

SETTLEMENTS IN INTERNATIONAL LAW

I. Why are settlements a crime:

The transfer of the Occupying Powers own population into an occupied territory, also known as settlements, are a war crime because the act “changes the demographic composition and factual and political position of the resident population.”¹ It has severe implications on the civilian population’s property rights and freedoms, and creates a situation of faits accomplis for that civilian population. Faits accomplis, or an accomplished fact, is something that has been done and cannot be changed. It is a crime because it can result in the displacement of a civilian population, while changing the ethnic, cultural, religious and linguistic character of the area. The transfer of an Occupying Power’s population into occupied territory is tantamount to an annexation of sovereign territory.

II. International criminal law:

Rome Statute Article 8 War Crimes

1. *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.*

2. *For the purpose of this Statute, ‘war crimes’ means:*

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

¹ Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court – Observers’ Notes, Article by Article* (1999), 213.

(viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory.

Under Article 8 of the *Rome Statute*,² the ICC has jurisdiction over alleged war crimes committed by or within the territory of member state parties. These war crimes must be committed “as part of a plan or policy or as part of a large-scale commission of such crimes.”³ Article 8 (2) of the *Rome Statute* defines what war crimes are; first by relying on grave breaches under the *Geneva Conventions* (Art 8 (2)(a)), and second by detailing other serious violations of the laws and customs in international armed conflict (Art 8(2)(b)).

It is under Article 8(2)(b), other serious violations, that the crime of settlements is found. Article 8(2)(b)(viii) states that the “*transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory*”⁴ is a war crime. Article 8(2)(b)(viii) is limited to conflicts of an international character.⁵

The elements of the crime are that the perpetrator, being the Occupying Power, transfers its own civilian population into the territory that it occupies, or deports and transfers all parts of the population of the occupied territory within or outside this territory.⁶ The conduct must take place within the context of an international armed conflict,⁷ and the perpetrator must be aware of the factual circumstances of the existence of the armed conflict.⁸

² *Rome Statute of the International Criminal Court* (1998).

³ *Rome Statute* Art 8 (1).

⁴ *Rome Statute* Art 8(2)(b)(viii).

⁵ *Rome Statute* Art 8(2)(b).

⁶ International Criminal Court (ICC) *Elements of Crime*, 2011, Art 8(2)(b)(viii)–1.

⁷ *Elements of Crime* Art 8(2)(b)(viii)–2.

⁸ *Elements of Crime* Art 8(2)(b)(viii)–3.

The Prosecutor of the International Criminal Court (ICC) has not yet brought charges against an individual for crimes committed under Article 8(2)(b)(viii); and therefore there is currently no precedent from the Trial Chambers that elaborate on the Court's conceptualization of the crime. However, the *Rome Statute* is clear, and the crimes origin in international humanitarian law is informative.

III. Origins in international humanitarian law:

The *Rome Statute* relies heavily on international humanitarian law to give substantive and technical meaning to war crimes. International humanitarian law forms the body of law sets the rules of armed conflict, aimed at limiting the effects of armed conflict.⁹ The sources of war crimes as a category of international crime, is the *Geneva Conventions* and customary international law.

In 2006 the International Committee of the Red Cross¹⁰ (Red Cross) published a comprehensive review of customary international humanitarian law, aimed at summarizing the fields basic customary rules. Within this document, Rule 130 is the prohibition on Occupying Powers settlements. In very simple language, the Red Cross states that the customary rule is that "States may not deport or transfer parts of their own civilian population into a territory they occupy."¹¹ This rule only applies to international armed conflicts, and is codified in the *Geneva Conventions*.

There is very little precedent on this particular war crime, although the *Case of the Major War Criminals* is cited as an example.¹² In 1946 at Military Tribunal of Nuremberg, two German soldiers were found guilty of war crimes for attempting "Germanization" of occupied territories

⁹ International Committee of the Red Cross, *What is International Humanitarian Law?* (2004) <https://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf>.

