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## Article 8(2)(e)(viii)

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- (viii) Ordering 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;<sup>137</sup>

2. Matthew Happold, “Child Recruitment as a Crime under the Rome Statute of the International Criminal Court”, in José Doria, Hans-Peter Gasser and M. Cherif Bassiouni (eds.), *The Legal Regime of the International Criminal Court: Essays in Memory of Igor Blisichenko*, Brill, Leiden, 2009.
3. Gerhard Werle, *Principles of International Criminal Law*, TMC Asser Press, The Hague, 2009.

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- <sup>137</sup> Article 8(2)(e)(viii), parallel to Article 8(2)(b)(viii), prohibits the displacement of the civilian population in the context of a non-international armed conflict, unless the security of the civilians involved or imperative military reasons so demand. This conduct is prohibited under the same terms in Article 17 Additional Protocol II and reflects customary international humanitarian law (Rule 129 of the ICRC Study, see also Henckaerts and Doswald-Beck, 2005).

The ICC Elements of Crimes clarify that to prove the war crime of displacing a civilian population it is necessary that 1) the perpetrator ordered a displacement of a civilian population; 2) such an order was not justified by the security of the civilians involved or by military necessity; 3) the perpetrator was in a position to effect such displacement by giving such order; 4) the conduct took place in the context and was associated with a non-international armed conflict; and 5) the perpetrator was aware of factual circumstances that established the existence of an armed conflict.

The term “displacement” shall be interpreted in light of international humanitarian law as to include the evacuation of the civilian population both within and outside the national territory. Article 17(2) AP II proscribes the displacement of civilians outside their national territory.

Differently from the wording used in the ICC Statute, the Elements of Crimes refer to the displacement of “a civilian population” as opposed to “the civilian population”. This discrepancy shall be construed as to criminalise conducts of displacement of civilians not necessarily involving the whole civilian population (on the point, cf. Dörmann, 2003, p. 473).

However, the number of civilians involved in the displacement shall exceed individual occurrences. This results from the systemic reading of the Elements of Crimes where, for example, Article 8(2)(a)(vii) refers to “one or more persons” as opposed to “a civilian population” (cf. Dörmann, 2003, p. 472). Arguably, since the letter of Article 8(2)(e)(vii) does not resort to the same expression, only the civilian population and not individual civilians shall be affected by the displacement in order for the conduct to fall under the scope of the provision. This proposition finds support in the *travaux préparatoires* to the ICC Statute where the expression “civilian population” was deliberately chosen against the “one or more civilians” as the drafters considered the displacement of one civilian to be insufficient to constitute the war crime of displacement of civilians (Dörmann, 2003, p. 472).

A salient issue which has been recently elucidated by the ICC case law relates to the existence of an actual order to displace a civilian population as a constitutive element of the war crime under Article 8(2)(e)(viii). In the case *Prosecutor v. Bosco Ntaganda*, the Pre-Trial Chamber has clarified what follows:

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. The Chamber considers that, should this not be the case, the actual circumstances of civilian displacement in the course of an armed conflict would be unduly restricted. This is specifically reflected in the general introduction to the Elements of Crimes, which states

(ix) Killing or wounding treacherously a combatant adversary;<sup>138</sup>

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that “[t]he elements [...] apply ‘*mutatis mutandis*’ to all those whose criminal responsibility may fall under Articles 25 and 28 of the Statute” (*Prosecutor v. Ntaganda*, ICC PT. Ch. II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, ICC-01/04-02/06-309, 9 June 2014, para. 64).

Nothing in the Elements of Crimes indicates the nature of the position which the alleged perpetrator has to cover in order to effect the displacement of civilians under Article 8(2)(e)(viii). Yet, the wording “to effect the displacement” seems to privilege a de facto appraisal of such a position. Therefore, both de jure and de facto positions can be reasonably contemplated under the terms of the provision. This finds support in the pronouncement of the Pre-Trial Chamber in the case *Prosecutor v. Bosco Ntaganda* (*Ntaganda*, ICC PT. Ch. II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, ICC-01/04-02/06-309, 9 June 2014, para. 68) stating “the means used [...] and the modus operandi show that the UPC/FPLC soldiers were in a position to displace civilians, as further demonstrated by the large number of civilians who were in fact displaced”.

Article 8(2)(e)(viii) admits the displacement of a civilian population for reasons connected to the conflict only in two exceptional circumstances: 1. When the security of the civilians involved so demands, (for example, when the civilians are located in areas likely to be subjected to bombings; 2. When imperative military reasons so demand, where the term “imperative” imposes a restrictive interpretation of this exception (Dörmann, 2003, pp. 474–75).

*Cross-references:*

Articles 7(1)(d), 8(2)(a)(vii) and 8(2)(b)(viii).

*Doctrine:*

1. Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, Cambridge, 2003.
2. Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, ICRC, Cambridge University Press, Cambridge, 2005, repr. 2009.

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<sup>138</sup> Treachery, also synonymous with perfidy, involves a breach of good faith of the combatant adversaries. In practice, it is typically cases in which the accused in deception claims a right to protection for him or herself, and uses this for his or her advantage in the combat. It includes:

- pretending to be a civilian;
- fake use of a flag of truce, the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions;
- fake use of the protective emblem of cultural property;
- fake use of other internationally recognised protective emblems, signs or signals;
- pretending to surrender;
- pretending to be incapacitated by wounds or sickness;
- pretending to belong to the enemy by the use of their signs.

The provision is similar, but not identical to Article 8(2)(b)(xi). The prohibition on perfidy in the present only extends to “combatant adversaries”, while Article 8(2)(b)(xi) also prohibits the killing and wounding of civilians. The use of the notion “combatant adversary” should be distinguished from “enemy combatants”, indicating that there is notion “combatant” is not ap-