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Making crimes mean: a normative analysis of the acts that constitute international crimes

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CHAPTER 3. PILLAGE

The war crime of pillage has received relatively limited scholarly attention in the field of international criminal law. This is despite having been addressed fairly extensively at Nuremberg and, more recently, having featured in ten cases at the ICTY, three of the four trials conducted by the SCSL, and in most of the cases that have proceeded to trial at the ICC to date.¹ The limited attention to pillage may result from its status as one of the most well-established prohibitions in international humanitarian law,² eliciting little controversy in legal terms, or from the lesser gravity understood to attach to crimes against property when compared to the acts of violence against persons criminalised under international law. This has been reinforced in how pillage has often featured as a somewhat peripheral charge in trials involving large-scale violence to life and person, with prosecutors having ‘focused on discrete, often relatively small-scale episodes of theft.’³ The limited existing scholarship on pillage in international criminal law has also focused almost exclusively on the question of how this crime could be employed to capture practices of natural resource exploitation during conflicts.⁴ For these reasons, while international courts prosecute pillage as a matter of course, there has nevertheless been relatively limited interrogation of the normative basis of its criminalisation and therefore the justification for prosecuting such ‘discrete, often relatively small-scale episodes of theft’⁵ on their own terms.

This chapter first traces the historical roots of the prohibition on pillage in international humanitarian law, identifying its roots in self-interested needs to ensure military discipline and its later correlation with emerging liberal concerns with protecting rights to private property. The chapter goes on to argue that the definitions of pillage applied at the ICTY, SCSL and the ICC offer a normative conceptualisation of the crime as rooted in this liberal concern with protecting property rights during armed conflict. Next, the chapter traces the normative themes constructed around this

¹ Namely *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (ICC-01/04-01/07), *Prosecutor v. Jean-Pierre Bemba Gombo* (ICC-01/05-01/08), *Prosecutor v. Bosco Ntaganda* (ICC-01/04-02/06) and *Prosecutor v. Dominic Ongwen* (ICC-02/04-01/15).

² Eve La Haye, ‘The Prohibition of Pillage in International Humanitarian Law’ in Nina H. B. Jørgensen (ed), *The International Criminal Responsibility of War’s Funders and Profiteers* (Cambridge University Press 2020), 190.

³ Patrick J. Keenan, ‘Conflict Minerals and the Law of Pillage’, (2014) 14(2) *Chicago Journal of International Law*, 527.

⁴ See Michael A Lundberg, ‘The Plunder of Natural Resources During War: A War Crime’, (2008) 39(3) *Georgetown Journal of International Law*, 495-525; James G. Stewart, *Corporate War Crimes: Prosecuting the Pillage of Natural Resources*, Open Society Institute, 2011; Larissa van den Herik and Daniëlla Dam-de Jong, ‘Revitalizing the Antique War Crime of Pillage: The Potential and Pitfalls of Using International Criminal Law to Address Illegal Resource Exploitation during Armed Conflict’, (2011) 22(3) *Criminal Law Forum*, 237-273; Keenan (n 3), 524-558.

⁵ Keenan (n 3), 527.

crime in the case law of the courts and tribunals, outlining how the themes of scale, use value, and a dilution of the legal element of ownership contribute to a degree of evolution away from the centrality of property rights that underlies the definition, to contribute to a more harm-based and use value-oriented account of the crime. Lastly, the discourse analysis of the narratives that emerge around the crime of pillage during the course of proceedings further reveals a pronounced shift towards emphasising the nature of the harms inflicted on victims of pillage. This is reflected in a particular emphasis on the economic implications of pillage for those already living at a subsistence minimum, as well as in how certain aspects of the social dimensions of property, which attribute it with meaning and value in particular communities or for individuals, are highlighted.

1. Historical-normative roots in international law

The prohibition on pillage has long historical roots in the laws of armed conflict.⁶ In general terms, pillage is understood to align with most states' domestic laws on theft in how it involves, at a basic level, the unauthorized taking of public or private property.⁷ In essence, pillage simply entails 'theft during war.'⁸ The term pillage is also widely understood to be synonymous with looting, plunder, spoliation and sacking.⁹ Historically, pillaging the enemy's property featured heavily in medieval feuding and became a typical part of European warfare by the 16th century.¹⁰ During this period, pillage or looting was not viewed as deviant, but was instead seen as a legitimate method of causing injury to the enemy, an appropriate means of sustaining an army, a useful recruiting tool and therefore as a form of justified self-compensation for soldiers.¹¹ At this point, pillage was viewed as a 'bona fide "spoils of war" to which the victors were entitled'.¹² Writing in 1625, Hugo Grotius deemed pillage to be lawful, explaining that:

Cicero, in the third of his Offices, declares, It is not against the Law of Nature to spoil or plunder him whom it is lawful to kill. No wonder then if the Law of Nations allows to spoil and waste an Enemy's Lands and Goods, since it permits him to be killed. [...] And we read in Livy, There are certain Rights of

⁶ La Haye (n 2), 190.

⁷ Kerrin Geoffrey Buck, 'Displacement and dispossession: redefining forced displacement and identifying when forced displacement becomes pillage under international humanitarian law', (2017) 2(1) *Journal of International Humanitarian Action*, 12; Jean-Marie Henckaerts and Louise Doswald-Beck, *ICRC Customary International Humanitarian Law Volume I: Rules* (Cambridge University Press 2009), 185.

⁸ Stewart (n 4), 10.

⁹ van den Herik and Dam-de Jong (n 4), 251; Stewart (n 4), 10; La Haye (n 2), 190-191.

¹⁰ Fritz Redlich, *De Praeda Militari: Looting and Booty 1500-1815* (Steiner 1956), 2-4.

¹¹ H. Wayne Elliott, 'The Third Priority: The Battlefield Dead', (1996) 7 *Army Lawyer*, 14.

¹² *Ibid.*, 14; Stuart Green, 'Looting, Law and Lawlessness', (2007) 81(4) *Tulane Law Review*, 1137.

