

“For private or personal use”: The meaning of the special intent requirement in the war crime of pillage under the Rome Statute of the International Criminal Court

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Abstract

*Legislating for international courts and tribunals is a delicate and complex process, which sometimes results in unintended consequences. Arguably, the inclusion of a special intent requirement, also known as *dolus specialis*, concerning “private or personal use” in the definition of pillage under the Rome Statute of the International Criminal Court is one such consequence. But this is not the only reason why the war crime of pillage deserves special attention. On closer*

* The views expressed in this article are those of the author and do not necessarily reflect the views of the ICC. The author would like to express her gratitude to Matthew Cross for his insights, and Nikila Kaushik for her prior collaboration and research assistance.

examination, other questions arise concerning its interpretation and application. What is the meaning of “military necessity” and “necessity” in relation to pillage, and how do they correlate with the special intent requirement? To answer these questions, the article examines the drafting history, law and current practice relating to the crime’s ambiguous new element. It then proposes several avenues to address the recurring uncertainty regarding its meaning: conservative, radical and pragmatic.

Keywords: pillage, plunder, International Criminal Court, Rome Statute, Elements of Crimes.



Introduction

This article explores the legal contours of the war crime of pillage in international and non-international armed conflicts under Articles 8(2)(b)(xvi) and 8(2)(e)(v) of the Rome Statute of the International Criminal Court (ICC). It focuses on the special intent of pillage, which was introduced during the drafting of the ICC Elements of Crimes. This novel element requires that the perpetrator intended to appropriate the property “for private or personal use”. To understand its meaning, the article also examines the notions of “military necessity” and “necessity”.

The meaning of the crime’s special intent requirement remains obscure more than two decades after the adoption of the ICC Statute and the Elements of Crimes. Pursuant to Article 9 of the ICC Statute, the Elements of Crimes shall assist the ICC in the interpretation and application of Article 8, consistent with the Statute. But has it been the case with pillage? The article addresses this question building on the current jurisprudence of the ICC and other international tribunals, as well as academic literature.¹

The core ICC jurisprudence on pillage consists of trial judgments in the cases of *Katanga* (2014), *Bemba* (2016), *Ntaganda* (2019) and *Ongwen* (2021). Consistent with the current prevalence of non-international armed conflicts, the four cases concern pillage under Article 8(2)(e)(v) of the ICC Statute. The verdicts in the first three cases have become final, but following the appellate acquittal in *Bemba*, there are just two final convictions for pillage at the moment: *Katanga* and *Ntaganda*. At the time of writing, the *Ongwen* case was pending resolution on appeal.

This modest track record concerning one of the most common crimes in armed conflicts is the centerpiece of this review. Current jurisprudence provides a good foundation for understanding the crime’s elements, but as discussed below, it does not give a clear and exhaustive interpretation of the special intent requirement. Meanwhile, the existing academic literature on the crime’s special intent is somewhat limited or dated. While commentators have paid much attention to pillage in the form of exploitation of natural resources, the ICC cases mostly concern basic items: food, household goods, furniture, building materials and clothes.

¹ The research and writing of this article concluded on 1 September 2021.

Thinking forward, the article considers three possible avenues to address the unresolved issue concerning the crime’s scope. It first suggests factors that could be indicative of the perpetrator’s special intent concerning “private or personal use”. As an alternative, it considers the possibility of replacing the special intent requirement in the Elements of Crimes. Finally, it argues that even without a legislative amendment, it is open to the ICC to disregard the “private or personal use” element, which would be consistent with the “established framework of the international law of armed conflict”.

Pillage in the International Criminal Court law and practice

Property crimes such as pillage remain a feature of modern armed conflicts around the world. Before delving into its special intent requirement (*dolus specialis*), the central question of this article, this section discusses pillage in the ICC law and practice. As an introduction, it recalls the crime’s definition under the ICC Statute and its constituent elements under the ICC Elements of Crimes, including their drafting history. It also gives a brief overview of pertinent ICC cases, focusing on the four cases that have been tried on pillage charges to date: *Katanga, Bemba, Ntaganda* and *Ongwen*.

The definition and legal elements of pillage

In simple terms, pillage means theft during armed conflict.² Pillage is otherwise known as looting, plunder, sacking or spoliation, although the exact definition of these terms remains elusive.³ All these concepts refer to an unlawful appropriation of any property during an armed conflict against the will of the rightful owner.

The ICC Statute criminalizes pillage under Articles 8(2)(b)(xvi) and 8(2)(e)(v). Its drafters categorized pillage as “[o]ther serious violations of the laws and customs” applicable in international and non-international armed conflicts “within the established framework of international law”. Save for the contextual elements, the legal elements of pillage in international and internal armed

2 James G. Stewart, *Corporate War Crimes: Prosecuting Pillage of Natural Resources*, Open Society Foundations, New York, 2011, p. 10. See also Armin Steinkamm, “Pillage”, in Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. 3, North-Holland, Amsterdam, 1997, p. 1029; Guido Carducci, “Pillage”, in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford, 2012; available at: <https://opil.ouplaw.com/> (all internet references were accessed in October 2021).

3 International Criminal Tribunal for the former Yugoslavia, *Delalić et al.*, Judgment, IT-96-21-T, 16 November 1998, para. 591; Request from the Governments of Belgium, Costa Rica, Finland, Hungary, the Republic of Korea and South Africa and the Permanent Observer Mission of Switzerland regarding the text prepared by the International Committee of the Red Cross on Article 8, para. 2(b), (c) and (e) of the Rome Statute of the ICC, PCNICC/1999/WGEC/INF.2, 14 July 1999 (hereafter Request from the Governments), p. 41. See also Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, Cambridge, 2003, p. 273.

conflicts are identical and raise the same legal questions. On that basis, this article makes no distinction between the two.

Articles 8(2)(b)(xvi) and 8(2)(e)(v) prohibit “[p]illaging a town or place, even when taken by assault”. Stewart observes that the language adopted in the ICC Statute is archaic and superfluous, adding “nothing of contemporary relevance”.⁴ It mirrors the language of Article 28 of the Hague Regulations Respecting the Laws and Customs of War on Land (1907), which states that “[t]he pillage of a town or place, even when taken by assault, is prohibited”.⁵ In February 1997, the US proposed to the Working Group on Definition of Crimes that this language be included in the draft text of the ICC Statute.⁶ It eventually prevailed over the simple phrasing of New Zealand and Switzerland, whose proposal was “pillage”.⁷ Another unsuccessful proposal, which the Working Group on Definition of Crimes included in its draft consolidated text for war crimes in February 1997, was “plunder”.⁸

The ICC Elements of Crimes then dropped that archaic language, similar to Article 33 of the Fourth Geneva Convention (1949), which declares in absolute terms that “[p]illage is prohibited”. But the Elements of Crimes added other peculiar features, most notably the “private or personal use” requirement, as discussed in the coming sections.

In addition to proof of the crime’s nexus to an armed conflict and the perpetrator’s awareness of the existence of an armed conflict, which are common to all war crimes,⁹ the core legal elements of pillage under the ICC Elements of Crimes are:

1. The perpetrator appropriated certain property.
2. The perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use.
3. The appropriation was without the consent of the owner.¹⁰

This specific set of elements is the result of extensive negotiations at the Working Group on Elements of Crimes concerning war crimes. Its official records show that the elements of pillage went through various stages of metamorphosis. The ICC Preparatory Commission received several proposals in the course of its work on the elements. The US proposal for the elements of

4 J. G. Stewart, above note 2, p. 13.

5 In relation to military authority over the territory of the hostile state (occupation), Article 47 of the 1907 Hague Regulations Respecting the Laws and Customs of War on Land states that “[p]illage is formally forbidden”, and Article 46 states that “private property [...] must be respected” and “[p]rivate property cannot be confiscated”.

