

DOI: <https://doi.org/10.34069/AI/2024.82.10.25>

How to Cite:

Chepkova, K., Herasymchuk, L., & Mazur, V. (2024). Forced evacuation as a mechanism of special protection measures for children during armed conflict. *Amazonia Investiga*, 13(82), 308-316. <https://doi.org/10.34069/AI/2024.82.10.25>


Forced evacuation as a mechanism of special protection measures for children during armed conflict

Примусова евакуація як механізм спеціального захисту дітей під час збройного конфлікту

Received: September 2, 2024

Accepted: October 28, 2024

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Abstract


The article examines the compulsory evacuation of children by force (hereinafter - forced evacuation) as one of the preventive mechanisms for the implementation of special protection of children during armed conflict. This is a new mechanism introduced by the Ukrainian government in March 2023 with the aim of protecting children in the area of hostilities and armed conflicts under martial law. The authors of the article examine the procedure for making a decision on the forced evacuation of children from a particular settlement in an area where hostilities are taking place and the mechanism of its implementation. It is established that evacuation of children during armed conflicts has been implemented before. However, such evacuations were exclusively voluntary and often involved children unaccompanied by legal representatives. The 'Ukrainian mechanism' provides for the forced evacuation of children and must be accompanied by one of their legal representatives. The authors note that this mechanism has been approved at the level of the Ukrainian government (the Parliament has not yet adopted any legislative acts). A comparative analysis of the peculiarities of the legal status of a child under international and national legal acts is carried out to take into account the scope of the child's rights and obligations during evacuation. The article concludes

Анотація

Стаття досліджує обов'язкову евакуацію дітей в примусовий спосіб (далі - примусова евакуація) як один із превентивних механізмів реалізації спеціального захисту дітей під час збройного конфлікту. Це новий механізм, який запроваджений українським урядом в березні 2023 року з метою захисту дітей, які перебувають у зоні воєнних дій і збройних конфліктів, в умовах воєнного стану. Авторами статті досліджено процедуру прийняття рішення про примусову евакуацію дітей з окремого населеного пункту в місцевості, де ведуться бойові дії та сам механізм її проведення. Встановлено, що механізм евакуації дітей під час збройних конфліктів реалізовувався і раніше. Однак така евакуація мала виключно добровільний характер і зазвичай евакуювали дітей без супроводу законних представників. "Український механізм" передбачає примусову евакуацію дітей і обов'язково у супроводі одного із законних представників. Авторами звернено увагу, що зазначений механізм затверджений на рівні українського уряду (парламентом досі не прийнято жодного нормативно-правового акту). Проведено порівняльний аналіз особливостей правового статусу дитини за міжнародними та національними нормативно-правовими актами для

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that the forced evacuation of children during armed conflict is a necessary preventive mechanism to provide protection to the most vulnerable category of civilians. At the same time, the authors focus on the existing shortcomings which require further regulatory regulation.

The purpose of the article is to provide a legal analysis of the evacuation of children during armed conflict at the level of international legal instruments and at the national level, and its specific features established in Ukrainian legislation.

The methodological basis of the study are the method of systematic approach, the method of descriptive analysis, the formal legal method and the method of comparative forecasting.

Keywords: children, armed conflict, special protection, preventive mechanism, forced evacuation.

врахування кола прав та обов'язків дитини при проведенні евакуації.

У статті зроблено висновки, що примусова евакуація дітей під час збройного конфлікту є необхідним превентивним механізмом з метою надання захисту найбільш вразливій категорії цивільного населення. Водночас акцентовано увагу на наявних недоліках, які потребують подальшого нормативного врегулювання.

Метою статті є правовий аналіз евакуації дітей під час збройного конфлікту на рівні міжнародно-правових актів та національному рівні, її особливості, встановлені в українському законодавстві.

Методологічну основу дослідження становлять: метод системного підходу, метод описового аналізу, формально-юридичний метод та метод порівняльного прогнозування.

Ключові слова: діти, збройний конфлікт, спеціальний захист, превентивний механізм, примусова евакуація.

