendants are assured of appropriate notice of all elements of this crime.

Key words

International humanitarian law, war crimes, forcible transfer or deportation, international criminal law

1. Introduction

On 11 July 1995, Bosnian Serb forces took control of the UN ‘Safe Zone’ of Srebrenica in Bosnia.¹ The forces carefully separated the military-aged men from the women, children, and elderly of the Bosnian Muslim population in the town.² They then forced the women, children, and elderly onto buses bound far from their homes and loved ones.³ The journey was rough and those who could not make it were either shot on the spot or simply left to die.⁴ Those who survived the journey found themselves in the tent city of Tuzla in the Bosnian Free Territory with very little means of making a living and no knowledge of the whereabouts or fate of their loved ones, friends, and neighbours.⁵ Those most vulnerable in society were forced to begin their lives anew in an unknown place because of the sheer inhumanity of the Bosnian Serb militias.

1. *Prosecutor v Krstić* (Trial Chamber Judgment), ICTY-98-33 (2 August 2001) § 36; BBC News, ‘Bosnia-Herzegovina profile – Timeline’ (8 October 2018), <<http://www.bbc.com/news/world-europe-17212376>> accessed 5 June 2019.
2. *ibid* § 53.
3. *ibid* §§ 48–52. See Remembering Srebrenica, ‘Kada Hotić – Seamstress of Srebrenica’ (14 June 2016), <<http://www.srebrenica.org.uk/survivor-stories/kada-hotic-seamstress-of-srebrenica/>>.
4. See *eg ibid* § 15.
5. *ibid*.

Not only are these acts a clear violation of the ‘laws of humanity and the dictates of the public conscience’,⁶ they are also a violation of the laws of war as codified in Article 49 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (Geneva IV)⁷ and Article 17 of Additional Protocol II to the Geneva Conventions of 12 August 1949 (Additional Protocol II).⁸ Article 49 of Geneva IV prohibits ‘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’.⁹ Article 17 of Additional Protocol II prohibits the ‘displacement of the civilian population’ and states that ‘civilians shall not be compelled to leave their own territory for reasons connected to the conflict’.¹⁰ In addition, Article 147 of Geneva IV declares ‘unlawful deportation or transfer’¹¹ to be a ‘grave breach’ of the Convention for which States have heightened obligations to arrest, prosecute, and punish violators.¹²

Despite the vehemence of the condemnation of these practices in international law, the practical application of the prohibition in Article 49 of Geneva IV is complicated by an exception for evacuations of the civilian population if ‘imperative military reasons so demand’.¹³ As elaborated below, this exception has not yet been systematically analysed. A more precise definition of an evacuation for imperative military reasons is required to ensure the just and rigorous application of the prohibition.

This article analyses the drafting history of the provisions, the practice of international tribunals, the practice of States, and the practice of international and regional human rights organizations to establish a concrete definition of what imperative military reasons would be sufficient to justify a forcible transfer or deportation in grave breach of the Geneva Conventions and the procedure that must be followed during the course of a lawful transfer or deportation.

2. Contribution to ongoing scholarly debate

International humanitarian law attempts to balance the needs of the military with protections for the human rights and dignity of civilians caught up in conflict. States drafting the laws of war wanted to ensure that their militaries retained enough flexibility to achieve military victory at the same time that they wanted to protect their own civilians and military from the indignities of war.¹⁴ There is an ongoing debate amongst scholars about the extent

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6. Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulation concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 187 CTS 227 (Hague Convention IV) preamble. Known as the Martens clause, this phrase forms the basis of the modern law on crimes against humanity.
 7. Convention Relative to the Protection of Civilian Persons in Time of War (entered into force 21 October 1950) 75 U.N.T.S. 287 (Geneva IV) Art 49.
 8. Additional Protocol II to the Geneva Conventions of August 12, 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (entered into force 7 December 1978) 1125 UNTS 609 (Additional Protocol II) Art 17.
 9. Geneva IV (n 7) Art 49. This provision applies in international armed conflicts: *ibid*, Art 2.
 10. Additional Protocol II (n 8), Art 17. This provision applies in non-international armed conflicts: *ibid*, Art 1.
 11. A forcible deportation occurs when civilians are forced across a national border and a forcible transfer occurs when civilians are forced to move within the same nation: see eg *Prosecutor v Stakić* (Appeals Judgment), ICTY-97-24 (22 March 2006) §289.
 12. Geneva IV (n 7) Arts 146-47.
 13. *ibid*, Art 49.
 14. Michael N Schmitt, ‘Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance’ (2010) 50 *Vanderbilt Journal of International Law* 795.

to which the law succeeds in this balance, and ways in which it can improve.¹⁵ This article contributes to this debate by providing the first in-depth doctrinal analysis of the specific balance between the needs of the military and protections for civilians in the case of forcible transfer or deportation.

In drafting provisions on forcible transfer and deportation, states wrote in an exception for the needs of the military that differed from the common wording of ‘military necessity’ used elsewhere in the Geneva Conventions. This exception, therefore, represents an attempt by states to balance the needs of the military with the needs of humanity in a different way. The ensuing analysis of this exception adds a new dimension to the general scholarly debate.

3. Drafting history

The prohibition on forcible transfer and deportation has a long history in the law of war. As early as the 1863 Lieber Code instructing the United States Army during the American Civil War, the nations of the world have prohibited their armies from ‘carr[ying civilians] off to distant parts’.¹⁶ The Lieber Code was the first modern code of war to regulate the conduct of a national army towards its enemy and is generally considered to be a basis for the modern law of war.¹⁷

In 1899, the international community began to codify the existing customary laws of war in a series of conferences known as the Hague Conferences.¹⁸ Although the resulting Hague Conventions and Regulations do not contain explicit provisions prohibiting the forcible transfer or deportation of civilians, such an act would be a violation of Article 46 of the Hague Regulations of 1907 that protects ‘family honour and rights, the lives of persons, and private property’.¹⁹ Tearing a civilian away from their family, home, and country is a grave violation of the rights to family and private property and, therefore, a violation of the Hague Regulations of 1907.

