

Could forced expulsion ever be considered as falling within the scope of Article II of the Genocide Convention?

Introduction

The prominence of mass violence, extermination and extreme discrimination in world history engendered the concept of genocide, eventually defined by R. Lemkin in 1944.¹ The most significant development of the concept came in the form of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide in 1948 (hereinafter the “Genocide Convention” or “Convention”). Article II of the Genocide Convention defines the crime of genocide. Case law from international institutions endowed with the jurisdiction to prosecute the crime have been instrumental in developing the definition and expanding the scope of genocide to include acts not originally envisaged or expressly mentioned in the Convention. It is for this reason that other acts, such as forced expulsion, could arguably fall under the scope of the Convention. The current state of the law with regards to forced expulsion is that it is not an act of genocide in itself, but could be a contributing factor in a system of acts constituting genocide, or an indicator of the specific intent required for genocide. As will be discussed, it is entirely likely that forced expulsion, as a lone act, will one day be considered to fall under Article II of the Convention.

Genocide

Article II of the Genocide Convention defines genocide as any act found in (a)-(e) of the provision, committed against a protected group with the intent to destroy that group, in whole or in part. The strict scope of the provision is illustrated by the fact that the acts included in Article II of the Convention are exhaustive. These are:

- a) “Killing members of the group;
- b) Causing serious bodily or mental harm to members of the group;
- c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

¹ Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation - Analysis of Government – Proposals for Redress*. (Carnegie Endowment for International Peace, 1944).

- d) Imposing measures intended to prevent births within the group;
- e) Forcibly transferring children of the group to another group.”

Although apparently an exhaustive list, conduct has been included that was not originally considered to fall within the scope, such as the act of rape and sexual violence, as will be discussed. The groups against which genocide may be committed are limited – only those formed on national, ethnical, racial and religious grounds are included.² This deliberate restriction excludes other groups, such as those based on cultural or political grounds, due to the requirement that the group be “stable and permanent”, with membership normally flowing automatically from birth.³ Additional to acts being committed against a protected group, Article II requires *dolus specialis*: a specific kind of intent particular to genocide, which confirms that perpetrators must participate in conduct with the intention to destroy the protected group, in whole or in part.

Forced expulsion

With regards to forced expulsion, it is important to note that during the drafting of the Convention, Syria proposed a sixth category be included in Article II, which would have included forced expulsion as a category of conduct, but this was rejected.⁴ Forced expulsion is an ancient concept, encompassing the deportation or forcible removal of persons from a particular place by an authoritative power, often on the discriminatory ground of ethnicity or religion. It is well established that forced expulsion can be considered as a crime against humanity⁵ or a war crime⁶, if the necessary requirements are fulfilled. The definition provided by Article 7(2)(d) (as a crime against humanity) of the Rome Statute is as follows:

² Article II, Convention on the Prevention and Punishment of the Crime of Genocide.

³ *Prosecutor v Akayesu*, Judgment of 2 September 2002 (Case No. ICTR-96-4-T), at 511-516.

⁴ UN Doc. A/C6/234.

⁵ Article 7(1)(d) of the Rome Statute, the Statute establishing the International Criminal Court, criminalizes deportation as a crime against humanity. Similar provisions can be found in Articles 3(d) and 5(d) of the Statutes establishing the ICTR and ICTY respectively. Forced expulsion could also be considered as Persecution, a separate crime against humanity, under Article 7(1)(h) of the Rome Statute.

⁶ Deportation can be a Grave Breach of the Geneva Conventions of 12 August 1949 (war crime) under Article 8(2)(a)(vii) of the Rome Statute, also found in Article 2(g) of the ICTY Statute.

“‘Deportation or forcible transfer of population’ 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.”

Forcible transfer will be considered together with expulsion, as both cause similar types of harmful effects. It should be noted that the mere fact that forced expulsion is an established crime against humanity does not preclude the classification of the act as genocide – many forms of conduct are considered to be both (e.g. murder, rape, torture etc.).

