Chapter 26

Displacement of Civilians as a War Crime Other than a Violation of Common Article 3 in Internal Armed Conflicts

Lindsay Moir

Introduction

Although Article 8(2)(e)(viii) of the Statute may appear partially similar to Article 8(2)(b)(viii), which deals with the transfer by an occupying power of parts of its own civilian population into occupied territory or the deportation or transfer of all or part of the population of the occupied territory, as another war crime in international armed conflicts, occupation is not a possibility in the context of internal armed conflict. The provision could not, therefore, simply be repeated. The text of Article 8(2)(e)(viii) is, instead, based directly on Article 17(1) of Additional Protocol II, which provides that, ‘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’.

Elements of the War Crime of Displacement of Civilians

The displacement of civilians has become a relatively common feature of modern internal armed conflict. It is therefore important to distinguish lawful acts of displacement, from unlawful. The ICTY, for example, has discussed the issue of ethnic cleansing, including sexual assaults as ethnic cleansing in ‘an effort to displace civilians’. It offered no guidance, however, regarding the particular elements of the

1 Bothe, ‘War Crimes’, 423, and Zimmerman, ‘War Crimes’, 281, describe Article 8(2)(b)(viii) and (e)(viii) as either ‘parallel’ or ‘related’. Kittichaisaree, International Criminal Law, 203, however, argues that Article 8(2)(e)(viii) is the only war crime in (e) with ‘no comparable provision in Article 8(2)(b)’.

2 Zimmerman suggests, ibid., 281, that Article 17 was itself based upon Article 49 of Geneva Convention IV, providing in paragraph 2 that, ‘the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand’. The second sentence of Article 17(1) further requires that, ‘Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.’ Dörmann, Elements of War Crimes, 475, sees this as an ‘additional element for determining the lawfulness of evacuation’. Special provision for children is made in Article 43(e) of Additional Protocol II.

3 Zimmerman, ibid.

4 Prosecutor v. Radovan Karadžić & Ratko Mladić, Review of the Indictments Pursuant
crime.\(^5\) In the context of the ICC Statute, they have now been specified as follows:

The perpetrator ordered a displacement of a civilian population.
Such order was not justified by the security of the civilians involved or by military necessity.
The perpetrator was in a position to effect such displacement by giving such order.

...  

A. The requirement of an order to displace

A number of issues arise from these elements. First, and reflecting the provisions of the Statute, it is evident that the crime is committed by the individual ordering the displacement rather than those carrying out the displacement. Of course, displacement does not occur simply because an order is given, but those involved in carrying out the order may incur criminal responsibility for their participation in the crime under Article 25 of the Statute.\(^6\)

In addition, the requirement that displacement be ordered means that only those acts specifically aimed at the removal of a civilian population will be criminal (at least in the context of Article 8(2)(e)(viii)). Orders which may lead to displacement only indirectly are not, accordingly, covered by this particular provision.\(^7\) As a further corollary, and in conformity with element 3 of Articles 8(2)(b)(xii) and (e)(x), element 3 requires that the perpetrator of the offence actually had sufficient authority – either \emph{de jure} or \emph{de facto} – to give the order and for that to result in the commission of the act.\(^8\)

B. The target group: ‘civilian population’ or ‘one or more persons’

Secondly, element 1 refers to the displacement of ‘a civilian population’. This contrasts slightly with the language of the Statute, which refers to ‘the’ civilian population, and can probably be taken to indicate that the removal of the entire civilian population is not required.\(^9\) There is, nonetheless, a minimum threshold that must be reached in order for an order to be criminal in this context. Thus, Zimmerman and Dörmann point to the differences between element 1 of this crime, element 1 of Article 8(2)(a)(vii)–1, which refers to the deportation or transfer of ‘one or more persons’, and Article 17(2) of Additional Protocol II, which refers simply to ‘civilians’,