In fact, the International Military Tribunal (IMT) at Nuremberg prosecuted such acts as war crimes and used these Hague Regulations provisions as evidence that the acts had been criminalized during the Second World War.²⁰ It was vital that the Tribunal establish this

15. See eg Ingrid Detter, *The Law of War* (2nd ed, Cambridge University Press 2000) 394; Thomas Erskine Holland, *The Laws of War on Land (Written and Unwritten)* (Clarendon Press 1908) 12–13; International Commission of the Red Cross, *Commentary to the Fourth Geneva Convention Relative to the Protection of Civilian Persons in the Time of War* (1958) (Commentary) 278; Eyal Benvenisti, ‘Human Dignity in Combat: The Duty to Spare Enemy Civilians’ (2006) 39 *Israel Law Review* 81, 81; Geoffrey Best, ‘The Restraint of War in Historical and Philosophical Perspective’ in Astrid JM Delissen and Gerard J Tanja (eds), *Humanitarian Law of Armed Conflict Challenges Ahead* (Nijhoff 1991) 5; NCH Dunbar, ‘The Significance of Military Necessity in the Law of War’ (1955) 67 *Juridical Review* 201, 212; Christopher Greenwood, ‘Historical Development and Legal Basis’ in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (2nd ed, Oxford University Press 2008) 37; Chris af Jochnick and Roger Normand, ‘The Legitimization of Violence: A Critical History of the Laws of War’ (1994) 35 *Harvard International Law Journal* 387, 416; Schmitt (n 14) 798; Nobuo Hayashi, ‘Contextualizing Military Necessity’ (2013) 27 *Emory International Law Review* 189.

16. US War Department, ‘General Orders 100: Instructions for the Government of Armies of the United States in the Field (1863)’, reprinted in D Schindler and J Toman (eds), *The Laws of Armed Conflict: A Collection of Conventions, Resolutions, and Other Documents* (Martinus Nijhoff Publishers 2004) (Lieber Code) Art 23. See also Jean-Marie Henckaerts, ‘Deportation and Transfer of Civilians in Time of War’ (1993) 26 *Vanderbilt Journal of Transnational Law* 469, 483.

17. See eg Richard Hartigan, *Lieber’s Code and the Law of War* (Transaction Publishers 1985) 72.

18. See Jochnick and Normand (n 15).

19. Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulation concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 187 CTS 227 (Hague Convention IV) Art 46. See Henckaerts (n 16) 481.

20. Judgment, International Military Tribunal, 30 September/1 October 1946, in *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg*, Vol. I (Nuremberg, 1948) (IMT Judgment) 56–59.

fact because prosecution for a crime that was not criminalized at the time it was committed would have been a serious violation of the criminal law principle of *nullum crimen sine lege* (no crime without law) and, therefore, a serious violation of the defendants' human rights. The Tribunal's analysis on this issue was an important complement to the fact that Article 6(b) of the London Charter establishing the Tribunal explicitly criminalized 'deportation to slave labour or for any other purpose of civilian population of or in occupied territory'.²¹

The mass forcible transfers and deportations committed during World War II were also prosecuted by the courts created by Allied Control Council Law No. 10 in Allied-occupied Germany immediately after the war.²² Allied Control Council Act No. 10 largely duplicated the London Charter and also criminalized 'deportation to slave labour or for any other purpose of civilian population of or in occupied territory'.²³

The horrors of the mass forced deportations perpetrated by the Nazis during World War II motivated the inclusion of an explicit provision on forcible transfer and deportation in the Geneva Convention of 1949.²⁴ The International Committee of the Red Cross (ICRC)'s original proposal for the Convention called for an absolute prohibition on all deportations and transfers from occupied territories.²⁵ The ensuing negotiations on the text of the Conventions led to the inclusion of the prohibition only of 'forcible' deportations and transfers to allow for deportations and transfers with the consent of those transferred. These negotiations also led to an exception for evacuations of civilians 'if the security of the population or imperative military reasons so demand'.²⁶ This exception was added to reflect the realities of warfare in which transfers and deportations may be necessary to protect both the security of the civilian population and the integrity of the military operation.

Acts of forcible transfer and deportation have been prohibited in the law of war since the law's inception with the 1863 Lieber Code and the Hague Regulations of 1907. This prohibition was based on a desire to protect civilians' rights to home and family life.²⁷ The demand to protect these rights from the specific violation of forcible transfer or deportation was made all the more urgent and necessary by the horrors of Nazi deportations and transfers during World War II. For this reason, the negotiators of the Geneva Conventions of 1949 were certain to explicitly prohibit these crimes. It is clear from the ICRC's Commentary and other analyses of the Convention's drafting history that the prohibition was motivated by a desire to prevent the horrors of World War II.²⁸ However, the motivation behind the inclusion of the exception for evacuations and the precise exception for and definition of imperative military reasons is less clear from these analyses. Therefore, it is necessary to analyse other sources of law to be able to apply the provision with the exactitude and consistency that justice requires.

21. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, (entered into force 8 August 1945), 82 UNTS 279 (London Charter) Art 6(b).

22. See eg Judgment in the case versus Hermann Roehling 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, § 6, Nuremberg), Judgment, 22 December 1947 in *Trials of War Criminals Before the Nuremberg Military Tribunals*, Vol VI, pp 1193, 1201.

23. Control Council Law No 10, 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), <<http://avalon.law.yale.edu/imt/imt10.asp>>.

24. See eg Commentary (n 15).

25. *ibid.*

26. Geneva IV (n 7) Art 49.

27. See Henckaerts (n 16) 481. See also *Prosecutor v Krnojelac* (Appeals Judgment), ICTY-97-25-T (17 September 2003) § 218.

28. See eg Commentary (n 15); Henckaerts (n 16) 508.

4. The practice of international and internationalized criminal tribunals

The International Military Tribunal at Nuremberg was the first international criminal tribunal to be established and the first to prosecute the actions that constitute the war crime of forcible transfer or deportation.²⁹ The IMT convicted 18 of the defendants of war crimes relating to the forcible deportation of Jewish and other civilian populations from occupied territory.³⁰ The IMT judgment raised no question that the mass deportation of civilian populations on the basis of their ethnicity could ever be justified by imperative military reasons. Instead, the IMT unequivocally declared that:

Such deportations were contrary to international conventions, in particular to Article 46 of the Hague Regulations, 1907, the laws and customs of war, the general principles of criminal law as derived from the criminal laws of all civilized nations, the internal penal laws of the countries in which such crimes were committed, and to Article 6 (b) of the Charter.³¹

In contrast, the tribunals created by Allied Control Council Law No. 10 in Allied-occupied post-war Germany did contemplate the possibility of justifying for military reasons the forced deportations perpetrated by the Nazis. In *The United States v William List and Others* before the United States Military Tribunal at Nuremberg, German army group commander Lothar Rendulic was acquitted of the war crime of forced deportation on the basis that his actions were justified by military necessity.³² Rendulic was charged with crimes allegedly committed during the mass German army retreat through the Norwegian province of Finnmark in 1944.³³ The mass retreat was precipitated by a treaty agreement between Finland and Russia that raised the distinct possibility that the Russian army would pursue the German army throughout Scandinavia in defence of Finland. In fear that the Russian army was in close pursuit, the retreating German army instituted a scorched earth policy that included the mass evacuation of the civilian population from Finnmark. At the time, German intelligence on Russian military intentions was slim and there was every indication that the Russian army had the ability to destroy the German army completely.³⁴ The tribunal held that Rendulic's actions were justified by 'urgent military necessity' because Rendulic reasonably believed, with the information available to him at the time, that they were necessary 'as a precautionary measure against an attack by superior forces'.³⁵ Therefore, according to the jurisprudence of the United States Military Tribunal at Nuremberg, a forcible transfer of the civilian population may be justified by the potential for an overwhelming attack by superior military forces.

