

neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons,¹⁴²

- (xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;¹⁴³

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1. Michael Bothe, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, Oxford, 2002, p. 422.
 2. Andreas Zimmerman, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2nd ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2008, p. 499.
 3. Gerhard Werle, *Principles of International Criminal Law*, TMC Asser Press, The Hague, 2009, pp. 307–8, MN 895–97.

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- ¹⁴¹ The prohibition of medical or scientific experiments cover the use of therapeutic methods which are not justified on medical grounds and not carried out in the interest of the affected person. The consent of the victim is not relevant.

Cross-references:

Article 8(2)(a)(ii) and 8(2)(e)(xi).

Doctrine:

1. Michael Bothe, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, Oxford, 2002, pp. 422.
2. Andreas Zimmerman, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2nd ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2008, pp. 382, 499.
3. Gerhard Werle, *Principles of International Criminal Law*, TMC Asser Press, The Hague, 2009, pp. 308–10, MN 898–902.

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- ¹⁴² The acts in Article 8(2)(e)(xi) can only be justified if undertaken in the interest of the person concerned, for example, amputations may be lawful if performed to save the live or overall health of the patient. Any physical mutilation or unwarranted medical or scientific experiments undertaken of either governmental authorities or on non-state groups are covered by Article 8(2)(e)(xi).

Cross-references:

Articles 8(2)(b)(x).

Doctrine:

1. Michael Bothe, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, Oxford, 2002, pp. 422.
2. Andreas Zimmerman, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2nd ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2008, pp. 382–83, 499.
3. Gerhard Werle, *Principles of International Criminal Law*, TMC Asser Press, The Hague, 2009, pp. 308–10, MN 898–902.

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¹⁴³ This provision is parallel, *mutatis mutandis*, to Article 8(2)(b)(xiii) ICC Statute and reflects customary international humanitarian law (Rule 50 ICRC Study, see also Henckaerts and Doswald-Beck, 2005).

The ICC Elements of Crimes set out the constitutive elements of the war crime of destroying or seizing the enemy's property: 1) The perpetrator destroyed or seized certain property; 2) such a property was of an adversary; 3) such property was protected from the destruction or seizure under the international law of armed conflict; 4) the perpetrator was aware of the factual circumstances that established the status of the property; the destruction of the property was not required by military necessity; 5) the conduct took place in the context and was associated with an armed conflict not of an international character; 6) the perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8(2)(e)(xii) has been invoked as ground of charges against, *inter alia*, Callixte Mbarushimana (*Prosecutor v. Mbarushimana*, ICC PT. Ch. I, Decision on the Confirmation of Charges, ICC-01/04-01/10-465-Red, 16 December 2011) and Bosco Ntaganda (*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. 72 ff.). Likewise, the crime of destruction of enemy's property has been imputed to German Katanga and Mathieu Ngudjolo Chui under Article 8(2)(b)(xiii). Such a legal basis was subsequently modified into Article 8(2)(e)(xii) after the requalification of the conflict from international to non-international.

In the judgment in the case *Prosecutor v. Katanga (Prosecutor v. Germain Katanga*, ICC T. Ch. II, Jugement rendu en application de l'Article 74 du Statut, ICC-01/04-01/07-3436, 7 March 2014, para. 889 ff.), the Trial Chamber clarified the scope of Article 8(2)(e)(xii) stating that "*rien n'indique que les éléments constitutifs du crime visé à l'Article 8-2-e-xii sont différents de ceux du crime de destruction des biens de l'ennemi commis dans le cadre d'un conflit armé international et visé à l'Article 8-2-b-xiii*" (para. 889). Such a statement is supported by authoritative doctrine (see Dörmann, pp. 485–86). Based on this, the analysis of Article 8(2)(e)(xii) may occur by analogy with Article 8(2)(b)(xiii) ICC Statute.