6 Proposal submitted by the United States: War Crimes, A/AC.249/1997/WG.I/DP.1, 14 February 1997. See also Andreas Zimmermann and Robin Geiß, para. 2(b)(xvi): “Pillage”, in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd ed., Bloomsbury Publishing, London, 2016, p. 452.

7 Working paper submitted by the delegations of New Zealand and Switzerland, A/AC.249/1997/WG.1/DP.2, 14 February 1997, pp. 3 and 5.

8 Draft consolidated text: War Crimes, 20 February 1997, A/AC.249/1997/WG.1/CRP.2, pp. 6 and 8.

9 For example, in a non-international armed conflict, the final two elements require that: “4. The conduct took place in the context of and was associated with an armed conflict not of an international character. 5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.”

10 See also *Ntaganda*, Judgment, ICC-01/04-02/06-2359, 8 July 2019, para. 1027.

pillage from February 1999 replicated its suggested core elements for the war crime of destruction or appropriation of property:¹¹

2. That the accused intended to destroy or appropriate certain property that did not constitute a military objective and whose destruction or appropriation would not serve a military purpose.
3. That the accused destroyed or appropriated that property.
4. That the destruction or appropriation was without, and the accused knew it was without, lawful justification or excuse.
5. That the amount of destruction or appropriation was extensive.

It also included a comment that destruction or appropriation justified by military necessity would not result in culpability since either the “without lawful justification or excuse” or the military purpose element would be satisfied. To define the elements of pillage, the US proposal suggested adding an extra requirement that it be “carried out in an arbitrary manner, devoid of concern for the consequences”.

In July 1999, the International Committee of the Red Cross (ICRC) presented its comprehensive paper on war crimes “in order to assist the [ICC Preparatory Commission] in elaborating the text on the elements of crimes” through Belgium, Costa Rica, Finland, Hungary, South Korea, South Africa and Switzerland. It identified the following core elements of pillage in international armed conflict:

Material elements

- (1) The perpetrator appropriated or obtained against the owner’s will [by force] [either through taking advantage of the circumstances of armed conflict or through abuse of military strength] private or public property in a town or a place.
- (2) The conduct was not permissible as lawful acts of, in particular, seizure, levying contributions, requisitions or taking war booty.

Mental element

- (3) The act is committed wilfully with the specific intention [of unjustified gain] [to deprive the owner or any other person of the use or benefit of the property, or to appropriate the property for the use of any person other than the owner].¹²

Introduced in July 1999, the joint proposal of Costa Rica, Hungary and Switzerland with respect to international armed conflicts replicated the above elements from the ICRC text.¹³ Following the ICRC’s example, it removed the reference to lawful acts such as seizure, levying contributions, requisitions or

11 Proposal submitted by the United States of America: Draft Elements of Crimes, PCNICC/1999/DP.4/Add.2, 4 February 1999, pp. 6, 14 and 21.

12 Request from the Governments, above note 3, pp. 1 and 42.

13 Proposal submitted by Costa Rica, Hungary and Switzerland on certain provisions of Article 8, para. 2(b), of the Rome Statute of the ICC: (viii), (x), (xiii), (xiv), (xv), (xvi), (xxi), (xxii), (xxvi), PCNICC/1999/WGEC/DP.8, 19 July 1999, p. 3.

taking war booty in the context of internal armed conflicts.¹⁴ The Japanese proposal dating July 1999 had just one core element, other than the contextual element, which read: “The accused pillaged a town or place.”¹⁵

On the basis of the submitted proposals and discussions, the Preparatory Commission agreed on two core elements in December 1999:

2. The accused appropriated or seized certain property.
3. The appropriation or seizure was not justified by military necessity and was committed with intent to deprive the owner thereof.¹⁶

There are common elements between the December 1999 text and the final text: the fact of appropriation of certain property and the intent to deprive the owner of such property. Hosang observes that the “need for such intent was disputed by a number of delegations”.¹⁷ He also notes that the term “seized”, which was briefly introduced into the elements, was later considered to be a superfluous addition to “appropriated”.¹⁸ Although the text that the ICC Preparatory Commission adopted in December 1999 included “military necessity” as an express exception, it was eventually downgraded to a footnote, which will be discussed later. In the text adopted in November 2000, the elements appear in their current form, and the footnote no longer makes exceptions for situations of military necessity.¹⁹

Pillage is a property crime, similar to destruction or appropriation (seizure) of property. During sentencing, the *Katanga* Trial Chamber distinguished murder and attacks on civilians as “violence to life” from destruction and pillage of property as “threat to property”, holding that there should be a more severe penalty for the former.²⁰ At the same time, it described the charged property crimes as “very serious crimes under particularly cruel conditions and [committed] in a discriminatory manner”.²¹ The *Ntaganda* Trial Chamber also recognized that “crimes against property are generally of lesser gravity than crimes against the life and/or bodily integrity of persons”.²²

Other international criminal tribunals, in particular the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL), did not elaborate on

14 Proposal submitted by Costa Rica, Hungary and Switzerland on certain provisions of Article 8, para. 2(e), of the Rome Statute of the ICC: (v), (vi), (vii), (viii), (xi), (xii), PCNICC/1999/WGEC/DP.11, 19 July 1999, p. 1; Request from the Governments, above note 3, pp. 122–3.

15 Proposal submitted by Japan: Elements of Crimes: Article 8, para. 2(b)(i) to (xvi), PCNICC/1999/WGEC/DP.12, 22 July 1999, p. 5.

16 Preparatory Commission for the International Criminal Court, Annex III: Elements of Crimes, PCNICC/1999/L.5/Rev.1/Add.2, 22 December 1999, pp. 24–5 and 33.

17 See also K. Dörmann, above note 3, p. 273.

18 Hans Boddens Hosang, “Pillaging”, in Roy Lee, *International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, New York, 2001, p. 176.

19 Report of the Preparatory Commission for the International Criminal Court, Part II: Finalized draft text of the Elements of Crimes, PCNICC/2000/1/Add.2, 2 November 2000, pp. 31–2 and 43.

20 See also *Delalić et al.*, Judgment, IT-96-21-A, 20 February 2002, para. 732.

21 *Katanga*, Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/04-01/07-3484-tENG, 22 September 2015, paras 143 and 145.

22 *Ntaganda*, Sentencing Judgment, ICC-01/04-02/06-2442, 7 November 2019, para. 136. See also *Al Mahdi*, Judgment and Sentence, ICC-01/12-01/15-171, 27 September 2019, para. 77.

the definition of the crime in their core legal texts. The ICTY Statute does not mention pillage at all: it criminalizes “plunder of public or private property”. The task of defining the crime of plunder under Article 3(e) of the ICTY Statute, as well as pillage under Article 4(f) of the ICTR Statute and Article 3 of the SCSL Statute, was left entirely to judges through jurisprudence. In *Delalić et al.*, later affirmed in *Kordić & Čerkez*, the ICTY Trial Chamber defined plunder as follows:

all forms of unlawful appropriation of property in armed conflict for which individual criminal responsibility attaches under international criminal law, including those acts traditionally described as “pillage”.²³

The ICTY Trial Chamber in *Hadžihasanović & Kubura* endorsed the above definition, explaining that there is plunder “when public or private property is acquired illegally and deliberately”.²⁴ It also cited *Kordić & Čerkez*, stating that plunder covers “both widespread and systematised acts of dispossession and acquisition of property in violation of the rights of the owners and isolated acts of theft or plunder by individuals for their private gain.”²⁵

Such considerable textual differences between the definition of pillage under the ICC Statute and plunder under the ICTY Statute invite the question if references to the jurisprudence of other tribunals are appropriate here. Besides, the *Delalić et al.* trial judgment implies – without explaining its reasoning – that plunder encompasses pillage. One possible interpretation is that the definition of plunder is broader than pillage, although there is no support for this distinction in the literature.²⁶ Arguably, both terms refer to the same or comparable unlawful acts. Since the ICC applies the “established principles of the international law of armed conflict” under Article 21(1)(b) of the ICC Statute, this article consults the jurisprudence of other international criminal tribunals on discrete issues.