War, which, as we may do, so we may suffer, as the burning of Corn, the pulling down of Houses, the taking away of Men and Cattle. [...] And we may observe, these Things are lawful to be done, even to those that surrender themselves.¹³

Later developments towards condemning, and ultimately prohibiting, pillage initially emerged from armies' self-interested concern with maintaining discipline among their own troops.¹⁴ As modern nation states emerged, with professional standing armies replacing mercenaries sustained through pillage, undisciplined armies came to constitute a hindrance to the ambitions of states and their monarchs in seeking total control over their territories. At the same time, pillage no longer benefitted the new states themselves as a recruiting incentive for mercenaries, whose soldiers instead received tax-funded salaries.¹⁵ Maintenance of discipline among troops became a particular concern for professional armies when military tactics evolved to require unified formations on battlefields, meaning that the distraction of temptations such as pillage could break such unity and lead to defeat. From the perspective of military authorities, pillage therefore came to be seen as a practice that 'disrupts units and disturbs orderly procedure toward the essential end – the correct and efficient conduct of military operations.'¹⁶ Early prohibitions on pillage in the 16th and 17th centuries therefore emerged in response to the need to regulate the behaviour of one's own army, rather than as a result of a concern with the welfare of the enemy's population.¹⁷ This underlying rationale for regulating pillage evolved over time, shifting by the early 18th century from a primary concern with the impact of the loss of discipline on the realisation of direct military objectives, to also reflect a desire not to embitter civilian populations towards invading armies, which was gradually also seen as counter-productive from the perspective of achieving overall military victory.¹⁸ In this way, shifts in the cost-benefit structure around pillage, driven by wider changes in the structures of armies and the nature of belligerent parties, shaped the initial self-interested considerations behind early efforts to regulate pillage as a matter of military discipline.¹⁹

During the 17th and 18th centuries, the emergence and consolidation of the nation state engendered a shift in how wars were understood, with the earlier conception of feuding between kings or princes and their subjects replaced by an understanding of

¹³ Hugo Grotius, *The Rights of War and Peace Book III* (Liberty Fund 2005), 1303-1304.

¹⁴ La Haye (n 2), 189.

¹⁵ Tuba Inal, *Looting and Rape in Wartime: Law and Change in International Relations* (University of Pennsylvania Press 2013), 42.

¹⁶ Elbridge Colby, 'The Military Value of the Laws of War', (1926) 15 *Georgetown Law Journal*, 25.

¹⁷ Inal (n 15), 42.

¹⁸ Doris Appel Graber, *The Development of the Law of Belligerent Occupation 1863-1914: A Historical Survey* (Columbia University Press 1949), 198. See also Inal (n 15), 42.

¹⁹ Inal (n 15), 43.

war as a relationship between states.²⁰ This shift, as the state came to develop its own identity, therefore resulted in a new understanding of war as taking place between the states themselves, rather than between their citizens, who ought for this reason to be 'left intact, except so far as they are disturbed by the necessities of war.'²¹ This evolution underpinned the much wider change in contemporary theorisations of what was permissible during war, with jurists beginning to argue in favour of limiting permissible force solely to that which contributed to the attainment of military victory.²² For this reason, the normative approach to pillage also began to shift to reflect the idea that:

If it should prove true [...] that plundering would not harm the enemy as a whole nor the king, but instead innocent persons to such an extent that they would be plunged into the greatest misfortunes; and if such plundering would have no notable effect in ending the war or in weakening the public strength of the enemy, then the gain acquired ought to be considered unworthy of a just man and especially a Christian.²³

Against the background of these military and normative developments, by the mid-18th century, pillage had come to be viewed as wrong and was often punished when it did take place.²⁴ At the same time, the 18th century saw major ideological changes in Europe as liberalism gained influence, reshaping European social, political, and economic structures. Tuba Inal has identified three key pillars of liberalism that came to form part of European states' self-image which, in turn, profoundly influenced the consolidation of norms against pillage in war and the shift in their normative justification. Inal highlights how the emergence of liberalism, with its valorisation of the notions progress, civilization and, in particular, the sanctity of private property, increasingly 'helped Europeans perceive pillage as an unpleasant practice.'²⁵

The liberal concern with individual political and economic liberty gave rise to the extension of franchise and laid the foundations for the emergence of laissez-faire capitalism with its emphasis on free trade and private property. Underpinning the emergence of this economic system was the theory that unrestricted individual accumulation of property contributed to overall production and in turn ensured

²⁰ Norman Bentwich, *The Law of Private Property in War, with a Chapter on Conquest* (Sweet and Maxwell 1907), 26.

²¹ *Ibid.*

²² Robert Kolb, 'The main epochs of modern international humanitarian law since 1864 and their related dominant legal constructions' in Kjetil Mujezinović Larsen, Camilla Guldahl Cooper and Gro Nystuen (eds), *Searching for a 'Principle of Humanity' in International Humanitarian Law* (Cambridge University Press 2012), 30; Redlich (n 10), 63.

²³ Redlich (n 10), 63-64.

²⁴ Inal (n 15), 47.

²⁵ *Ibid.*, 44.

economic progress and the creation of wealth for all. While the notion of private property had pre-existed the emergence of liberalism, its normative roots were in theories of natural rights. As the liberal theory of economics emerged, the institution of private property came instead to be associated with wider ideals of political and civilizational progress.²⁶ Property laws came to feature as 'a central fixture in philosophical and political narratives of a developmental, teleological vision of modernization that [...] set the standard for what [could] be considered civilized.'²⁷ The colonial encounter and its modes of appropriation, in which property laws functioned as 'a crucial mechanism for the colonial accumulation of capital'²⁸, were also central to the emergence of modern property law and the justifications for private property ownership in Enlightenment thought.

For these reasons, liberal standards of civilization came to include the moral factors of 'good government, religious toleration, and individual liberty, particularly freedom of expression and property ownership'²⁹ which, combined with the material factors of 'commerce, science, and advanced modes of production [...] created the necessary conditions of individual autonomy and sociability.'³⁰ In this way, the institution of private property was a central pillar of liberal theories of progress and civilisation, which were in turn understood as being in some ways a 'side effect of the rise of property.'³¹ These ideational factors in turn underpinned the shift towards understanding pillage as a wrong that ought to be prohibited not only for self-interested reasons, but also on more moralistic grounds, attached to European states' self-image.³² In this respect, Inal suggests that it is 'no wonder [...] that eighteenth-century Europe, in its euphoria over the progress of its civilization, would consider private property to be one of the main building blocks of its existence and treat it as such,'³³ resulting, therefore, in a consolidation of the view that pillage ought to be condemned as an 'uncivilised' practice.

By the mid-19th century, while not entirely uniform, the prohibition on pillage enjoyed widespread recognition and was included in the first codification of rules governing the conduct of belligerents in war.³⁴ Setting out its broad normative commitments, Article 22 of the 1863 Lieber Code asserted that 'the principle has been more and more

²⁶ *Ibid.*, 44-45.

²⁷ Brenna Bhandar, *Colonial Lives of Property: Law, Land and Racial Regimes of Ownership* (Duke University Press 2018), 4.

²⁸ *Ibid.*, 2.

