

THE EVACUATION OF EASTERN ALEPPO: FORCED DISPLACEMENT UNDER INTERNATIONAL LAW?

Matt Brown

ICD Brief 25
January 2019



www.internationalcrimesdatabase.org

ABSTRACT

The Syrian conflict has raised many legal issues that pose new questions for international lawyers. The evacuation of civilians from Eastern Aleppo raises the question of whether this evacuation should be examined from the viewpoint not of an evacuation, but of the crime of forced displacement. With Syrian forces launching months of attacks to counter rebel forces in Aleppo, they have ultimately regained Eastern Aleppo under their control. However, this success has come at a tremendous civilian cost, with allegations that their military campaign focused excessively upon targeting civilian areas. This Brief will examine whether there is a causal link between this military campaign and the subsequent displacement of civilians from Eastern Aleppo. Notably, whether in light of this link the actions of Syrian forces satisfy the requirement for the crime of forced displacement as either a crime against humanity or as a war crime. In turning attention from the humanitarian issue of the evacuation to the potentially criminal nature of the conduct that forced this displacement, this Brief will provide a new perspective on a critical aspect of the Syrian conflict.

INTRODUCTION

Since 2011, the Syrian conflict has seen numerous examples of alleged war crimes and crimes against humanity.¹ The breadth of allegations against the Syrian government and opposition forces has led to extensive academic scrutiny. This Brief will focus on the single issue of the civilian evacuation from the city of Aleppo, asking whether this can be viewed as the crime of forced displacement.

The evacuation of civilians from Eastern Aleppo followed a continued bombardment by Syrian forces of Aleppo (with the support of Russian airstrikes),² undertaken with the justification of recapturing the city from ISIS.³ However, the targeting of civilian objects, including schools and hospitals,⁴ and the high civilian death toll, have led to international outcry. With that in mind, on 15 December 2016, an agreement was signed for the evacuation of civilians from rebel-held areas of Aleppo,⁵ and within a week 35,000 civilians had been evacuated.⁶ During this evacuation, attention focused mainly upon the human tales of suffering and attempts of the international community to rescue the remaining civilians from Aleppo. Amidst this focus on the *evacuation*, there has been less attention focused on the *circumstances* that led to the evacuation being required. This Brief therefore seeks to provide an examination of whether the bombardment of Aleppo that led to the evacuation amounts to a situation that can be described as the crime of forced displacement as defined under international law.⁷ The structure of this Brief therefore serves to answer the following research question:

'Whether the actions of the Syrian government in Aleppo can be qualified as the crime of forced displacement under international law.'

This Brief adopts the following structure; Section 1 provides an overview of the situation in Aleppo, outlining the classification of the Syrian conflict. In Section 2, the Brief outlines the applicable law of forced displacement, and in Section 3, the legal framework is applied to the situation in Aleppo to answer whether the actions of parties to

¹ Pari Ibrahim, Laurie Adams, 'It was Genocide With a Template. We Must Seek Justice For The Yazidi People' (*The Guardian*, 4 August 2016) <<https://www.theguardian.com/global-development-professionals-network/2016/aug/04/genocide-yazidi-isis-murderers-tried>>.

² Independent International Commission of Inquiry on the Syrian Arab Republic, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (A/HRC/34/64) Human Rights Council (2 February 2017); Martin Chulov, 'Forced Evacuation of East Aleppo was War Crime, says UN' (*The Guardian*, 1 March 2017) <<https://www.theguardian.com/world/2017/mar/01/syrian-regime-aleppo-airstrike-aid-convoy-united-nations-report>>.

³ John Davison, Tom Perry, 'Syrian Army Says it Will Press On Against Islamic State Near Aleppo' (*Reuters*, 2 February 2017) <<http://www.reuters.com/article/us-mideast-crisis-syria-army-idUSKBN15H0VB>>.

⁴ Angela Dewan, Steve Visser, Kareem Khadder and Merieme Ari 'Syria: Aleppo Pounded by 'Heaviest Bombardment' Since War Began' (CNN, 21 November 2016) <<http://edition.cnn.com/2016/11/20/middleeast/syria-aleppo-airstrikes/>>.

⁵ Sheena McKenzie, 'Evacuation Agreement Reached in Aleppo, Rebel Group Say' (CNN, 18 December 2016) <<http://edition.cnn.com/2016/12/17/middleeast/aleppo-syria-evacuation-agreement-reached/>>.

⁶ United Nations, 'At Security Council, UN Humanitarian Official Flags 'Catastrophic' Situation in Syria Despite Eastern Aleppo Evacuations' (UN News, 23 December 2016) <<http://www.un.org/apps/news/story.asp?NewsID=55873#.WL7hAPK B44U>>.

Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 Article 7(1)(d), Article 8(2)(e)(viii).

the Syrian conflict could amount to the crime of forced displacement. This Brief will not examine the broader Syrian situation or the individual criminal responsibility of any individual.

I. THE SYRIAN CONFLICTS

1.1 Conflict Classification

The purpose of this section is to classify the Syrian conflict within the framework of international humanitarian law (IHL). It will begin with an explanation of international and non-international armed conflicts (IACs and NIACs respectively) and then continue with an application of this legal framework to the Syrian conflict.

International Armed Conflict (IAC)

Common Article 2 of the 1949 Geneva Conventions defines an IAC, stating that the present Convention shall apply to “all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties even if the state of war is not recognised by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.”⁸

Non-International Armed Conflict (NIAC)

The ICRC notes that a NIAC consists of “protracted armed confrontations occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State [party to the Geneva Conventions].”⁹ The ICTY in *Tadić* clarified the term *protracted armed violence between organised parties*, as including (i) the intensity of violence, and (ii) the requirement of organisational capacity among the parties to the conflict;¹⁰ a finding supported by subsequent jurisprudence.¹¹ The following sub-sections will analyse these terms to establish their contemporary definition.