Introduction

'Every war is a war against children,' said Eglantine Jebb, founder of Save the Children. Protecting children in times of war is an extremely important task, as children are the most vulnerable to the consequences of conflict. War poses a direct threat to their lives, health, and psychological well-being, and can violate their right to education and security. Children witness cruel realities. The armed conflict affects their mental health, education and development, as many of them lose their homes, loved ones and safe environment. During an armed conflict, child protection becomes especially important, and the state, represented by authorized bodies, must use various tools to ensure their well-being.

For this reason, it is important to examine the mechanism of preventive protection of children during hostilities. One of these measures is the evacuation of children. Evacuation of children has been carried out during armed conflicts since the beginning of the twentieth century. Such evacuations were carried out on a voluntary basis and without any legal representatives. However, a number of studies have shown that this format of evacuation had negative consequences for the children's psychological and physical health because the children were without sufficient care and guidance.

Children's evacuation norms have been introduced on the international level in several legal acts. However, in common with most other international legal frameworks containing general rules and regulations, the specificity of international relations is that subjects of international law themselves play the role of guarantor of the adopted rules.

The war in Ukraine has increased the risks for children in terms of poverty, illness, family separation, loss of education, mental health, and violence, including gender-based violence. That is why the Ukrainian government introduced innovations in 2023 and implemented forced evacuation of children from the combat zone for children's protection.

The purpose of the study is to review the international and Ukrainian legal framework for the evacuation of children during periods of hostilities; analyze correlation of international and Ukrainian regulations in the field of research; outline the shortcomings in the existing mechanism for further improvement of the legal and regulatory framework.

Literature Review

Research on child protection during armed conflict is widely available. All research in this area that exists today can be grouped into the following categories. The first category is about general international and national regulation in the field of children's protection during armed conflict.

Olha Melnychuk (2022) researched peculiarities of protection of children's rights in conditions of military action and armed conflicts. The author made the conclusion that to effectively protect the rights of children in war zones and armed conflicts and children affected by them, national legislation needs to be further improved. To do this, it is necessary to develop a state program for the rehabilitation of children injured in hostilities and armed conflicts, etc.

Oksana Moroz, Valery Bondar & Yuriy Khatniuk (2023) investigated national legal acts in the sphere of children's protection during martial law. They summed up that this part of legislation is a part of Ukraine's national security. Authors also conversed about creating a register of minors living in areas where intense fighting is taking place, so that the state has the most complete information about the material and psychological needs of the most vulnerable groups of the population, such as children. This is also crucial for the implementation of the forced evacuation mechanism to fully understand the real number of children in a particular territory.

Valentyna Chernobuk (2023) outlined international legal standards for the protection of children's rights in armed conflicts, because it is the main base for formulated national regulation. The author observed the international legal framework in the sphere of children's protection during hostilities. The most interesting part of this study is also the study of the case law of the International Criminal Court on crimes against children.

The second category is about more concrete researchers, which cover the issue of evacuation of children during armed conflict. This is where it is instructive to study evacuation from a historical perspective in order to make a comparative analysis and identify proposed changes in the mechanism of evacuation of children during the war.

The widespread research in the sphere of children's evacuation is a period of the Second World War. There are several investigations of children's evacuation from different points of view. For example, Zetterqvist Nelson (2015) investigated children's evacuation from psychology and how children react to evacuation and consequences of this process. Based on the results of her research, the author found that the evacuation was carried out separately from children and parents. As a result, these children later experienced psychological health problems, as unexpected separation from their parents is a very traumatic event. Also, the further stay of such children without any of their relatives and friends had a negative impact on their psychological and physical health.

Damian Gonzalez (2021) described the process of children's evacuation during the Spanish Civil War. The author paid attention to the legal component of organizing the process of evacuation of children and their subsequent return after the end of the armed conflict. In this study, it is remarkable that the author focuses not only on the evacuation procedure during the armed conflict, but also on the stage of return of such children from evacuation.

Existing historical research suggests that states have used evacuation of children from war zones before. However, it should be noted that such evacuations were voluntary and children were evacuated unaccompanied by their parents, only in the presence of their supervisors.