Overview of the International Criminal Court cases on pillage

Trial judgments in the *Katanga*, *Bemba*, *Ntaganda* and *Ongwen* cases constitute the most authoritative jurisprudence on the crime of pillage under the ICC Statute. Apart from the dissenting opinion of Judges Monageng and Hofmański in *Bemba*, the ICC has so far produced no appellate jurisprudence on pillage. The four cases concern pillage in the context of internal armed conflicts under Article 8(2)(e)(v) of the ICC Statute.²⁷ While it is consistent with the growing prevalence

23 *Delalić et al.*, Judgment, IT-96-21-T, 16 November 1998, para. 591. See also *Kordić & Čerkez*, Appeal Judgment, IT-95-14/2-A, 17 December 2004, para. 79.

24 *Hadžihasanović & Kubura*, Judgment, IT-01-47-T, 15 March 2006, para. 49.

25 *Kordić & Čerkez*, Judgment, IT-95-14/2-T, 26 February 2001, para. 352; *Hadžihasanović & Kubura*, Judgment, IT-01-47-T, 15 March 2006, para. 49.

26 See, for example, K. Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, Cambridge 2003; J. G. Stewart, *Corporate War Crimes: Prosecuting Pillage of Natural Resources*, Open Society Foundations, New York, 2011.

27 Apart from the *Katanga & Ngudjolo* case, which was later split, the ICC Prosecutor has brought no pillage charges in international armed conflict under Article 8(2)(b)(xvi) of the ICC Statute.

of internal armed conflicts in modern times, this charging pattern is the result of case selection from among the available situations under investigation.

The first ICC conviction on pillage charges came over a decade after the ICC Statute had entered into force. In March 2014, the Trial Chamber found Germain Katanga guilty as an accessory to the crime of pillage as a war crime under Articles 8(2)(e)(v) and 25(3)(d) committed during a February 2003 attack on the village of Bogoro, Ituri District, Democratic Republic of the Congo (DRC).²⁸ Mr Katanga and the Prosecution did not appeal the verdict, allowing the trial judgment to become final. The Trial Chamber sentenced him to a joint sentence of twelve years of imprisonment,²⁹ including ten years for pillage as a war crime.³⁰

The second case was overturned on appeal, but produced valuable jurisprudence. In March 2016, the Trial Chamber convicted Jean-Pierre Bemba Gombo under Articles 8(2)(e)(v) and 28(a) as a person effectively acting as a military commander for the crimes of murder, rape and pillage in the Central African Republic in 2002–2003. In June 2016, the Trial Chamber sentenced Mr Bemba to sixteen years of imprisonment for pillage out of a total of eighteen years, taking into account all relevant factors.³¹ In June 2018, the Appeals Chamber, Judges Monageng and Hofmański dissenting, overturned the conviction and Mr Bemba was acquitted of all charges, including pillage, on various grounds.³² Treating pillage as an incidental issue, the appeals judgment did not discuss the crime’s legal elements.

The third case consolidated and further developed the jurisprudence on pillage. In July 2019, the Trial Chamber found Bosco Ntaganda guilty of eighteen counts of war crimes and crimes against humanity committed in the Ituri District, DRC in 2002–2003, including pillage as an indirect co-perpetrator under Articles 8(2)(e)(v) and 25(3)(a).³³ It sentenced Mr Ntaganda to a joint sentence of thirty years of imprisonment, including twelve years for pillage.³⁴ In March 2021, the Appeals Chamber confirmed his conviction and sentence.³⁵

28 *Katanga*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/07-3436-tENG, 7 March 2014, paras 658–9. Earlier, in April 2013, the Trial Chamber acquitted his co-accused, Mr Ngudjolo, of all the charges. See *Ngudjolo*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-02/12-3-tENG, 26 December 2012, p. 197.

29 *Katanga*, Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/04-01/07-3484-tENG, 22 September 2015, paras 146–7.

30 Pursuant to Article 78(3) of the ICC Statute, when a person has been convicted of more than one crime, the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment.

31 *Bemba*, Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/05-01/08-3399, 21 June 2016, para. 94.

32 *Bemba*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s “Judgment pursuant to Article 74 of the Statute”, ICC-01/05-01/08-3636-Red, 8 June 2018.

33 *Ntaganda*, Judgment, ICC-01/04-02/06-2359, 8 July 2019.

34 *Ntaganda*, Sentencing Judgment, ICC-01/04-02/06-2442, 7 November 2019, paras 155 and 246.

35 *Ntaganda*, Public Redacted Version of Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled “Judgment”, ICC-01/04-02/06-2666-Red, 30 March 2021; *Ntaganda*, Public Redacted Version of Judgment on the appeal of Mr Bosco Ntaganda against the decision of Trial Chamber VI of 7 November 2019 entitled “Sentencing Judgment”, ICC-01/04-02/06-2667-Red.

The latest ICC jurisprudence on pillage arrived in February 2021, when the Trial Chamber convicted Dominic Ongwen of more than sixty counts of war crimes and crimes against humanity. He was found guilty of pillage as an indirect co-perpetrator under Articles 8(2)(e)(v) and 25(3)(a) committed during attacks on four internally displaced people (IDP) camps in northern Uganda between October 2003 and June 2004.³⁶ The Trial Chamber, Judge Pangalangan dissenting, sentenced him to eight years of imprisonment for pillage in each of the four camps out of a joint sentence of twenty-five years.³⁷ At the time of writing, the appeal proceedings were ongoing.³⁸

The ICC practice concerning pillage is not limited to the four cases. The Prosecution has charged pillage as a war crime in other cases, as outlined in [Table 1](#).

The cases of *Abd-Al-Rahman* and *Yekatom & Ngaiïssona*, which remain at the pre-trial and trial stages of proceedings, are expected to complement the current jurisprudence on pillage in the coming years. The cases of *Al Bashir*, *Banda*, *Harun, Hussein, Kony & Otti* and *Mudacumura* are dormant because the suspects remain at large and the ICC does not permit trials *in absentia*. If these suspects are arrested and prosecuted, their cases would further test the legal contours of pillage under the ICC Statute. Since all of them are factually comparable to *Katanga*, *Bemba*, *Ntaganda* and *Ongwen*, it remains to be seen if they will bring clarity to the meaning of the special intent requirement.

Although the Prosecution has also charged pillage in the cases of *Abu Garda* and *Mbarushimana*, the Pre-Trial Chambers declined to confirm the charges and the cases did not proceed to the trial stage. Evidence of other property crimes in connection with the charged crimes is also present in such cases as *Lubanga* and *Al Mahdi*. Given their lesser relevance to the issues examined here, the article will devote limited attention to them.

The meaning of the three core elements

This section examines the three core elements of pillage under the ICC Elements of Crimes. It focuses on the special intent (*dolus specialis*), which requires that the perpetrator intended to appropriate the property “for private or personal use”. Currently, its meaning remains unsettled in jurisprudence and academic literature. In an attempt to remedy this uncertainty, the article proposes several alternative avenues to address the issue concerning this ambiguous new element: conservative, radical and pragmatic.

The meaning of appropriation without the owner’s consent

The first and the third elements of pillage under the ICC Elements of Crimes require that the “perpetrator appropriated certain property” and that the “appropriation

36 *Ongwen*, Trial Judgment, ICC-02/04-01/15-1762-Red, 4 February 2021.

37 *Ongwen*, Sentence, ICC-02/04-01/15-1819-Red, 6 May 2021.

38 Since the parties did not raise any issues related to the crime of pillage on appeal, these proceedings are not expected to affect the ICC’s jurisprudence on pillage.

