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# Without order, anything goes? The prohibition of forced displacement in non-international armed conflict

**Jan Willms***

Jan Willms is former legal attaché at the International Committee of the Red Cross and former Carlo Schmid Fellow at the International Criminal Tribunal for the former Yugoslavia. He holds an LL.M. in Public International Law from the University of Nottingham.

## Abstract

*At first glance, merely the 'ordering' of displacement seems to be prohibited in non-international armed conflict. However, after interpreting Article 17(1) AP II and Rule 129(B) of the ICRC Customary Law Study with particular regard to State practice and* opinio juris, *the author concludes that these norms prohibit forced displacement regardless of whether it is ordered or not. On the other hand, the ICC Elements of Crimes for the crime of forced displacement under Article 8(2)(e)(viii) ICC Statute require an order. It remains to be seen whether the ICC adopts that interpretation in its jurisprudence.*

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## Introduction

Pictures of displaced civilians emerge regularly after an armed conflict has broken out. This often exposes a great humanitarian need and leads to criticism of the parties to the conflict. From the viewpoint of international humanitarian law, it is, however, very important to distinguish between the voluntary displacement caused by the hardship of armed conflict, on the one hand, and forced displacement of the civilian population, on the other. Only the forced displacement of civilians for illegitimate reasons[1] is prohibited under international humanitarian law and can be prosecuted as a war crime. Thus the question arises by which criteria it can be determined whether displacement of the civilian population is forced or not. One criterion for forced displacement seems to be that the displacement must be 'ordered' as suggested by the literal meaning of Article 17(1) AP II, Rule 129(B) of the ICRC Customary Law Study[2] and Article 8(2)(e)(viii) ICC Statute.[3] Does that mean that forced displacement which has not been ordered is lawful? The question was not discussed in the *travaux préparatoires* of Additional Protocol II and no declarative interpretations or reservations have been made on Article 17(1) AP II.

However, in the literature, the question of whether an order is required for a violation of Article 17(1) AP II has in isolated cases been answered in the affirmative, although it was only treated in passing.[4]

The issue has also been raised by the Defence in the Gotovina *et al.* case at the International Criminal Tribunal for the former Yugoslavia (ICTY). The Defence argues that Ante Gotovina was unduly indicted for the crime against humanity of 'deportation and forcible transfer' because it alleges that this is an offence applicable in international armed conflict only. Instead, Gotovina should have been indicted for the crime against humanity of 'forced movement of civilians' which is in the opinion of the Defence the equivalent to forcible transfer in non-international armed conflict. In that case, the Prosecution would have to prove that Gotovina 'ordered' the displacement. The Defence derives this 'order' requirement from the literal meaning of Article 17(1) AP II, Rule 129(B) of the ICRC Customary Law Study, Article 8(2)(e)(viii) ICC Statute and the ICC

1 Illegitimate reasons are those which are not covered by the exceptions in Additional Protocol II (APII). Article 17(1) AP II does not prohibit the displacement of the civilian population 'if the security of the civilians involved or imperative military reasons so demand'. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, adopted 8 June 1977, entered into force 7 December 1978, 1125 UNTS 609 (Additional Protocol II, AP II).

2 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, ICRC/ Cambridge University Press, Cambridge, 2005, Vol. I, pp. 457–462.

3 Statute of the International Criminal Court (ICC Statute), adopted 17 July 1998, entered into force 1 July 2002, 37 ILM 1002.

4 See e.g. Carlyn Carey, 'Internal Displacement: Is Prevention through Accountability Possible? A Kosovo Case Study', *American University Law Review*, Vol. 43, 1999, p. 267.

Elements of Crimes.[5] Trial Chamber I rejected the Defence's argument mainly for the reason that the Defence derives the 'order' requirement from a war crime, a category which has – in the opinion of Trial Chamber I – no relevance when adjudicating crimes against humanity.[6] Trial Chamber I elaborated that Article 5 ICTY Statute, giving the ICTY jurisdiction over crimes against humanity, does not require an order.[7] The Appeals Chamber held that the Defence did not raise a proper jurisdictional challenge, but that the Defence merely submitted a different *interpretation* of a crime, a challenge to be raised on the merits.[8] Thus neither the Trial Chamber nor the Appeals Chamber addressed the question of whether an order is required for a violation of Article 17(1) AP II or of customary international law.

The ICTY held that persecution by way of forcible transfer as a crime against humanity can take place through coercion and that it does not require an order.[9] However, if the opinion of Trial Chamber I in the Gotovina *et al.* case is followed, such conclusions concerning crimes against humanity do not necessarily apply to war crimes.

## Terminology

In international armed conflict, Article 49(1) GC IV prohibits 'forcible transfer' within and 'deportation' from occupied territory.[10] As for non-international armed

5 International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor* v. *Gotovina et al.*, Defendant Ante Gotovina's Preliminary Motion Challenging Jurisdiction Pursuant to Rule 72(A)(i) of the Rules of Procedure and Evidence, 18 January 2007, IT-06-90-PT paras. 7–9; ICTY, *Prosecutor* v. *Gotovina et al.*, Defendant Ante Gotovina's Interlocutory Appeal Against Decision on Several Motions Challenging Jurisdiction Rendered 19 March 2007 by Trial Chamber I, 3 April 2007, IT-06-90-AR72.1, para. 69 and paras. 31–36 (for the Defence's argument on the distinction between war crimes and crimes against humanity); ICTY, *Prosecutor* v. *Gotovina et al.*, Pre-Trial Brief of General Ante Gotovina, IT-06-90-PT, 5 April 2007, para. 157. The Gotovina Defence argues that crimes against humanity are derived from war crimes. Therefore, the requirements of a war crime need to be applied when addressing whether or not the corresponding crime against humanity has been committed. The Defence elaborates that Rule 129 of the ICRC Customary Law Study (Henckaerts and Doswald-Beck, above note 2) indicates that the crime of 'deportation and forcible transfer' is only applicable in international armed conflict. The corresponding offence in non-international armed conflict is the 'forced movement of civilians'. Based on the Defence's assumption that the Trial Chamber considered the armed conflict during Operation Storm of non-international nature, it concludes that Ante Gotovina was illegally indicted for the crime against humanity of 'deportation and forcible transfer'.

6 ICTY, *Prosecutor* v. *Gotovina et al.*, Decision on Several Motions Challenging Jurisdiction, 19 March 2007, IT-06-90-PT, fn. 61 referring to the above, i.e. paras. 24–28; Trial Chamber I held that regimes of war crimes and crimes against humanity exist 'separately and independently' of each other. Article 5 of the ICTY Statute applies in international and non-international armed conflict and does not require the application of the laws and customs of war.

7 *Ibid.*, fn. 61.

8 ICTY, *Prosecutor* v. *Gotovina et al.*, Decision on Ante Gotovina's Interlocutory Appeal against the Decision on Several Motions Challenging Jurisdiction, 6 June 2007, IT-06-90-AR72.1, para. 15.

9 See e.g. ICTY, *Prosecutor* v. *Blagojević and Jokić*, Trial Judgement, IT-02-60-T, 17 January 2005, para. 596.

10 Traditionally 'forcible transfer' is a displacement within the territory of a state, and 'deportation' takes place beyond internationally recognized state borders (*Ibid.*, para. 595).

conflict, Article 17 AP II is titled 'forced movement of civilians', which covers both the ordering of displacement within a territory (Article 17(1) AP II) and the compelling of civilians to leave their territory (Article 17(2) AP II). The present article will only deal with 'forced displacement', defined as the forced movement of civilians within a territory during non-international armed conflict. 'Ordered displacement' or similar formulations, which imply that civilians do not leave voluntarily, have the same meaning as forced displacement.[11]

## Article 17(1) AP II

Three possible interpretations of the scope of Article 17(1) AP II will be discussed: first, the most restrictive view of Article 17(1) AP II, that an order of displacement has to be addressed to the civilian population ('Interpretation 1'); second, the interpretation that an order does not necessarily have to be announced but that it can also be given within the chain of command of a State or of an armed group ('Interpretation 2'); and third, the interpretation whereby Article 17(1) AP II prohibits forced displacement regardless of whether it was ordered or not ('Interpretation 3').

Article 31(1) of the Vienna Convention on the Law of Treaties[12] stipulates that 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'[13] These means of interpretation will be used to discuss the three different interpretations of Article 17(1) AP II. The abundant subsequent treaty practice[14] will be central when evaluating Interpretation 3. The *travaux préparatoires*[15] will only play a minor role as they are merely a supplementary means of interpretation, and because the term 'order' was not discussed at the Diplomatic Conference 1974–1977.

11 For the broader notion of 'arbitrary displacement' see *Guiding Principles on Internal Displacement*, UN Doc. E/CN.4/1998/53/Add.2, 11 February 1998, Principle 6.

12 Vienna Convention on the Law of Treaties (VCLT) (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

13 According to its Article 4, the VCLT applies only to treaties after the VCLT's entry into force in 1980. However, its rules of interpretation were considered as declaratory of customary international law before. See Bundesverfassungsgericht (Constitutional Court of the Federal Republic of Germany) (1971) 40 BVerfGE pp. 141–179, p. 166; *Golder* v. *UK* (App. No. 4451/70) (1975) Series A, No. 18, pp. 5–22, paras. 34–35. It is thus possible to apply the rules of treaty interpretation, stipulated in the VCLT, to treaties concluded before 1980, including Additional Protocol II. Heribert Köck, *Vertragsinterpretation und Vertragsrechtskonvention: Zur Bedeutung der Artikel 31 und 32 der Wiener Vertragsrechtskonvention 1969*, Duncker & Humblot, Berlin, 1976, p. 79; Georg Ress, 'The Interpretation of the Charter' in Bruno Simma *et al*, *The Charter of the United Nations: A Commentary*, Oxford University Press, Oxford, 2002, p. 18.

14 Art. 31(3)(b), VCLT.

15 Art. 32(a), VCLT. Recourse may be had to preparatory works in so far as the interpretation resulting from Article 31(1) 'leaves the meaning ambiguous or obscure' or leads to a manifestly unreasonable result.

## Interpretation 1: for a violation of Article 17(1) AP II an order of displacement needs to be given to the civilian population

In favour of this interpretation, it could be advanced that such a requirement was intended to prevent a party to the conflict being accused of forced displacement too easily. If an order to the civilian population were necessary, a party to the conflict could be certain of not being accused of forced displacement in cases where displacement was caused by lawful military operations.

Another argument in support of such an order requirement could be based on the fact that Article 17(1) AP II was also drafted in order to restrict the practice of governments to move civilians from the conflict zone with the intention of depriving insurgents of the support they might attain from the civilian population.[16] Indeed, before the entry into force of Additional Protocol II, governments often regarded displacement of their own civilian population in non-international armed conflict as their right.[17] Thus the argument would continue, State representatives at the Diplomatic Conference 1974–1977 intended to prohibit a State from officially ordering the civilian population to leave. They might not have considered that a State would displace civilians through coercion (rather than an order) to hide its intentions because, prior to the entry into force of Additional Protocol II, it was not conventionally prohibited for States to displace the civilian population in non-international armed conflict. In addition, State representatives might not have considered the possibility that non-state actors would displace the civilian population in 'classical guerrilla' warfare between a State, which exercises control over its territory, and an armed opposition group. Indeed, in such a scenario the members of an armed group had little interest in displacing civilians, as they could hide and seek support among those civilians.

However, these arguments are speculative as they do not find support in the *travaux préparatoires*. Moreover, requiring an order to be addressed to the civilian population is neither an interpretation in good faith nor in accordance with the object and purpose of Additional Protocol II to 'ensure a better protection for the victims of […] armed conflicts'.[18] This is the case because such a requirement would encourage governments to use indirect means of coercion to displace the civilian population. Indeed, the *travaux préparatoires* support the view that displacement caused by indiscriminate military operations is prohibited too. Before Article 17 of AP II was formally proposed, the insertion of an Article which prohibits forced displacement was contemplated by the ICRC. In the ICRC's

16 Michael Bothe *et al.*, *New Rules for Victims of Armed Conflicts, Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, Martinus Nijhoff Publishers, The Hague, 1982, p. 691.
17 See e.g. Report of Committee III, Second Session, CDDH/215/Rev. 1; vol. XV, p. 259, para. 150.
18 Preamble, AP II.

report, the phrase 'displacement by force' was used, with 'force' being understood to include indirect means:

> 'Force' may be direct or indirect: in the former case the civilian population would be displaced *manu militari*; in the latter, the displacement, because of military operations, would be labelled 'spontaneous'.[19]

The fact that a 'spontaneous' displacement caused by military operations is included as a form of 'displacement by force' shows that there was an understanding that the displacement of civilians need not take place as the result of an order addressed to them directly. For the above-mentioned reasons, Interpretation 1 is not very convincing.