Olha Melnychuk, Oleksandr Yaremenko, Tetiana Kronivets & Tetiana Overkovska (2022) were one of the first who carried out a study in the sphere of tasks before the government about protection of children's rights during hostilities. They concluded that the authorities of Ukraine have to resolve a number of current and long-term tasks. The current tasks include nearest means and remedies for protection of children who became victims of the military conflict. This includes performing highly organized safe evacuation of children from the areas of military action, repatriation of children from abroad and returning internally dislocated persons to the de-occupied territory of Ukraine, repatriating deported children back to Ukraine, and administering measures to address the basic needs of children in times of war. The long-term tasks concerning the protection of rights of children include, among others, the development of a comprehensive policy for protecting the rights of children, creating a governmental body that would perform a consolidating function in relation to the protection of children's rights, reforming the justice system in relation to children, and deinstitutionalizing the area of children's rights.

The most useful for us in this study is division government's tasks into two groups and their identification. Authors include a note on the evacuation of children and referring to this mechanism as an area of current focus.

Kateryna Rashevskya (2023) also reviewed evacuation of children during the Russian-Ukrainian armed conflict. The author concluded that children's evacuation is a legal mechanism to ensure the safety of children during armed conflict.

In general, the issue of forced evacuation of children has not yet been sufficiently researched and covered. The results of these studies indicate that the mechanism of children's evacuation requires more attention given the challenges faced by the state as a result of the armed conflict. All of the above literature makes it possible to summarize both general regulatory acts and more narrowly regulated legal acts in the issue under study. Based on which to make our own conclusions.

Methodology

The following research methods were used to conduct the study in the field of the evacuation of children during armed conflict.

The authors used the method of document analysis. First of all, the researchers analyzed international legal acts related to the topic of the study (Geneva Convention IV (United Nations, 1949), the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) (United Nations, 1977), the Convention on the Rights of the Child (United Nations, 1989), etc.) The second level of legal acts that were analyzed were Ukrainian legal acts depending on their legal force. In particular, the Civil Protection Code of Ukraine (CPC of Ukraine) (Law No. 5403-VI VR, 2013), the Law of Ukraine "On the Legal Regime of Martial Law" (Martial Law) (Law No. 389-VIII, 2015), Procedure for Evacuation in the Event of a Threat or Occurrence of Emergency (Procedure) (Resolution of the Cabinet of Ministers of Ukraine No. 841, 2013), etc. The principle of legal force was used to systematize and logically refer to legal acts.

The legislative sources of international legal acts are selected from the United Nations legislative databases. In reviewing the Ukrainian legislation, we have used legislative sources from the official open data portal of the Verkhovna Rada of Ukraine <https://data.rada.gov.ua/open/data/zak>.

Simultaneously with the analysis of regulatory acts, the authors reviewed the academic literature that formed the scientific basis of this study. This helped to analyses the evacuation of children during armed conflicts from a historical perspective. The scientific basis of the study is based on scientific publications in the field of children's protection during armed conflict in general and in particular on the evacuation of children during armed conflict. The search for scientific publications was carried out in the scientific metric databases ResearchGate, WoS and Google Scholar.

The authors used a systematic process during the writing of the article, which was manifested in reading, identifying specific provisions, and categorizing information. Based on the above, it was possible established participants in the organization of forced evacuation, in relation to whom it is carried out, and the mandatory conditions for its implementation.

As a result, it was possible to compare the existing mechanisms for evacuating children during armed conflict with the introduced 'Ukrainian mechanism' for the forced evacuation of children during armed conflict. Using the method of comparative analysis, the article highlights the advantages and disadvantages of forced evacuation of children during armed conflict.

The generalization method was applied on the basis of the comparison, which helped to formulate the relevant conclusions to the article.

Results and discussion

The issue of special protection of children at the international level was first raised in international humanitarian law (IHL) after the Second World War. In 1949, international law was marked by the adoption of the four Geneva Conventions, which became the fundamentals of IHL. One of these conventions – Convention IV, regulates the special protection of children during armed conflict (United Nations, 1949).