²⁹ Marco Duranti, *The Conservative Human Rights Revolution: European Identity, Transnational Politics, and the Origins of the European Convention* (Oxford University Press 2017), 53.

³⁰ *Ibid.*

³¹ Inal (n 15), 44-45.

³² Stephen M. Miller and Jessica Miller, 'Moral and legal prohibitions against pillage in the context of the 1899 Hague Convention and the South African War', (2019) 26(2) *War in History*, 202.

³³ Inal (n 15), 45-46.

³⁴ Graber (n 18), 197-198.

acknowledged that the unarmed citizen is to be spared in person, property and honor as much as the exigencies of war will admit.' On the protection of private property, Article 38 stated that 'private property, unless forfeited by crimes or by offenses of the owner, can be seized only by way of military necessity, for the support or other benefit of the army or of the United States.' Article 44 then specifically prohibited 'all wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking, even after taking a place by main force'. These provisions have been understood to 'breathe a liberal spirit'³⁵ in how they reflect a 'staunch defence of property rights'³⁶ on the part of their author.

The Brussels Declaration of 1874 subsequently reinforced Lieber's initial codification of the prohibition on pillage in particularly emphatic terms. Article 18 stated that 'a town taken by assault should not be given over to pillage by the victorious troops'. Article 38 required that 'family honour and rights, and the lives and property of persons [...] must be respected. Private property cannot be confiscated', while Article 39 straightforwardly asserted that 'pillage is formally forbidden.' Lastly, Article 40, on taxes and requisitions, expounded on these general rules, explaining that 'as private property should be respected, the enemy will demand from communes or inhabitants only such payments and services as are connected with the generally recognised necessities of war'.

Inal attributes the particular centrality afforded to protections for property in the Brussels Declaration to the ideological convictions of its author, the Russian jurist Fyodor Fyodorovich Martens, whose dissertation addressed the law of private property during war.³⁷ Indeed, the moral significance of private property for Martens is reflected in the nature of the fundamental individual liberties he identified as being a 'yardstick of the degree of civilization of states and international relations'³⁸ in an 1883 treatise. Martens described 'the right to respect for [the] person, the inviolability of [...] family and of [...] property'³⁹ as rights that 'flow from the nature and conditions of humanity and therefore cannot be created by legislation. They exist by themselves.'⁴⁰ These early rules prohibiting pillage during war in this sense suggest an evolution in its underlying normative conception, from early roots in the self-interested concerns of military forces with the discipline of their own troops, to a more

³⁵ *Ibid.*, 193.

³⁶ Frank Freidel, *Francis Lieber: Nineteenth-century Liberal* (Louisiana State University Press 1947), 335.

³⁷ Inal (n 15), 33.

³⁸ Vladimir Vasilievich Pustogarov, 'Fyodor Fyodorovich Martens (1845-1909) - A Humanist of Modern Times', (1996) 312 *International Review of the Red Cross*, 304.

³⁹ Stephen C. Neff, *Justice Among Nations: A History of International Law* (Harvard University Press 2014), 274.

⁴⁰ *Ibid.*

normative commitment to the notion of private property as a facet of individual liberty that emerged with the expansion of liberal ideas in the 18th and 19th centuries.

The Hague Conventions of 1899 and 1907 created the modern international prohibition regime on pillage, by and large reflecting those same rules infused with liberal ideas contained in the Brussels Declaration, and consolidating this normative shift in legal terms.⁴¹ Article 28 of the Regulations prohibits ‘pillage of a town or place, even when taken by assault’ during the conduct of hostilities. With respect to the rules applicable to occupied territory, Article 46 contains the same language as the Brussels Declaration, requiring that ‘family honour and rights, the lives of persons, and private property [...] must be respected. Private property cannot be confiscated’, while Article 47 similarly emphasizes that ‘pillage is formally prohibited.’

Highlighting how these rules codified the shift towards understanding pillage as normatively rooted in the principle of the sanctity of private property, Marco Duranti has interpreted the Hague Conventions as having given rise not only to new obligations on states to one another, but also to have ‘safeguarded the fundamental freedoms of individuals as well. States party to them were bound by its terms to respect the liberties of combatants and noncombatants alike, enshrining their freedom of religion, property rights, and rights to a fair trial in international law.’⁴² This interpretation of the Hague Conventions, and the rules they codified prohibiting pillage, underscores the significant shift that had taken place by the early 20th century from the historical condemnation of pillage as a matter related to efficient military operations and internal discipline, to its ultimate prohibition on normative grounds, as a violation of the freedoms of the individual in terms of property ownership, reflecting in this way a set of rules ‘adopted in an atmosphere of nineteenth century liberalism, shaped by the basic philosophy of that era.’⁴³

Pillage first appeared as a criminal offence among the list of war crimes produced by the 1919 Commission on Responsibility,⁴⁴ and was later included in the Nuremberg Charter under Article 6(b) as ‘plunder of public or private property’. The International Military Tribunal at Nuremberg convicted Göring, Rosenberg, Seyss-Inquart and Schacht of plunder on the basis of evidence that ‘the territories occupied by Germany were exploited for the German war effort in the most ruthless way, without consideration of the local economy, and in consequence of a deliberate design and policy.’⁴⁵ The tribunal outlined the systematic exploitation of raw materials,

⁴¹ Ernst H. Feilchenfeld, *The International Economic Law of Belligerent Occupation* (Rumford Press 1942), 10-12.

⁴² Duranti (n 29), 27.

⁴³ Feilchenfeld (n 41), 17.

⁴⁴ La Haye (n 2), 197.

⁴⁵ Trial of the Major War Criminals before the International Military Tribunal 14 November 1945-1 October 1946, Volume 1, 239.

agricultural products, food, machines, transportation equipment, art, cultural treasures, furniture and textiles during German occupation,⁴⁶ noting that 'these resources were requisitioned in a manner out of all proportion to the economic resources of those countries, and resulted in famine, inflation, and an active black market.'⁴⁷

Numerous trials involving charges of plunder also took place at the military tribunals established under Control Council Law No. 10, including the *Flick, I.G. Farben* and *Krupp* industrialist trials, which involved firms that acquired leases from the German authorities to operate factories in occupied territories, plundering raw materials, equipment and other goods in the process.⁴⁸ From a normative perspective, these post-war trials consolidated the construction of the crime of pillage as, at heart, about respect for the sanctity of private property. In this regard, the military tribunal in the *I.G. Farben* case, noting that the term 'spoliation' 'is used interchangeably with the words "plunder" and "exploitation"', considered the term to apply to 'the widespread and systematized acts of dispossession and acquisition of property in violation of the rights of the owners, which took place in territories under the belligerent occupation or control of Nazi Germany during World War II.'⁴⁹ Centralising the violation of ownership rights in its interpretation, the tribunal went on to state that it deemed it 'to be of the essence of the crime of pillage that the owner be deprived of his property involuntarily and against his will'⁵⁰, further adding that the 'essence of the offense is the use of the power resulting from the military occupation [...] as the means of acquiring private property in utter disregard of the rights and wishes of the owner.'⁵¹

Underscoring the centrality of the violation of individual property rights for its normative conception of the crime, the tribunal also rejected the prosecution's argument that 'the offenses of plunder and spoliation alleged in the indictment have a double aspect.'⁵² The prosecution had argued that the crime of spoliation entailed both an offense 'against the rightful owner or owners by taking away their property without regard to their will, 'confiscation', or by obtaining their 'consent' by threats or pressure'⁵³, as well as being:

⁴⁶ *Ibid.*, 239-242.