⁸ Common Article 2 to the Geneva Conventions (12 August 1949).

⁹ ICRC, ‘How is the Term “Armed Conflict” Defined in International Humanitarian Law?’ (Opinion Paper, 2008) <<https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>>.

¹⁰ *Prosecutor v Dusko Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-A (2 October 1995) [70].

¹¹ *Prosecutor v Ljube Boškoski* (Judgment) IT-04-82-T (10 July 2008) [175]; *Prosecutor v Jean-Paul Akayesu* (Judgment) ICTR-96-4-T (2 September 1998) [620]; *Prosecutor v Georges Rutaganda* (Judgment) ICTR-96-3 (6 December 1999) [93].

Intensity

This requirement has been interpreted to include a broad range of factors, among others, civilians being forced to flee,¹² being expelled,¹³ threatened,¹⁴ or displaced,¹⁵ as well as the spread of clashes being over territory and over a period of time,¹⁶ and whether the conflict has been addressed by the United Nations Security Council.¹⁷ On the relationship between intensity and duration, the 2016 ICRC Commentary of Common Article 3 and the *Haradinaj* trial judgment of the ICTY highlight that the “criterion of protracted armed violence has [...] been interpreted in practice as referring more to the intensity of the armed violence than to its duration.”¹⁸

Organisational Requirement

Second, the non-state armed group(s) (NSAG(s)) in question must be considered as “parties to the conflict”, requiring that they possess organised armed forces.¹⁹ This can be evidenced by a range of “convenient criteria”, which are indicative of sufficient organisation,²⁰ including: the degree of command structure,²¹ the capacity to sustain military operations,²² and that “at a minimum [it has] the ability to exercise some control over its members so that the basic obligations of Common Article 3 may be implemented.”²³ In interpreting the threshold of organised, a flexible application has been preferred.²⁴ To emphasise, control of territory is not a requirement to constitute a party to a NIAC, although it is a jurisdictional threshold for the application of Additional Protocol II.²⁵

With the definition of an IAC and NIAC outlined, this Brief now moves on to define the exact nature of the Syrian conflict(s).

¹² *Prosecutor v Dario Kordić and Mario Čerkez* (Judgment) IT-95-14/2-A (17 December 2004) [340].

¹³ *Prosecutor v Duško Tadić* (Judgment) IT-94-1-T (7 May 1997) [562-565].

¹⁴ *Prosecutor v Fatmir Limaj et al* (Judgment) IT-03-66-T (30 November 2005) [139].

¹⁵ *Prosecutor v Ramush Haradinaj et al* (Judgment) IT-04-84-T (3 April 2008) [97]; ICRC, ‘Commentary of the Geneva Conventions, CA3’ (2016, ICRC) [441] <<https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D004BA0EC>>.

¹⁶ *Prosecutor v Thomas Lubanga Dyilo* (Trial Judgment) ICC-01/04-01/06 (12 March 2012) [538]; *Prosecutor v Zejnil Delalic et al* (Judgment) IT-96-21-A (20 February 2001) [186]; Supra note 12 *Kordić and Čerkez Judgment* [340].

¹⁷ Supra note 16, *Lubanga Judgment* [538]; Supra note 11, *Boškoski Judgment* [177]; Supra note 15 *Haradinaj Judgment* [49].

¹⁸ Supra note 15, *Haradinaj Judgment* [49]. ICRC, ‘Commentary of the Geneva Conventions, Common Article 3’ (2016, ICRC) [44].

¹⁹ Supra note 14, *Limaj Judgment* [134].

²⁰ Supra note 11, *Boškoski Judgment* [192]; Supra note 14, *Limaj Judgment* [87]; Sir Christopher Greenwood, ‘Scope of Application of IHL’ in D Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflict* (OUP, 1995), 48; Knut Dormann, *Elements of War Crimes under the Rome Statute: Sources and Commentary*, (CUP / ICRC, 2003) 387.

²¹ *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (Confirmation of Charges) ICC-01/04-01/07 (30 September 2008) [239]; *Prosecutor v Jean-Pierre Bemba Gombo* (Confirmation of Charges) ICC-01/05-01/08 (15 June 2009) [234].

²² Supra note 16, *Lubanga Judgment* [506].

²³ Supra note 16, *Lubanga Judgment* [506]; Supra note 11, *Boškoski et al Judgment* [196].

²⁴ Supra note 16, *Lubanga Judgment* [539].

²⁵ Supra note 16, *Lubanga Judgment* [536].

1.2 Classifying the Syrian Conflict

In determining the legal nature of the Syrian conflict, the jurisprudence outlined above would appear to give a clear set of rules by which to determine the nature of the armed conflict(s) in Syria. But this formulaic approach to defining the armed conflict in Syria has in fact led to disagreement between scholars on whether an IAC exists in part within the Syrian conflict,²⁶ whether distinguishable NIACs are found,²⁷ or whether to treat the entire situation as one single NIAC.²⁸ In short, as this Brief is focused on the evacuation of civilians from Aleppo, the conflict classification of a NIAC relates to the circumstances in which the allegations of forced displacement arise.

The basis for this conclusion is that the Syrian conflict represents *protracted armed violence* between the governmental authority of Syria and NSAGs, who have demonstrated sufficient organisational capacity.²⁹ The applicable law is restricted to Common Article 3, and customary international law, as Syria is not a party to Additional Protocol II.

This section has thus established that the alleged conduct of forced displacement occurred during a NIAC. The following section will now seek to outline the law of forced displacement that pertains to NIACs, using the Rome Statute to outline the elements of a potential charge of either a crime against humanity under Article 7(1)(d), or as a war crime under Article 8(2)(e)(viii).