Conversely, in the case of *The United Kingdom v Erich von Lewinski*, the British Military Court at Hamburg established by the same Allied Control Council Act declined to accept the defendant's military necessity defence for an act of forced deportation.³⁶ The case concerned the forced deportations of civilians in German-occupied territory in Russia to labour

29. See Henckaerts (n 16) 484–85; *Case 002/01 (Co-Prosecutors' Rule 92 Submission on the Crime against Humanity of Other Inhumane Acts in Respect of Forced Transfer)*, 002/19-09-2007/ECCC (17 January 2013) § 12.

30. IMT Judgment (n 20).

31. *ibid* 51.

32. *United States v Wilhelm List and others, VIII Law Reports of Trials of War Criminals* (1949) (Hostages Trial).

33. *ibid* 51.

34. *ibid*.

35. *ibid*.

36. *United Kingdom v Erich von Lewinski (called von Manstein)*, 16 *International Law Reports* (1949) 509.

camps outside the country.³⁷ The defendant argued that these forced deportations were required by military necessity because the German army needed the labour of these civilians to sustain the military effort, and that deporting these civilians prevented the Russian army from later conscripting these civilians into military service and, therefore, gaining distinct military advantage.³⁸ The tribunal declined to accept these arguments and the defendant was convicted on all charges.³⁹ Crippling the enemy's personnel resources and providing labour for munitions and other military-related factories undoubtedly provide a distinct military advantage, yet the tribunal refused to accept these advantages as adequate justification for the forcible deportation of the civilian population. Therefore, a military reason that is imperative enough to justify a forcible transfer or deportation must be more than the simple reason that the action provides a distinct military advantage.

The judgments of international criminal tribunals after the entry into force of the Geneva Conventions provide further criteria for the application of the imperative military reasons justification to forcible transfer and deportation. In particular, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the Extraordinary Chambers in the Courts of Cambodia (ECCC) have attempted to systematically apply the Geneva Convention provisions on forcible transfer and displacement to crimes within their respective jurisdictions.

The ICTY was the first international criminal tribunal to tackle this question after the entry into force of the Geneva Conventions. In the *Krstić* case, the ICTY discussed several criteria for the determination of whether a forcible transfer or displacement was truly a legally justifiable evacuation for imperative military reasons.⁴⁰ The defendant was charged with the crime against humanity of forced displacement for the forcible transfer of civilians from the Srebrenica area described supra in this paper.⁴¹ Although the defendant was not charged with a war crime, the tribunal had to determine whether the displacement could be justified by one of the exceptions in Article 49 of Geneva IV because it would not be a crime against humanity if committed with grounds recognized in international law.⁴² The first question that the tribunal asked was whether there was in fact a military threat present in the area from which the civilians were displaced.⁴³ The tribunal determined that there was no military threat because Bosnian Serb forces had easily taken the town of Srebrenica and the UN forces present did not have the mandate to retaliate with military force.⁴⁴ However, the tribunal did not finish its analysis there. It also discussed the importance of the displacement being conducted in a manner consistent with an evacuation.⁴⁵ It concluded that the atmosphere of terror in which the displacement was conducted and the evidence of advance planning of the displacement demonstrated that the displacement could not have been an evacuation for imperative military reasons.⁴⁶ The atmosphere of terror demonstrated that the true goal of the displacement was to harm the Bosnian Muslim civilians against whom

37. *ibid*, 510.

38. *ibid*, 512.

39. *ibid*, 525.

40. *Prosecutor v Krstić* (Trial Chamber Judgment) (n 1) §§ 524–27.

41. *ibid* §519.

42. *ibid* §520.

43. *ibid* §527.

44. *ibid*.

45. *ibid*.

46. *ibid*.

the Bosnian Serbs held persecutory animus.⁴⁷ The advanced planning demonstrated that it could not have been an action taken in response to an unexpected and imperative military need.⁴⁸ Overall the tribunal held that, for a forced transfer or deportation to be justified as an evacuation for imperative military reasons, there must be an actual military threat, the displacement must be carried out in a manner conducive to the eventual return of the civilians, and the displacement must not have been planned in advance.

The ICTY further developed these criteria in the *Naletilić & Martinović* case.⁴⁹ The defendants in this case were charged with war crimes related to several alleged acts of forcible transfer or deportation committed during the Yugoslav war.⁵⁰ The tribunal only discussed the potential justification of imperative military reasons for one of these acts: the displacement of the Bosnian Muslim population from the town of Sovići in May 1993.⁵¹ The tribunal concluded that this displacement was not a lawful evacuation for imperative military reasons because no imperative military reasons existed, there were no attempts to return the civilian population after the cessation of hostilities, Bosnian Serb forces took actions (such as burning down houses) that would have made it impossible to return the population, and the civilians were deliberately transferred outside of occupied territory when they could have been easily transferred within occupied territory.⁵² In addition to the requirement of an actual military reason established in *Krstić*, the decision in *Naletilić & Martinović* establishes a requirement that persons conducting a true evacuation for imperative military reasons actually return the civilian population after the cessation of hostilities, and that they not take actions to thwart the potential return of the population.

The ICTY Appeals Chamber's judgment in *Stakić* established the additional criterion that the circumstances justifying the civilian displacement not be the creation of the forces conducting the displacement.⁵³ The case concerned charges of forcible transfer as a crime against humanity relating to the transfer of civilians from the town of Prijedor.⁵⁴ The defendant argued that the transfer was a legal evacuation for the security of the civilian population because the humanitarian situation in Prijedor was so dire that the civilian population would not be able to survive if it remained in the town.⁵⁵ The tribunal determined that, although the humanitarian situation was indeed dire, it could not justify a forcible transfer because the situation was the result of the Bosnian Serb forces' destruction, confiscation, and redistribution of objects necessary for survival from the civilian population.⁵⁶ Although this determination was made in response to an attempted justification for humanitarian reasons, it could easily be applied to an attempted justification for imperative military reasons. For example, if a military deliberately retreated through a heavily populated area and then claimed that it had to evacuate the civilian population along the way for imperative military reasons, this justification would not be legal. In these circumstances, the military has deliberately created a situation in which the civilian population stood in the way of their retreat and needed to be transferred for imperative military reasons and, therefore, it cannot claim the exception under international humanitarian law.