Table 1. *Overview of International Criminal Court cases concerning pillage*

Case name	Charging basis	Conviction basis	Current status
<i>Abd-Al-Rahman</i>	Art. 8(2)(e)(v)	–	Active, pre-trial ongoing
<i>Abu Garda</i>	Art. 8(2)(e)(v)	–	Closed, charges not confirmed
<i>Al Bashir</i>	Art. 8(2)(e)(v)	–	Inactive, suspect at large
<i>Banda</i>	Art. 8(2)(e)(v)	–	Inactive, suspect at large
<i>Bemba</i>	Art. 8(2)(e)(v)	–	Closed, acquitted on appeal
<i>Harun</i>	Art. 8(2)(e)(v)	–	Inactive, suspect at large
<i>Husseini</i>	Art. 8(2)(e)(v)	–	Inactive, suspect at large
<i>Katanga</i>	Art. 8(2)(b)(xvi) or 8(2)(e)(v)	Art. 8(2)(e)(v)	Closed, convicted at trial
<i>Kony & Otti</i>	Art. 8(2)(e)(v)	–	Inactive, suspect at large
<i>Mbarushimana</i>	Art. 8(2)(e)(v)	–	Closed, charges not confirmed
<i>Mudacumura</i>	Art. 8(2)(e)(v)	–	Inactive, suspect at large
<i>Ngudjolo</i>	Art. 8(2)(b)(xvi) or 8(2)(e)(v)	–	Closed, acquitted at trial
<i>Ntaganda</i>	Art. 8(2)(e)(v)	Art. 8(2)(e)(v)	Closed, conviction affirmed
<i>Ongwen</i>	Art. 8(2)(e)(v)	Art. 8(2)(e)(v)	Active, appeal ongoing
<i>Yekatom & Ngaissona</i>	Art. 8(2)(e)(v)	–	Active, trial ongoing

was without the consent of the owner”. These requirements are a common denominator between most definitions of pillage. According to the ICC Elements

of Crimes, these elements concentrate on the conduct and circumstances associated with pillage, respectively.³⁹

The *Cambridge Dictionary* defines the term “appropriation” as the “act of taking something that belongs to someone else”.⁴⁰ Further to the *Katanga*, *Ntaganda* and *Ongwen* trial judgments, the pillaging of a town or place comprises all forms of appropriation, public or private, including organized and systematic appropriation, as well as acts of appropriation committed by combatants in their own interest.⁴¹ In *Katanga*, the Trial Chamber observed that pillage was a common practice in Ituri District, DRC during the charged period and constituted a method of warfare and a form of “pay” or gain for the attackers.⁴²

In its 1958 Commentary to Article 33 of the Fourth Geneva Convention (1949), the ICRC explained that the prohibition “concerns not only pillage through individual acts without the consent of the military authorities, but also organized pillage, the effects of which are recounted in the histories of former wars, when the booty allocated to each soldier was considered as part of his pay”.⁴³ The 1987 Commentary to the Additional Protocol II to the Geneva Conventions (1977) noted that the prohibition of pillage under Article 4(2)(g) of the Additional Protocol II was based on Article 33(2) of the Fourth Geneva Convention. It covers both organized pillage and pillage resulting from isolated acts of indiscipline, and applies to all categories of property: state and private. It is prohibited to issue orders authorizing pillage.

The *Ongwen* Trial Chamber has rightly observed that although the jurisprudence is not uniform on this point, “there is no requirement that appropriations must occur on a large scale basis” to constitute the crime of pillage.⁴⁴ Indeed, any quantitative qualifiers are conspicuously absent from the crime’s definition under the ICC Statute and the Elements of Crimes. Scale may, however, be a factor for admissibility of a case based on gravity under Article 17 (1)(d) or determination of sentence under Article 78(1).

It is interesting that in the *Katanga & Ngudjolo* confirmation decision, and to a lesser degree in the *Bemba* trial judgment, appropriation was interpreted to have taken place after “property has come under the control of the perpetrator”.⁴⁵ In practice, it may be difficult to establish the exact moment when property comes

39 Elements of Crimes, General Introduction, para. 7(a).

40 *Cambridge Business English Dictionary*, available at: <https://dictionary.cambridge.org/>.

41 *Katanga*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/07-3436-tENG, 7 March 2014, para. 905; *Ntaganda*, Judgment, ICC-01/04-02/06-2359, 8 July 2019, para. 1028; *Ongwen*, Trial Judgment, ICC-02/04-01/15-1762-Red, 4 February 2021, para. 2763. See also *Delalić et al.*, Judgment, IT-96-21-T, 16 November 1998, para. 590.

42 *Katanga*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/07-3436-tENG, 7 March 2014, para. 519.

43 “Article 33. Individual Responsibility, Collective Penalties, Pillage, Reprisals”, in Jean Pictet (ed.), *ICRC Commentary on Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, Geneva, 1 August 1949, ICRC, Geneva, 1958.

44 *Ongwen*, Trial Judgment, ICC-02/04-01/15-1762-Red, 4 February 2021, para. 2764.

45 *Katanga & Ngudjolo*, Decision on the confirmation of charges, ICC-01/04-01/07-717, 14 October 2008, para. 330; *Bemba*, Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/08-3343, 21 March 2016, para. 115.

under the control of the perpetrator, while in some instances, the moment of it coming under the perpetrator's control and the moment of appropriation may coincide in time. This debatable interpretation has thus far been inconsequential in litigation, and appears to have been silently abandoned in the *Katanga*, *Ntaganda* and *Ongwen* trial judgments.

The Trial Chamber in *Katanga* and Pre-Trial Chamber in *Mbarushimana* have pointed out that the war crime of pillage does not require that the pillaged property belong to an "enemy" or "hostile" party to the conflict.⁴⁶ The *Katanga* Trial Chamber concluded that appropriation of private property belonging to combatants but not justified by military necessity constitutes the crime of pillaging.⁴⁷ This is an important correction of an earlier jurisprudence on the issue, where the Pre-Trial Chamber in *Katanga & Ngudjolo* effectively read a new element into the crime's definition.

Consent is defined in the *Cambridge Dictionary* as "permission or agreement". The perpetrator's knowledge of a lack of the owner's consent may be inferred from the facts and circumstances. The *Katanga* Trial Chamber considered the circumstances, in particular that the appropriation was effected as part of the attack. It concluded that the appropriation took place without the consent of the owner of the property as civilians were attempting to flee or hide. The evidence showed, for example, that houses were pillaged in the absence of their owners and that captives, particularly women, were forced to transport the pillaged property.⁴⁸ The Trial Chambers in *Bemba*, *Ntaganda* and *Ongwen* reiterated that lack of consent could be inferred from the absence of the owner or coercive circumstances.⁴⁹

Building on the current ICC jurisprudence, and borrowing from the elements of sexual and gender-based crimes where lack of consent is an express requirement,⁵⁰ this article suggests that the following factors could be indicative of a non-consensual appropriation:

- Statements of the perpetrator before, during or after the appropriation;
- Use or threat of force or coercion;
- Coercive environment or circumstances of appropriation;
- Deception;
- Verbal and non-verbal statements of the owner;

46 *Katanga*, Judgment pursuant to Article 74 of the Statute, ICC-01/03-01/07-3436-tENG, 7 March 2014, footnote 430; *Mbarushimana*, Decision on the confirmation of charges, ICC-01/04-01/10-465-Red, 16 December 2011, footnote 411.

47 *Katanga*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/07-3436-tENG, 7 March 2014, para. 907.

48 *Katanga*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/07-3436-tENG, 7 March 2014, para. 954. See also *Katanga & Ngudjolo*, Decision on the confirmation of charges, ICC-01/04-01/07-717, 14 October 2008, para. 337.

49 *Bemba*, Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/08-3343, 21 March 2016, para. 121; *Ntaganda*, Judgment, ICC-01/04-02/06-2359, 8 July 2019, para. 1029; *Ongwen*, Trial Judgment, ICC-02/04-01/15-1762-Red, 4 February 2021, paras 2766 and 2844.

50 Arts 7(1)(g)-1, -3, -5 and -6 (crimes against humanity), Arts 8(2)(b)(xxii)-1, -3, -5 and -6 (international war crimes) and Arts 8(2)(e)(vi)-1, -3, -5 and -6 (non-international war crimes) of the ICC Statute.

Absence of the owner during appropriation;
Physical or mental incapacity to give genuine consent.

Although the perpetrator’s use of violence may be indicative of the lack of the owner’s consent, the Trial Chamber in *Bemba* explained that the ICC’s legal framework does not include any requirement of violence as an element of the appropriation.⁵¹ This important, albeit obvious, clarification helps delineate between lawful and unlawful acts, and avoid conflating pillage with crimes against the life or bodily integrity of persons.⁵² But the judges may consider this factor as an aggravating circumstance in their determination of the sentence under Rule 145 of the ICC Rules of Procedure and Evidence.

The requirements that the perpetrator appropriated certain property and did so without the owner’s consent adequately define pillage as a war crime “within the established framework of the international law of armed conflict”. The instances where property appropriations are lawful under international humanitarian law are discussed in the later section. With the addition of a new requirement concerning “private or personal use” in the ICC Elements of Crimes, the definition of pillage became narrower and more difficult to prove.

The meaning of appropriation “for private or personal use”

In addition to the mental elements in Article 30 of the ICC Statute, the Elements of Crimes require that the “perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use”.⁵³ The Elements of Crimes explain that this element of pillage focuses on the consequences followed by a “particular mental element”: special intent.

Dörmann notes that the second element of pillage was introduced during drafting and negotiations as a result of difficulties to define the crime in the ICC Elements of Crimes.⁵⁴ Hosang recalls that “it was agreed that the requirement that the appropriation be for private or personal use distinguished pillage from the otherwise similar crime of destroying or seizing property”.⁵⁵ In *Bemba*, the Trial Chamber observed that the “private or personal use” requirement is specific to the ICC, and is not reflected in customary or conventional international humanitarian law, or in the jurisprudence of other international criminal tribunals.⁵⁶ At the same time, the judges in *Bemba* reasoned that the special intent requirement allows the ICC to better distinguish pillage from seizure,

51 *Bemba*, Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/08-3343, 21 March 2016, para. 115.

52 In *Ntaganda*, for example, the Trial Chamber found that pillaging of protected objects does not constitute an attack against protected objects (such as hospitals and churches) under Article 8(2)(e)(iv) of the ICC Statute.

53 *Katanga*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/07-3436-tENG, 7 March 2014, paras 772 and 913.

54 K. Dörmann, above note 3, pp. 272–3.

55 H. B. Hosang, above note 18, pp. 176–7.

56 *Bemba*, Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/08-3343, 21 March 2016, para. 120. See also J. G. Stewart, above note 2, pp. 20–1; *Brima et al.*, Judgment, SCSL-04-16-T, 22 February 2008, paras 753–4; *Fofana & Kondewa*, Judgment, SCSL-04-14-T-785, 2 August 2007, para. 160.

booty or other types of lawful appropriation,⁵⁷ and from other crimes under the ICC Statute concerning the expropriation of property.⁵⁸

Since other international tribunals did not restrict pillage to “private or personal use”, it permitted them to prosecute a broader category of unlawful appropriations as pillage. In *Hadžihasanović & Kubura*, the ICTY Trial Chamber recalled that international law did not allow “arbitrary and unjustified pillage for army purposes, or for the individual use of army members, even if the property seized can be used collectively or individually”.⁵⁹ In *Brima et al.*, the SCSL Trial Chamber went further and expressly stated that “the requirement of ‘private or personal use’ is unduly restrictive and ought not to be an element of the crime of pillage”.⁶⁰

Based on this particular element, the ICC Chambers have held that pillage under the ICC Statute occurs when the perpetrator appropriated items for personal use (use by him- or herself), or for private use by another person or entity, assuming all other legal elements have been met.⁶¹ Besides, it must be demonstrated that the perpetrator intended to prevent the owner from having or using his or her property.⁶²

In *Katanga*, the Trial Chamber explained that the “volitional element can be inferred from the specific conduct of the perpetrator of the deprivation”, drawing inferences about the perpetrators’ intent from their conduct. In so doing, it recalled witness testimony that the attackers had “acted in their own interest” and “acted as they wished”, seizing the spoils and using them as they pleased.⁶³ The Trial Chamber concluded that they were motivated by “private or personal gain” when they took property during the attack. Mr Katanga himself had testified that the combatants had no salary, and pillaging was a form of remuneration. In the Trial Chamber’s view, “even where food alone was involved, the pillaging was [...] not perpetrated out of military necessity, [...] but out of personal gain”.⁶⁴

In *Bemba*, the Trial Chamber considered all relevant factors when determining that items had been appropriated for private or personal use, including the “nature, location and purpose of the items, and the circumstances

57 *Bemba*, Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/08-3343, 21 March 2016, para. 120.

58 *Bemba*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s “Judgment pursuant to Article 74 of the Statute”, Dissenting Opinion of Judges Monageng and Hofmański, ICC-01/05-01/08-3636-Anx1-Red, 8 June 2018, para. 561.

59 *Hadžihasanović & Kubura*, Judgment, IT-01-47-T, 15 March 2006, para. 52.

60 *Brima et al.*, Judgment, SCSL-04-16-T, 20 June 2007, para. 754. However, the SCSL Appeals Chamber held that “[s]eizure is distinct from pillage because seizure is the appropriation of property for public purposes, whereas pillage is for private purposes”. See *Fofana and Kondewa*, Judgment, SCSL-04-14-A, 28 May 2008, footnote 770.

61 *Bemba*, Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/08-3343, 21 March 2016, para. 124; *Ntaganda*, Judgment, ICC-01/04-02/06-2359, 8 July 2019, para. 1030.

62 *Bemba*, Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/08-3343, 21 March 2016, para. 119; *Ntaganda*, Judgment, ICC-01/04-02/06-2359, 8 July 2019, para. 1029.

63 *Katanga*, Judgment pursuant to Article 74 of the Statute, ICC-01/03-01/07-3436-tENG, 7 March 2014, paras 913 and 951.

64 *Katanga*, Judgment pursuant to Article 74 of the Statute, ICC-01/03-01/07-3436-tENG, 7 March 2014, paras 951–2. Footnotes omitted.

of their appropriation”. It found that Movement for the Liberation of Congo (MLC) soldiers had “personally used” pillaged goods, such as food, beverages and livestock, as well as furniture and wooden items. It also found that MLC soldiers had traded some pillaged items for other items, such as alcohol, or forced civilians to buy back goods taken from them or their neighbours. The Trial Chamber considered that the nature of the appropriated items—personal effects, household items, business supplies, tools, money, vehicles, and livestock—indicated that the perpetrators had intended them for private or personal use.⁶⁵

On appeal, the Defence in *Bemba* argued that appropriations conducted in relation to any military purpose, or even in a military context, would not be appropriations for “private or personal use”. Such expansive interpretation blurs the lines between the permissible and impermissible acts, making it hard to investigate and prosecute pillage. It goes beyond the notion of military necessity in armed conflicts, as will be explained in the next section. Unsurprisingly, Judges Monageng and Hofmański rejected this argument in their dissenting opinion, but the majority did not address it in the appeals judgment.⁶⁶

In *Ntaganda*, the Trial Chamber also construed the phrase “private or personal use” in opposition to military use. It considered whether the appropriated property could serve a military purpose. It noted that some of the items taken by soldiers, such as vehicles and medical equipment, could potentially serve a military purpose. Without evidence of the manner in which the items were used, the Chamber was unable to conclude that their appropriation had been intended for private or personal use. Conversely, it found that items such as chairs, beds, mattresses, radio and television sets, clothing, livestock, corrugated roofing sheets and gold did not serve an “inherently military purpose”. It concluded on that basis that the items had been appropriated for private or personal use. It also noted that goods taken to Mr Ntaganda’s residence were clearly appropriated for private or personal use.⁶⁷

The *Ntaganda* trial judgment underscores that, with the exception of a certain category of items that do not serve an “inherently military purpose”, which the Trial Chamber did not define or explain, it is insufficient to demonstrate that property as such had been appropriated. There must be clear, positive evidence that the appropriation had as its purpose private or personal use. Given the volatile nature of armed conflicts, tracing the use of some pillaged items could be a complicated task. In some instances, however, the *Bemba*, *Ntaganda* and *Ongwen* Trial Chambers permitted drawing inferences about the intended purpose of appropriation based on the nature and destination of items.