II. THE LAW OF FORCED DISPLACEMENT

2.1 Crimes Against Humanity

Contextual elements

The Rome Statute of the International Criminal Court (hereinafter: Rome Statute), in Article 7, is clear in defining crimes against humanity as (i) any act directed against any civilian population, (ii) committed as part of a widespread or systematic attack, (iii) pursuant to, or in furtherance of a state or organisational policy, (iv) committed with knowledge of the attack.³⁰

²⁶ Dapo Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts' in E Wilmshurst (ed), *International Law and the Classification of Conflicts* (OUP, 2012); Dapo Akande, 'When Does the Use of Force Against a Non-State Armed Group Trigger an International Armed Conflict and Why Does This Matter?' *EJIL*, 2016 <<http://www.ejiltalk.org/when-does-the-use-of-force-against-a-non-state-armed-group-trigger-an-international-armed-conflict-and-why-does-this-matter>>; Adil Ahmad Haque 'The United States is at War with Syria (according to the ICRC's New Geneva Convention Commentary)' (*EJIL*, 2016) <<http://www.ejiltalk.org/the-united-states-is-at-war-with-syria-according-to-the-icrcs-new-geneva-convention-commentary/>>. Supra note 15, *ICRC Commentary* [262].

²⁷ Supra note 15, *ICRC Commentary* [261].

²⁸ Terry Gill, 'Classifying the Conflict in Syria' (2016) 92 *International Legal Studies US Naval War College* 353, 375.

²⁹ BBC News, Guide to the Syrian rebels (BBC News, 13 December 2013) <<http://www.bbc.com/news/world-middle-east-24403003>>.

³⁰ Supra note 7, Rome Statute, Article 7(1).

Defining these requirements, attack as defined in Article 7 consists of a course of conduct involving the multiple commission of acts referred to in Article 7(1).³¹ This attack must be against a civilian population,³² with the expression “directed against” specifying that the civilian population is the primary object of attack.³³ The use of the term “any”,³⁴ additionally implies a liberal approach to defining civilian population,³⁵ as can be seen by the lack of any discriminatory intent. Indeed, the only requirement is that the attack be directed against civilians sharing a common characteristic,³⁶ with the ICC frequently using Article 50(1) AP I to define the term “civilian”.³⁷

The widespread or systematic requirement of Article 7(1) emphasises the disjunctive nature of the requirement. Importantly, it is the overall attack, not the individual acts, that must be widespread or systematic.³⁸ Widespread refers to large-scale action carried out with considerable seriousness and directed against multiple victims,³⁹ over a large geographical area.⁴⁰ An attack is likewise systematic in nature when it is organised,⁴¹ relies upon substantial public or private resources,⁴² and can be distinguished by the improbability of its random occurrence.⁴³

In respect to a State’s organisational policy, there is no need for it to be formalised, so long as the acts themselves are not spontaneous or isolated acts of violence.⁴⁴ Unlike with war crimes, crimes against humanity do not require an armed conflict nexus. The following section will now outline the particular elements of a possible Article 7(1)(d) charge of deportation or forcible transfer.

Article 7(1)(d) - Deportation or forcible transfer of population

Article 7(1)(d) of the Rome Statute offers a potential avenue for the prosecution of forced displacement. In applying Article 21 of the Rome Statute, which outlines the sources of law considered by the Court, we first turn to the Statute’s definition found in Article 7(2)(d) noting that although not explicitly referring to forced displacement as the crime itself, “[d]eportation or forcible transfer of population” means the “forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds

³¹ Ibid, Article 7(2)(a).

³² Supra note 7, Rome Statute, Article 7(1).

³³ *Situation in The Republic of Kenya* (Decision Pursuant to Article 15) ICC-01/09 (31 March 2010) [82].

³⁴ Supra note 7, Rome Statute, Article 7(1).

³⁵ *Prosecutor v Germain Katanga* (Judgment pursuant to article 74 of the Statute) ICC-01/04-01/07 (7 March 2014) [1103].

³⁶ *Prosecutor v William Ruto et al* (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute) ICC-01/09-01/11 (23 January 2012) [164].

³⁷ Supra note 33, *Kenya Situation* [82]; Supra note 21, *Bemba Gombo Confirmation of Charges* [78].

³⁸ Supra note 33, *Kenya Situation* [82]; Supra note 21, *Bemba Gombo Confirmation of Charges* [94].

³⁹ Supra note 21, *Bemba Gombo Confirmation of Charges* [83]; Supra note 21, *Katanga Confirmation of Charges* [395].

⁴⁰ Supra note 21, *Bemba Gombo Confirmation of Charges* [83].

⁴¹ *Prosecutor v Omar Al Bashir* (Decision on the Prosecution’s Application for a Warrant of Arrest Against Al Bashir) ICC-02/05-01/09 (4 March 2009) [81]; Supra note 21 *Katanga Confirmation of Charges* [396].

⁴² Supra note 33, *Kenya Situation* [96]; Supra note 21 *Katanga Confirmation of Charges* (30 September 2008) [396].

⁴³ Supra note 33, *Kenya Situation* [96]; *Prosecutor v Laurent Gbagbo Confirmation of Charges* ICC-02/11-01/11 (12 June 2014) [223].

⁴⁴ Supra note 21, *Katanga Confirmation of Charges* [396].

permitted under international law".⁴⁵ The following section will focus on the important distinction between these two terms to lay the ground for Section 3's application to the facts.