47. *ibid.*

48. *ibid.*

49. *Prosecutor v Naletilić & Martinović* (Trial Chamber Judgment), ICTY-98-34-T (31 March 2003) §§ 512–571.

50. *ibid.*

51. *ibid.* §526.

52. *ibid.*

53. *Prosecutor v Stakić* (n 11) §§ 285–287.

54. *ibid.* §§5, 266. The crime was charged as the crime against humanity of other inhumane acts.

55. *ibid.* § 273.

56. *ibid.*

In *Brđanin*, the ICTY reiterated the importance of the return of the civilian population after the cessation of hostilities.⁵⁷ This case concerned crimes against humanity (forced deportation and other inhumane acts) charges relating to the forcible transfer of civilians from municipalities within the Autonomous Region of Krajina.⁵⁸ The tribunal dismissed the defendant's attempted justification for imperative military reasons by stating:

The Trial Chamber notes that decisions to either of the said effects [the security of the population or for imperative military reasons] would have required that persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased, which did not happen in the present case.⁵⁹

Therefore, an evacuation that becomes permanent and where there is no attempt to return the civilian population after the cessation of hostilities cannot be a legal evacuation for imperative military reasons.

In *Blagojević & Jokić*, the ICTY elaborated on both the definition of an imperative military reason and the requirements for a lawful evacuation.⁶⁰ The tribunal defined imperative military reasons as 'overriding' military reasons and stated that, to determine whether the military reasons were in fact overriding, 'the trier of fact will consider whether there was in actual fact a military or other significant threat to the physical security of the population, and whether the military operation in question was "imperative"'.⁶¹ Although the use of the word 'imperative' without any further definition still gives the interpreter significant leeway, this definition provides the important clarification that not every military reason or operation is imperative and that only those reasons and operations that are vital to the success of the overall military operation are sufficient to justify a forcible transfer or deportation. On the facts of the case relating to the forced transfer from the Srebrenica area, the tribunal held that the transfer could not be justified by imperative military reasons despite the fact that the armed forces had consistently referred to the action as an 'evacuation'.⁶² The tribunal also discussed the specific requirements for the conduct of a lawful evacuation and stated, '[i]t is incumbent upon the evacuating party to ensure that the civilian population, to the extent possible and practicable, is properly provided for in terms of accommodation, hygiene, health, safety and nutrition'.⁶³ Even if a supposed evacuation results in the return of the civilian population after the cessation of hostilities, it will still not be a lawful evacuation if the civilian population is not properly taken care of during the evacuation.

The ECCC also dealt with the question of the justification of imperative military reasons for forced transfer or deportation in *Case 002/01*.⁶⁴ This case concerned the Khmer Rouge's mass transfer of civilians from urban areas such as Phnom Penh to the countryside.⁶⁵ The Khmer Rouge had an explicit policy of removing civilians from captured villages and towns to deprive the enemy of the civilians' labour.⁶⁶ The tribunal found that these transfers could

57. *Prosecutor v Brđanin* (Trial Chamber Judgment), ICTY-99-36-T (1 September 2004) § 556.

58. *ibid* §§539, 546.

59. *ibid* § 556 (internal quotation marks omitted).

60. *Prosecutor v Blagojević & Jokić* (Trial Chamber Judgment), ICTY-02-60-T (17 January 2005) §§ 598–599.

61. *ibid* § 598.

62. *ibid* § 618.

63. *ibid* § 599.

64. *Case 002/01* (Trial Chamber Judgment), 002/19-09-2007/ECCC (19 September 2007), § 448.

65. *ibid* §§104–16.

66. *ibid* §108.

not be justified by imperative military reasons.⁶⁷ In the specific case of the transfer of the population from Phnom Penh, the defendants argued that the transfer was justified by the imperative military reason of providing labour for military-related manufacturing and of preventing the US from bombing a heavily populated Phnom Penh.⁶⁸ The tribunal quickly rejected this justification as a ‘clear deception’ on the basis that the Khmer Rouge had previously stated that the evacuation to the countryside was part of a larger economic policy to reinvigorate the rural economy and that the evacuation had been carried out in a violent manner that resulted in more deaths than any US bombing was likely to.⁶⁹ The ECCC’s analysis echoes that of the ICTY on this question. Both tribunals hold that a particularly violent or persecutory supposed evacuation can invalidate any imperative military reasons justification. In addition, they both require that the evacuation be temporary and that the civilians be returned after the cessation of hostilities.

In sum, the jurisprudence of international criminal tribunals establishes several detailed requirements for a forcible transfer or deportation to be justified as an evacuation for imperative military reasons. First, there must actually be a threat to military operations present in the place from which the civilians are transferred. Second, the threat must be overriding and relate to a military operation that is itself imperative in nature. Third, the evacuation must be conducted in a manner consistent with international law, consistent with an evacuation planned spontaneously because of an immediate military need, and conducive to the return of the civilian population after the cessation of hostilities. Specifically, the population’s basic needs must be provided for during the evacuation, the evacuation must not be the result of advanced planning long before any military threat, and the armed forces must not deliberately destroy the homes and belongings of the evacuated civilians. Fourth, the civilian population must actually be returned to the place from which they were evacuated after the cessation of hostilities in that specific area.

5. State practice

Since the Lieber Code in the United States in 1863, States have criminalized acts of forcible transfer or deportation in their military codes and their domestic criminal codes to varying degrees of specificity.⁷⁰ The proliferation of domestic codes explicitly prohibiting acts of forcible transfer or deportation increased in 1949 with domestic implementation of the Geneva Conventions⁷¹ and again in 2002 with domestic implementation of the Rome Statute of the International Criminal Court.⁷² Several domestic military and criminal codes simply prohibit ‘unlawful’ or ‘illegal’ deportations and transfers and incorporate by reference the Geneva Conventions’ exception for evacuation for imperative military reasons.⁷³ These codes, therefore, provide little assistance in the development of a more precise defi-

67. *ibid* §551.

68. *ibid* §549.

69. *ibid*.

70. See eg *The Law of Armed Conflict at the Operational and Tactical Levels*, Office of the Judge Advocate General of Canada, 13 August 2001; International Criminal Court Act 27 of 2002 § 40 (S Afr).

71. See eg Int’l Comm of the Red Cross, ‘Practice Relating to Rule 129. The Act of Displacement,’ <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule129> accessed 5 June 2019.

72. See eg *ibid*; International Criminal Court Act 27 of 2002 § 40 (S Afr); Law on Cooperation with the ICC art 26.3 (Uru).