¹⁰ International Committee of the Red Cross, *Customary International Humanitarian Law* (2006). <<https://www.icrc.org/eng/resources/documents/publication/pcustom.htm>>.

¹¹ *Customary International Humanitarian Law* 'Rule 130', 462.

¹² *Customary International Humanitarian Law* 'Rule 130', 463.

during WWII. Here the emphasis was on the change of ethnic composition of the Occupied Territory, being the “Germanization” of non-German land.

More contemporary examples of this war crime being upheld and accepted by the international community include various United Nations (UN) Resolutions; from the Security Council,¹³ General Assembly¹⁴ and the UN Commission on Human Rights.¹⁵ The prohibition of Occupying Powers’ settlement is also included in many sovereign states military manuals around the world.¹⁶ The United States Department of Defense Law of War Manual¹⁷ provides a direct prohibition. Section 11.12.5 states “[t]he Occupying Power shall not deport or transfer parts of its own civilian population into a territory it occupies.”¹⁸ These examples are evidence of the settlement status as a war crime under customary international law.

As mentioned above, the *Fourth Geneva Convention*¹⁹ Article 49 codifies the prohibition on deportations, transfers and evacuations of civilian populations by an Occupying Power. Article 49 states that an Occupying Power is not to forcibly transfer civilian populations,²⁰ with the exception for security purposes.²¹ Article 49 codifies minimum protections for the civilian populations, requiring that they are provided with proper accommodation,²² in an area where they are not exposed to the dangers of war,²³ and satisfactory conditions of hygiene, health,

¹³ United Nations Security Council Resolutions: 446, 452, 476, 465, 677.

¹⁴ United Nations General Assembly Resolutions: 36/147 C, 37/88 C, 38/79 D, 39/95 D, 40/161 D, 54/78.

¹⁵ United Nations Commission on Human Rights Resolution 2001/17.

¹⁶ *International Committee of the Red Cross ‘Rule 130’, 462.*

¹⁷ United States Department of Defense Law of War Manual, Office of General Counsel, Department of Defense, June 2015 (Updated December 2016)

<<https://www.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20-%20June%202015%20Updated%20Dec%202016.pdf?ver=2016-12-13-172036-190>>.

¹⁸ United States Department of Defense Law of War Manual, 11.12.5, 798.

¹⁹ International Committee of the Red Cross, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)* (1949).

²⁰ *Fourth Geneva Convention* Art 49 Para 1.

²¹ *Fourth Geneva Convention* Art 49 Para 2.

²² *Fourth Geneva Convention* Art 49 Para 3.

²³ *Fourth Geneva Convention* Art 49 Para 5.

safety and nutrition.²⁴ The Article also explicitly states that families are not to be separated.²⁵ Most crucially, Article 49 explicitly states that “[t]he Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.”²⁶

Under the *Additional Protocol 1977*²⁷ to the *Geneva Conventions*, Article 85(4) clarifies that settlement of an Occupying Powers civilian population into an occupied territory is a grave breach of international law and Article 49 of the *Geneva Conventions*.

IV. Summary:

- Article 8(2)(b)(viii) provides that the settlement of an Occupying Powers population into an occupied territory is a war crime.
- This crime is codified in both the *Rome Statute* and the *Geneva Conventions*.
- Article 8(2)(b)(viii) declares this a crime because of the severe and detrimental impact it has on civilian populations.
- Article 8(2)(b)(viii) is a crime under customary international law, and has been accepted as such since WWII.
- Article 8(2)(b)(viii) is analogous to 11.12.5 of the 2015 US Military Manual, which prohibits an Occupying Power deporting or transferring parts of its own civilian population into a territory it occupies.

Drafted by Ally L. Pettitt, AMICC Professional Associate (Unpaid)
8/30/2017

²⁴Fourth Geneva Convention Art 49 Para 3.

²⁵ Fourth Geneva Convention Art 49 Para 3.

²⁶ Fourth Geneva Convention Art 49 Para 6.

²⁷ International Committee of the Red Cross, *Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)* (1977).