The category of children refers to the civilian population. However, the text of this document implies that children should be under special protection. This fundamental right stipulates that both in peacetime and in time of armed conflict, states that have signed and ratified the above convention may authorize the establishment of sanitary and safe zones on their territory and on the occupied territory. It is a mandatory requirement that these zones allow for the protection of the wounded, sick and elderly, children under 15, pregnant women and mothers with children under seven from the effects of war (United Nations, 1949).

Convention IV also provides for the guarantee of other basic rights for children at the appropriate level, such as nutrition, medical care, education and protection of victims of war, etc. (United Nations, 1949).

Children's special protection aspects are enshrined in the Additional Protocol I (United Nations, 1977). Thus, provides that children are an object of special respect and must be protected from any form of indecent abuse. Armed conflict parties shall provide them with the care and assistance they need because of their age or for another purpose (Article 77).

The main international normative instrument on the child's rights protection is the Convention on the Rights of the Child (United Nations, 1989). This international act for the first time defines general guidelines for the protection of children during armed conflict, including the following:

- Obligate themselves to respect and ensure that IHL applicable to them in armed conflicts that are relevant to the child is respected;
- Ensure that persons under the age of 15 do not take part in hostilities directly;
- Restrain from conscripting persons under the age of 15 into their armed forces;
- Adopt all possible measures to ensure the protection and care of child victims of hostilities.

In the context of all the problematic issues related to ensuring the basic life needs of every child, each state, in the presence of armed conflict, must create and implement measures for the special child protection during the hostilities, which are preventive in nature. One of the most pressing issues among the measures for the special protection of children during armed conflict is their evacuation.

The issue of evacuation of children was first envisaged in the Convention IV, which records that between the opposing sides of the conflict will attempt to negotiate local agreements for the removal from occupied or surrounded areas of the wounded, sick, infirm and aged persons, children and pregnant women, as well as for the passage of clergy of all religions, medical personnel and equipment on the way to such areas (United Nations, 1949).

Additional Protocol I pay more attention to the issue of evacuation of children. Thus, notes that no participants to a conflict should organize the evacuation of children other than its own nationals to a foreign country, except for temporary evacuation when it is required for compelling reasons relating to the health or medical treatment of the children or, with the exception of occupied territory, their safety (Article 78) (United Nations, 1977).

If parents or legal guardians can be located, their written consent to such evacuation is mandatory.

Where no such persons can be found, the written consent of the persons who, by law or custom, have primary responsibility for the care of the children is to be granted.

Each such evacuation shall be monitored by the Protecting State in consultation with the Parties concerned, namely: The Party organizing the evacuation, the Party receiving the children and any Parties whose nationals are being evacuated. In each case, all sides to the conflict shall take all feasible precautions not to jeopardize the evacuation. Simultaneously, during all cases of evacuation in accordance with the above conditions, the education of each child, including his or her religious and moral education at the request of the parents, should be guaranteed during his or her absence with the most possible continuity.

In 1992, UNHCR/UNICEF produced a publication with reflections and recommendations on the evacuation of children from areas of conflict (Ressler, 1992). In this guideline's authors analyzed the historical base of children's evacuation. Over the last 150 years, numerous evacuation programs for children have been implemented throughout the world. These evacuations have taken many forms – rescue efforts, summer holidays, temporary rest and recuperation periods, temporary asylum, long-term care. In the history of mankind, children were evacuated during the Russian Revolution (1918-1920), the Spanish Revolution (1931-1939), the Second World War (1939-1945), the Greek Civil War (1946-1949), and the Nigerian Civil War (1967-1970).

The common feature of the above evacuations was that all children were evacuated without their parents. In particular, this experience indicates that such evacuation leads to a number of negative consequences for children's health. Researchers on this issue claim that there is a phenomenon called "evacuation neurosis", which indicates that children develop neurological diseases after being separated from their families.

In addition, as illustrated examples from history, evacuated children have not always received positive nurturing care. Sometimes the caregivers have been inappropriate, the individual needs of children not met or, in the worst cases, children have been abused. Child welfare issues have often been inadequately considered prior to the movement of children because organizers have assumed that care arrangements would be made after evacuation, as may happen when children are moved simply as medical cases or as holiday children rather than as children for whom long term care arrangements might be necessary.