The ICTY's Appeals Chamber in *Stakić* highlighted this distinction, noting that deportation requires forced displacement by "expulsion or other forms of coercion from the area in which they are lawfully present, across a *de jure* State border or, in certain circumstances, a *de facto* border".⁴⁶ The *Krnojelac* Trial Judgement supports this by holding that "[d]eportation requires the displacement of persons across a national border, to be distinguished from forcible transfer which may take place *within national boundaries*".⁴⁷ (emphasis added). Jurisprudence,⁴⁸ including the ICC's Pre Trial Chamber's finding that the "two separate crimes are distinguished from each other by the destination of the forced displacement.",⁴⁹ in addition to the International Law Commission (ILC)⁵⁰ and academic commentary, support this. In particular, Triffterer's commentary notes that although the Rome Statute does not expressly distinguish between deportation and forcible transfer, it is likely that the usual distinction was intended.⁵¹ The implied distinction between Article 17(1) and Article 17(2) of Additional Protocol II also underlines the distinction, with Article (17)(2) emphasising the cross border element of leaving their own territory.⁵²

The Perpetrator Deported or Forcibly Transferred by Expulsion or Other Coercive Acts

The Elements of Crimes note that the term forcibly is "not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment."⁵³ The *Simić* Trial Chamber concurred, noting that: the essential element is that the "displacement be involuntary in nature, [and that] the relevant persons had no real choice". In other words, a civilian is involuntarily displaced if he is "not faced with a genuine choice as to whether to leave or to remain in the area".⁵⁴

As noted by the *Krnojelac* Trial Chamber, consent induced by force or threat of force should not be considered to be real consent.⁵⁵ Likewise, in *Prlić*, the Trial Chamber held that "the mere threat of resorting to force or physical or mental coercion may be enough, if the targeted population facing this coercive climate or these threats, has no

⁴⁵ Supra note 7, Rome Statute, Article 7(2)(d).

⁴⁶ *Prosecutor v Milomir Stakić* (Judgment) IT-97-24-A (22 March 2006) [284-285].

⁴⁷ Supra note 45, *Krnojelac Judgment* [474].

⁴⁸ *Prosecutor v Vidoje Blagojević & Dragan Jokić* (Judgment) IT-02-60-T (17 January 2005) [595].

⁴⁹ Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute" ICC-RoC46(3)-01/18 (6 September 2018) [55].

⁵⁰ International Law Commission 1996 'Draft Code of Crimes Against the Peace and Security of Mankind - Commentary to the Code,' (1996) Article 18 [13].

⁵¹ Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court* (Hart, 2008) Article 7 [47].

⁵² *Prosecutor v Slobodan Milošević* (Decision on Motion for Judgment of Acquittal) IT-02-54-T (16 June 2004) [56].

⁵³ Elements of Crimes, Article 7(1)(d).

⁵⁴ *Prosecutor v Milan Simić* (Judgment) IT-95-9-T (17 October 2003) [125-126].

⁵⁵ *Prosecutor v Milorad Krnojelac* (Judgment) IT-97-25-A (7 September 2003) [229]; *Prosecutor v Naletilić & Martinović* (Judgment) IT-98-34-T (31 March 2003) [519].

other choice but to leave its territory. It is the absence of genuine choice that renders removal unlawful.”⁵⁶ In *Ruto and Sang*, the ICC’s Pre-Trial Chamber II noted that “one or more acts that the perpetrator has performed [must have] produced the effect to deport or forcibly transfer the victim”.⁵⁷ The crime therefore requires “a link between the conduct and the resulting effect of forcing the victim to leave.”⁵⁸

Without grounds permitted under international law

Under Article 7(2)(d), deportation or forcible transfer “without grounds permitted under international law” relates to the power of States to “restrict the freedom of nationals and aliens who are lawfully present” to move within their territory.⁵⁹ However, if the transfer took place within an armed conflict, the *Kunarac* Appeals Chamber noted that “to the extent that the alleged crimes against humanity were committed in the course of an armed conflict, the laws of war provide a benchmark against which the Chamber may assess the nature of the attack and the legality of the acts committed.”⁶⁰ The precise interpretation of this provision remains a subject for further legal discourse.

Lawfully Present

The Elements of Crimes repeat the language found in Article 7(2)(d), therefore leaving the interpretation of the term *lawfully present* to the adjudication of the Court. For a potential guide, the *Popović* Trial Chamber noted that:

“What is important is that the protection is provided to those who have, for whatever reason, come to “live” in the community—whether long term or temporarily [...]. [T]he requirement for lawful presence is intended to exclude only those situations where the individuals are occupying houses or premises unlawfully or illegally and not to impose a requirement for “residency”.⁶¹

In interpreting this quote, it suggests a liberal definition of the threshold of lawfully present.

Mens Rea

The Elements of Crimes outline that “the perpetrator [must be] aware of the factual circumstances that established the lawfulness of such presence.” Also, that “the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.”⁶² With the elements of Article 7(1)(d) outlined, attention now turns to Article 8(2)(e)(viii).

⁵⁶ *Prosecutor v Prlić* (Judgment) IT-04-74-T (29 May 2013) [50].

⁵⁷ Supra note 36, *Ruto et al Confirmation of Charges* [245].

⁵⁸ *Ibid.*

⁵⁹ Supra note 51, *Triffterer*, Article 7(2)(d) [129].

⁶⁰ *Prosecutor v Dragoljub Kunarac* (Judgment) IT-96-23 & IT-96-23/1-A (22 February 2001) [91].

⁶¹ *Prosecutor v Vujadin Popović et al* (Judgment) IT-05-88-T (10 June 2010) [900].

⁶² Supra note 53, Article 7(1)(d).

2.2 War crimes – Article 8(2)(e)(viii)

Contextual Elements

Briefly stated: for conduct to be considered as a war crime, there must be a nexus to an armed conflict. Article 8(1) also notes that the Court shall have jurisdiction “in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.”⁶³

2.2.2 Article 8(2)(e)(viii)

Article 8(2)(e)(viii) of the Rome Statute prohibits ‘order[ing] the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand’.⁶⁴ The origins of this provision can be traced to Article 17(1) AP II, which outlines that “[t]he 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.”⁶⁵ Unlike with a charge under Article 7(1)(d), there is no *either/or* requirement, depending on whether those displaced cross a state border.