Ethnic cleansing

Much debate involving the inclusion of forced expulsion as an act of genocide is centred on the issue of ‘ethnic cleansing’. The term is used to cover practices adopted to expel or displace a group of individuals on the basis of their ethnicity.⁷ It has been established by the UN that ‘ethnic cleansing’, of which a central component is forced expulsion, is in fact a form of genocide and thus an act against humanity.⁸ It is, however, important to note that ethnic cleansing does not constitute a singular act – it is a “system rather than a series of random incidents”,⁹ often composed of acts of deportation, murder and violence. This is why it is often held that ethnic cleansing constitutes genocide, but forced expulsion in itself does not – forced expulsion is merely one act in the system of ethnic cleansing. However, it could be argued that eventually, forced expulsion alone could be considered as a genocidal act.

When forced expulsion could not be considered within Article II

This section considers in what circumstances the act of forced expulsion would not be considered under Article II of the Convention. As previously mentioned, deportation and forcible transfer are established crimes against humanity and war crimes. There is an exception provided in Conventions concerning these crimes – if the expulsion is allowed under international law, the act is not criminal. In some situations, forced expulsion is necessary; in times of war, it may be essential.¹⁰ However, this is not the kind that might

⁷ Antonio Cassese, *The Oxford Companion to International Criminal Justice*, (OUP, 2009).

⁸ UN Resolution 47/121, (UN Doc. A/Res/47/121, 1992).

⁹ Peter Maass, *Love Thy Neighbor: A Story of War* (Vintage Publishing, 1997).

¹⁰ Article 49(2), Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949.

fall under Article II of the Genocide Convention – that is, involuntary banishment from an area with the intent to destroy the group. When such conduct could be considered as falling within this scope will be discussed later – first, it is important to ascertain how forced expulsion is treated under the law as it stands today.

Forced expulsion – the current state of the law

Forced expulsion, as a lone act, is generally not considered to fall within the scope of Article II of the Genocide Convention. As stated in *Krstić*, “...forcible transfer does not constitute in and of itself a genocidal act”.¹¹ This, however, does not end the involvement of forced removal in genocide altogether. In several cases, the act of expelling civilians from an area has been seen as a contributing factor to a genocidal system, or an act, which could infer the required intent of the crime of genocide. These ideas will be considered respectively.

Forced expulsion is the principal act involved in the notion of ‘ethnic cleansing’ – a system of acts conducted to cleanse an area of a group, often alongside other acts including extermination, detainment and violence. In such a situation, international courts and tribunals have recognised forced expulsion as a contributing factor to genocide.¹²

Additionally, forced expulsion has been held to have evidentiary significance as it may infer genocidal intent. The aforementioned *dolus specialis* requirement contained in Article II is difficult to establish, for it is uncommon for an accused person to expressly announce his/her intent to destroy a targeted group. Therefore intent might be inferred from the conduct of the perpetrator. The quote from *Krstić*, mentioned above, provides guidance on the stance of forced expulsion in international law today: “The fact that the forcible transfer does not constitute in and of itself a genocidal act does not preclude a Trial Chamber from relying on it as evidence of the intentions of members of the [perpetrators].”¹³

¹¹ *Prosecutor v Krstić*, Judgment of 19 April 2004, (Case No. IT-98-33-A), at 33.

¹² *Prosecutor v Blagojević and Jokić*, Judgment of 17 January 2005, (Case No. IT-02-60-T).

¹³ *Prosecutor v Krstić*, Judgment of 19 April 2004, (Case No. IT-98-33-A), at 33.

A similar, if more vehement approach was taken in *Blagojević and Jokić*, where forced expulsion was held to be a “manifestation of the specific intent”¹⁴ of genocide. It is therefore evident that where forced expulsion is considered as an act in itself, it will not be placed under the scope of Article II of the Genocide Convention. However it is a factor considered contributing to a genocidal system, and the progression of case law considering this issue indicates that the conduct could one day be considered as a genocidal act under the Genocide Convention.