At the time of February 24, 2022 there was no special legal regulation at the Ukrainian national level regarding the evacuation of children who were directly in or near the combat zone. There was only a general settlement of the change of residence and the evacuation issue. On the legislative level, the CPC of Ukraine (Law No. 5403-VI VR, 2013) determines "evacuation" as the controlled removal or withdrawal of people from an emergency zone or a zone of potential damage if there is a risk to their life or health, as well as material and cultural possessions if there is a risk of their damage or destruction. The CPC of Ukraine also provides for the following classification: depending on the specifics of the emergency, the following types of evacuation are established: 1) mandatory; 2) general or partial; 3) temporary or irrevocable.

Since February 2022, Ukrainian lawmakers began to develop amendments to the legislation to meet the requirements of martial law. For example, Martial Law (Law No. 389-VIII, 2015) introduces an additional measure of this regime, namely the evacuation of the population in case of an emergency or a threat of an emergency, as well as from areas of armed conflict (from areas of possible hostilities) to safe areas (Article 8).

Furthermore, in 2022, the Ukrainian legislator amended the grounds for mandatory evacuation (CPC of Ukraine), namely, stipulated that compulsory evacuation of the population is scheduled and implemented in advance in case of a threat of possible armed conflict (from areas of possible hostilities determined by the General Staff of the Armed Forces of Ukraine for a special period to safe areas) (Article 33 (6)).

One of the first steps to resolve the issue of evacuation of children during armed conflict was to amend the Procedure for Evacuation in the Event of a Threat or Occurrence of Emergency (Resolution of the Cabinet of Ministers of Ukraine No. 841, 2013) (Procedure).

The said Procedure stipulates that in order to protect children in the zone of hostilities and armed conflicts under martial law, regional military administrations, in agreement with the military command authorities in the relevant territory and the Coordination Headquarters for the Compulsory Evacuation of the Population during Martial Law, may decide to conduct a forced evacuation of children with their parents, persons in loco parentis or other legal representatives from a separate settlement in the area where hostilities are taking place.

The novelty of the Ukrainian legislator is that forced evacuation of children is carried out just under the accompaniment of one of the parents, a person in loco parentis, or another legal representative. No refusal of parents, persons in loco parentis or other legal representatives from the forced evacuation of children from a particular settlement in the area where hostilities are taking place is allowed.

The competence to establish the list of territories where hostilities are (were) conducted is approved by the Ministry of Reintegration of the Temporarily Occupied Territories in cooperation with the Ministry of Defense, taking into account proposals of the relevant regional and Kyiv city military administrations.

From our perspective, the amendments to the Procedure regarding the mechanism for the forced evacuation of children from a particular settlement in an area where hostilities are taking place are not sufficiently specific. In particular, the question of where a child with one of his/her parents, a person in loco parentis or another legal representative will be evacuated to is not clearly defined; it is not determined who is directly responsible for such evacuation; it is not defined what exactly is a forced evacuation and how it can be implemented; the above-mentioned evacuation is carried out from the territories where hostilities are already underway, etc. At the same time, the above-mentioned Procedure stipulates that the organization of evacuation of the population, material and cultural property during a special period is carried out in accordance with the provisions of this law.

In April 2023, there was an attempt at the parliamentary level to improve the mechanism of forced evacuation of children and fill in the gaps in the law. The Verkhovna Rada of Ukraine has been considering draft law No. 9207 on amendments to the Martial Law (Draft of Law No. 9207, 2023) regarding the principles of forced evacuation of children, which proposes to legislate for the forced evacuation of children from settlements where hostilities are taking place and to determine its procedure. The draft law proposes to supplement the Martial Law with a new extra article "Legal Principles of Forced Evacuation of Children" and to define the rule that the evacuation of children during martial law is forced and must be accompanied by one of their legal representatives. The refusal of parents or other legal representatives from the forced evacuation of children is not allowed. The decision on the forced evacuation of children is made by the regional military administrations, in agreement with the General Staff of the Armed Forces of Ukraine and the Coordination Headquarters, which is established by the Cabinet of Ministers of Ukraine. This Draft Law defines the place of residence of a child together with a legal representative after forced evacuation, as well as the issue of financing (Article 18-1). However, unfortunately, as of November 2024, no changes in this direction have been adopted by the parliament.