In *Ongwen*, the Trial Chamber elected to be economical in its interpretation of the law on pillage and military necessity. Using succinct language, it recalled the

65 *Bemba*, Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/08-3343, 21 March 2016, paras 125 and 643–4.

66 *Bemba*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s “Judgment pursuant to Article 74 of the Statute”, Dissenting Opinion of Judges Monageng and Hofmański, ICC-01/05-01/08-3636-Anx1-Red, 8 June 2018, para. 566.

67 *Ntaganda*, Judgment, ICC-01/04-02/06-2359, 8 July 2019, paras 1041–2.

material and mental elements of the crime, distinguishing it from appropriations dictated by military necessity.⁶⁸ For each charged incident, it listed facts pointing towards the special intent of the perpetrators, but refrained from elaborating on the legal requirements as such. Importantly, it did not conflate the special intent requirement with the distinct notion of military necessity, simply stating that the “circumstances of the appropriation do not allow for consideration of military necessity as a justification”.⁶⁹ Although the streamlined approach of the Trial Chamber in *Ongwen* is preferred for its clarity and simplicity, it does nothing to explain the ambiguous issues.

Avenues to address the issue of special intent requirement

The current ICC jurisprudence does not give a clear and exhaustive interpretation of the “private or personal use” requirement. Neither does it elaborate on its relation to “military necessity”, which appears to be interpreted in rather broad terms. In stating the law, the ICC Trial Chambers have limited themselves to the specific facts of the cases at hand. This article suggests several alternative avenues to address the situation.

Despite a flaw in the current phrasing of the special intent, the ICC could pursue a conservative approach and continue interpreting the crime of pillage with reference to the “private or personal use”. In that case, building on the existing ICC jurisprudence, this article suggests that the factors indicative of the perpetrator’s special intent include:

- (i) Statements of the perpetrator before, during or after the appropriation;
- (ii) Nature, location and purpose of the appropriated property;
- (iii) Destination of the appropriated property;
- (iv) Declared and actual use of the appropriated property;
- (v) Reporting concerning appropriation or its lack via the chain of command.

However, this conservative approach concerning the special intent requirement would not fully resolve the problem. Public or official use of appropriated items appears to be excluded from the definition of pillage. Adding to the confusion, the ICC jurisprudence conflates private and personal with public and official, defining personal use as one’s own but private use as another person’s or entity’s. This is problematic because in an attempt to address restrictive language, it risks giving the terms an amorphous meaning. However, if the ICC distinguishes between “private” or “personal” and “public” or “official”, giving the terms their ordinary meaning, it may be detrimental to future cases.

The question of “private or personal use” is particularly acute with respect to non-state armed groups, which may have limited access to resources and infrastructures. The line between private or personal on the one hand and public

68 *Ongwen*, Trial Judgment, ICC-02/04-01/15-1762-Red, 4 February 2021, paras 2762–7.

69 *Ongwen*, Trial Judgment, ICC-02/04-01/15-1762-Red, 4 February 2021, paras 2873, 2926, 2972 and 3019.

or official on the other becomes less pronounced in practice and more elusive in evidence. For example, could the appropriation of FM radios be considered as serving a private or personal purpose if they are occasionally used for gathering military intelligence? What about those armed groups where private and public life are merged into one? It becomes hard to demand the same degree of distinction in the case of non-state armed groups with more fluid structures and fewer resources.

Commentators agree that the “private or personal use” requirement is problematic and could lead to a restrictive application of the prohibition. For example, Dam-de Jong observes that confining pillage to appropriation of natural resources for private or personal use seems to exclude the exploitation of natural resources for the purpose of funding an armed conflict.⁷⁰ Gillett concurs, noting that “[w]arring factions will regularly use misappropriated property to fund their military campaigns, rather than for personal ends”.⁷¹ Radics and Bruch point out that “it is challenging to disentangle the symbiotic relationship that often exists between exploitation activities that are done in furtherance of an armed conflict – either by government or rebel groups – or for strictly personal gain and enrichment”.⁷² These examples illustrate the difficulty of prosecuting certain cases as pillage due to its current *dolus specialis*.

Given these considerations, it is worth exploring other, more adequate solutions. With sufficient interest and support, the optimal solution would be for the ICC Assembly of States Parties to consider removing the unduly restrictive requirement that the perpetrator intended to appropriate property “for private or personal use” from the Elements of Crimes. Although a radical step, it would eliminate the risk of a restrictive interpretation and application of the prohibition in the future. To avoid the chance of penalizing lawful appropriations, it could be replaced with language prohibiting appropriation “for arbitrary purposes” or “for unjustified gain”. The latter would partly resurrect the ICRC’s original proposal, which it made to the ICC Preparatory Commission in July 1999.⁷³

Another available avenue requires no changes to the Elements of Crimes. Even without legislative amendments, it is open to the ICC to interpret the legal elements of pillage in line with the “established framework of the international law of armed conflict”. Article 9 of the ICC Statute makes it clear that the Elements of Crimes shall assist the ICC in its interpretation and application of war crimes in Article 8. Since the Elements of Crimes cannot restrict the ICC in its interpretation of pillage, it is open to the ICC to disregard the “private or

70 Daniëlla Dam-de Jong, “From Engines for Conflict into Engines for Sustainable Development: The Potential of International Law to Address Predatory Exploitation of Natural Resources in Situations of Internal Armed Conflict”, *Nordic Journal of International Law*, Vol. 82, No. 1, 2013, pp. 165–6.

71 Matthew Gillett, “Eco-Struggles: Using International Criminal Law to Protect the Environment During and After Non-International Armed Conflict”, in Carsten Stahn, Jens Iverson and Jennifer S. Easterday (eds), *Environmental Protection and Transitions from Conflict to Peace: Clarifying Norms, Principles, and Practices*, Oxford University Press, Oxford, 2017, p. 231.

72 Olivia Radics and Carl Bruch, “Pillage, Conflict Resources, and *Jus Post Bellum*”, in C. Stahn, J. Iverson and J. S. Easterday (eds), *ibid.*, pp. 150–1.

73 Request from the Governments, above note 3, p. 40.

personal use” requirement as inconsistent with the established framework of international humanitarian law. This would honour the ICC Statute’s object and purpose, whose Preamble declares that “the most serious crimes of concern to the international community as a whole must not go unpunished”. To distinguish pillage from lawful appropriations, which will be discussed next, the ICC could follow the ICTY’s example and define the crime as “arbitrary”, “illegal” or “unlawful” appropriations.

The relation of pillage to lawful appropriations

In certain cases, wartime appropriations are permissible if justified by military necessity. Although the drafters of the ICC Statute attempted to clarify the difference between lawful and unlawful appropriations by including a footnote to the crime of pillage,⁷⁴ they seem to have inadvertently introduced more confusion for the practitioners.

“Military necessity” appropriations are not pillage

Footnote 47 to Article 8(2)(b)(xvi) and footnote 62 to Article 8(2)(e)(v) in the Elements of Crimes read, “[a]s indicated by the use of the term ‘private or personal use’, appropriations justified by military necessity cannot constitute the crime of pillaging”.