⁴⁷ *Ibid.*, 240.

⁴⁸ UN War Crimes Commission, Law Reports of Trial of War Criminals, Volume XV, Digest of Laws and Cases (1947), 126. For an exhaustive list of post-World War II trials involving charges of pillage or plunder see Stewart (n 4), 96-112.

⁴⁹ *United States v. Krauch et al. (IG Farben Case)*, Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council No. 10, Volume VIII, 1133 [hereafter Krauch et al. Judgment].

⁵⁰ *Ibid.*, 1134.

⁵¹ *Ibid.*, 1150.

⁵² *Ibid.*, 1135.

⁵³ *Ibid.*

...a crime against the country concerned in that it disrupts the economy, alienates its industry from its inherent purpose, makes it subservient to the interest of the occupying power, and interferes with the natural connection between the spoliated industry and the local economy. As far as this aspect is concerned, the consent of the owner or owners, or their representatives, even if genuine, does not affect the criminal character of the act.⁵⁴

Rejecting the second, wider conceptualisation of the crime proposed by the prosecution on the grounds that the Hague Regulations contained no support for such an interpretation, the tribunal instead reasserted that the prohibition on plunder implies:

...action in relation to property committed against the will and without the consent of the owner. [...] If, in fact, there is no coercion present in an agreement relating to the purchase of industrial enterprises or interests equivalent thereto, even during time of military occupancy, and if, in fact, the owner's consent is voluntarily given, we do not find such action to be violation of the Hague Regulations.⁵⁵

In this way, the tribunal's analysis, rejecting a wider account of the nature of plunder or pillage in its impact on the economy of the occupied territory, instead offered an interpretation that conceptualised the normative basis of the crime wholly in terms of the inviolability of private property; the offense is understood to hinge exclusively upon the violation of individual ownership rights through the presence or absence of the owner's consent to the appropriation of the property.

The tribunal in the *Krupp* case reached the opposite conclusion, arguing that 'spoliation of private property, then, is forbidden under two aspects; firstly, the individual private owner of property must not be deprived of it; secondly, the economic substance of the belligerently occupied territory must not be taken over by the occupant or put to the service of his war effort.'⁵⁶ This conclusion was reached by way of an analysis of the various rules protecting property in occupied territory in the Hague Regulations, rather than the specific prohibition on pillage or plunder, but nevertheless suggests a possible embrace of a more expansive normative conception of the rule that also captures the potential impact of widespread pillage on the wider economy of an occupied territory.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *United States v. Krupp et al. (The Krupp case)*, Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, Volume IX, 1343.

In its subsequent discussion of the war crime of pillage, plunder or spoliation, the UN War Crimes Commission stressed that '[p]roperty offences recognised by modern international law are not [...] limited to offences against physical tangible possessions or to open robbery in the old sense of pillage, but include the acquisition of intangible property and the securing of ownership, use or control of all kinds of property by many ways other than by open violence'⁵⁷, describing forms of pillage involving the theft of personal property as 'war crimes of the more traditional type.'⁵⁸ The Commission went on to summarise the conflicting approaches to the crime adopted in the *I.G. Farben* and *Krupp* cases, in which it identified two possible aspects of the offence, which highlight the normative stakes at play in how the crime was interpreted in the post-World War II jurisprudence. These two aspects were, '(i) that private property rights were infringed' and '(ii) that the ultimate outcome of the alleged offences was that the economy of the occupied territory was injured and/or that of the occupying State benefitted.'⁵⁹ In its analysis, the Commission favoured the position adopted in the *I.G. Farben* case, concluding that:

In so far as *private property* is concerned it seems sounder to base a definition of a war crime involved upon the first aspect, namely the infringement of the property rights of individual inhabitants of the occupied territory. [...] provided a sufficient infringement of private property rights has been proved to bring the offence within the terms of the Hague Regulation, the more public effects of the act are not necessary to constitute the crime. There is also *some* authority for saying that, conversely, if no illegal breach of private property rights has occurred no war crime can be said to have been committed, irrespective of the effects of the act upon the general economy of the occupied territory of the enemy State.⁶⁰

Hannah Franzki has highlighted how centring rights to private property and the distinction between criminal and non-criminal conduct exclusively on the presence or absence of the owner's consent in this context effectively functioned to introduce a distinction between legitimate business transactions during occupation and seizure of property that constituted war crimes.⁶¹ This centralisation of the violation of the owner's consent in this way constructed an operative distinction between 'free choice as criterion for the validity of business transactions and the presence of the occupying state forces ('coercion') as indicator for the lack of such freedom of choice.'⁶² In

⁵⁷ UN War Crimes Commission (n 48), 129.

⁵⁸ *Ibid.*, 130.

⁵⁹ *Ibid.*, 126.

⁶⁰ *Ibid.*

⁶¹ Hannah Franzki, 'Criminal trials, economic dimensions of state crime, and the politics of time in international criminal law: a German-Argentine constellation' (PhD dissertation, Birkbeck University of London, 2018), 136.

⁶² *Ibid.*, 138.

Franzki's view, the industrialists' cases' interpretation of the crime of plunder in this way carried the implication that what was ultimately criminal about these offences was how they violated the logic of free choice central to economic liberalism and the free market economy.⁶³ From this perspective, the tribunal's and the UN War Crimes Commission's reasoning, rejecting a wider account of the nature of plunder or pillage in its impact on the economy of the occupied territory and instead offering a definition of the crime that hinged exclusively on the owner's exercise of free choice, suggests that, at this juncture, the crime was conceptualised primarily in terms of the inviolability of private property and the protection of individual property rights.