73. See eg *Manual on Law of Armed Conflict*, Australian Defence Force Publication, Operations Series, ADFP 37 – Interim Edition, 1994.

inition of the exception for imperative military reasons. Other domestic codes simply parrot the language of either the Geneva Conventions or the Rome Statute and are similarly unlikely to assist in the elaboration of the definition.⁷⁴

Domestic codes that depart from the exact wording of the Geneva Conventions or Rome Statute generally do so in a way that either provides little precision to the definition of the exception or provides an emphasis on a particular aspect of the exception. For example, the Canadian Law of Armed Conflict Manual carefully lays out the requirement that, 'if [civilians] do have to be displaced, arrangements must be made, if possible, for their shelter, hygiene, health, safety and nutrition.'⁷⁵ This emphasis on the provision of basic needs to the evacuated civilian population demonstrates both that forcible transfer or deportation of the civilian population may only occur in exceptional cases and that an 'evacuation' that fails to provide for civilians or deliberately places them in a position where their basic needs cannot be provided for cannot be a lawful evacuation for imperative military reasons.

In addition, prosecutions of crimes committed during the Yugoslav war in the domestic courts of Bosnia and Herzegovina provide clarification of the definition of imperative military reasons. In *The Prosecutor's Office of Bosnia and Herzegovina v Savić*, the Court of Bosnia and Herzegovina was faced with the mass forcible transfer of the Bosnian Muslim population from the village of Drinsko.⁷⁶ The court held that the forcible transfer could not be justified as an evacuation for imperative military reasons because it occurred in the context of a widespread and systematic attack against the very civilian population that was transferred.⁷⁷ There could be no imperative military reason for the forcible transfer because the only reason the military was in Drinsko was to terrorize and drive out the civilian population of Bosnian Muslims.⁷⁸ Therefore, a forcible transfer in the context of a widespread and systematic attack on the civilians who are transferred cannot be justified by imperative military reasons.

In *The Prosecutor's Office of Bosnia and Herzegovina v Mitar Rašević and Savo Todović*, the Court of Bosnia and Herzegovina reiterated the importance of there being actual military operations in the area in question for the justification of imperative military reasons to apply.⁷⁹ The court was faced with the forcible transfer of non-Serb Bosnian civilians from various parts of Bosnia to the prison at KP Dom.⁸⁰ Because there were no active military operations in the areas from which the civilians were transferred, the court held that these transfers could not be lawful evacuations for imperative military reasons.⁸¹ A justification of imperative military reasons requires, at the very least, that there actually be military operations that benefit from the transfer of the civilians.

In general, State practice on the evacuation for imperative military reasons justification provides important emphasis and practical application of the principles established by international criminal tribunals. The inclusion of the justification for imperative military reasons

74. See eg Law on Genocide, Crimes against Humanity and War Crimes of 2003 Art 8 (Burundi).

75. The Law of Armed Conflict at the Operational and Tactical Levels, Office of the Judge Advocate General, 13 August 2001 (Can).

76. Sud Bosne i Hercegovine (Court of Bosnia and Herzegovina), Verdict, *Momir Savić* (X-KR/07/478), Trial Chamber, 3 July 2009.

77. *ibid* 70.

78. *ibid*.

79. *Prosecutor's Office of Bosnia and Herzegovina v Mitar Rašević and Savo Todović*, Case No X-KR/06/275, Verdict (Court of Bosnia and Herzegovina 28 February 2008).

80. *ibid* 89.

81. *ibid* 91.

in a large majority of domestic military and criminal codes demonstrates that it is generally accepted as one of very few justifications for this grave breach.⁸² The description of the requirements for a lawful evacuation for imperative military reasons in the Canadian Law of Armed Conflict Manual demonstrates that States emphasize the protection of the civilian population during the evacuation.⁸³ The domestic case law of Bosnia and Herzegovina puts an important emphasis on the actual presence of military operations in the area and establishes that a forcible transfer in the context of a widespread and systematic attack against the civilian population cannot be justified by imperative military reasons.⁸⁴

6. The practice of international and regional human rights organizations

Because forcible transfer or deportation of the civilian population infringes on many basic human rights, the practice of international human rights organizations is particularly relevant to the question of exceptions to its prohibition. This practice serves to further the understanding of the relevant “principles and rules of international law” as contemplated by Article 21 of the Rome Statute.⁸⁵ The latter provision expressly enjoins the ICC to ensure that its decisions are ‘consistent with internationally-recognized human rights’.⁸⁶ Therefore, when the legal requirements under the principles of the international law of armed conflict are unclear, the Court must turn to relevant decisions of international and regional human rights bodies. Although there is some question in the scholarly debate as to whether human rights law can be directly applied during armed conflict,⁸⁷ the ICC has not hesitated to apply human rights law to its adjudications of crimes committed during armed conflict.⁸⁸

In particular, forcible transfer or deportation of the civilian population is a severe infringement on the right to freedom of movement and, therefore, the practice of organizations that study and enforce the implementation of that right is particularly relevant

82. See eg *Manual on Law of Armed Conflict*, Australian Defense Force Publication, Operations Series, ADFP 37 – Interim Edition, 1994; *Règlement n° 98 sur le droit international humanitaire*, Ministère de la Défense Nationale et des Anciens Combattants, Projet “Moralisation” (BDI/B-05), August 2007; *Droit des conflits armés et droit international humanitaire*, Manuel de l’instructeur en vigueur dans les forces de défense, Présidence de la République du Cameroun, Ministère de la Défense, Etat-major des Armées, Edition 2006; *Defence of the United Kingdom of Great Britain and Northern Ireland*, 1 July 2004; Penal Code of 2003 Art 392 (Arm); International Crimes (Tribunal) Act of 1973 § 3 (Bangl); Law on Genocide, Crimes against Humanity and War Crimes of 2003 Art 8 (Burundi); Penal Code of 1965 (Senegal); International Criminal Court Act 27 of 2002 § 40 (S Afr); Law on Cooperation with the ICC Art 26.3 (Uru).

83. *The Law of Armed Conflict at the Operational and Tactical Levels*, Office of the Judge Advocate General, 13 August 2001 (Can).

84. See *Sud Bosne i Hercegovine (Court of Bosnia and Herzegovina)*, Verdict, *Momir Savić* (X-KR/07/478) (n 76); *Prosecutor’s Office of Bosnia and Herzegovina v Mitar Rašević and Savo Todović*, Case No X-KR/06/275 (n 79).

85. Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (Rome Statute) Art 21(1)(b).

86. *ibid* Art 21(3).