The sole purpose of footnotes 47 and 62 is to explain the second element of the crime of pillage, namely that the perpetrator intended to “appropriate [the property] for private or personal use”. Trial Chambers in *Bemba* and *Ntaganda* indicated that the reference to “military necessity” in footnote 62 does not provide for an exception to the absolute prohibition on pillage. Rather, it clarifies that military necessity is incompatible with the requirement that the perpetrator intended the appropriation for private or personal use. On the contrary, military necessity would require its use to be directed at furthering the war effort and thus being used for military purposes.⁷⁵ In other words, pillage and military necessity are mutually exclusive concepts.

The interpretation in *Bemba* and *Ntaganda* reflects the drafting and negotiations history. Hosang recalls that the footnote initially explained that the term “private or personal use” necessarily excluded appropriations justified by military necessity. During negotiations, various delegations either contested or strongly defended this phrasing. Given these disagreements, the footnote was redrafted to take its present shape. Hosang concludes that the need for the footnote remains obscure, but concedes that it would be hard to imagine

⁷⁴ K. Dörmann, above note 3, pp. 272–3.

⁷⁵ *Ntaganda*, Judgment, ICC-01/04-02/06-2359, 8 July 2019, para. 1030; *Bemba*, Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/08-3343, 21 March 2016, para. 124. See also *Ongwen*, Trial Judgment, ICC-02/04-01/15-1762-Red, 4 February 2021, para. 2767.

appropriations that are both justified by military necessity and intended for private or personal use.⁷⁶

Pursuant to the Lieber Code (1863), cited in *Katanga* and *Bemba*, “[m]ilitary necessity [...] consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war”.⁷⁷ It flows from the above definition that appropriations of property during attacks directed against civilians and civilian objects, which are in turn utilized to conduct further attacks on civilians and civilian objects, cannot be justified by military necessity because these attacks are unlawful.

Based on footnote 62, the Defence in the *Katanga* and *Bemba* cases argued that the Prosecution must disprove military necessity. The Trial Chambers have rightly dismissed that reasoning as unjustified under the ICC Statute, despite an earlier holding of the *Mbarushimana* Pre-Trial Chamber.⁷⁸ The *Bemba* Trial Chamber confirmed that the Prosecution is not required to disprove the existence of “military necessity”.⁷⁹

This reading is consistent with the Elements of Crimes. Absence of military necessity is not an express element under Articles 8(2)(b)(xvi) or 8(2)(e)(v). This distinguishes pillage from war crimes of “destruction and appropriation of property” under Article 8(2)(a)(iv), “destroying or seizing the enemy’s property” under Article 8(2)(b)(xiii) or 8(2)(e)(xiii), and “displacing civilians” under Article 8(2)(e)(viii) of the ICC Statute. Unlike pillage, these crimes include an explicit language requiring that the Prosecution disprove the existence of military necessity.⁸⁰

In their dissent to the appeal judgment in *Bemba*, Judges Monageng and Hofmański explained that the Hague Regulations, as well as the Geneva Conventions and Additional Protocols, do not provide an absolute protection for public or private property in armed conflicts. They concluded that the prohibition on pillage is not the same as the prohibition on appropriation of property without the consent of the owner *per se*. Rather, the prohibition targets a particular type of wartime looting by soldiers.⁸¹

The crime of pillage is conceptually different from requisition, seizure or other lawful appropriations, which can be justified by military necessity.⁸² According to Articles 51–3 of the Hague Regulations Respecting the Laws and Customs of War on Land (1907), cited in the ICTY’s *Naletilić & Martinović* trial

76 H. B. Hosang, above note 18, p. 177.

77 Instructions for the Government of Armies of the United States in the Field (Lieber Code), 24 April 1863, Art. 14.

78 *Mbarushimana*, Decision on the confirmation of charges, ICC-01/04-01/10-465-Red, 16 December 2011, para. 176.

79 See *Bemba*, Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/08-3343, 21 March 2016, para. 124.

80 For example, Article 8(2)(a)(iv) of the ICC Statute requires that “[t]he destruction or appropriation was not justified by military necessity”.

81 *Bemba*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s “Judgment pursuant to Article 74 of the Statute”, Dissenting Opinion of Judges Monageng and Hofmański, ICC-01/05-01/08-3636-Anx1-Red, 8 June 2018, para. 560.

82 The *Cambridge Dictionary* defines requisition as the “act of officially asking for or taking something”. It defines seizure as “the action of taking something by force or with legal authority”.

judgment, forcible contribution of money, requisition for the needs of the army of occupation, and seizure of material obviously related to the conduct of military operations, though restricted, are lawful in principle.⁸³

Pursuant to Article 52 of the Hague Regulations, requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, not involving the inhabitants in the obligation of taking part in military operations against their own country. Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied. Contributions in kind shall as far as possible be paid for in cash. If not, a receipt shall be given and the payment of the amount due shall be made as soon as possible. As evident from the above, the scope of lawful appropriations in armed conflict is well defined in law and there is no *carte blanche*.

The 1958 Commentary to the Fourth Geneva Convention (1949) also noted that the prohibition on pillage “leaves intact the right of requisition or seizure”.⁸⁴ The ICTY jurisprudence is instructive here. In *Delalić et al.*, the ICTY Trial Chamber observed that “whereas historically enemy property was subject to arbitrary appropriation during war, international law today imposes strict limitations on the measures which a party to an armed conflict may lawfully take in relation to the private and public property of an opposing party”.⁸⁵

In *Hadžihasanović & Kubura*, the ICTY Trial Chamber found that plunder occurred when appropriation was unlawful and deliberate. In contrast, property seized as war booty, requisitioned, or whose seizure was justified by necessity were exceptions to the principle of protection of public and private property.⁸⁶ In *Simić et al.*, the ICTY Trial Chamber described the permissible contours of requisition and seizure as follows:

The Trial Chamber notes that in certain circumstances, property may be requisitioned lawfully under international humanitarian law. These circumstances are defined by The Hague Regulations and are limited to the following: taxes and dues imposed within the purview of the existing laws, or requisitions for the needs of the army of occupation, which shall be proportional to the resources of the country. Private property also may be seized if it is needed for the conduct of military operations and should be returned and compensated upon termination of the conflict. Monetary contributions may be collected only under a written order issued by the commander-in-chief in accordance with the tax rules in force and for every contribution a receipt should be issued.⁸⁷

Besides, the crime of pillage must be distinguished from the ancient concept of booty in warfare. Under customary international law, a belligerent party in an

83 *Naletilić and Martinović*, Judgment, IT-98-34-T, 31 March 2003, para. 616.

84 J. Pictet, above note 43, p. 227.

85 *Delalić et al.*, Judgment, IT-96-21-T, 16 November 1998, para. 587.

86 *Hadžihasanović & Kubura*, Judgment, IT-01-47-T, 15 March 2006, para. 56.

87 *Simić et al.*, Judgment, IT-95-9-T, 17 October 2003, para. 100. Footnotes omitted.

international armed conflict may capture an enemy’s movable property on the battlefield—such as weapons and military equipment—as war booty.⁸⁸ Dörmann points out that captured property, according to some military manuals and domestic legislation, must be handed over to authorities.⁸⁹

In sum, the established framework of the international law of armed conflict makes it plain that under limited circumstances, property appropriations may be permissible. Requisition, seizure and war booty are lawful and do not constitute pillage. The current reading of the special intent requirement suggests that these permissible appropriations do not fall within its scope. However, the ICC jurisprudence should take it further and explain the correlation between “military necessity” and the requirement that the perpetrator intended to appropriate the property for “private or personal use”. Even if the ICC eventually drops the special intent requirement, as this article proposes, “military necessity” calls for a more in-depth discussion of its meaning in the context of pillage under the ICC Statute. In any event, this concept should be construed narrowly, in line with its meaning under the Lieber Code.

“Necessity” can exclude criminal responsibility for pillage

Necessity (duress) can be raised as a ground for excluding criminal responsibility under Article 31(1)(d) of the ICC Statute.⁹⁰ It should be distinguished from the notion of “military necessity”, which features in the footnote to the legal elements of pillage. Necessity under Article 31(1)(d) of the ICC Statute does not make the appropriation lawful, unlike military necessity. It thus requires demonstrating that appropriation was intended for private or personal use. However, it removes the ensuing legal consequences for committing the crime.