The provision criminalises the destruction or seizure of enemy's property protected by the law of armed conflicts. There exists a plurality of ways in which the destruction of property may be carried out. The Trial Chamber has exemplified some of them, namely, "*par des acts tels que l'incendie, le démantèlement ou toute autre forme de dégradation de biens*" (*Prosecutor v. Katanga*, T. Ch. II, Jugement rendu en application de l'Article 74 du Statut, ICC-01/04-01/07-3436, 7 March 2014, para. 891), concluding that property heavily damaged can be assimilated to partly destroyed property and can thus fall under the terms of Article 8(2)(e)(xii) (*Prosecutor v. Katanga*, T. Ch. II, Jugement rendu en application de l'Article 74 du Statut, ICC-01/04-01/07-3436, March 2014, para. 891). In the case *Prosecutor v. Bosco Ntaganda*, the Pre-Trial Chamber confirmed the charge of destruction of property against the defendant for having destroyed houses, buildings and other permanent structures, set on fire houses or removed their metal roofs, destroyed fields, destroyed and burned villages (*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, paras. 72–73). Similarly, destruction of property may occur by "setting fire to, pulling down, or otherwise damaging the adversaries' property" (*Prosecutor v. Mbarushimana*, ICC PT. Ch. I, Decision on the Confirmation of Charges, ICC-01/04-01/10-465-Red, 16 December 2011, para. 171).

As to the "seizure" of property, neither the ICC Statute nor the Elements of Crimes help clarify the meaning of the term. According to the ICRC Commentary, seizure is to be distinguished from requisition because the former relates to public property and is a temporary sequestration followed by restitution and indemnity; the latter affects private property and consists

(xiii) Employing poison or poisoned weapons;¹⁴⁴

in a passage of ownership (Pictet, 1958, p. 296). However, this point remains debated in the literature and unclarified by the ICC case law (for a recollection of relevant positions, cf. Dörmann, 2003, pp. 256–57).

The notion of property is quiet broad. It includes property of natural and legal persons, moveable and immovable, public and private, provided that they are of the adverse party (*Prosecutor v. Katanga*, Jugement, para. 892). The Trial Chamber has shed light of the meaning of adverse, notably, “*alliées ou faisant allégeance à une partie au conflit opposée ou hostile à l’auteur du crime*” (in *Katanga* Judgment, para. 892). Such an adverse character can be established by virtue of the ethnic origin of the persons whose property has been destroyed (or partly destroyed) or seized or based on their place of residence (*Prosecutor v. Katanga*, Jugement, para. 892).

Article 8(2)(e)(xii) applies to individual acts of destruction or seizure of enemy’s property which are protected by the law of armed conflict and does not require any element of extensiveness as opposed to Article 8(2)(a)(iv)) (“Extensive destruction and appropriation of property [...] carried out unlawfully and wantonly”).

The destruction of enemy property does not constitute a crime under the terms of the Statute if such a destruction was “imperatively demanded by the necessities of the conflict”. Such an expression has been regarded as substantively equivalent to “military necessity” and interpreted in line with the ICTY case law (*Prosecutor v. Katanga*, T. Ch. II, Jugement rendu en application de l’Article 74 du Statut, ICC-01/04-01/07-3436, March 2014, para. 894). Military necessity is therefore meant as “*nécessité de mesures indispensables pour atteindre les buts de guerre, et légales selon les lois et coutumes de la guerre*” (Lieber Code, Article 14, cited in *Prosecutor v. Katanga*, T. Ch. II, Jugement rendu en application de l’Article 74 du Statut, ICC-01/04-01/07-3436, 7 March 2014, para. 894).

Cross-references:

Articles 8(2)(a)(iv), 8(2)(b)(xiii), 8(2)(b)(xvi) and 8(2)(e)(v).

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*, Cambridge University Press, Cambridge, 2005, repr. 2009.
3. Jean Pictet, *Commentary to I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva, 1958.

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¹⁴⁴ This offence could, for example, include the poisoning of water supplies. The production and storage of poison is not prohibited. There is no agreement whether the prohibition on the use of poison covers poison gas. Article 8(2)(b)(xvii) is an identical provision to the present provision, but applies in international armed conflicts.

The provision does not prohibit chemical and biological weapons of mass destruction. This may be explained the lack of agreement on the prohibition on of nuclear weapons and a following compromise during the Rome conference, with the result that weapons of mass destruction are not subject to an explicit and binding provision in the ICC Statute.

Cross-references:

Article 8(2)(b)(xvii), 8(2)(b)(xviii) and 8(2)(b)(xx).

Doctrine: