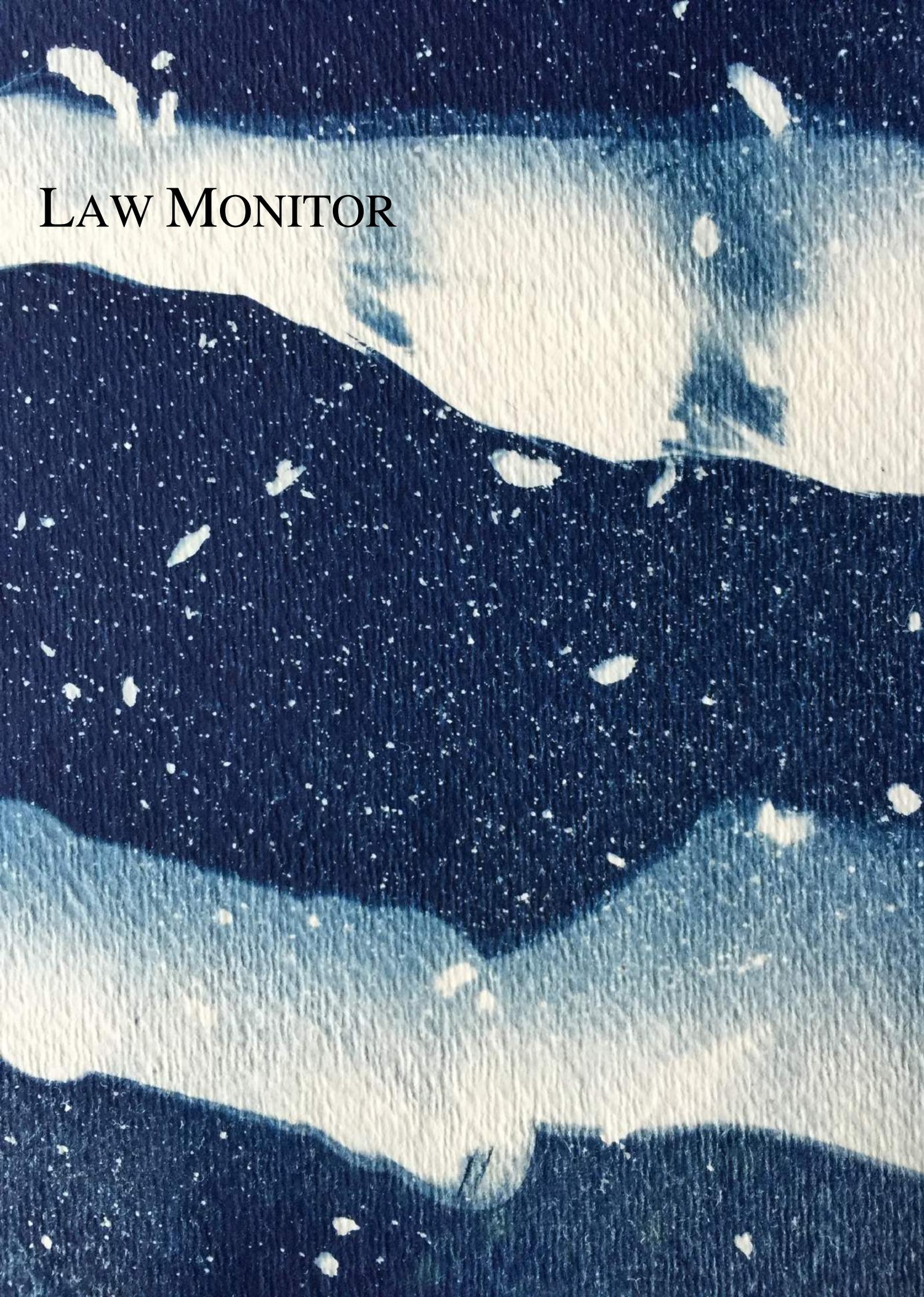


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## **Forced displacement as a war crime in non-international armed conflicts under the ICC Statute: exploring the horizons of a wider interpretation complimenting international humanitarian law**

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*Forced displacement has become a regular feature of non-international armed conflicts pointing towards the fragrant violation of international humanitarian law (IHL) by parties to the conflicts. The paper addresses the war crime of forced displacement in internal armed conflicts under the Statute of the International Criminal Court and advances the argument that the provision must be interpreted against the background of IHL principles. Such wider interpretation not only fulfills the legal obligation to interpret the treaty in good faith, but may act as a deterrent to armed actors in such conflict, and thus prove beneficial for the effective protection of civilians during internal armed conflicts.*

### **Introduction**

The paper addresses the war crime of forced displacement in non-international armed conflicts (NIACs) under the 1998 Statute of the International Criminal Court (ICC Statute). As part of the analysis, the author will be evaluating the foundations of the prohibition of forced displacement in NIACs under international humanitarian law (IHL). Such an IHL-based analysis is relevant because the underpinnings of war crimes are in the principles governing armed conflicts. Therefore, it is pertinent to specifically evaluate Article 8(2)(e)(viii) of the ICC Statute and the corresponding provisions in the 1977 Additional Protocol II to the Geneva Conventions of 1949 (AP II) relating to forced displacement in NIACs.

The author's argument is based on the premise that the war crime of forced displacement in NIACs has to be interpreted in light of the principles of IHL, otherwise its complementary nature to the laws of armed conflict will be undermined. The fundamental purpose of international criminal law is the deterrence of crimes (and eliminating impunity); thus it is necessary to interpret the war crime of forced displacement to uphold this objective.

According to the Internal Displacement Monitoring Centre, in 2014, armed conflicts and violence resulted in 38 million internally displaced persons alone (IDMC 2014). The Office of the United Nations High Commissioner for Refugees (UNHCR 2014) estimated that in the same year an average of 32,200 persons per day were forced to leave their homes and seek protection, either within the borders of their countries or in other countries due to conflict and persecution. Therefore, forced displacement has become a central feature, rather than a collateral consequence, of conflict (Jacques 2012:50).

Forced displacement in NIACs can be prosecuted both as a crime against humanity and a war crime under the ICC Statute; however, lack of prosecution as a war crime has highlighted certain complex issues in the interpretation of the Article 8(2)(e)(viii) of the ICC Statute

which lays down the characteristics constituting the war crime of forced displacement in NIACs. These characteristics are yet to be specifically analysed by ICC. This paper analyses the prohibition of forced displacement in NIACs under the ICC Statute, while highlighting the importance of interpreting international criminal law in line with international humanitarian law, especially in war crime prosecutions.

Thus, the main issues addressed in this paper are:

- (i) the prohibition of forced displacement in NIACs under IHL and its basis in customary international law;
- (ii) the characteristics of the war crime of forced displacement in NIACs under Article 8(2)(e)(viii) of the ICC Statute, with emphasis on the principles of IHL; and
- (iii) the requirement of ‘ordering’ displacement to ascertain the war crime under Article 8(2)(e)(viii) and whether it is a necessary requirement in light of the ICC Elements of Crimes?

### **Prohibition of Forced Displacement in NIAC under IHL**

Wars have always resulted in forced displacement. However, this phenomenon has been exacerbated with the increasing number of NIACs (UNCHR 1992:para18). As a result, AP II is of great significance, since, while complementing Common Article 3 of the Geneva Conventions, 1949 (Common Article 3), it has laid down principles under IHL which are applicable to NIACs. Some of the acts causing displacements in NIACs, such as threats to life and cruel treatment, acts of terrorism, forced recruitment of children, pillage, acts constituting outrages upon personal dignity such as rape and enforced prostitution, etc., are by themselves already prohibited under AP II (see Articles 4(2) and (3)). Additionally, displacement, itself, is also prohibited under AP II within the contours of Article 17.

The insertion of the displacement clause in AP II was met with scepticism by some states who saw it as a divergence from the principle of state sovereignty, and their right to restore public order, which may entail forcibly displacing civilians (Levie 1987:536). Moreover, prior to AP II, there was no specific prohibition on forced displacement in NIACs (Willms 2009:551). However, the delegation deliberating AP II could not ignore that displacement had become a grave consequence of NIACs, undermining the fundamental purpose of the Geneva Conventions; namely the protection of civilians during armed conflicts. Therefore, Article 17 regarding forced displacement was adopted in AP II (Sandoz *et al.* 1987:1473).

### **Prohibition of forced displacement as customary international law**

It has repeatedly been stressed that *all* the provisions in AP II do not constitute customary international law, thereby making it possible for states which are not parties to AP II to evade their obligations (Jacques 2012:70). This argument can also be put forth against the prohibition of forced displacement in NIACs. Moreover, in NIACs, there is an additional obstacle of binding non-state armed groups to the obligations under IHL since, unlike states, they are not parties to the treaties.

In any case, the broader question is whether the prohibition of forced displacement in NIACs constitutes customary international law so as to bind such states which are not signatories to AP II?