## Interpretation 2: for a violation of Article 17(1) AP II, an order of displacement needs to be given within a chain of command

### *Arguments in favour of Interpretation 2*

Interpretation 2, that an order to displace can be given within a chain of command, is more reasonable than Interpretation 1 because it would at least cover cases of indirect forced displacement (e.g. by mistreatment of civilians so as to make them leave), provided that they were ordered by a superior to combatants or 'fighters' under his/her command.

Like Interpretation 1, one could also argue in favour of Interpretation 2 that the ordinary meaning of the phrase 'the displacement of the civilian population shall not be ordered' seems to require a formal order.

The context lends some support to this interpretation. Article 17(2) AP II provides that 'civilians shall not be *compelled* to leave their own territory'. The 'compelling' of civilians is possible by indirect means; the term clearly does not require an order.[20] If State representatives had wanted to draft an unambiguous provision not requiring an order, they would have done so by also using 'compel' in Article 17(1) AP II, which deals with the forced displacement of the civilian population from their territory. It could be imagined that a higher threshold was intended for Article 17(1) AP II (which also covers the forced displacement of civilians within their territory) than for the forced displacement of civilians beyond their territory (Article 17(2) AP II). In that vein, an earlier draft of what is now Article 17(1) AP II stipulated that the 'displacement of civilians shall not be

19 ICRC, *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts 24 May–12 June 1971*, Vol. VI, p. 29, fn. 9 (background document for the Conference based on expert consultations).

20 The ordinary meaning of 'compel' is to 'bring about an action by force' – *The Concise Oxford Dictionary of English*, Oxford University Press, Oxford, 1991, p. 232. 'Force', as opposed to 'order', covers indirect acts. *Ibid.*, p. 459. See also Yves Sandoz *et al.* (eds), *Commentary on the Additional Protocols*, ICRC/Martinus Nijhoff Publishers, Geneva/Dordrecht, 1987, p. 1474.

ordered *or compelled*'.[21] The fact that 'or compelled' was removed from the text could be interpreted as an indication that the drafters intended to restrict the scope of Article 17(1) AP II and limit it to a prohibition of forced displacement that is 'ordered'. Indeed, some State delegates voiced concerns that Article 17(1) AP II would restrict the sovereign right of a State to displace its own population.[22] However, as there is no debate reported which clarifies why the word 'ordered' was chosen and why the term 'compelled' was dropped, such conclusions remain speculative.

### *Arguments against Interpretation 2*

As a reminder, according to Interpretation 2, Article 17(1) AP II only prohibits the ordering of displacement. Much like Interpretation 1, Interpretation 2 is hard to reconcile with the principle that a treaty must be interpreted in good faith and in accordance with its object and purpose (in the case of Additional Protocol II, to 'ensure a better protection for the victims of […] armed conflicts').[23] The protection of civilians would be seriously compromised if forced displacement were only illegal pursuant to an order. This holds true especially where a whole campaign is being conducted to displace the civilian population. An order to displace civilians which is given within the chain of command may also be very difficult to prove.

Moreover, Interpretation 2 is problematic considering that States are responsible for acts committed *ultra vires*, a norm well-established in international law before 1977.[24] According to this rule, actions and omissions of an agent of a State, who acts in an official capacity but in contravention of instructions, need to be attributed to that State.[25] The rationale is that State agents who act in an official capacity should engage the responsibility of the State regardless of whether their acts were ordered or not. This was already eloquently explained by the Spanish government in 1898:

> If this [that all Governments should always be held responsible for all acts committed by their agents in their official capacity] were not the case, one would end by authorizing abuse, for in most cases there would be no practical way of proving that the agent had or had not acted on orders received.[26]

21 Conference of Government Experts 1972, Report, Vol. I, para. 2503, Vol. II CE/COM II/85, p. 50 (emphasis added).

22 Mr Wolfe (Canada), Mr Cristescu (Romania), Miss Ahmadi (Iran), Meeting of Committee III, 4 April 1975 (CDDH/III/SR. 37; XIV, 387) reprinted in Howard Levie (ed), *The Law of Non-International Armed Conflict: Protocol II to the 1949 Geneva Conventions*, Martinus Nijhoff Publishers, Dordrecht, 1987, pp. 531, 537–538.

23 Preamble, AP II.

24 See State practice and *opinio juris* quoted in *Yearbook of the International Law Commission (YILC)*, 2001, Vol. II, Part Two, as corrected, pp. 45–46.

25 Draft Articles on Responsibility of States for Internationally Wrongful Acts, Article 7, in *YILC, ibid.* p. 45.

26 *Note verbale* by Duke Almodóvar del Río, 4 July 1898, *Archivio del Ministero degli Affari esteri italiano*, Serie Politica P, No. 43, quoted in Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *YILC*, above note 24, p. 45.

If Interpretation 2 were applied, however, responsibility for unordered displacement would not be engaged, as this type of displacement would not be considered a breach of an international obligation (thus not fulfilling the requirement for an internationally wrongful act set out in Article 2(b) of the ILC Articles on State Responsibility).[27] Thus responsibility would be denied on the basis of the primary rule prohibiting forced displacement and not on the basis of the secondary rule of attribution. Nevertheless, the outcome would render the secondary *ultra vires* rule meaningless, as the State would effectively escape responsibility purely on the basis that its officials were not instructed to perform the acts.

Of course, from a strictly legal point of view, States are at liberty to adopt a primary rule of international law which requires an order for a breach of international law to materialize.[28] However, Additional Protocol II is a treaty of international humanitarian law regulating armed conflict, i.e. in situations where control over one's subordinates is essential and for which the responsibility of a State for the acts of its armed forces has long been accepted.[29] Therefore, it would be hard to conceive that State representatives negotiating Additional Protocol II tried to circumvent the rule that acts *ultra vires* are attributable. For these reasons, Interpretation 2 is not satisfactory either.

## Interpretation 3: Article 17(1) AP II prohibits the act of forced displacement

According to Interpretation 3, forced displacement does not need to have been ordered for a violation of Article 17 AP II to materialize. This is an interpretation in good faith and in accordance with the object and purpose of Additional Protocol II. Interpretation 3 can also be reconciled with the text of Additional Protocol II: if ordering of displacement is prohibited, this seems to imply that the act of forced displacement is prohibited too. The substance of Article 17(1) is to prohibit the displacement itself, not merely the order; therefore, if it is to be effective, displacement needs to be prohibited regardless of the means used to accomplish this, be it through an order or through indirect means (such as indiscriminate attacks)

27 According to Article 2 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts: 'There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.' *YILC*, above note 24, p. 34.

28 *YILC*, above note 24, p. 47.

29 Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, adopted 18 October 1907, entered into force 26 January 1910, in De Martens, *Nouveau Recueil général de Traités*, Series 3, Vol. III, 461, Article 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, adopted 8 June 1977, entered into force 7 December 1978, 1125 UNTS 3, Article 91. Admittedly, these are provisions applicable in international armed conflict only, but Rule 149 of the ICRC Customary Law Study (Henckaerts and Doswald-Beck, above note 2) extends the content of these provisions to non-international armed conflict. It does not need to be discussed whether or not Rule 149 was customary in non-international armed conflict in 1977. The point that is made is simply that military discipline and State responsibility for violations are important principles in international humanitarian law.

which create a situation that forces civilians to leave. Otherwise, civilians who are coerced to leave an area without an order having been given – neither in the chain of command nor to the civilians directly – would not be considered as forcibly displaced. If this were correct, the prohibition of forced displacement would be void of any substance and could be easily circumvented. Interpretation 3 also finds support in the treaty practice subsequent to Article 17(1) AP II, which will be considered below after a brief outline on the standard for the interpretation of subsequent practice.

### *Standard for the interpretation of subsequent treaty practice*

Subsequent practice is dealt with in Article 31(3)(b) of the Vienna Convention on the Law of Treaties, which reads:

> There shall be taken into account, together with the context […] any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.

The exact level of consent needed for 'agreement of the parties' being ambiguous, recourse to the *travaux préparatoires* of Article 31(3)(b) may be had.[30] The International Law Commission considered 'that the phrase "the understanding [later changed to agreement] of the parties" necessarily meant "the parties as a whole".'[31] Gerald Fitzmaurice, Special Rapporteur on the Law of Treaties, specifies that 'at least the great majority' of the parties suffices.[32]

Moreover, the International Law Commission pointed out that not every party to the treaty 'must individually have engaged in the practice […] but it suffices that it should have accepted the practice'[33] by 'its reaction or absence of reaction to the practice'.[34] The view that acquiescence, i.e. 'tacit consent', can lead to an 'agreement' in the sense of article 31(3)(b) is confirmed by the jurisprudence.[35] A lack of reaction can only be interpreted as acquiescence, if it is customary to react to a certain act.[36] For this reason, resolutions adopted at the United Nations (UN) are a very good indication of subsequent practice, as States will necessarily endorse or react to a certain practice by voting on the resolutions.

30 Art 32, VCLT (chapeau).
31 *YILC*, 1964, Vol. 2, p. 199.
32 Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Vol. II, Cambridge University Press, Cambridge, 1995, p. 796.
33 *YILC*, 1966, Vol. II, p. 222.
34 *Ibid.*, p 99. In the above quote, the ILC referred to the term 'understanding' rather than 'agreement'. The drafting committee changed 'understanding' to 'agreement', not in order to alter the meaning of article 31(3)(b), but in order to attain consistency between the different authoritative language versions. See also International Court of Justice, *Kasiliki/Sedudu Island Case (Botswana/Namibia)*, Public Sitting held on 17 February 1999, Arguments by Namibia, para. 8, available at http://www.icj-cij.org/docket/files/98/4749.pdf (visited 17 September 2009).
35 *Beagle Channel Arbitration (Argentina* v. *Chile)*, International Law Reports, Vol. 52, p. 224, para. 169.
36 Wolff Heintschel von Heinegg, 'Die weiteren Quellen des Völkerrechts' in Knut Ipsen (ed), *Völkerrecht*, Verlag C.H. Beck, Munich, 2004, p. 239.

### *The treaty practice subsequent to Article 17(1) AP I supports Interpretation 3*

There are numerous instances of practice that set out the prohibition of forced displacement in non-international armed conflict and clarify that Article 17(1) AP II prohibits forced displacement regardless of whether it was ordered or not.

In the context of the armed conflict in Bosnia and Herzegovina, the UN General Assembly condemned in Resolution 46/242 'massive violations of human rights and international humanitarian law, in particular the abhorrent practice of "ethnic cleansing"'.[37] The General Assembly did not discuss the question of whether or not forced displacement had been ordered. Only Yugoslavia voted against Resolution 46/242 for obvious reasons. All other States, including Croatia and Bosnia and Herzegovina (admitted to the United Nations on 22 May 1992) agreed with the interpretation in Resolution 46/242, or at least acquiesced to it. Thus all States (but Yugoslavia) agreed that forced displacement regardless of an order is illegal under Article 17(1) AP II. Considering that the UN already had almost universal membership in the 1990s, Resolution 46/242 shows wide acceptance of that interpretation.

Moreover, the UN Security Council condemned ethnic cleansing as a violation of international humanitarian law on several occasions and reaffirmed that 'those that commit or order the commission' of such acts are individually responsible.[38] The Security Council considered the armed conflicts in the former Yugoslavia to be, in part, of non-international nature.[39] The only treaty norm that protects civilians against forced displacement in non-international armed conflict is Article 17(1) AP II. The former Yugoslavia was a State Party to AP II and the secessionist States from Yugoslavia succeeded to these treaties. The fact that the Security Council did not discuss the question whether these forced displacements were ordered indicates that it did not consider this necessary to conclude that a violation of Article 17(1) AP II had taken place.

This construction of Article 17(1) AP II is also confirmed by jurisprudence in national law. The Colombian Constitutional Court held the following:

> Protocol II also prohibits ordering the displacement of the civilian population for reasons related to the conflict […] As regards the situation in Colombia, application of these rules by the parties to a conflict is particularly binding and important, since the armed conflict currently affecting the country has

37 UN General Assembly, Res. 46/242, UN Doc. A/RES/46/242, preamble (136-1-5). Even though the condemnation is found in the preamble, it is still a good indication of *opinio juris*. The objective of ethnic cleansing is to change the ethnic composition of a territory, primarily through displacement but also through other means. See Henckaerts and Doswald-Beck, above note 2, Vol. I, pp. 461–462.

38 UN Security Council, Res. 771, 13 August 1992, UN Doc. S/RES/771, para. 2; Res. 787, 16 November 1992, S/RES/819, para. 7; Res. 819, 16 April 1993, UN Doc. S/RES 819, para. 7; Res. 820, 17 April 1993, UN Doc. S/RES/820, para. 6; Res. 941, 23 September 1994, UN Doc. S/RES/941, para. 2.

39 *Prosecutor* v. *Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, paras. 75–77.

> seriously affected the civilian population, as evidenced by the alarming data on the forced displacement of persons included in this case. The Court cannot disregard the fact that, according to the statistics compiled by the Colombian Episcopacy, more than half a million Colombians have been displaced from their homes as a result of the violence and that, as stated in the investigation in question, the principal cause of displacement involves violations of international humanitarian law associated with the armed conflict.[40]

First, the Court stated that the 'ordering' of displacement is prohibited based on Article 17(1) AP II. In a passage below, the Court found that the forced displacement was caused by violence and violations of international humanitarian law in particular (which were not necessarily ordered). This is another clear indication that Interpretation 1 is incorrect, and that Article 17(1) AP II does not require a formal order to the civilian population. Second, the Court did not address the question of whether or not these violations of international humanitarian law leading to displacement had been ordered within the chain of command and is unlikely to have known, especially with regard to the Revolutionary Armed Forces of Colombia (FARC), whether orders were actually given. This suggests that the Court considered Interpretation 3 to be correct, i.e. that Article 17(1) AP II prohibits forced displacement whether it is ordered or not.

There is much more subsequent practice in support of Interpretation 3, including the fact that many States implemented Article 17(1) AP II by prohibiting forced displacement in non-international armed conflicts without making reference to an order. Moreover, States have condemned forced displacements in non-international armed conflicts that took place on the territory of States party to AP II such as Georgia and the former Yugoslavia at the beginning of the 1990s (in the former Yugoslavia the conflicts were at least partly of non-international nature). In none of these condemnations was the question of an order raised and it cannot be assumed that State representatives always knew with certainty that an order had been given.[41]

40 Constitutional Court of Colombia, *Constitutional revision of Additional Protocol II and the Law 171 of 16 December 1994, implementing this Protocol*, Judgement, Constitutional Case No. C-225/95, 18 May 1995, para. 33.

41 The following instances of practice contain an explicit reference to non-international armed conflict: Canada's Law of Armed Conflict (LOAC) Manual (2004), p. 17-6 (under the heading of violations of Additional Protocol II); Colombia's Basic Military Manual (1995), p. 77; Netherlands, Military Manual (1993), p. IX-7; New Zealand, Military Manual (1992), para. 1823(1); Georgia, Criminal Code (1999), Article 411(2)(f); Tajikistan, Criminal Code (1998), Article 374(1). Tajikistan's law is ambiguous as it refers to international armed conflict or non-international armed conflict but then sets occupation as a condition; Report on the Practice of Egypt, 1997, chapter 5.5; Report on the Practice of France, 1999, chapters 5.5 and 5.7; The relevance of the following practice for non-international armed conflict is indirect (in most instances there is a reference to armed conflict thus comprising non-international armed conflict): 1992 Sarajevo Declaration on Humanitarian Treatment of Displaced Persons; Cotonou Agreement (Liberia peace agreement), p. 2911, para. 29; Guiding Principles on Internal Displacement, UN Doc. E/CN.4/1998/53/Add.2, 11 February 1998, Principle 6(2)(b); 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines, Part IV, Art. 3(7); France LOAC Manual (2001), p. 65; Colombia, Law on Internally Displaced Persons (1997), Articles 2(7) and 10(5); Colombia, Penal Code (2000), Article 159; Côte d'Ivoire, Penal Code as amended (1981), Article 138(3); Estonia,

A much smaller number of States and non-state actors have used the formulation in Additional Protocol II to prohibit the 'order' of displacement in non-international armed conflict, or agreed in a treaty to abstain from giving such an order.[42] The fact that the number of instruments where the original formulation of Additional Protocol II is used is relatively small is in itself remarkable, since it is common practice to incorporate treaty formulations into other instruments. Moreover, the prohibition to 'order' displacement in these instruments would seem to comprise a prohibition on forced displacement where no order was necessarily given. This is the case because all of the States that prohibit the 'ordering' of displacement under national legislation voted in favour of Resolution 46/242,[43] which suggests that they do not regard an order as necessary to find a violation of Article 17(1) AP II.

## Conclusion on the interpretation of Article 17(1) AP II

The examples quoted above support the interpretation that no order is necessary for a violation of Article 17 AP II. The argument put forward in favour of Interpretation 2 (based on the context and *travaux préparatoires*) that a distinction was intended between Article 17(1) AP II (prohibition to order displacement within the territory) and Article 17(2) AP II (prohibition to compel civilians to leave their territory) must be dismissed, as the majority of States have not retained that distinction in their national implementation, nor have they taken it into consideration in public condemnations of cases of forced displacement. For all

Penal Code (2001), para. 97; Ethiopia, Penal Code (1957), Article 282(c); Mali, Penal Code (2001), Article 31(g) and (i)(8); Nicaragua, Military Penal Code (1996), Article 58; Niger, Penal Code as amended (1961), Article 208.3(6); Slovenia, Penal Code (1994), Article 374(1); Japan, Statement before the UN Security Council, UN Doc. S/PV.3106, 13 August 1992, p. 21; Netherlands, Letter from the Minister of Defence to the Lower House of Parliament, 1994–1995 Session, Doc. 22 181, No. 109, p. 6; New Zealand, Statement before the UN Security Council, UN Doc. S/PV.3217, 25 May 1993, p. 22; Nigeria, Statement before the UN Security Council, UN Doc. S/PV.3344, 4 March 1994, p. 6; Russia, Statement before the UN Security Council, UN Doc. S/PV.3591, 9 November 1995, p. 8; Report on the practice of Russia, 1997, chapter 5.5; Botswana, Statement before the UN Security Council, UN Doc. S/PV.3535, 12 May 1995, p. 9; Russia, Statement before the UN Security Council, UN Doc. S/PV.3591, 9 November 1995, p. 8; Spain, Statement before the UN Security Council, UN Doc. S/PV.3325, 22 December 1993; UK, Statement before the UN Security Council, UN Doc. S/PV.3106, 13 August 1992, p. 36; UN Security Council, Res. 752, 15 May 1992, UN Doc. S/RES/752, para. 6; UN Security Council, Res. 819, 16 April 1993, S/RES/819, preamble; UN Security Council, Res. 822, 30 April 1993, UN Doc. S/RES/822, preamble; UN Security Council, Res. 918, 17 May 1994, UN Doc. S/RES/918, preamble; UN Security Council, Res. 1009, 10 August 1995, S/RES/1009, para. 2.

42 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina, quoted in Henckaerts and Doswald-Beck, above note 2, Vol. II, p. 2911, para. 28; UNTAET Regulation No. 2000/15, Section 6(1)(e)(iii); Argentina, Law of War Manual (1989), para. 7.08; Bosnia and Herzegovina, Federation, Criminal Code (1998), Article 154(1); Bosnia and Herzegovina, Republika Srpska, Criminal Code (2000), Article 433(1); Croatia, Criminal Code (1997), Article 158(1); Report on the Practice of Jordan, 1997, chapter 5.5. Most of the practice quoted in this and in the preceding footnote can be found in Henckaerts and Doswald-Beck, above note 2, Vol. II, Part 2, chapter 38 on displacement, p. 2908ff.

43 Argentina, Bosnia and Herzegovina, Croatia and Jordan voted in favour. For the voting record, see UN General Assembly, 91st Plenary Meeting, 25 August 1992, UN Doc. A/46/PV.91.

these reasons, Interpretation 3 must be favoured, i.e. forced displacement does not need to have been ordered for a violation of Article 17(1) AP II to materialize.

## Rule 129(B) ICRC Customary Law Study

Rule 129(B) of the ICRC Customary Law Study prohibiting the forced displacement in non-international armed conflict restates Additional Protocol II in large parts:

> Parties to a non-international armed conflict may not order the displacement of the civilian population, in whole or in part, for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand.

It would be reasonable to interpret Rule 129(B) in a manner analogous to Article 17(1) AP II, as the latter had a significant impact on the formation of the former. This would justify the hypothesis that the prohibition of an 'order' of displacement in Rule 129(B) comprises the prohibition of forced displacement through coercion. However, in order to confirm that interpretation, the practice of States not party to Additional Protocol II, or practice in relation to displacement on their territory, will be reviewed.[44]

In Resolution 55/116 adopted in 2000, the UN General Assembly expressed its deep concern about the

> serious violations of human rights and international humanitarian law by all parties in particular […] [t]he occurrence, within the framework of the conflict in southern Sudan, of cases of […] forced displacement of populations […].[45]

Sudan only acceded to Additional Protocol II on 13 July 2006. Therefore, all condemnations of forced displacement in non-international armed conflict, prior to that date, are based on the customary prohibition of forced displacement. The armed conflict between the Sudanese government and South Sudan was of non-international nature. Resolution 55/116 does not mention or discuss an order, nor is it likely that the drafters knew with certainty whether or not the forced displacement was ordered. Thus it can be argued that all States in favour of Resolution 55/116 implicitly shared the opinion that no order is required to trigger the application of the customary rule, which outlaws forced displacement in non-international armed conflict. The Resolution passed by 85 votes to 32, with 49 abstentions. Important States not party to Additional Protocol II were not

44 This includes practice prior to the publication of the ICRC Customary Law Study (Henckaerts and Doswald-Beck, above note 2), as it is practice from which the rules in the ICRC Customary Law Study were deduced.

45 UN General Assembly, Res. 55/116, 4 December 2000, UN Doc. A/RES/55/116, para. 2(a)(ii).

opposed: Israel voted in favour whilst the United States and India abstained.[46] None of the States, that voted against or abstained, protested against the implicit understanding of the customary prohibition of forced displacement in it, even though they had a forum to do so. Rather, their voting needs to be explained with a very broad understanding of sovereignty and internal affairs of a State and a perceived selectivity of UN General Assembly pronouncements on human rights issues.[47]

In Resolution 1556 (2004) concerning the armed conflict in Darfur, the UN Security Council condemned 'all acts of violence and violations of human rights and international humanitarian law by all parties to the crisis, in particular by the Janjaweed, including […] forced displacements'.[48] As the conflict in Darfur is of non-international nature, the same argument made above in relation to the conflict in South Sudan applies to Darfur *mutatis mutandis*, i.e. that the Security Council pronounced itself on the customary prohibition of forced displacement in non-international armed conflict. No State voted against Resolution 1556 and there were only two abstentions. Of the States not party to Additional Protocol II, the United States voted in favour of the resolution whereas China and Pakistan abstained.[49]

In 2004, the UN Human Rights Commission condemned without a vote the 'widespread violations and abuses of human rights and humanitarian law [including] the forced displacement of civilians'.[50] The armed conflict in Somalia was of non-international nature at that point. As Somalia is not a party to Additional Protocol II, the Commission must have pronounced itself on the basis of the customary prohibition of forced displacement in non-international armed conflict. The UN Human Rights Commission never addressed the question of whether or not the forced displacements had been ordered, and was unlikely to have known whether each of these forced displacements had in fact been carried out pursuant to an order. This suggests that it did not consider an order necessary for a finding of forced displacement.

In Resolution 61/232, the UN General Assembly expressed grave concern at the 'attacks by military forces on villages in Karen State and other ethnic States in Myanmar, leading to extensive forced displacements'[51] in the context of violations of human rights and international humanitarian law. Myanmar is not a party to

46 UN General Assembly, 81st Plenary Meeting, 3 December 2000, UN Doc. A/55/PV.81, pp. 23–24.

47 See e.g. Yemen which declined to vote on any human rights resolution (Mr Al-Ethary), UN General Assembly, 81st Plenary Meeting, 3 December 2000, UN Doc. A/55/PV.81, p. 21. The States which voted against the Resolution were Algeria, Bahrain, Chad, China, Comoros, Cuba, Democratic People's Republic of Korea, Democratic Republic of the Congo, Djibouti, Egypt, Gambia, India, Indonesia, Iran (Islamic Republic of), Jordan, Kuwait, Lao People's Democratic Republic, Lebanon, Libyan Arab Jamahiriya, Mauritania, Morocco, Myanmar, Oman, Pakistan, Qatar, Saudi Arabia, Sudan, Syrian Arab Republic, Togo, Tunisia, United Arab Emirates, Vietnam.

48 UN Security Council, Res. 1556, 30 July 2004, UN Doc. S/RES/1556, preamble.

49 UN Security Council, 5015th Meeting, UN Doc. S/PV.5015, p. 3.

50 UN Commission on Human Rights, 21 April 2004, UN Doc. E/CN.4/RES/2004/80.

51 UN General Assembly, Res. 61/232, 22 December 2006, UN Doc. 61/232, para. 2(b), voting record: 82-25-45.

Additional Protocol II and the conflict referred to was of a non-international character. Again, the General Assembly did not discuss whether or not these forced displacements had been ordered. States not party to Additional Protocol II such as Afghanistan, Andorra, Angola, Israel, Mexico, Morocco and the United States voted in favour of Resolution 61/232.[52] States which voted against it did not criticize the interpretation that forced displacement is prohibited under customary international law regardless of whether it is ordered or not. Therefore, Resolution 61/232 is interpreted in support of the view that there is no requirement for an order in the customary prohibition of forced displacement.

Although the US are not a party to Additional Protocol II, Article 17(1) AP II 'reflects general US policy'.[53] At the same time, as has been mentioned, the US condemned forced displacement in Darfur[54] and Myanmar[55] without discussing whether each of these displacements had been ordered. Azerbaijan and India, which are not party to Additional Protocol II, have prohibited forced displacement in non-international armed conflict without requiring an order.[56]

State practice and *opinio juris* of States not party to Additional Protocol II, and in relation to armed conflicts on the territory of such States, shows that the customary prohibition on forcible displacement also covered displacement which was not the result of an order.

## Article 8(2)(e)(viii) ICC Statute and its implementing legislation

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

According to Article 8(2)(e)(viii) of its Statute, the ICC has jurisdiction over forced displacement in non-international armed conflict. The crime is defined as follows:

> Ordering the displacement of the civilian population for reasons related to the armed conflict, unless the security of the civilians involved or imperative military reasons so demand.[57]

The Elements of Crimes require, *inter alia*, that the 'perpetrator ordered a displacement of the civilian population'[58]. Knut Dörmann indicates that this formulation was chosen in order

52 UN General Assembly, 84th Plenary Meeting, 22 December 2006, UN Doc. A/61/PV.84, pp. 14–15.
53 Report on US Practice, 1997, chapter 5.5, referring to a Message from the US President Transmitting AP II to the US Senate for Advice and Consent to Ratification, Treaty Doc. 100-2, 29 January 1987, Comment on Article 17, quoted in Henckaerts and Doswald-Beck, above note 2, para. 17.
54 UN Security Council, 5015th Meeting, UN Doc. S/PV.5015, p. 3.
55 UN General Assembly, 84th Plenary Meeting, 22 December 2006, UN Doc. A/61/PV.84, p. 15.
56 Report on the Practice of India, 1997, chapter 5.5, para. 103; Azerbaijan Criminal Code, 1999, Article 115.2 (quoted in Henckaerts and Doswald-Beck, above note 2, Vol. II, at paras. 103 and 70, respectively).
57 Article 8(2)(e)(viii), ICC Statute.
58 International Criminal Court (ICC), *Elements of Crimes*, ICC-ASP/1/3(part II-B), adopted and entered into force 9 September 2002, p. 42, Element 1.

> to implicate the individual giving the order, not someone who simply carries out the displacement (this fact does not exclude the possibility that the person carrying out the displacement can be held individually responsible, for example for participation in the commission of the crime; see Article 25 of the ICC Statute dealing with other forms of individual criminal responsibility).[59]

The Elements of Crimes also proscribe that the 'perpetrator was in a position to effect such displacement by giving such an order.'[60] According to Dörmann this

> would cover both *de iure* and *de facto* authority to carry out the order, so that the definition would cover the individual who, for example, has effective control over a situation by sheer strength of force.[61]

In sum, the Elements of Crimes for Article 8(2)(e)(viii) of the ICC Statute require an order by a person with authority as a means of establishing individual criminal responsibility at the top of the hierarchy. Thus the Elements of Crimes do not require that an order of displacement is addressed to the civilian population publicly; an order within the chain of command is also sufficient.

It remains to be seen whether the ICC will follow the Elements of Crimes which 'shall assist' the ICC 'in the interpretation and application of Articles 6, 7 and 8'.[62] According to the prevailing view, the ICC Elements of Crimes are only a subsidiary means of interpretation.[63] Some even argue that the Elements of Crimes are not binding on the ICC.[64] In that regard, Otto Triffterer opines that the Elements of Crimes are a 'proposal' which the ICC may accept, alter or refuse in its interpretation.[65]

At any rate, even if Article 8(2)(e)(viii) ICC Statute requires an order, this does not limit or prejudice the scope of Article 17(1) AP II and Rule 129(B) of the ICRC Customary Law Study as interpreted above. This follows from Article 10 of the ICC Statute which reads:

> Nothing in this part [including the definition of war crimes] shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.

59 Knut Dörmann, *Elements of War Crimes under the Rome Statute*, Cambridge University Press, Cambridge 2002, p. 472.
60 ICC, *Elements of Crimes*, above note 58, p. 42, Element 3.
61 Dörmann, *Elements of War Crimes*, above note 59, p. 473.
62 Article 9(1), ICC Statute.
63 See e.g. Mauro Politi, 'Elements of the Crimes: an overview', in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds), *The International Criminal Court: A Commentary*, Oxford University Press, Oxford, 2002, Vol. I, p. 447; Erkin Gadirov, in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court*, Nomos Verlagsgesellschaft, Baden-Baden, 1999, p. 309.
64 Dörmann, *Elements of War Crimes*, above note 59, p. 8. According to Dörmann, Article 9(3) of the ICC Statute is *lex specialis* to Article 21(1)(a) ICC Statute.
65 Otto Triffterer, in Bernd Schünemann *et al.* (eds), *Festschrift für Claus Roxin zum 70. Geburtstag am 15. Mai 2001*, De Gruyter, Berlin, 2001, p. 1430.

## Implementing legislation of Article 8(2)(e)(viii) ICC Statute

Article 10 of the ICC Statute stipulates that Part 2 of the ICC Statute must not be interpreted as limiting rules of international law. However, it cannot be excluded that implementing legislation of the ICC Statute has a restricting effect on customary international law. In the present case, States could restrict the customary prohibition of forced displacement by incorporating the Elements of Crimes in their national law.