Ordering the displacement of the civilian population for reasons related to the conflict

An ordinary reading of the term “ordering” in Article 8(2)(e)(viii) would mean that a specific order to displace a civilian population is required. Indeed, despite the desirability of ignoring the term *ordering*, Elvina Pothelet highlights that we cannot “ignore the fact that states agreed to adopt the specific wording of “order” in AP II in 1977 and that they again decided to keep this as a specific requirement in the ICC Statute and in the ICC Elements of Crimes.”⁶⁶ In applying this approach, acts that do not contain such an explicit act, but lead to the same result, such as the intentional starvation of the civilian population in order to force them to leave a certain area, are not prohibited by Article 8(2)(e)(viii).⁶⁷

In response to Pothelet’s point,⁶⁸ three arguments can be raised.

⁶³ Supra note 7, Rome Statute, Article 8(1).

⁶⁴ Supra note 7, Rome Statute, Article 8(2)(e)(viii).

⁶⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (adopted 7 June 1977) (entered into force 7 December 1978) Article 17 (1).

⁶⁶ Elvina Pothelet, ‘The Evacuation of Eastern Aleppo: Humanitarian Obligation or War Crime (*EJIL Talk*, 14 March 2017) <<http://www.ejiltalk.org/the-evacuation-of-eastern-aleppo-humanitarianobligation-or-war-crime/comment-page-1/#comment-250452>>.

⁶⁷ *Prosecutor v Gotovina* (Preliminary Motion Challenging Jurisdiction Pursuant to Rule 72(A)(i) of the Rules of Procedure and Evidence) IT-06-90-PT (18 January 2007) [7–9].

⁶⁸ Also see Vincent Chetail, ‘Geneva Convention IV’ in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds) *The 1949 Geneva Conventions: A Commentary* (OUP, 2016); Ryszard Piotrowicz, ‘Displacement and displaced persons’ in Elizabeth Wilmshurst, Susan Breau (eds) *Perspectives on the ICRC Study on Customary International Humanitarian Law* (CUP, 2009) 347.

First, despite the strict wording of the Rome Statute, the ICC's Pre-Trial Chamber in *Ntaganda* concluded that "the conduct by which the perpetrator(s) force(s) civilians to leave a certain area is not limited to an order, as referred to in element 1 of the relevant Elements of Crimes [...]. [S]hould that be the case, the actual circumstances of civilian displacement in the course of an armed conflict would be *unduly restricted*".⁶⁹ (emphasis added)

A second argument can be advanced, that given the harmonisation of the law of armed conflict between IACs and NIACs, it remains startling that the similar crime under Article 8(2)(vii) of the Rome Statute makes no reference to the requirement of ordering, yet Article 8(2)(e)(viii) does. Far from ignoring the intent of the drafters, however, it is permissible to assess the broader context of the Statute, through applying Vienna Convention on the Law of Treaties (VCLT) Article 31(2).⁷⁰ In drawing on Article 8(2)(vii), an argument can be advanced that the term ordering should not be viewed as a rigid element of the crime, given that the clear intent of the drafters with respect to Article 8(2)(vii) was not to include an ordering requirement. This approach therefore places focus on the coercive aspect of the crime over a strict interpretation of how that coercion was created.

Thirdly, one can invoke Article 31(3)(b) VCLT that permits the interpretation of treaties to be undertaken "together with the context [...] [and] any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."⁷¹ A study of military manuals reveals that even where States have adopted Article 8(2)(e)(viii) directly into their criminal legislation, for example the Canadian Crimes Against Humanity and War Crimes Act 2000,⁷² their military manuals subsequently prohibit forced displacement in NIACs without requiring that it be ordered.⁷³ Other military manuals from Burundi and South Africa to Spain and others, place their emphasis solely on the forcible nature,⁷⁴ over a direct order. National legislation from Colombia among many others also punishes "anyone who, during an armed conflict, without military justification, deports, expels or carries out a forced transfer or displacement of the civilian population from its own territory."⁷⁵ Given that states have interpreted the prohibition as not requiring a specific order, a narrower interpretation would therefore stand in contrast to the customary understanding of the term. An agreement signed between the Government of the

⁶⁹ *Prosecutor v Bosco Ntaganda* (Confirmation of Charges) ICC-01/04-02/06 (9 June 2016) [64].

⁷⁰ Vienna Convention on the Law of Treaties (adopted 22 May 1969) (entered into force 27 January 1980) 1155 UNTS 331, Article 31(2).

⁷¹ Ibid, VCLT, Article 31(3)(b).

⁷² Canadian Crimes Against Humanity and War Crimes Act 2000, S.C. 2000, c 24, 26.

⁷³ Canada, The Law of Armed Conflict at the Operational and Tactical Levels, Office of the Judge Advocate General, 13 August 2001 § 1724.

⁷⁴ Règlement no.98 sur le droit humanitaire, Ministre de la Défense Nationale et des Anciens Combattants, Project 'Moralisation' (BDI/B-05) August 2007, Part I bis p 27; Presentation of the South African Approach to IHL, Appendix A, Chapter 4: IHL (The Law of Armed Conflict) National Defence Force, 1996 § 40; Orientaciones, El Derecho de los Conflictos Armados, Publicación OR7-004, 2 Tomos, Aprobado por el Estado Mayor del Ejercito, División de Operaciones, 18 March 1996, Vol I, § 5.5.c. (5); ICRC 'Practice Relating to Rule 129. The Act of Displacement' <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule129>.

⁷⁵ Colombia, Penal Code 2000. Article 159.

Philippines and the National Democratic Front, also emphasises that “practices that cause or allow the forcible evacuations or forcible reconcentration of civilians shall be prohibited,” irrespective of the lack of an order.⁷⁶

Accordingly, despite what may seem as the clear-cut wording of the Rome Statute, the Court itself in the above mentioned *Ntaganda* case, along with states’ interpretation evidences a consistent position that the war crime of forced displacement can be committed without a direct order to do so.