With the codification of the Geneva Conventions in 1949 this private property rights-based conception of the prohibition of pillage, while not abandoned in its entirety, nevertheless came to be somewhat diluted or tempered by the broader shift in the law of armed conflict from a concern primarily with military matters, to being increasingly understood as 'centred around the concept of humanitarian protection of the victims of war.'⁶⁴ In line with this shift, the prohibition on pillage, along with the wider protections for property contained in the Conventions, came to be conceptualised in more emphatically humanitarian terms. Article 16 of the Fourth Geneva Convention requires that 'each Party to the conflict shall facilitate the steps taken to search for the killed and wounded, to assist the shipwrecked and other persons exposed to grave danger, and to protect them against pillage and ill-treatment.' This article refers to the more archaic notion of pillage on the battlefield, explained in the ICRC commentary in terms of 'the presence of hordes of pillagers, formerly called the "hyenas of the battlefield" [which] may not be so common today but the possessions of the wounded and dead may well excite the greed of unscrupulous soldiers or civilians and incite them to pillage.'⁶⁵ Article 33 of the Convention IV states more straightforwardly that 'pillage is prohibited.'

While the Geneva Conventions did not in this way expand on the existing provisions with respect to pillage contained in the Hague Conventions, the wider regulatory framework on property within which they were embedded, and how this was interpreted, suggest a turn away from the concern with private property and ownership rights reflected in previous conventions, and made explicit in the jurisprudence following World War II, towards a normative account of the prohibition of pillage as relating instead to the 'use value' of property. In their analysis of the various dimensions of the legal framework protecting property in the Geneva Conventions, Lea Brilmayer and Geoffrey Chepiga argue that protections for property under international humanitarian law can be understood as distinct from protections for property contained in other areas of domestic and international law in how they

⁶³ *Ibid.*, 139-140.

⁶⁴ Kolb (n 22), 2. See also 38-39, 45.

⁶⁵ ICRC, *Commentary on the Geneva Conventions of 12 August 1949, Volume IV* (1958), 137.

centralise this 'use value' conception of property. In this respect, Brilmayer and Chepiga distinguish between domestic property regimes which 'privilege ownership and its corollary, the right to exclude [which] view property primarily as an end in itself'⁶⁶ from the protections for property contained in international humanitarian law, which, in their view, are 'driven by a conception of property that is more instrumental, and values property in direct proportion to its role in assuring the survival of civilians.'⁶⁷

Revealing of this conceptual shift is the ICRC's 1958 Commentary on Article 33 of the Fourth Geneva Convention, prohibiting pillage, which begins its analysis by explaining that 'the purpose of this Convention is to protect human beings, but it also contains certain provisions concerning property, designed to spare people the suffering resulting from the destruction of their real and personal property (houses, deeds, bonds etc., furniture, clothing, provisions, tools, etc.).'⁶⁸ Hersch Lauterpacht's response to the developments contained in the Geneva Conventions reflects the same view, describing the 'true character' of the law of war as 'almost entirely humanitarian in the literal sense of the word, namely, to prevent or mitigate suffering.'⁶⁹ In relation to the protections for property contained in the Conventions, he similarly concluded that '[n]either is the humanitarian purpose absent from the rules relating to the treatment of private enemy property and to devastation. For property is not merely an economic asset; it may be a means of livelihood.'⁷⁰ In its discussion of Article 46 of the Fourth Convention, on the cancellation of restrictive measures relating to property after the close of hostilities, the ICRC commentary reinforced this sentiment in emphasising that:

This provision, which is to be compared with those prohibiting pillage and reprisals, is nevertheless somewhat foreign to the real purpose of the Convention. The Diplomatic Conference emphasised on various occasions that its object was to protect people and not property. Consequently the question of the treatment of enemy private property in the territory of a belligerent is still, in general, governed by usage and by the Hague Regulations of 1907.⁷¹

These accounts of the intentions behind the prohibition on pillage in Article 33 and the protections for property during occupation under Article 46 of the Fourth Convention suggest that the prohibition on pillage had at this point evolved to be

⁶⁶ Lea Brilmayer and Geoffrey Chepiga, 'Ownership or Use – Civilian Property Interests in International Humanitarian Law', (2008) 49(2) *Harvard International Law Journal*, 417.

⁶⁷ *Ibid.*

⁶⁸ ICRC (n 65), 226.

⁶⁹ Hersch Lauterpacht, 'The Problem of the Revision of the Law of War', (1952) 29 *British Year Book of International Law*, 363.

⁷⁰ *Ibid.*

⁷¹ ICRC (n 65), 271.

conceptualised primarily in terms of the 'use value' of property and its role in ensuring the survival of people.

In addition to the wider shift towards a more humanitarian understanding of the laws governing the conduct of belligerents during war, which partly informed this transformation in how the justification for prohibiting pillage was conceptualised, the move away from the previous emphasis on protections for private property and ownership rights also resulted from the place and nature of property in the different political-economic systems that had emerged by the time of the codification of the Geneva Conventions. While not involving the prohibition on pillage specifically, the debates during the drafting of Article 53 of the Fourth Geneva Convention, which prohibits the destruction of certain types of property during occupation, are illustrative of the significance of the ideological shift that had taken place by this point.

Initially, the prohibition on the destruction of particular types of property in occupied territory was contained in draft Article 30 of the Fourth Geneva Convention, which, along with prohibiting collective penalties, stated that 'measures of reprisal against protected persons or their property are prohibited. Any destruction of personal or real property which is not made absolutely necessary by military operations, is prohibited, as are likewise all measures of intimidation or terrorism.'⁷² While the Hague Conventions and previous military codes prohibited the destruction and confiscation of private property in occupied territories except in cases of military necessity, property belonging to the state had not enjoyed such protection.⁷³

For this reason, during the drafting of the Fourth Geneva Convention, the Soviet Union observed that the draft 'Article 30 as it stood did not take into account the changes that had supervened in the economic structure of many countries. In some countries, State property was the property of the people as a whole. Consequently, the destruction of such property affected not only the interests of the State but also those of individuals.'⁷⁴ China supported the Soviet Union's position, because 'it provided for the prohibition of destruction of all categories of property except in the case of military necessity'⁷⁵, stressing therefore that 'the Article should be worded in such a way as to ensure the alleviation of the sufferings of war victims.'⁷⁶ Following objections from the United States, Canada and the United Kingdom, a compromise

⁷² Final Record of the Diplomatic Conference Convened by the Swiss Federal Council for the Establishment of International Conventions for the Protection of War Victims and Held at Geneva from April 21st to August 12th 1949, Volume I, 118.

⁷³ Brilmayer and Chepiga (n 66), 425.

⁷⁴ Final Record of the Diplomatic Conference Convened by the Swiss Federal Council for the Establishment of International Conventions for the Protection of War Victims and Held at Geneva from April 21st to August 12th 1949, Volume II A, 649.