The International Committee of the Red Cross (ICRC) has answered the above question in the affirmative by referring to state practice reflected in military manuals which are or have been applicable in NIACs, domestic legislation in several states prohibiting forced displacement in NIACs, and official statements in relation to NIACs (Henckaerts and Doswald-Beck 2009:459). Further, the UN Security Council (UNSC 2006: para 5), the UN General Assembly (UNGA 2000: para 2(a)(ii)), and the UN Commission on Human Rights (UNCHR 2004: para4(e)) have repeatedly condemned instances of forced displacement caused by NIACs. In addition, the statutes of the International Criminal Tribunals for the Former Yugoslavia (ICTY) and for Rwanda (ICTR) also contain the prohibition of forced displacement in the form of deportation and transfer of civilian population constituting crimes against humanity (Article 59(d), ICTY Statute, 1993; Article 3(d), ICTR Statute, 1994; Article 7(1)(d), ICC Statute, 1998).

Even states tend not to dismiss the existence of such a prohibition in international law rather focussing on denying the existence of NIACs to justify forced displacement (Henckaerts and Doswald-Beck 2009:459). Thus, there is strong argument for considering forced displacement in NIAC as a rule of customary law.

### **Forced displacement in NIACs as a war crime in international criminal law**

An examination of the prohibition against forced displacement in NIACs under IHL leads us to analyse its prosecution as a war crime in international criminal law. Indeed, criminal accountability for violations of IHL is essential for upholding its basic purpose, which is the protection of civilians during armed conflicts. Prosecution for violations of IHL as a war crime could also act as a deterrent for future violations of IHL. Therefore, it is pertinent that the prohibition against forced displacement during NIACs is also prosecuted as a war crime, thus, complementing the principles of IHL.

The ICC Statute states that ‘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’ constitutes a war crime in NIACs (Article 8(2)(e)(viii), ICC Statute, 1998). Thus, it is almost verbatim to the first sentence in Article 17(1), AP II, implying that it was intended to expressly treat forced displacement in NIACs under IHL as a war crime (Bassiouni 2008:349).

At the same time, one can argue that forced displacement, together with its causes, is sufficiently addressed as ‘crimes against humanity’ (Articles 7(1)(a),(f),(g),(h),(k), ICC Statute, 1998). The ICTY in *Prosecutor v. Naletic & Martinovic* (2003: para 531) has gone further to find that the forcible transfer of civilians could constitute persecution within crimes against humanity. Forcibly displacing civilians was also one of the charges against Sudanese President, Omar Al-Bashir, within Article 7(1)(d) of the ICC Statute (*Prosecutor v. Omar Al-Bashir*, 2009). In other words, forced displacement in NIACs, in addition to acts leading to forcible displacement, may constitute crimes against humanity.

On the other hand, despite the growing recognition of the grave nature of displacement, there have been no successful prosecutions of forced displacement as a war crime in NIACs in the ICC to date (Jacques 2012:153). This may be due to varied factors influencing the inclination of the Prosecutor to charge the alleged perpetrator for the ‘more serious’ crimes against humanity. Also, the difficulties of placing individual criminal responsibility for perpetration of war crimes in NIACs and of collecting evidence to establish specific elements of war crimes could also have influenced the Prosecutors in avoiding prosecution of forced displacement in NIACs as a war crime (Jacques 2012:154). In any case, the present

preference given to prosecuting forced displacement as a crime against humanity should not close the door to the war crime prosecution of forced displacement in NIACs. The perpetrators of deplorable acts which lead to the uprooting of huge number of civilians from their homes, should not enjoy impunity if the conditions required to prove crimes against humanity, such as ‘widespread and systematic attack’, cannot be met.

### **Characteristics of the war crime of forced displacement in NIACs under the ICC Statute**

In order to evaluate the scope of forced displacement as a war crime, it is necessary to analyse Article 8(2)(e)(viii) of the ICC Statute. Article 8(2)(e)(viii) of the ICC Statute describes ‘[o]rdering 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’ as a war crime in NIACs. The provision evidently contains critical characteristics, the analysis of which will determine the prosecution of forced displacement as a war crime. Further, such analysis must be undertaken in light of IHL principles, since IHL forms the basis of war crimes under the ICC Statute.

(i) ‘displacement of the civilian population’

Under AP II and the ICC Statute, the term ‘displacement’ in a NIAC context covers both external and internal displacement, unlike the principles of IHL applicable solely to international armed conflicts which distinguish between ‘deportation’ (external displacement) and ‘forcible transfer’ (internal displacement) (Article 49(1), Geneva Convention IV, 1949). The term under AP II and the ICC Statute thus, makes no distinction between civilians who have fled beyond the territories of the state or remain within it.

‘Civilian population’ reflects the protection in IHL accorded to civilians who do not take part in hostilities. Therefore, the prohibition against forced displacement is available only to civilians who have not lost their entitlement to protection under IHL due to taking part in hostilities (Acquaviva 2011:7).