When forced expulsion could be considered under Article II

Forced expulsion in a system could already be considered under the scope of the Convention, providing the acts used to forcibly expel a group were enumerated in Article II(a)-(e). Expulsion may be (and commonly has been) achieved by intimidation, serious violence or murder. Such coercive acts would certainly fall under Article II and could be held to be genocide – this was accepted in *Prosecutor v Karadžić and Mladić*.¹⁵

I propose that the act of forced expulsion alone could be included in one of two ways: either under Article II(b) (serious physical or mental harm) or (c) (conditions inflicted to bring about physical destruction). The reasons these provisions could encompass such conduct will be considered below.

Article II(b): causing serious bodily or mental harm

The act of forced expulsion deals with situations where individuals are involuntarily banished from areas where they once resided. Being taken from a place that one has considered home for a substantial length of time, possibly their entire lives, and expelled or transferred to unknown territories is an incredibly damaging situation by any standard. The Genocide Convention does not specify what exactly is meant by ‘serious bodily or mental harm’ – this is provided by case law. It has been established that harm does not have to be “permanent and irremediable”,¹⁶ but should be “more than minor or temporary impairment of mental faculties”.¹⁷ Forcibly expelling a group or part of a group from their place of residence and making them leave behind their homes and belongings

¹⁴ *Prosecutor v Blagojević and Jokić*, Judgment of 17 January 2005, (Case No. IT-02-60-T), at 675.

¹⁵ Review of the indictments pursuant to Rule 61, 16 July 1996, (Case No. IT-95-5-R61 and IT-95-18-R61) at 93.

¹⁶ *Prosecutor v Akayesu*, Judgment of 2 September 2002 (Case No. ICTR-96-4-T), at 502.

¹⁷ *Prosecutor v Semanza*, Judgment of 15 May 2003, (Case No. ICTR-97-20-T) at 321.

would most definitely meet this test, and therefore the harm would be sufficiently serious to fall under this provision. This argument was upheld in the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY):

“...there is sufficient evidence to establish beyond reasonable doubt that in the circumstances of this case forcible transfer constituted ‘serious mental harm’ within the meaning of Article 4(2)(b)”¹⁸ (Article 4(2)(b) being the equivalent provision in the ICTY Statute).

Article II(c): deliberately inflicting conditions of life calculated to bring about physical destruction

Forced expulsion could arguably also be considered under the scope of Article II(c): deliberately inflicting conditions of life calculated to bring about its physical destruction. The presence of deportation under this heading has been considered numerous times in case law after first being established in *Akayesu*.¹⁹ This view was subsequently upheld in several cases²⁰ and the 1996 Report of the International Law Commission, which reiterated:

“...the forcible transfer of members of a group, particularly when it involved the separation of family members, could also constitute genocide under subparagraph (c).”²¹

It is clear to see why such conduct could fall under this heading. A group, expelled from their homes, forced to migrate to territories that may lack essential resources would definitely expose the group to conditions that may bring about its physical destruction. In some situations, a group might be forced into territories where the death of individuals is almost inevitable: dangerous and unstable climates, places which significantly lack resources and have no appropriate means of living, or even hostile environments where the group might be subject to further discrimination by members of the community. If the perpetrator intended to produce such life-threatening effects, the conduct would

¹⁸ *Prosecutor v Blagojević and Jokić*, Judgment of 17 January 2005, (Case No. IT-02-60-T), at 654.

¹⁹ *Prosecutor v Akayesu*, Judgment of 2 September 2002 (Case No. ICTR-96-4-T), at 506.

²⁰ *Prosecutor v Rutanganda*, Judgment of 6 December 1999, (Case No. ICTR96-3-T) at 51 and *Prosecutor v Musema*, Judgment of 17 January 2000, (Case No. ICTR-96-13-A).