87. Hannah Matthews ‘The Interaction between International Human Rights Law and International Humanitarian Law: Seeking the Most Effective Protection for Civilians in Non-International Armed Conflicts’ (2013) 17 *International Journal of Human Rights* 633, DOI: 10.1080/13642987.2013.831694; Noam Lubell, ‘Challenges in Applying Human Rights Law to Armed Conflict,’ (2005) 87 *Int’l Rev Red Cross* 737; GD Draper, ‘The Relationship between the Human Rights Regime and the Law of Armed Conflict’ in Yoram Dinstein and Fania Domb (eds), *The Progression Of International Law* (Brill | Nijhoff, Leiden 2011) DOI: https://doi.org/10.1163/9789004219120_012; L. Doswald-Beck and S. Vité, ‘International Humanitarian Law and Human Rights Law’ (1993) 293 *Int’l Rev Red Cross* 94.

88. *Prosecutor v Lubanga* (Trial Chamber I Judgment) ICC-01/04-01/06 (14 March 2012), §§ 602, 604; *Prosecutor v Ongwen* (Decision on the Confirmation of Charges) ICC-02/04-01/15-422-Red (23 March 2016), § 92.

to inform a tribunal's understanding of the requirements for unlawful forcible transfer or deportation.⁸⁹ A forcible transfer or deportation forces an individual to move to a place where they have not chosen to go. The victims' freedom of movement is, therefore, completely restricted. They can neither stay where they were before nor move to any other new place of their choosing.

Article 12 of the International Covenant on Civil and Political Rights (ICCPR) provides that '[e]veryone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.'⁹⁰ The ICCPR further provides that any restrictions on this right must be 'provided by law, necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and consistent with other rights'.⁹¹

The United Nations Human Rights Committee's General Comment No. 27 on Freedom of Movement provides a framework for the application of these requirements on a restriction on freedom of movement, such as a forcible transfer or deportation.⁹² On the specific requirement of provision by law, the General Comment states that the law must explicitly spell out the conditions under which the freedom of movement may be restricted and must not allow for 'unfettered discretion'.⁹³ The General Comment interprets the requirement of necessity to include a requirement that any infringement on the right be proportional to the legitimate end achieved by the infringement.⁹⁴ Therefore, all infringements on the freedom of movement must be the least intrusive means to achieve the end and must be applied in a manner that is the least intrusive and restrictive on other rights. States must explain the reasons for the restriction to all persons affected and impose the restrictions in the most expeditious manner possible.⁹⁵ Importantly for forcible transfers and deportations that can often be conducted on the basis of ethnicity or religion, the requirement that all restrictions be consistent with other rights in the ICCPR includes the right to non-discrimination and, therefore, requires that restrictions not be made on the basis of characteristics such as race, sex, religion, or national origin.⁹⁶

In its considerations of individual complaints under the mechanism established by the First Optional Protocol to the ICCPR, the Human Rights Committee has further clarified the requirements for legally justified restrictions on freedom of movement. The Committee has consistently interpreted proportionality and necessity in a strict and fact-dependent manner. It has found that measures infringing on the freedom of movement were proportional and necessary only in rare circumstances. For example, in *Peltonen v Finland*, it found the refusal to renew a passport and its accompanying consequences on freedom of movement to be lawful when the renewal was refused because the applicant had failed to perform his mandatory military service.⁹⁷ The Committee found that this restriction on his freedom of movement was necessary and proportionate for the protection of national security and

89. See eg *Case 002/01* (Trial Chamber Judgment) (n 64) § 450.

90. International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) Art 12(1).

91. *ibid* Art 12(3).

92. UNCHR, 'General Comment 27: Article 12 (Freedom of Movement)' (2 November 1999) UN Doc CCPR/C/21/Rev.1/Add.9, §§ 11–18.

93. *ibid* §§ 12–13.

94. *ibid* §§ 14–15.

95. *ibid*.

96. *ibid* § 18; See also ICCPR (n 90) Art 26.

97. *Peltonen v Finland* (Merits, 21 July 1994) UNCHR, UN Doc CCPR/C/51/D/492/1992.

public order because the drafting history of the ICCPR explicitly contemplated and condoned restricting the freedom of movement as a means of ensuring that citizens perform their required national service.⁹⁸

However, in *Sayadi and Vinck v Belgium*, the Committee found that restrictions on the right to leave a country on the basis that a person was listed on a UN sanctions list for terror-related activities was not sufficiently proportional or necessary.⁹⁹ The Committee reasoned that there was insufficient evidence that the individuals affected actually constituted any threat to national security or public order.¹⁰⁰ In this case, Belgium had placed two individuals on the UN list prior to a domestic criminal investigation into terrorism-related charges that were eventually dismissed.¹⁰¹ Despite this dismissal and Belgium's repeated attempts to have them removed from the UN list, they remained on it and the related travel sanctions continued to be applied. The Committee held that the restriction on the freedom of movement was, therefore, insufficiently necessary and proportionate for national security reasons because the individuals were not actually threats to national security.¹⁰²

The Committee further emphasized the fact-dependent nature of the proportionality analysis in *González del Río v Peru*.¹⁰³ In this case, the Committee was faced with the question of whether a ban on an individual leaving a country during the course of criminal proceedings against him could be a violation of his right to freedom of movement.¹⁰⁴ Despite stating that, in theory, a restriction on an individual's right to leave a country because of criminal proceedings against him would be necessary and proportionate to protect public order, the Committee held that the restriction was not necessary and proportionate in this specific case because the judicial proceedings against him had been unduly delayed and, therefore, he had been prohibited from leaving his country for a disproportionate amount of time.¹⁰⁵ Therefore, a restriction on freedom of movement must not only be necessary and proportionate to meet a legitimate end in theory, but must be so under the specific, individual circumstances of the case.

Article 22 of the American Convention on Human Rights provides that 'every person lawfully in the territory of a State Party has the right to move about in it, and to reside in it subject to the provisions of the law' and that 'every person has the right to leave any country freely, including his own.'¹⁰⁶ Similarly to the ICCPR, it states that any restriction to this right must be 'pursuant to a law to the extent necessary in a democratic society to prevent crime or to protect national security, public safety, public order, public morals, public health, or the rights or freedoms of others'.¹⁰⁷

In *Ricardo Canese v Paraguay*, the Inter-American Court of Human Rights held that a ban on leaving the country during the course of criminal proceedings against a person became disproportionate and unnecessary when those criminal proceedings lasted an unduly long time.¹⁰⁸ In this case, the individual had been prohibited from leaving his country for more

98. *ibid* § 8.4.

99. *Sayadi and Vinck v Belgium* (Merits, 22 October 2008) UNHCR, UN Doc CCPR/C/94/D/1472/2006.

100. *ibid*.

101. *ibid* § 10.8.

102. *ibid*.

103. *González del Río v Peru* (Merits, 28 October 1992) UNCHR, UN Doc CCPR/C/46/D/263/1987.

104. *ibid* § 5.3.