Finally, the perpetrator need not order the displacement of the *entire* civilian population; however, displacement of a single civilian might not be enough to constitute a war crime under Article 8(2)(e)(viii) (Doria, Gasser and Bassiouni 2009:640). Definite clarity on the quantitative aspect has to be ascertained on a case by case basis.

(ii) ‘for reasons related to the conflict’

For a war crime to have occurred, there has to be a link with an armed conflict. Before addressing this, it is important to understand the threshold under the ICC Statute for constituting a NIAC.

Article 8(2)(e) does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of similar nature. It applies to conflicts in the territory of a state when there is *protracted* violence between governmental authorities and *organised* armed groups or between such armed groups (Article 8(2)(f), ICC Statute, 1998). Therefore, the threshold of NIACs under ICC Statute is based on Common Article 3 to the Geneva Conventions, Article 1, AP II and the interpretation of ICTY regarding ‘armed conflict’. The ICTY, in *Prosecutor v. Dusko Tadic* (1995: para 70), related an armed conflict to the existence of ‘protracted’ armed violence between government authorities and organised

armed groups or between such groups within a state. In that case, ‘protracted’ referred to the length of the armed confrontation, however, the exact time period to constitute ‘protracted’ is unclear. Nevertheless, when resort to force leading to hostilities continues for a long time, an armed conflict exists.

Additionally, the requirement that armed groups are ‘organised’, is to ascertain whether the armed groups can discharge their obligations under IHL (Article 1, AP II, 1977). Under the ICC Statute, and particularly in relation to the war crime of forced displacement in NIACs, the requirement of ‘organised’ armed groups implies the ability to identify perpetrators who, being in a position of authority, could order the displacement or other acts leading to displacement (ICC Elements of Crimes relating to Article 8(2)(e)(viii)). Thus, the organisation of armed groups is essential for determining the individual criminal responsibility of the perpetrators.

After establishing that a NIAC exists, it is necessary to analyse whether the displacement of civilians was a consequence of such conflict. The link between displacement and conflict must be analysed in light of relevant facts to ascertain whether there were genuine reasons for civilians to flee as a result of acts or specific orders by the members of the parties to the conflict (Acquaviva 2011:22). Further, it has to be assessed in light of the circumstances which made it possible for such displacement to occur and whether such circumstances were created or promoted due to the existence of the armed conflict (Acquaviva 2011:23,24).

- (iii) ‘unless the security of the civilians involved or imperative military reasons so demand’

The prohibition against forced displacement in IHL is not without certain caveats which recognise the right of belligerents to attack military objects; however, such attacks must adhere to the principles of military necessity, proportionality and distinction in order to minimise civilian casualties (Sandoz *et al.* 1987:1473).

In terms of forced displacement, these principles are reflected in the conditions of ‘security of civilians’ and ‘imperative military reasons’. They have been incorporated as exceptions under Article 8(2)(e)(viii). This is another instance of ICC Statute complementing the violations of certain obligations in IHL but within the parameters of other principles therein.

For example, if displacement is ordered so as to separate the civilian population from the belligerents, then it would qualify under these exceptions and would at the same time be in pursuance of the principle of distinction in IHL. Also, an order to effect displacement by removing civilians from an area, which could come under attack, would be in pursuance to the civilians’ own security and hence legal (Jacques 2012:52).

### **The requirement of an explicit ‘order’ under Article 8(2)(e)(viii): the need for a wider interpretation?**

The final, and most contentious, characteristic of Article 8(2)(e)(viii) of the ICC Statute is that of ‘ordering’ the displacement. A literal reading of the provisions relating to forced displacement under AP II (Article 17) and the ICC Statute (Article 8(2)(e)(viii)) could lead to the conclusion that it is the act of ‘ordering’ of displacement which is prohibited under AP II and prosecutable as a war crime under the ICC Statute. Moreover, element 1 of the ICC Elements of Crimes suggests that an explicit order is required to establish a war crime of forced displacement in NIACs. Therefore, the focus of a war crime prosecution seems to

move away from the actual forcible displacement of civilians to whether an explicit order was ever given to effect such displacement.

In this regard, it is important to note that under Article 31(1), Vienna Convention on the Law of Treaties 1969, a treaty must be interpreted in good faith in accordance with the ordinary meaning given to the terms of the treaty in its context and in light of its object and purpose. AP II is part of IHL, the purpose of which is to protect civilians during armed conflicts. Therefore, the interpretation that only an *order* of displacement is prohibited, and not displacement in the absence of an explicit order, would not be in good faith and subsequently not in the pursuance of AP II's objects and purpose (Willms 2009:558,559).