⁷⁵ *Ibid.*, 651.

⁷⁶ *Ibid.*

proposed by Morocco which would protect property 'intended solely'⁷⁷ for use by individuals, and which the Norwegian delegate endorsed on the grounds that 'identical reasons prevailed for the protection of private and public property where the property was such as mainly served the needs of individuals'⁷⁸, the draft article was amended and became Article 53. This article ultimately states that 'any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.'

The debate during the drafting of Article 53 in this way illuminates how the ideological stakes in protections for private property contained in previous conventions, and deemed uncontroversial at the time,⁷⁹ had shifted with the emergence of socialist states and their abolition of the institution of private property. In addition, it underscores how a turn towards more humanitarian reasoning, and the increasing link being drawn between protecting property and preventing suffering during war, allowed the compromise contained in Article 53 to therefore be achieved.

Most recently, the codification of Additional Protocols I and II to the Geneva Conventions in 1977 consolidated this conceptual shift in protections for property in international humanitarian law. Through the convergence of the rules contained in the Hague and Geneva Conventions, the language of private property came to be abandoned entirely, to be replaced by the more fundamental humanitarian distinction between military and civilian objects, and the prohibition on directing attacks against the latter in Additional Protocol I, regardless of ownership. In this respect, Brilmayer and Chepiga suggest that the rules governing the protection of property contained in the Additional Protocols, which 'discarded the concept of "ownership" altogether, substituting "civilian use" as the criterion for protection'⁸⁰ in this way 'exemplify and expand on the Fourth Geneva Convention's valuation of property according to its role in mitigating civilian suffering.'⁸¹

With respect to pillage specifically, Article 4(2)(g) of Additional Protocol II, based on Article 33 of the Fourth Geneva Convention, explicitly prohibits pillage in non-international armed conflict against persons who do not take a direct part or who have ceased to take part in hostilities. The ICRC commentary makes clear that, in line with the elision of the public-private distinction in favour of a civilian use approach as the criterion for protection in Additional Protocol I, the prohibition on pillage in

⁷⁷ *Ibid.*, 650.

⁷⁸ *Ibid.*, 651.

⁷⁹ Graber (n 18), 214.

⁸⁰ Brilmayer and Chepiga (n 66), 427.

⁸¹ *Ibid.*

Additional Protocol II ‘applies to all categories of property, both State-owned and private.’⁸² In this way, the codification of the Additional Protocols to the Geneva Conventions can be understood to have sealed the gradual evolution in how protections for property are conceptualised under international humanitarian law and, embedded within this wider change, how the prohibition on pillage was also understood. This conceptual evolution had its origins in armies’ early self-interested concern with maintaining discipline among troops, which gradually evolved with the emergence of liberalism into a normative concern with the sanctity of private property as an indicator of ‘civilised’ societies, to be supplanted most recently by the more humanitarian commitment to protecting property to the extent that it ameliorates civilian suffering.

2. Definitions of pillage in international criminal law

The war crime of pillage is contained in the statutes of each of the modern international criminal tribunals, but appears in different forms. Article 3(e) of the ICTY Statute criminalises ‘plunder of public or private property’ as a violation of the laws or customs of war. Article 4(f) of the ICTR Statute and Article 3(f) of the Statute of the SCSL criminalise ‘pillage’ as a serious violation of Common Article 3 to the Geneva Conventions, without further qualification. The Rome Statute refers to ‘pillaging a town or place, even when taken by assault’ in international and non-international armed conflict under Articles 8(2)(b)(xvi) and 8(2)(e)(v). The ICTY has confirmed that ‘the unlawful appropriation of public and private property in armed conflict has varyingly been termed “pillage”, “plunder,” and “spoliation”.’⁸³ The SCSL has similarly concluded that ‘the prohibition of the unlawful appropriation of public and private property in armed conflict [...] has been variously referred to as ‘pillage’, ‘plunder’ and ‘looting’⁸⁴, similarly making clear that the provisions on plunder and pillage in each of these statutes refer to the same offence.

a. Legal elements

At the ICTY, the crime of plunder or pillage was defined as ‘the unlawful appropriation of public and private property in armed conflict.’⁸⁵ In the first case addressing pillage at the ICTY, the Trial Chamber in *Mucić et al.* raised the question of whether ‘the concept of pillage in the traditional sense implied an element of violence

⁸² ICRC, *Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)* 8 June 1977 (1987), 1376.

⁸³ *Prosecutor v. Zdravko Mucić et al.*, IT-96-21-T, ICTY, Trial Judgment, 16 November 1998, para 591 [hereafter *Mucić et al. Trial Judgment*].

⁸⁴ *Prosecutor v. Alex Tamba Brima et al. (AFRC Case)*, SCSL-04-16-T, SCSL, Trial Judgment, 20 June 2007, para 751 [hereafter *Brima et al. Trial Judgment*].

⁸⁵ *Mucić et al. Trial Judgment* (n 83), para 591; *Brima et al. Trial Judgment* (n 84), para 751.

not necessarily present in the offence of plunder.⁸⁶ Determining that it was not necessary in this case to address the question of whether the terms pillage and plunder were entirely synonymous under international law, the Trial Chamber went on to conclude that the offence of plunder under the Statute of the ICTY 'should be understood to embrace all forms of unlawful appropriation of property in armed conflict for which individual criminal responsibility attaches under international law, including those acts traditionally described as "pillage".'⁸⁷ This understanding of pillage as a sub-category involving violence of a wider offence of plunder was nevertheless not adopted in subsequent case law.⁸⁸ 'Unlawful appropriation of public and private property in armed conflict'⁸⁹ has therefore remained an offence in its own right, without needing the addition of violence to constitute pillage under international law.

The elements of the crime of plunder at the ICTY were therefore identified as 'a) an act of appropriation of public or private property b) the appropriation was unlawful; and c) the act was committed with intent.'⁹⁰ Appropriation has been interpreted broadly to include 'all forms of seizure of public or private property'⁹¹ while the requirement that the appropriation 'must be done without lawful basis or legal justification'⁹² has been understood to refer to those circumstances in which appropriation of property is permitted during armed conflict, such as the seizure of military equipment as war booty or requisition for the needs of an occupying army.⁹³

⁸⁶ Mucić et al. Trial Judgment (n 83), para 591.