105. *ibid*.

106. American Convention on Human Rights (entered into force 18 July 1978) 1144 UNTS 123 (American Convention) Art 22(1),(2).

107. *ibid* Art 22(3).

108. *Ricardo Canese v Paraguay*, Merits, Reparations, and Costs, Inter-American Court of Human Rights Series C No 111 (31 August 2004) § 162.

than eight years during the course of criminal proceedings against him that the Court determined were unduly delayed.¹⁰⁹ In addition, the Court determined that the individual was not actually at risk of leaving the country to evade the criminal proceedings against him because he had actually left the country several times during the proceedings and had returned.¹¹⁰ The Inter-American Court of Human Rights' analysis in this case took careful account of the specific situation of the individual affected, which indicates that a proportionality analysis for a restriction on the freedom of movement must be carefully calculated to the specific situation.

Article 2 of Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) provides for a similar right to freedom of movement and also only allows for restrictions on the right when they 'are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'.¹¹¹ The case law of the European Court of Human Rights (ECtHR) that is tasked with enforcing the European Convention provides useful analysis of the right and potential restrictions to it.

For example, in *Raimondo v Italy*, the ECtHR elaborated on the requirements for a restriction to be 'in accordance with the law'.¹¹² In this case, the Court was faced with the question of whether house arrest for an individual awaiting criminal trial was a violation of the right to freedom of movement.¹¹³ The Court held that, even though house arrest for an individual in this situation was theoretically proportional and necessary, the measure had violated the individual's rights because he was not informed of the reason for his house arrest for at least the first five months of his arrest.¹¹⁴ The measure could not have been properly in accordance with the law when the individual had not been informed of any legal decision or statute that mandated the restriction.¹¹⁵ Therefore, a measure restricting freedom must not only be made in accordance with a legal proceeding, but the individual affected must also be informed of the decision or law justifying the restriction.

ECtHR jurisprudence also provides useful, relevant, and in-depth analysis of the concept of proportionality and necessity in a democratic society. In *Gochev v Bulgaria*, the Court was asked to determine whether the confiscation of a passport and the corresponding consequences on an individual's ability to travel was proportional to the end achieved.¹¹⁶ In this case, the passport had been confiscated as punishment for unpaid debt and to respect the rights of an individual's creditors.¹¹⁷ The Court held that, whether or not protection of the rights of creditors can justify such a restriction on freedom of movement, the length of time that the individual had been without his passport had rendered the restriction disproportionate after a certain amount of time.

The Court also considered the question of the duration of the restriction in *Luordo v Italy* and came to a similar conclusion.¹¹⁸ *Luordo v Italy* dealt with a situation in which an

109. *ibid* § 130.

110. *ibid* § 131.

111. Convention for the Protection of Human Rights and Fundamental Freedoms Protocol No 4 (European Convention on Human Rights, as amended) (ECHR) Arts 2, 3.

112. *Raimondo v Italy*, 22 February 1994, Series A no 281-A.

113. *ibid* § 38.

114. *ibid* § 39.

115. *ibid*.

116. *Gochev v Bulgaria*, no 34383/03, 26 November 2009.

117. *ibid* §§ 6–10.

118. *Luordo v Italy*, no 32190/96, ECHR 2003-IX.

individual had been forbidden from moving from his home and moving into another home during the course of bankruptcy proceedings against him.¹¹⁹ The Court held that, in theory, the restriction could be justified by the need to ensure that the individual could be contacted during the proceedings, but that the proceedings had lasted so long that the restriction was no longer proportional to the end achieved.¹²⁰ This indicates that a proportionality analysis to determine the lawfulness of a restriction of the right to freedom of movement requires an in-depth analysis of the specific circumstances of the individuals affected, and cannot be conducted in the abstract.

The cases of *Olivieira v Netherlands*¹²¹ and *Labita v Italy*¹²² reiterate the importance of taking into account individual circumstances in the proportionality analysis. In *Olivieira v Netherlands*, the Court was faced with a legal decision that prohibited a specific individual from entering a specific area of the city of Amsterdam because the drug trade and drug use were prevalent in the area of the city and the individual had a history of drug use and refusing to heed police orders to cease his illegal and disruptive activities.¹²³ The Court held that this restriction was proportionate to the need to preserve social order in an area of the city that was facing an emergency caused by excessive and often violent crime.¹²⁴ In particular, the Court held that the restriction was proportionate because the individual affected did not live or work in the area that he had been prohibited from entering and, therefore, the actual restriction on his rights and daily life was insignificant in proportion to the social good caused by the restriction.¹²⁵

Similarly, in *Labita v Italy*, the Court took into account the circumstances of the individual affected to determine the proportionality of the restriction.¹²⁶ In this case, the Italian government had severely restricted an individual's right to move within his city and his country (including, among other restrictions, requiring him to notify the authorities whenever he left his home and requiring him to be home by 8 p.m. every evening) because he was suspected of being a member of the Mafia.¹²⁷ The Court held that, although restricting the freedom of movement of suspected Mafia members could theoretically be necessary and proportional, the restrictions were not justified in the case because there was inadequate evidence that he was actually a member of the Mafia.¹²⁸ A court had acquitted the individual of all crimes relating to Mafia membership and the only remaining evidence against him was his familial connection to the Mafia.¹²⁹ This decision demonstrates that the actual benefit to the public order of the restriction on a specific individual must be proportionate to the limitation on the right to freedom of movement on the specific individual.

Summing up, the practice and treaty law of international and regional human rights organizations generally indicates that there are three basic requirements for the lawfulness of a restriction on the right to freedom of movement: 1) the restriction must be made in accordance with the law; 2) the restriction must be necessary and proportionate to accom-

119. *ibid* §§ 90–91.

120. *ibid* § 96.

121. *Olivieira v the Netherlands*, no 33129/96, ECHR 2002-IV.

122. *Labita v Italy* [GC], no 26772/95, ECHR 2000-IV.

123. *Olivieira v the Netherlands* (n 121) §§ 10-11.

124. *ibid* §§ 61–63.

125. *ibid* § 65.

126. *Labita v Italy* [GC] (n 122).

127. *ibid* § 63.

128. *ibid* §196.

129. *ibid*.

plish a legitimate end; and 3) the restriction must be consistent with other rights. The requirement of accordance with the law means not only that the restriction be made as a result of a legal process or decision, but also that the individual affected have access to the legal decision or document granting the restriction and that the law not allow for excessive discretion. The proportionality of the restriction must be determined on the basis of the specific facts of the case and must take into account the actual effects on the individual's rights and daily life and the concrete legitimate end achieved by the restriction. The rights that must be respected in the course of the restriction include the right to non-discrimination on the basis of race, sex, religion, or national origin.