Although the principle of complementarity certainly gives States an incentive to incorporate the crimes in the ICC Statute into their domestic law,[66] the ICC Statute does not expressly oblige States to do so. Nor are States bound to follow the ICC Elements of Crimes if they choose to implement the crimes set out in the ICC Statute. Some States have indeed chosen not to incorporate the crimes in the ICC Statute into their national law when implementing the rules on co-operation with the ICC. Moreover, there are still many States Parties to the ICC Statute which have not yet implemented the Statute. Thus it is not yet clear to what extent precisely States will follow the definition of crimes in the ICC Statute and in particular in the ICC Elements of Crimes or how national courts will interpret the prohibition of forced displacement in practice.

This being said, there seems to be a trend to simply restate the war crimes of the ICC Statute in national legislation, including the term 'ordering' in Article 8(2)(e)(viii).[67] Germany is an exception, which criminalizes forced displacement as such.[68] With the exception of Australia,[69] States tend not to implement the ICC Elements of Crimes, which gives national courts some flexibility in their interpretation of the equivalent to Article 8(2)(e)(viii) ICC Statute under national legislation. Even if States followed the ICC Elements of Crimes, this would most likely not have an impact on the prohibition of forced displacement in non-international armed conflict (which would remain illegal whether ordered or not). Indeed, practice shows that the criminalization of 'ordering' does not mean that forced displacement without an order is legal. In that vein, both Canada and New Zealand, which have adopted Article 8(2)(e)(viii) ICC Statute *verbatim* in criminal legislation,[70] prohibit forced displacement in non-international armed conflict in their military manuals without requiring that it be ordered.[71]

66 See Article 17, ICC Statute.

67 See e.g. Australia, ICC (Consequential Amendments) Act, 2002, Schedule 1, para. 268.89; Canada, Crimes Against Humanity and War Crimes Act, 2000, Schedule; New Zealand, International Crimes and ICC Act, 2003, Section 11(2); Trinidad and Tobago, Draft ICC Act (1999), Section 5(1)(a); United Kingdom ICC Act, 2001, Sections 50(1) and 51(1). The latter three acts are quoted in Henckaerts and Doswald-Beck, above note 2, at paras. 124, 144 and 148, respectively.

68 See Germany, Law Introducing the International Crimes Code (2002), Article 1, para. 8(1)(6), quoted in Henckaerts and Doswald-Beck, above note 2, para. 100.

69 Australia, ICC (Consequential Amendments) Act (2002), Schedule 1, para. 268.89.

70 See above note 67 and corresponding text.

71 Canada's Law of Armed Conflict (LOAC) Manual (2004), p. 17-6; New Zealand, Military Manual (1992), para. 1823(1) quoted in Henckaerts and Doswald-Beck, above note 2, para. 54.

In sum, it is still an open question whether or not the ICC will follow the order requirement in the Elements of Crimes for Article 8(2)(e)(viii). At any rate, the order requirement in the Elements of Crimes is very unlikely to have a limiting impact on customary international law.

## Conclusion

It has been argued that Article 17(1), AP II not only prohibits orders of forced displacement, but also the coercion of civilians to leave an area. This is an interpretation in good faith and in accordance with the object and purpose of Additional Protocol II to 'ensure a better protection for the victims of […] armed conflicts'.[72] Otherwise, parties to a non-international armed conflict could circumvent the prohibition laid down in Article 17(1) AP II by forcibly displacing the civilian population through coercion and claiming that this displacement had not been ordered. Moreover, the conclusion that an order is not necessary is evidenced by treaty practice subsequent to Article 17(1) AP II. In their implementation of Article 17(1) AP II in military manuals and penal codes, many States Parties to Additional Protocol II have dropped the term 'ordered'. In addition, the UN Security Council and the UN General Assembly condemned forced displacement in resolutions adopted unanimously or by large majorities without discussing whether the forced displacements had been ordered.

As in Article 17(1), AP II, the prohibition on ordering displacement in Rule 129(B) of the ICRC Customary Law Study includes unordered forced displacement. This holds true because States not party to Additional Protocol II have prohibited forced displacement regardless of whether it has been 'ordered' in their domestic legal systems. In addition, States condemned forced displacement on the territory of States not party to Additional Protocol II without considering whether or not these forced displacements had been conducted in pursuance of an order.

On the other hand, in order for forced displacement to constitute a crime, the ICC Elements of Crimes expressly require that the perpetrator ordered the displacement of civilians. This does not need to be an order to the civilian population, but may be an order within the political or military chain of command. Future jurisprudence will reveal whether the ICC will adopt this order requirement in the Elements of Crimes. However, it follows from Article 10 of the ICC Statute that Article 8(2)(e)(viii) of the Statute, even if interpreted in accordance with the corresponding Elements of Crimes, is without prejudice to the interpretations of Article 17(1), AP II and Rule 129(B) of the ICRC Customary Law Study above.

This leaves the question open as to exactly which elements constitute forced displacement in non-international armed conflict. All three rules under consideration (Article 17(1), AP II, Rule 129(B) of the Customary Law Study, and Article 8(2)(e)(viii) ICC Statute) prohibit forced displacement 'unless the security

72 Preamble, AP II.

of the civilians involved or imperative military reasons so demand'. Moreover, if civilians leave an area and this cannot be justified by these two exceptional reasons, displacement could nevertheless be lawful if it was entirely voluntary. Under which circumstances can displacement be considered voluntary and under which it is not? It has been pointed out above that the criteria for forcible transfer as a crime against humanity cannot necessarily be used to clarify forced displacement as a war crime.[73] However, there is no reason why this could not be done in order to determine the voluntariness of displacement. In this regard, the ICTY used the following criteria in *Blagojević and Jokić*:

> 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. Even in cases where those displaced may have wished – and in fact may have even requested – to be removed, this does not necessarily mean that they had or exercised a genuine choice. 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.[74]

In determining whether displacement was forced, only unlawful violence, e.g. violence which is indiscriminate or specifically directed against the civilian population, should be taken into account. Indeed, the flight of the civilian population from lawful military operations, where parties have taken precautions to spare civilians and civilian objects, can hardly be equated to forced displacement caused by coercion of civilians.

73 See paragraph accompanying note 9 above. In the above, the ICTY jurisprudence on crimes against humanity was not used in order to ascertain whether an order is necessary for a violation of Article 17(1) AP II, also because Article 5 of the ICTY Statute does not require an order for crimes against humanity.

74 ICTY, *Prosecutor* v. *Blagojević and Jokić*, Trial Judgement, IT-02-60-T, 17 January 2005, para. 596, referring, *inter alia*, to ICTY, *Prosecutor* v. *Krnojelac*, Appeal Judgement, IT-97-25-A, 17 September 2003, para. 229.