²¹ International Law Commission, *Report of the International Law Commission on the work of its 48th Session*, (Doc. A/51/10, 1996).

certainly fall under Article II(c). However, the intention element is at times more difficult to satisfy.

Arguments against the inclusion of forced expulsion in Article II

It was held that forced expulsion cannot be considered as an act falling under Article II of the Genocide Convention because it does not aim at the physical destruction of a group.²² Whether the physical destruction of a group is a necessary requirement for the intention to commit genocide is debated; existing case law is divided.²³ Regardless, this argument can be rejected for two reasons. The first is that whether conduct can be held to fall under Article II is an objective question – if it could be considered to fall within this scope, then it is entirely possible for it to be conducted with the intent to destroy a targeted group. The question of intent is a subjective one which must be determined in the individual circumstances of the perpetrator. As stated by the International Court of Justice:

“This is not to say that acts described as “ethnic cleansing” may never constitute genocide, if they are such as to be characterized as... “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part” ...provided such action is carried out with the necessary specific intent”.²⁴

The second reason is that acts which fall short of causing the physical destruction of individuals are already considered in Article II(e) - forcibly transferring children of the group into another group. Such conduct does not lead to the physical destruction of the group any more or less than forced expulsion – both achieve the dissolution and eventual termination of the group.²⁵

Insofar as acts falling short of causing death are involved in the Convention, it is important to have cognizance of the development of the act of rape within the Convention. Like forced expulsion, rape is an act that does not achieve the physical destruction of the group, but is now held to be an established form of conduct under Article II. Originally, it was not

²² *Prosecutor v Stakić*, Judgment 31 July 2003, (Case No. IT-97-24-T), at 519.

²³ For case law supporting the view that destruction must be physical or biological, see *Prosecutor v Krstić*, Judgment of 19 April 2004, (Case No. IT-98-33-A) and *Prosecutor v Stakić*, Judgment 31 July 2003, (Case No. IT-97-24-T).

For case law supporting the view that destruction may be as a social unit, see *Prosecutor v Blagojević and Jokić*, Judgment of 17 January 2005, (Case No. IT-02-60-T) and *Jorgić v Germany*, Judgment of 12 July 2007 (Application No. 74613/01).

²⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43.

²⁵ J. Quigley, *Genocide Convention: An International Law Analysis* (Ashgate Publishing Ltd., 2006).

considered under the provision, but through case law, the interpretation of the Convention expanded and rape was eventually included – first in Article II(d), then in Article II(b). It is now widely recognised that rape and sexual violence are covered by ‘Causing serious bodily or mental harm to members of the group’.²⁶ As primarily established in *Akayesu*:

“Sexual violence was a step in the process of destruction of the Tutsi group - destruction of the spirit, of the will to live, and of life itself.”²⁷

This demonstrates that an act does not need to cause the death of individuals to be included as an act of genocide. Therefore, there is no reason why the act of forced expulsion, coupled with the required intention to destroy the targeted group, could not be considered under Article II of the Convention.

Conclusion

The discussion of the highly contentious and heavily debated topic of the inclusion of forced expulsion in Article II of the Convention is ongoing, and is likely to continue for many years to come. Decisions of international courts and tribunals have established the position of the law today – forced expulsion is only included as a contributory factor in a system of conduct directed against a particular group, or as an indicator of genocidal intent. However, it is likely that the law will progress, much like it has already progressed with regards to other acts, so that forced expulsion in itself will one day be established within the scope of Article II of the Genocide Convention.

²⁶ *Prosecutor v Akayesu*, Judgment of 2 September 2002 (Case No. ICTR-96-4-T), *Prosecutor v Kayishema and Ruzindana*, Judgment 1 June 2001, (Case No. ICTR-95-1-A).

²⁷ *Prosecutor v Akayesu*, Judgment of 2 September 2002 (Case No. ICTR-96-4-T), at 732.