⁸⁷ *Ibid.*

⁸⁸ *Prosecutor v. Goran Jelisić*, IT-95-10-T, ICTY, Trial Judgment, 14 December 1999, para 48; *Prosecutor v. Tihomir Blaškić*, IT-95-14-T, ICTY, Trial Judgment, 3 March 2000, para 184; *Prosecutor v. Dario Kordić and Mario Čerkez*, IT-95-14/2-T, ICTY, Trial Judgment, 26 February 2001, para 352 [hereafter Kordić and Čerkez Trial Judgment]; *Prosecutor v. Mladen Naletilić and Vinko Martinović*, IT-98-34-T, ICTY, Trial Judgment, 31 March 2003, para 617 [hereafter Naletilić and Martinović Trial Judgment]; *Prosecutor v. Dario Kordić and Mario Čerkez*, IT-95-14/2-A, ICTY, Appeal Judgment, 17 December 2004, para 79 [hereafter Kordić and Čerkez Appeal Judgment]; *Prosecutor v. Emer Hadžihasanović and Amir Kubura*, IT-01-47-T, ICTY, Trial Judgment, 15 March 2006, para 49 [hereafter Hadžihasanović and Kubura Trial Judgment]; *Prosecutor v. Milan Martić*, IT-95-11-T, ICTY, Trial Judgment, 12 June 2007, para 101 [hereafter Martić Trial Judgment]; *Prosecutor v. Ante Gotovina et al.*, IT-06-90-T, ICTY, Trial Judgment - Volume 2, 15 April 2011, para 1777 [hereafter Gotovina et al. Trial Judgment - Volume 2]. See also the Trial Chamber in the *Bemba* case at the ICC emphasising that 'the Court's legal framework does not include any requirement of violence.' – *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, ICC, Judgment pursuant to Article 74 of the Statute, 21 March 2016, para 116 [hereafter Bemba Trial Judgment].

⁸⁹ Mucić et al. Trial Judgment (n 83), para 591.

⁹⁰ Gotovina et al. Trial Judgment – Volume 2 (n 88), para 1777.

⁹¹ *Ibid.*, para 1778.

⁹² Martić Trial Judgment (n 88), para 102.

⁹³ *Ibid.*

Beyond the elements of the crime, some of the reasoning as to the legal basis of the prohibition on pillage suggests that a property rights conceptualisation of the crime may have shaped how it was understood in normative terms at the ICTY. In its first case involving charges of plunder at the ICTY, the Trial Chamber in *Mucić et al.* explained that:

In considering the elements of the offence of plunder, the Trial Chamber must take as its point of departure the basic fact that international humanitarian law not only proscribes certain conduct harmful to the human person, but also contains rules aimed at protecting property rights in times of armed conflict. [...] The basic norms in this respect, which form part of customary international law, are contained in the Hague Regulations, article 46 to 56 which are broadly aimed at preserving the inviolability of public and private property during occupation. In relation to private property, the fundamental principle is contained in article 46, which provides that private property must be respected and cannot be confiscated. [...] this rule is reinforced by article 47, which unequivocally establishes that “[p]illage is formally forbidden.” [...] The principle of respect for private property is further reflected in the four Geneva Conventions of 1949. [...] Likewise, article 33 of Convention IV categorically affirms that “[p]illage is prohibited.” [...] The basic principle that violations of the rules protecting property rights in armed conflict can constitute war crimes, for which individual criminal liability may be imposed, has not been questioned in the present case.⁹⁴

The Trial Chamber’s analysis in *Mucić et al.* in this way invokes a normative conception of the crime of plunder as rooted explicitly and exclusively in the protection of property rights. Indeed, by explicitly distinguishing between those rules prohibiting conduct that is harmful to the human person and those that protect property rights in times of armed conflict⁹⁵, the Chamber underscored this normative approach to the crime by implying that the two sets of rules rest on distinct normative foundations. This normative approach was echoed in *Kordić and Čerkez*, where the Trial Chamber identified the violation of ownership rights as central to its understanding of the crime. The Chamber concluded that ‘acts of appropriation include 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.’⁹⁶

While the jurisprudence of the ICTY in this way contextualised its understanding of the definition of plunder in protections for property rights during armed conflict, the definitions of pillage adopted at the SCSL and the ICC capture this conceptualisation

⁹⁴ *Mucić et al.* Trial Judgment (n 83), para 587-588.

⁹⁵ *Ibid.*, para 587.

⁹⁶ *Kordić and Čerkez* Trial Judgment (n 88), para 352.

more clearly in legal terms. The elements of the crime of pillage at the ICC require that:

- 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.
- 4) The conduct took place in the context of and was associated with an international armed conflict.
- 5) The perpetrator was aware of factual circumstances that established the existence of an armed conflict.⁹⁷

At the SCSL, pillage was defined in essentially the same terms as 1) the perpetrator appropriated property 2) the appropriation was without the consent of the owner 3) the perpetrator intended to deprive the owner of the property.⁹⁸ In distinguishing between pillage and destruction of property, the Trial Chamber in the *CDF* case at the SCSL defined appropriation as ‘the exercise of control over property; a taking or possession’⁹⁹ while in *Bemba* at the ICC, the Trial Chamber interpreted appropriation to imply that ‘property has come under the control of the perpetrator.’¹⁰⁰

A footnote to the ICC definition clarifies that ‘as indicated by the use of the term “private or personal use”, appropriations justified by military necessity cannot constitute the crime of pillaging.’¹⁰¹ The Trial Chamber in *Bemba* similarly confirmed that ‘the “special intent” requirement, i.e. the “private or personal use” element, allows it to better distinguish pillage from seizure or booty, or any other type of appropriation of property which may in certain circumstances be carried out lawfully.’¹⁰² This suggests that the requirement that the appropriation took place for private or personal use does not significantly change the approach adopted at the ICTY of requiring that the appropriation be ‘unlawful’ in reference to those circumstances during armed conflict in which appropriation of property is lawful. At the SCSL, the Trial Chamber in the *AFRC* case nevertheless rejected the Rome Statute approach, noting that ‘[i]nclusion of the element of “private or personal use” in the

⁹⁷ ICC Elements of Crimes, Article 8(2)(b)(xvi) War crime of pillaging. See Article 8(2)(e)(v) for non-international armed conflict.

⁹⁸ *Brima et al. Trial Judgment* (n 84), para 755; *Prosecutor v. Moinina Fofana and Allieu Kondewa (CDF Case)*, SCSL-04-14-T, SCSL, Trial Judgment, 2 August 2007, para 165 [hereafter *Fofana and Kondewa Trial Judgment*]; *Prosecutor v. Issa Hassan Sesay et al. (RUF Case)*, SCSL-04-15-T, SCSL, Trial Judgment, 2 March 2009, para 207 [hereafter *Sesay et al. Trial Judgment*]; *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-T, SCSL, Trial Judgment, 18 May 2012, para 452 [hereafter *Taylor Trial Judgment*].