In *Hadžihasanović & Kubura*, the ICTY Trial Chamber acknowledged that under certain conditions, necessity could be a defence against plunder:

The Chamber is of the view that, in the context of an actual or looming famine, a state of necessity may be an exception to the prohibition on the appropriation of public or private property. Property that can be appropriated in a state of necessity includes mostly food, which may be eaten in situ, but also livestock. To plead a defence of necessity and for it to succeed, the following conditions must be met: (i) there must be a real and imminent threat of severe and irreparable harm to life existence; (ii) the acts of plunder must have been the only means to avoid the aforesaid harm; (iii) the acts of plunder were not disproportionate and, (iv) the situation was not voluntarily brought about by the perpetrator himself.⁹¹

88 Yoram Dinstein, “Booty in Warfare”, in *Max Planck Encyclopedia of Public International Law*, above note 2. See also *Hadžihasanović & Kubura*, Judgment, IT-01-47-T, 15 March 2006, para. 51.

89 K. Dörmann, above note 3, p. 277.

90 Article 31(3) of the ICC Statute allows raising other grounds for excluding criminal responsibility, in accordance with the procedure elaborated in Rule 80 of the ICC Rules of Procedure and Evidence.

91 *Hadžihasanović & Kubura*, Judgment, IT-01-47-T, 15 March 2006, para. 53.

In *Katanga*, the Defence argued that criminal responsibility must have been excluded under Article 31(1)(d) of the ICC Statute on the grounds that appropriations were essential to survival. It argued that the Trial Chamber must take into account the circumstances in which the property was appropriated because survival was at stake.⁹² The Trial Chamber, however, pointed out that such assessment cannot be made in abstract and must be done on a case-by-case basis.⁹³

The *Katanga* Trial Chamber endorsed the above reasoning in *Hadžihasanović & Kubura*, and held that in certain circumstances, “appropriation of livestock and food could, indeed, and on its own, constitute a response to a grave, ongoing or imminent threat to physical integrity”.⁹⁴ It pointed out that the pillaged property in the case sometimes consisted of livestock, but mainly included roofing sheets, furniture or personal belongings. Having acknowledged that the attackers were enduring a very difficult situation at the time, which had forced people to go to other villages to pillage, it found no indication that they were in a situation of grave, ongoing or imminent threat to their existence comparable to a famine.

It is unclear what such situations of grave, ongoing or imminent threat to existence comparable to a famine entail in practice. It would have been helpful if the Chamber clarified whether the test for threat assessment rests on a subjective view of the perpetrator or an objective evaluation, or some combination of the two. In the *Katanga* case, the Trial Chamber appears to have followed an objective test. Irrespective, establishing a “grave, ongoing or imminent threat to existence comparable to famine” could prove a delicate task in some cases.

Necessity was once raised as a ground for excluding criminal responsibility under Article 31(1)(d) of the ICC Statute in the *Ongwen* case.⁹⁵ During trial opening submissions, the Defence argued necessity to pillage food from civilians in the following terms:

[T]he IDP camps became the only place where food could be found in the whole of northern Uganda. Therefore, out of necessity, your Honours, the LRA [Lord’s Resistance Army] had to find a way of getting this food from the IDP camps.⁹⁶

The only LRA attack which involved civilians, especially the IDP camps, were not targeted at civilians, per se. They were aimed to look for food out of necessity. And, your Honours, isn’t it the saying that necessity obeys no law.⁹⁷

92 *Katanga*, Judgment pursuant to Article 74 of the Statute, ICC-01/03-01/07-3436-tENG, 7 March 2014, para. 949.

93 *Katanga*, Judgment pursuant to Article 74 of the Statute, ICC-01/03-01/07-3436-tENG, 7 March 2014, para. 955.

94 *Katanga*, Judgment pursuant to Article 74 of the Statute, ICC-01/03-01/07-3436-tENG, 7 March 2014, para. 956.

95 The Defence appears to have abandoned these arguments in its closing brief and oral submissions. See *Ongwen*, Public Redacted Version of “Corrected Version of ‘Defence Closing Brief’”, filed on 24 February 2020”, ICC-02/04-01/15-1722-Corr-Red, 13 March 2020; *Ongwen*, ICC-02/04-01/15-T-258-Red-ENG, 12 March 2020.

96 *Ongwen*, ICC-02/04-01/15-T-179-Red-ENG, 18 September 2018, p. 16.

97 *Ongwen*, ICC-02/04-01/15-T-179-Red-ENG, 18 September 2018, p. 32.

The *Ongwen* Trial Chamber did not specifically address necessity in relation to pillage, focusing instead on a discrete notion of military necessity.⁹⁸ It discussed duress as an overarching ground for excluding criminal responsibility, which Mr Ongwen raised in relation to all crimes, finding that it was not applicable to his criminal conduct.⁹⁹ This leaves the *Katanga* trial judgment as the sole authoritative jurisprudence on necessity to pillage under the ICC Statute.

Considering that military necessity under the Lieber Code requires demonstrating “necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war”, arguing necessity under Article 31(1)(d) might prove a better strategy in situations where appropriations target food and similar essential items. The interpretation of “private or personal use” based on the nature of the appropriated items in *Katanga*, *Bemba*, *Ntaganda* and *Ongwen* seems to support this conclusion. In such cases, *Hadžihasanović & Kubura* could offer a blueprint for understanding necessity in the context of pillage under Article 31(1)(d) of the ICC Statute.

Conclusion

After the adoption of the ICC Statute in July 1998, the judges have been shaping the legal contours of the war crime of pillage through jurisprudence. Despite the crime’s recurring presence in the ICC cases, some legal ambiguities remain unresolved, in particular the element concerning “private or personal use”. This article aims to contribute to the discussion regarding the crime’s meaning under the ICC Statute.

The current ICC jurisprudence does not provide a clear and exhaustive interpretation of “private or personal use” and does not elaborate on its correlation with “military necessity”. In stating the law, the ICC Trial Chambers have limited themselves to the specific facts of the cases at hand. To date, there has been no appellate jurisprudence on substantive issues concerning pillage. Building on the existing ICC jurisprudence, the article suggests that several factors could be indicative of the perpetrator’s special intent in relation to “private or personal use”: (i) the perpetrator’s statements, (ii) nature, location and purpose of the appropriated property, (iii) destination of the appropriated property, (iv) declared and actual use of the appropriated property, and (v) reporting via the chain of command.

This conservative step would not entirely address the problem with the special intent requirement. Being overly rigid and restrictive, it limits the unlawful acts to a narrow category of those appropriations that are intended “for private or personal use”. The issue is particularly acute in situations of internal armed conflicts, where non-state armed groups may have no sustainable access to infrastructures and resources, unlike most governmental authorities. The line

98 *Ongwen*, Trial Judgment, ICC-02/04-01/15-1762-Red, 4 February 2021, paras 2767 and 2873.

99 *Ongwen*, Trial Judgment, ICC-02/04-01/15-1762-Red, 4 February 2021, paras 2581–672.

between private or personal on the one hand and public or official on the other hand becomes less pronounced in practice and more elusive in evidence.

Given these practical difficulties, and since no such requirement is present “within the established framework of the international law of armed conflict”, it is open to the ICC to take more fundamental steps to address the issue. Ultimately, the Assembly of States Parties may decide to remove the unduly restrictive intent requirement of appropriation “for private or personal use” from the Elements of Crimes and replace it with a more inclusive language. However, even without this legislative amendment, there is a simple and practical avenue, which the ICC Trial Chambers have thus far overlooked. The ICC could elect to interpret the legal elements of pillage in line with the established framework of international humanitarian law, which requires no special intent concerning private or personal use.