In the meantime, it is worth paying attention to another aspect of national legislation. The state of Ukraine, having ratified the Geneva Conventions and implemented them into national legislation, did not take into account the peculiarities of national legislation. By Ukrainian law, children are divided into two categories: minimally capable (a person under the age of 14 - part 1 of Article 31 of the Civil Code of Ukraine) and minors (a person aged 14 to 18 - part 1 of Article 32 of the Civil Code of Ukraine) (Law No. 435-IV VR, 2003). We will not talk about the minimally capable, as they have partial civil capacity. As for minors with incomplete civil capacity, the following should be noted. In accordance with Article 313 of the Civil Code of Ukraine (Law No. 435-IV VR, 2003), stipulated those persons who have reached the age of 14 have the right to free independent movement throughout Ukraine and to choose their place of residence. Persons under the age of 14 are allowed to move throughout Ukraine only if accompanied by one of their legal representatives or an authorized person. Minors in Ukraine have a significant scope of rights and are liable for damages on a general basis. Therefore, in our opinion, the state of Ukraine, by creating a precedent in the form of forced evacuation (the Geneva Convention does not provide for forced evacuation), in a certain way restricts the personal non-property rights of persons aged 14 to 18. In our opinion, this is in some way contrary to the spirit of the Geneva Conventions.

Despite certain gaps in the legal regulation of forced evacuation, this mechanism is working. The Coordination Headquarters reported that in 2023, a total of 2,940 children were evacuated to safe places. This became possible due to the approval by the Coordination Headquarters of 9 decisions of regional military administrations on the forced evacuation of children with their parents or persons in loco parentis from a separate settlement in the area where hostilities are taking place (Government Portal, 2024b).

In 2024, a decision was already made to forcibly evacuate children from settlements in Kharkiv and Sumy regions. The Kharkiv Regional Military Administration's decision to forcibly evacuate 161 children from certain communities in the Kupiansk district was subsequently unanimously supported by the Coordination Centre for Forced Evacuation. In the Sumy region, it is planned to evacuate a total of 297 children from 52 settlements in the Sumy region (Government Portal, 2024a). The most recent forced evacuation of children was announced on August 9 this year in the Pokrovsk district of Donetsk region, during which more than 700 children are expected to be displaced (Tyshchenko, 2024).

Conclusion

Based on the above, it can be stated that at the level of international law there is a special protection of children during armed conflict. One of the measures aimed at protection is the mechanism of evacuation of children during armed conflict. International law provides for a general rule on the evacuation of children. Therefore, the evacuation of children at the level of international legal regulation involves three parties, one of which is a party not involved in the armed conflict. This entire mechanism involves supervision by the Protecting State. Additionally, the international procedure for the evacuation of children is voluntary and does not provide for the mandatory evacuation of one of the legal representatives together with the child.

Ukrainian legislation has set a precedent in the form of forced evacuation of children during armed conflict as one of the elements of special protection that can be characterized as preventive. The peculiarity is that the Ukrainian legislator has determined that one of the legal representatives must be evacuated together with the child that takes into consideration the age-specific needs of each child, which further affect their physiological and psychological health.

At the same time, the Ukrainian mechanism does not take into account the following points. Firstly, the existence of the legal status of minimally capable (0-14 years) and minors (14-18 years) and the different scope of rights and obligations of children of these age groups. Secondly, Ukrainian legislation still does not provide for a state support mechanism for those children with their legal representatives who have been forcibly evacuated after such evacuation. In such a situation, the child and his/her legal representative find themselves in new difficult life circumstances (lack of permanent housing, place of work and place of education, etc.)

As a result, we can conclude that the 'Ukrainian mechanism' of forced evacuation is definitely a positive step in the protection of children during armed conflict. However, it requires further improvement and harmonization with existing legal acts.

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