

Annex D.5

Elements of War Crimes

under the Rome Statute of the
International Criminal Court

Sources and Commentary

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'the population', clarifies that the perpetrator does not need to order the displacement of the whole civilian population. The situation in between these two extremes was not further discussed.

Element 2 resembles Element 3 of Art. 8(2)(b)(xii), and addresses the question as to whether the perpetrator had the authority or power to carry out the displacement. The drafters agreed – and this view was not contested by the Working Group on EOC when the text proposal was introduced with that explanation – that the formulation '[t]he perpetrator was in a position to effect such displacement by giving such order' would cover both *de iure* and *de facto* authority to carry out the order, so that the definition would cover the individual who, for example, has effective control of a situation by sheer strength of force.

Element 3 is based on the statutory language, which is derived from Art. 17(1) first sentence AP II. Although one might argue that the element could be superfluous in light of paragraph 6 of the General Introduction to the EOC document relating to the concept of 'unlawfulness', the PrepCom decided to state that '[s]uch order was not justified by the security of the civilians involved or by military necessity'. This departure from the approach taken in other cases¹ was justified by the fact that this requirement is explicitly mentioned in the Statute and should therefore be repeated.

Legal basis of the war crime

This offence is derived from Art. 17(1) first sentence AP II, which reads as follows:

The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand.

Remarks concerning the material elements

It appears that there are no judgments from the ICTY or the ICTR concerning this offence to date. From one decision of the ICTY under Rule 61, one may conclude that the Tribunal considers 'ethnic cleansing' as an example of unlawful displacement.² However, in this decision the Tribunal did not specifically point out the elements of this crime.

¹ For example in the case of Art. 8(2)(a)(vii)–1: Unlawful deportation, Art. 49(2) GC IV allows evacuations or displacements justified for exactly the same reasons, namely if justified for the security of the population or by imperative military reasons. These situations excluding unlawfulness are, however, not mentioned in the elements adopted.

² ICTY, Review of the Indictment, *The Prosecutor v. Radovan Karadzic and Ratko Mladic*, IT-95-5-R61 and IT-95-18-R61, 108 ILR 85 at 115–19.

The ICRC Commentary on Art. 17 AP II points out that

[p]aragraph 1 covers displacements of the civilian population as individuals or in groups within the territory of a Contracting Party where a conflict . . . is taking place.

This offence prohibits the forced displacement of the civilian population, except in exceptional circumstances of two kinds:

- Circumstances involving the security of the civilian population, and
- Circumstances involving imperative military reasons.

Art. 49(2) GC IV, applicable to evacuations in international armed conflicts, refers to the same circumstances. The indications given under sections 'Art. 8(2)(a)(vii)', subsection 'Unlawful deportation and transfer, Legal basis of the war crime' and 'Art. 8(2)(b)(viii)', subsection 'Legal basis of the war crime' may be useful as well for this offence.

In sum, the following indications were made under these sections:

- With respect to the security interests, '[i]f . . . an area is in danger as a result of military operations or is liable to be subjected to intense bombing', it may or must be evacuated 'partially or wholly, by placing the inhabitants in places of refuge'.³
- With respect to evacuations justified on the basis of imperative military reasons, the ICRC Commentary refers to situations 'when the presence of protected persons in an area hampers military operations' and overriding military considerations make the evacuation imperative.⁴

In general terms, military necessity as a ground for derogation from a rule always requires the most meticulous assessment of the circumstances. In this case, military necessity is qualified by referring to 'imperative military reasons'. The situation should be scrutinised most carefully, as the adjective 'imperative' reduces to a minimum cases in which displacement may be ordered.⁵

Clearly, imperative military reasons cannot be justified by political motives. For example, it would be prohibited to move a population in order to exercise more effective control over a dissident ethnic group.⁶

³ J. S. Pictet (ed.), *Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (ICRC, Geneva, 1958), Art. 147, p. 280.

⁴ *Ibid.*

⁵ S. Junod, 'Art. 17' in Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Martinus Nijhoff, Geneva, 1987), no. 4853.

⁶ *Ibid.*, no. 4854.

Elements of War Crimes under the Rome Statute of the International Criminal Court

The Elements of Crimes are intended to assist the International Criminal Court (ICC) in the interpretation and application of the articles of the ICC Statute defining the crimes under its jurisdiction. These will not only be of crucial importance for the future work of the ICC in interpreting the crimes provisions, but also for national courts, which have the primary responsibility in the prosecution of international crimes under the Rome Statute. This commentary provides a critical insight into the *travaux préparatoires* of the Preparatory Commission leading to the adoption of the elements of war crimes. It contains an analysis of existing case law related to each war crime in the Statute. The aim is to provide States, judges, prosecutors and international and national lawyers with the necessary background information to implement international humanitarian law in future cases dealing with war crimes under the ICC Statute. A unique, indispensable tool for anyone working in international criminal law.

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