In the specific context of forcible transfer or deportation of civilians for imperative military reasons, this jurisprudence and related practice indicate that such acts must: 1) be taken as a result of a public decision by a person or entity with the legal authority to take such decisions; 2) be proportional to the actual military objective achieved by the action; and 3) not be taken on a discriminatory basis or in a way that unnecessarily infringes other rights. To the extent possible, the legal decision enabling the transfer or deportation must be made available to all individuals affected by the act and must clearly describe the reasons for the transfer or deportation and exactly what measures will be taken. The proportionality analysis must be made with careful consideration of the concrete effects on the civilians and the concrete military objective achieved. This analysis should include aspects such as the family and economic situation of the civilians affected. The other rights to be taken into account include the right to non-discrimination as well as the right to family life, the right to freedom from inhumane treatment, and the right to life.

7. Conclusion

The drafting history of the Geneva Conventions, the jurisprudence of international criminal tribunals, the practice of States, and the practice of international and regional human rights organizations establish five basic elements of the legal test for a forcible transfer or deportation of the civilian population to be justified as an evacuation for imperative military reasons: 1) that there be an actual military threat to a vital military operation present in the area where the civilians reside; 2) that the concrete military end achieved be proportional to the concrete violation of the civilians' rights; 3) that the decision to displace the population be made by a person or entity with the legal authority to take such a decision and, to the extent possible, be clearly announced to the affected population; 4) that the displacement occur in a manner consistent with returning the population after the threat is no longer present and consistent with the protection of the civilians' human rights; and 5) that the civilians be returned to their homes as soon as practicable after the military threat is no longer present.

The presence of an actual military threat requires that there be active combat operations or the reasonably expected imminent arrival of active combat operations in the area in which the civilians reside.¹³⁰ For the threat to be to a vital military operation, the operation threatened must be one whose frustration would threaten the entire military's victory in the con-

130. See eg *Prosecutor v Krstić* (n 1) §§ 524–27; *Prosecutor v Naletilić & Martinović* (n 49) §§ 512–571; *Case 002/01* (Trial Chamber Judgment) (n 64) § 448; See *Sud Bosne i Hercegovine* (Court of Bosnia and Herzegovina), *Verdict, Momir Savić* (X-KR/07/478) (n 76); *Prosecutor's Office of Bosnia and Herzegovina v Mitar Rašević and Savo Todović*, Case No X-KR/06/275 (n 79).

flict.¹³¹ Simply depriving the enemy's military of a distinct military advantage or providing one's own military with a distinct military advantage does not constitute sufficient justification for a forcible transfer or deportation of the civilian population.¹³²

An analysis of the proportionality between the military advantage achieved and the rights violated requires an examination of the concrete effects of the forcible transfer or deportation.¹³³ This analysis includes aspects such as the overall conduct of the conflict; the family, economic, and health situation of the individual civilians; and the environment into which they will be transferred.¹³⁴ The ability of a military commander to weigh all of these factors to make a battlefield decision will, of course, be limited compared to decisions made in peacetime. Nonetheless, an evacuation taken with no consideration of these factors would be unlawful.

Because of the nature of the rights affected by a forcible transfer or deportation, the action must be taken on the basis of a decision made by a person or entity with the legal authority to make such a decision.¹³⁵ To the extent possible in war, the decision must be announced to the civilians affected.¹³⁶ This is vital to ensure that such decisions are not made capriciously or with hidden discriminatory intent.

The conduct of the displacement itself must not prejudice the ability of the civilians to return to their homes and businesses after the military threat is no longer present.¹³⁷ Actions such as the burning down of homes and businesses and the confiscation of private property must not be taken as they make it difficult for the civilian population to re-establish their lives upon return.¹³⁸ In addition, the displacement must not take place in an atmosphere of terror that would discourage the civilians from returning to their homes.¹³⁹ The conduct of the displacement must also respect the human rights of the civilians to the extent practicable.¹⁴⁰ These rights include the right to non-discrimination, so a forcible deportation or transfer taken on the basis of the ethnicity or religion of the civilians could not be legally justified.¹⁴¹

The civilians must actually be returned to the place from which they were displaced because a displacement that becomes permanent would be an explicit violation of the Geneva Conventions.¹⁴² The return must occur when military threats and hostilities have ceased in the specific area from which the civilians were displaced and may occur before all hostilities in the conflict have ceased.¹⁴³

131. See eg *Prosecutor v Blagojević & Jokić* (n 60) §§ 598–599.

132. See eg *ibid*; *United Kingdom v Erich von Lewinski* (called von Manstein) (n 36); *Case 002/01* (Trial Chamber Judgment) (n 64) § 448.

133. See eg UNCHR, 'General Comment 27: Article 12 (Freedom of Movement)' (2 November 1999) UN Doc CCPR/C/21/Rev.1/Add.9, §§ 11–18; *Sayadi and Vinck v Belgium* (n 99); *González del Río v Peru* (n 103); *Ricardo Canese v Paraguay* (n 108) § 162; *Olivieira v the Netherlands* (no 121); *Labita v Italy* [GC] (n 122); *Gochev v Bulgaria* (n 116); *Luordo v Italy* (n 118).

134. See eg UNCHR, 'General Comment 27' (n 133); *Olivieira v the Netherlands* (n 121); *Labita v Italy* (n 122); *Gochev v Bulgaria* (n 116); *Luordo v Italy* (n 118).

135. See eg UNCHR, 'General Comment 27: Article 12 (Freedom of Movement)' (n 133); *Raimondo v Italy* (n 112).

136. See eg UNCHR, 'General Comment 27: Article 12 (Freedom of Movement)' (n 133); *Raimondo v Italy* (n 112).

137. See eg *Prosecutor v Stakić* (n 11) §§ 285–287; *Prosecutor v Naletilić & Martinović* (n 49) §§ 512–571.

138. See eg *Prosecutor v Naletilić & Martinović* (n 49) §§ 512–571.

139. *Prosecutor v Krstić* (n 1) §§ 524–27.

140. See eg UNCHR, 'General Comment 27: Article 12 (Freedom of Movement)' (n 133).

141. See eg *ibid*.

142. Geneva IV (n 7) art 49. See *Prosecutor v Brđanin* (n 57) § 556.

143. *ibid*.

This precise definition of an evacuation of the civilian population for imperative military reasons will allow domestic and international criminal tribunals to provide accurate and consistent justice to victims of the crime of forcible transfer or deportation of a civilian population. It will allow prosecutors to be confident in their ability to rebut a defence of imperative military reasons, which will make them more likely to charge this crime. In addition, it will give potential defendants appropriate notice of the specific elements of the crime and its defences, which will satisfy basic principles of criminal law and protect defendants' rights.