When the Security of the Civilians Involved or Imperative Military Reasons Demand

As noted, there is a distinction between the exceptions granted under Article 7 and Article 8 of the Rome Statute. Article 8(2)(e)(viii) highlights the exception to the illegality of forced displacement “[w]hen the security of civilians involved or imperative military reasons so demand.”⁷⁷ Illustrating that there are strictly limited grounds permitted to displace civilians during a NIAC, the ICTY Trial Chamber in *Simic* noted that “in view of the drastic nature of a forced displacement of persons, recourse to such measures would only be lawful in the gravest of circumstances and only as measures of last resort.”⁷⁸ Where such legitimate reasons exist, then this becomes a legitimate evacuation of civilians.

Two key factors must be assessed to determine the legitimacy of the evacuation. First, the burden of proof (in our case) remains upon the Syrian government to prove that overriding military reasons made the evacuation imperative. The Commentary to the Additional Protocols illustrates that the adjective *imperative* “reduces to a minimum, cases in which displacement may be ordered,”⁷⁹ and that political considerations cannot be used.⁸⁰ Second, the Commentary outlines that should such displacement be necessary, 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.⁸¹

Mens Rea

Finally, the perpetrator must be aware of factual circumstances that established the existence of an armed conflict and aware of the factual circumstances that established the protected status of the victims.⁸²

⁷⁶ Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law between the Government of the Republic of the Philippines and the National Democratic Front of the Philippines, The Hague, 16 March 1998, Part IV, Article 3(7).

⁷⁷ Supra note 7, Rome Statute, Article 8(2)(e)(viii).

⁷⁸ Supra note 54, *Simic* [125] ft 218.

⁷⁹ 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* (Geneva 1987) 1472–3 [4853].

⁸⁰ Ibid [4854].

⁸¹ Ibid [4856].

⁸² Supra note 53, Article 7(1)(d).

This section has outlined the law of forced displacement, including the elements that would need to be satisfied for a successful prosecution under either Article 7(1)(d) or Article 8(2)(e)(viii). The following section will now seek to apply the factual situation of the Aleppo evacuation to the law of forced displacement to assess the viability of a prosecution under either charge.

III. ALEPO: A POTENTIAL CASE OF FORCED DISPLACEMENT AS A CRIME UNDER INTERNATIONAL LAW

The ICRC has stated that they assisted in the evacuation of 35,000 people from Eastern Aleppo in just four days.⁸³ Before this evacuation, thousands more had fled amid hostilities.⁸⁴ The following section will therefore apply the situation in Aleppo against the aforementioned Elements of Crimes. To clarify, this assessment views the potential act of forced displacement as being committed by Syrian governmental officials, for creating the environment in which civilians felt compelled to leave. It does not view the displacement as being the fault of those who brokered or signed the evacuation agreement. With that in mind, the following sub-section will outline how the elements of Article 7(1)(d) are satisfied.

3.1 Article 7(1)(d) - Deportation or Forceable Transfer of Population

Contextual Elements

With respect to the contextual elements, the campaign launched by Syrian forces in Eastern Aleppo⁸⁵ was an organised state policy. A legitimate question could be raised as to whether the civilian population was the primary object of the attack,⁸⁶ or merely an “incidental victim of the attack”.⁸⁷ Given the means and methods used in Aleppo,⁸⁸ which are alleged to include “killing people, including women and children, on the spot in their homes and on the street,”⁸⁹ there is at least a reasonable basis to believe that the civilian population was the object of the attack.

⁸³ ICRC, ‘Syria: Aleppo Evacuation Completed’ (*ICRC Newsletter*, 2016) <<http://www.redcross.org.uk/About-us/News/2016/December/Syria-Aleppo-evacuation-completed>>.

⁸⁴ Damien McElroy, ‘Syria: Refugees Tell of the Horrors of the Flight from Aleppo’ (*The Telegraph*, 30 July 2012) <<http://www.telegraph.co.uk/news/worldnews/middleeast/syria/9439454/Syria-refugees-tell-of-the-horrors-of-the-flight-from-Aleppo.html>>.

⁸⁵ Human Rights Watch ‘Russia/Syria: War Crimes in Month of Bombing Aleppo’ (*HRW*, 1 December 2016) <<https://www.hrw.org/news/2016/12/01/russia/syria-war-crimes-month-bombing-aleppo>>.

⁸⁶ Supra note 60, *Kunarac Judgment* [91].

⁸⁷ Supra note 21, *Bemba Gombo Confirmation of Charges* [76].

⁸⁸ Supra note 60, *Kunarac Judgment* [91].

⁸⁹ BBC News, ‘Aleppo Battle: UN Says civilians Shot On the Spot’ (*BBC News*, 13 December 2017) <<http://www.bbc.com/news/world-middle-east-38301629>>.

Even if legitimate opposition targets were based in Aleppo,⁹⁰ “a population remains civilian in nature even if there are individuals within it who are not civilians, as long as the population is predominantly civilian.”⁹¹ In this author’s opinion, the overall attack amounts to one of a widespread nature, having targeted multiple victims, with considerable seriousness across a large geographical area.⁹² The attack’s systematic nature is also satisfied by reference to the substantial resources employed and its organised nature.⁹³ This organisation and use of state resources in a specific area similarly evidences a state policy, beyond “spontaneous or isolated acts of violence”.⁹⁴

Article 7(1)(d) - Deportation or Forcible Transfer of Population

In this case, some of those who fled Aleppo following the attack have remained within Syria, whilst others have sought refuge in other neighbouring countries or beyond. In recalling that “[d]eportation requires the displacement of persons across a national border, to be distinguished from forcible transfer which may take place within national boundaries”,⁹⁵ it is possible that under Article 7(1)(d) a charge of either deportation or forcible transfer could be brought, although arguably a charge of forcible transfer would reduce the need to demonstrate a further element.