If this is the case, then why was the specific requirement of 'ordering' drafted into Article 8(2)(e)(viii)? The answer may very well lie in the fact that forced displacement is qualified by caveats which require military oversight from superior and commanders who are in a position to foresee displacement in violation of the principles of IHL. A member of the armed group or a soldier in a government army may not be prudently expected to know whether the order of displacement or acts leading to displacement is for the security of the civilians or for imperative military reasons (Osiel 1999:181). The perpetrator, thus, must be someone in a position of authority, or someone who could weigh such factors at the planning stages of a military operation. This does not mean that the perpetuation of acts leading to forced displacement cannot be prosecuted in relation to individuals who were merely following orders (Doria, Gasser and Bassiouni 2009:640). However, the war crime of forced displacement is primarily focussed on persons who are in command and can give orders which would lead to displacement.

Therefore, if the act of displacement can be attributed to persons who were in a position to effect it without explicitly giving an order of displacement either to the personnel they command or to the civilians directly, then they must be liable for the war crime under the ambit of Article 8(2)(e)(viii).

This argument is supported by a statement by the ICC's Pre-Trial Chamber, while confirming the charges against Bosco Ntaganda, which noted that:

for the purposes of the war crime of displacing civilians, 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 that be the case, the actual circumstances of civilian displacement in the course of an armed conflict would be unduly restricted (*The Prosecutor v. Bosco Ntaganda* 2014: 23).

Therefore the key issue is not whether there was an order or not, but whether acts committed by members of the parties to an 'NIAC' forced civilians to flee. Therefore a distinction needs to be made between 'voluntary' and 'forcible' displacement, as it is only the latter which is prohibited in IHL. In *Prosecutor v. Gotovina et al.* (2007: para.15), the ICTY was presented with ascertaining the nature of 'forced' displacement with reference to the violation of Article 17 (1) AP II as a crime against humanity. It refused to clarify this aspect in the light of the requirement of 'order' since Article 5, ICTY Statute did not require an order to constitute crimes against humanity.

However, the ICTY's interpretation of 'forced displacement' may be resorted to, to identify the link between the nature of displacement and its prosecution as a war crime in NIACs. In relation to the forcible nature of displacement, ICTY has observed that:

It is the 'forced character of displacement and the forced uprooting of the inhabitants of a territory' that give rise to criminal responsibility. The requirement of 'forcible' describes a situation where individuals do not have a free or 'genuine' choice to remain in the territory where they were present. The element of 'forcible' has been interpreted to include threats or the use of force, fear of violence, and illegal detention. It is essential therefore that the displacement takes place under coercion. [...] The trier of fact must consequently consider the prevailing situation and atmosphere, as well as all relevant circumstances, including in particular the victims' vulnerability, when assessing whether the displaced victims had a genuine choice to remain or leave and thus whether the resultant displacement was unlawful (*Prosecutor v. Blagojevic & Jokic* 2005: para 596).

Thus, there has to be a link between the acts leading to displacement and the forcible nature of displacement arising thereto, and the above interpretation by the ICTY indicates a test for establishing such a link.

### Conclusion

The war crime of forced displacement in NIACs is directly linked to the principles of IHL. Therefore, Article 8(2)(e)(viii) of the ICC Statute must be interpreted in the context of the principles under IHL. One of the objectives of prosecution of war crimes is the deterrence of serious violations of the laws and customs of armed conflicts, one of them being the forcible displacement of civilians. And yet, the common occurrence of forced displacement in NIACs points to the widespread violations of various other obligations of the parties to the conflict under IHL. Thus, it is important to address the issue of forced displacement in order to discourage violations of other obligations under IHL so as to further the objective of protecting civilians during armed conflicts.

In light of this, it is important that Article 8(2)(e)(viii) is interpreted in good faith keeping in mind the prohibition of forced displacement itself. It may be easy to resort to a restrictive literal interpretation of the provision; however, this would undermine the spirit of international criminal law as complementing IHL.

In this paper, the author has argued in favour of an expanded reading of Article 8(2)(e)(viii). If a link is drawn between acts leading to displacement and the forcible character of displacement, then it would be in pursuance to the object and spirit of the ICC Statute as complementing IHL in the protection of civilians during armed conflicts.

A holistic interpretation of Article 8(2)(e)(viii) may also bring the focus on forced displacement in NIACs from the angle of a war crime. This may prove integral for the purposes of observance of IHL by the parties to the conflicts by acting as a deterrent for future war crimes, thus, signifying a major victory for international criminal law and its role in internal armed conflicts.

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