The Perpetrator Deported or Forcibly Transferred by Expulsion or Other Coercive Acts

By recalling that the Elements of Crimes state that “forcible” “may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power”⁹⁶ the state policy does not need to satisfy a high threshold image of commissioned armed gangs entering house to house to forcibly transfer or deport civilians. The Trial Chamber in *Simić* noted that in assessing whether displacement was forced, the focus should be on the person’s “genuine intention”.⁹⁷ If the person does not face a “real choice” and would have happily stayed in the area “absent circumstances of discrimination or persecution”,⁹⁸ then a picture of the forced nature of his/her displacement can be constructed. The *Simić* Trial Chamber even emphasised that acts including the shelling of civilian objects, the burning of civilian property, and the commission or the threat to commit other crimes “calculated to terrify the population and make them flee the area with no hope of return”⁹⁹ amount to forcing the displacement of civilians.

⁹⁰ BBC News ‘Syrian War: Assad Says Aleppo Bombing was Justified’ (BBC News, 9 January 2017) <<http://www.bbc.co.uk/news/world-middle-east-38552913>>.

⁹¹ *Prosecutor v Bemba Gombo* (Trial Judgment) ICC-01/05-01/08 (21 March 2016) [153]; Supra note 35, *Katanga Judgment*, [1105].

⁹² Amnesty International ‘Syria: ‘Surrender or Starve’ Strategy Displacing Thousands Amounts to Crimes Against Humanity’ (Amnesty International, 13 November 2017) <<https://www.amnesty.org/en/latest/news/2017/11/syria-surrender-or-starve-strategy-displacing-thousands-amounts-to-crimes-against-humanity/>>.

⁹³ Ibid.

⁹⁴ Supra note 21, *Katanga Confirmation of Charges* [396].

⁹⁵ Supra note 45, *Krnojelac Trial Judgment* [474].

⁹⁶ Supra note 53, Elements of Crimes, Article 7(1)(d) ft 12.

⁹⁷ Supra note 54, *Simić Judgment* [126].

⁹⁸ Ibid.

⁹⁹ Ibid [126].

Applied to the current situation, there are two reasons why the fact that civilians boarded evacuation busses cannot be understood as voluntarily leaving the area. First, the agreement organised to facilitate their evacuation cannot amount to consent. As stated by the *Naletilić* Trial Chamber, “an agreement between representatives of the parties in a conflict does not have any implications on the circumstances under which a transfer is lawful. Military commanders or political leaders cannot consent on behalf of the individual.”¹⁰⁰ Second, reports leading up to the December 2016 agreement noted that “parties to the conflict have shown time and again they are willing to take any action to secure military advantage, even if it means killing, maiming or starving civilians into submission in the process.”¹⁰¹ This evidences how civilians were fleeing Aleppo as a direct causal link of force employed by the Syrian forces,¹⁰² leading to chronic food¹⁰³ and water shortages,¹⁰⁴ and numerous civilian casualties,¹⁰⁵ leaving them with no genuine choice but to leave its territory.¹⁰⁶

Without grounds permitted under international law

The discussion in Section 2.1.2.2 focused on whether the term “under international law” incorporates IHL, when the crime against humanity takes place within an armed conflict. The *Kunarac* Appeals Chamber judgment noted in such situations that the “laws of war provide a benchmark against which the Chamber may assess the nature of the attack and the legality of the acts committed.”¹⁰⁷ Even with the exceptions found within Article 8(2)(e)(viii), the bombardment of Aleppo does not assist the security of civilians. The term *imperative* sets a high threshold – higher than an ordinary assessment of military necessity. Even if one accepts that there are legitimate opposition forces within Aleppo, the response of bombing a highly concentrated civilian area, which ultimately forced the displacement of thousands of civilians, cannot be justified even if an appeal to IHL is made.

Lawfully present

In light of the fact that “the requirement for lawful presence is intended only to those situations where individuals are occupying houses or premises unlawfully or illegally and not to impose a requirement for “residency”,¹⁰⁸ the civilians living in Aleppo were lawfully present.

¹⁰⁰ *Prosecutor v Mladen Naletilic* (Judgment) IT-98-34-T (31 March 2003) [523].

¹⁰¹ Hwaida Saad, Nick Cumming Bruce, ‘Thousands Flee Parts of Aleppo, Syria, as Assad’s Forces Gain Ground (*The New York Times*, 29 November 2016) <<https://www.nytimes.com/2016/11/29/world/middleeast/thousands-flee-onslaught-in-aleppo-as-assads-forces-gain-ground.html>>.

¹⁰² Supra note 36, *Ruto et al Confirmation of Charges* [245].

¹⁰³ BBC News, ‘Syria Conflict: Food Rations Run Out in Rebel-held Aleppo’ (BBC News, 10 November 2016) <<http://www.bbc.com/news/world-middle-east-37938216>>.

¹⁰⁴ UN News, ‘Syria: UN Provides Emergency Water Around Aleppo, as 1.8 million Cut Off From Water Supply’ (UN News, 6 February 2017) <<http://www.un.org/apps/news/story.asp?NewsID=56116#.WLFufoQoFSU>>; Siege Watch, ‘Fifth Quarterly Report on Besieged Areas in Syria’ <<https://siegewatch.org/wp-content/uploads/2015/10/pax-tsi-siege-watch-5-final-r.pdf>>.

¹⁰⁵ Supra note 89, ‘Aleppo Battle’.

¹⁰⁶ Supra note 56, *Prlić Judgment* [50].

¹⁰⁷ Supra note 60, *Kunarac Judgment* [91].

¹⁰⁸ Supra note 61, *Popović et al Judgment* [900].

Mens Rea

Without a suspect in question, this Brief has instead focused on the *actus reus* of the charge. But it would be likely that any potential perpetrator was aware that the civilians in question were lawfully present and that the bombardment was part of a widespread or systematic attack.

Conclusion

To summarise, the Aleppo evacuation could represent either a charge of deportation or forcible transfer under Article 7(1)(d). In respect to the individual elements, the bombardment of Aleppo satisfies the requirement of forcible within “forcible displacement”, as they were left with no real choice but to leave in light of the heavy attack. Moreover, there is no exception under international law that can justify the forced displacement of civilians, who in this case were lawfully present on the territory. Section 3.2 will now apply the elements of Article 8(2)(e)(viii) to the facts.

3.2 War crimes – Article 8(2)(e)(viii)

In assessing the contextual elements, there exists a nexus between the displacement and the broader NIAC in Syria. The bombardment of Aleppo also appears to have been part of a plan or policy to target the city.¹⁰⁹

Ordering the displacement of the civilian population for reasons related to the conflict

Section 2.2.2.1 outlined that the term “ordering” does not require a specific written or verbal order, but can occur “for reasons of violence” or violations of IHL. In the present case, although the evacuation was coordinated by international aid agencies, and not directly ordered by an official of the Syrian government, the focus does not need to be on whether or not the evacuation was ordered, but whether the conditions which *forced* such events to occur can be traced back to a responsible individual. In our present case, if an individual can be proven to have ordered, coordinated or participated in this military campaign in Eastern Aleppo, then there is the potential for their responsibility.

Security of the civilians involved or imperative military reasons

In the present case, the security of the civilians involved may in practice be improved by their evacuation, but the purpose of this provision is not to excuse the situation we face where aid agencies fill the void of governmental actors and evacuate civilians following bombardment of civilian infrastructure. In drawing on the commentary of

¹⁰⁹ Josie Ensor, Luna Safwan “Worse than Aleppo”: Syrian Regime Pounds Last Rebel City With ‘Scorched Earth Policy’ (*The Telegraph*, 12 January 2018) <<https://www.telegraph.co.uk/news/2018/01/12/worst-seen-says-white-helmet-rescuer-syrian-regime-pounds-last/>>.

Article 49 Geneva Convention IV (given Article 17 AP I's commentary acknowledges that it was inspired by the wording of Article 49 GC IV), we see that two provisions are included that serve as exemptions and would permit evacuation. These include, according to the ICRC's commentary on Geneva Convention IV, permitting an evacuation if an area is in "danger as a result of military operations or is liable to be subjected to intense bombing", or if the presence of protected persons in an area hampers military operations.¹¹⁰ Given Aleppo was under bombardment for an extensive period, their ultimate evacuation after so much destruction seems difficult to justify by resort to his first exception. Likewise, the presence of civilians seemed to do little to hamper military operations leading up to their evacuation. In any event, although many people have returned to Aleppo within one month,¹¹¹ they have not been provided with satisfactory conditions of shelter, hygiene, health, safety and nutrition, and their homes and neighbourhoods in most cases no longer exist.

With respect to imperative military reasons, the fact that *imperative* reasons only arise "in the gravest of circumstances and only as measures of last resort"¹¹² makes a further persuasive case that the ordering of a bombing campaign, which lead to civilians being forcibly displaced from Syria, cannot serve as sufficient justification for the resulting civilian displacement. This point was clearly supported by the Independent International Commission of Inquiry on the Syrian Arab Republic, which found that, because the evacuation of eastern Aleppo was agreed for strategic reasons – and not for the security of civilians or imperative military necessity – the Aleppo evacuation agreement amounts to the war crime of forced displacement.

Mens Rea

Again, without a suspect in question, this Brief has instead focused on the *actus reus* of the charge. However, it would be likely that any potential perpetrator was aware of factual circumstances that established the existence of an armed conflict and was aware of the factual circumstances that established the protected status of the victims.

CONCLUSION

Section 3 outlined the potential for the forced displacement of civilians to be prosecuted under Article 7(1)(d). After an application of the facts to Article 8(2)(e)(viii), this Brief concludes similar to the earlier discussion, namely that the forced displacement of civilians from Eastern Aleppo, amounts to the war crime of forced displacement.¹¹³

¹¹⁰ ICRC, 'Commentary of Convention (IV) relative to the Protection of Civilian Persons in Time of War. (Geneva, 12 August 1949) Article 49(2) 280.
<<https://ihldatabases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=523BA38706C71588C12563CD0042C407>>.

¹¹¹ Jeremy Bowen, 'Displaced Syrians Return Home to Ruins of East Aleppo (BBC News, 18 January 2017)
<<http://www.bbc.com/news/world-middle-east-38653060>>.

¹¹² Supra note 54, *Simic* [125] ft 218.

¹¹³ Supra note 2, Independent Inquiry Report 21.

Without first hand evidence from Aleppo, the conclusions of this Brief are by their nature limited. Nonetheless, the aim of this Brief was to establish in broad terms the potential for a prosecution of the forced displacement of civilians from Eastern Aleppo. Having defined the conflict affecting the region as a NIAC, and outlined the law applicable to the situation, Section 3 has sought to use the information freely available to determine that the crime of forced displacement has occurred, either as a crime against humanity, or as a war crime. Given the inherent jurisdictional problems that face the potential *Situation in Syria* at the ICC, the legal framework outlined above still has merit in shaping prosecutorial interest at the domestic level. Where there exists domestic implementation of the Rome Statute, and/or where States are willing to exercise their jurisdiction over the conduct in question, the distinctions outlined and elements that constitute the crime of forced displacement apply in customary form beyond their Rome Statute confines.¹¹⁴ This Brief has therefore outlined what could be a preliminary roadmap to the prosecution of the forced displacement of civilians from Eastern Aleppo.

¹¹⁴ Anubhav Dutt Titwari, 'Forced Displacement as a War crime in Non-international Armed Conflicts Under the ICC Statute: Exploring the Horizons of a Wider Interpretation Complimenting [sic] International Humanitarian Law' (2015) 5 *Oxford Monitor of Forced Migration* 2, 39; ICRC Customary IHL Study Rule 129; Human Rights Watch, 'Forced Population Transfers as a Crime Against Humanity' (HRW) <<https://www.hrw.org/reports/2004/iraq0804/5.htm>>.