⁹⁹ *Fofana and Kondewa Trial Judgment* (n 98), para 166.

¹⁰⁰ *Bemba Trial Judgment* (n 88), para 115.

¹⁰¹ ICC Elements of Crimes, Article 8(2)(b)(xvi) War crime of pillaging, footnote 47.

¹⁰² *Bemba Trial Judgment* (n 88), para 120.

definition appears to be at variance with *Čelebići*, since it may not include ‘organized’ and ‘systematic’ seizure of property. The Trial Chamber is therefore of the view that the requirement of “private or personal use” is unduly restrictive and ought not to be an element of the crime of pillage.’¹⁰³

From a normative perspective, the most significant dimension of the definition of pillage applied at the ICC and the SCSL is how it centralises the perpetrator’s intent to deprive the owner of their property, and the owner’s lack of consent to the appropriation. This definition constitutes a change in legal terms from the definition identified by the ICTY, and echoes more strongly the dominant normative approach reflected in the post-World War II trials in terms of how it centralises the violation of ownership interests by making the owner’s lack of consent to the appropriation the crux of the offence. The particular centrality of the violation of the owner’s consent has been further reinforced in a number of decisions, which echo the reasoning in the *I.G. Farben* case. For instance, the Pre-Trial Chamber in *Katanga* emphasised that ‘the Elements of Crimes expressly provide for the exculpation of the perpetrator’s unlawful conduct where the perpetrator appropriated property with the owner’s consent.’¹⁰⁴

Similarly, the Trial Chamber in *Bemba* suggested that consent lies at the normative core of pillage in highlighting how ‘the Court’s legal framework does not include any requirement of violence as an element of the appropriation’ but that ‘in certain circumstances lack of consent can be inferred from the absence of the rightful owner from the place from where property was taken. Lack of consent may be further inferred by the existence of coercion.’¹⁰⁵ In a revealing footnote in the *CDF* case at the SCSL, during the Appeals Chamber’s discussion of whether the burning of property could constitute the crime of pillage, the Chamber underscored this point in noting that ‘acts of burning and destruction do not constitute acts of appropriation because no property interest is acquired or transferred by the perpetrator.’¹⁰⁶ In this sense, despite the similar nature of the harm experienced by a victim through the theft or destruction of their property, the Appeals Chamber implied that the decisive principle engaged by the definition of the crime of pillage, that distinguishes normatively it from the war crime of destruction not justified by military necessity, relates to how it involves the acquisition or transfer of property interests from the owner to the perpetrator.

¹⁰³ Brima et al. Trial Judgment (n 84), para 754.

¹⁰⁴ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, ICC, Decision on the Confirmation of Charges, 30 September 2008, para 333.

¹⁰⁵ Bemba Trial Judgment (n 88), para 116.

¹⁰⁶ *Prosecutor v. Moinina Fofana and Allieu Kondewa (CDF Case)*, SCSL-04-14-A, SCSL, Appeal Judgment, 28 May 2008, para 402 at footnote 780 [hereafter Fofana and Kondewa Appeal Judgment].

b. Gravity

While not strictly a definitional issue, from a normative perspective a significant dimension of the approach to pillage reflected in the case law of the international tribunals also relates to the question of the gravity of the conduct and its relationship to the court or tribunal's jurisdiction. In its first decision on plunder at the ICTY in the *Mucić et al.* case, the Trial Chamber dismissed charges involving the theft of money, watches and other valuables from detainees in a prison camp on jurisdictional grounds. The defence had argued with reference to the tribunal's jurisdiction over 'serious' violations of international humanitarian law under Article 1 of its Statute, that:

[t]he Hague Regulations forbidding plunder were designed to prevent abuses such as those of the Nazis during the Second World War in taking valuable property such as artworks from occupied nations. They were not designed to punish under international law private soldiers who steal property of little value from civilians. [...] [s]tealing watches and coins is not what plunder is about. It is not a serious grave breach of the Geneva Conventions [...] Plunder is what Herman Goering did with the art of Eastern Europe. That's what grave breaches are. Or, for example, emptying entire houses of their quality furniture.¹⁰⁷

The Trial Chamber rejected this argument, concluding that 'the prohibition against the unjustified appropriation of public and private enemy property is general in scope, and extends both to acts of looting committed by individual soldiers for their private gain and to the organized seizure of property undertaken within the framework of a systematic economic exploitation of occupied territory'.¹⁰⁸ It went on to note that '[c]onsistent with this view, isolated instances of theft of personal property of modest value were treated as war crimes in a number of trials before French Military Tribunals following the Second World War.'¹⁰⁹ The Trial Chamber in *Naletilić and Martinović* came to the same conclusion, noting the 'under international law, plunder does not require the appropriation to be extensive or to involve a large economic value. Dispossession of personal property, a common way individual soldiers gain illicit booty, is considered a war crime of the more traditional type.'¹¹⁰

However, in addressing the jurisdictional requirement of a 'serious' violation of international humanitarian law, the Chamber in *Mucić et al.* endorsed the defence's analysis that the conduct in this case failed to meet the conditions of seriousness laid

¹⁰⁷ *Mucić et al.* Trial Judgment (n 83), para 586.

¹⁰⁸ *Ibid.*, para 590.

¹⁰⁹ *Ibid.*

¹¹⁰ *Naletilić and Martinović* Trial Judgment (n 88), para 612.

out in the Tadić Jurisdiction Decision. In *Tadić*, the Appeals Chamber used precisely the example of appropriation of property to identify the conditions for an offence to be subject to the ICTY's jurisdiction under Article 3 of its Statute, namely that:

the violation must be “serious”, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim. Thus, for instance, the fact of a combatant simply appropriating a loaf of bread in an occupied village would not amount to a “serious” violation of international law” although it may be regarded as falling foul of the basic principle laid down in Article 46, paragraph 1, of the Hague Regulations (and the corresponding rule of customary international law) whereby “private property must be respected” by an army occupying an enemy territory.¹¹¹

While the Trial Chamber in *Mucić et al.* emphasised that ‘the prohibition against unjustified appropriation of private or public property constitutes a rule protecting important values’¹¹², it nevertheless concluded that ‘the evidence before the Trial Chamber fails to demonstrate that any property taken from the detainees in the Čelebići prison-camp was of sufficient monetary value for its unlawful appropriation to involve grave consequences for the victims.’¹¹³ For this reason, the Chamber concluded that the conduct charged as plunder in this case could not be considered to constitute a sufficiently serious violation of international humanitarian law to fall within the jurisdiction of the tribunal.¹¹⁴ The Appeals Chamber in *Kordić and Čerkez* later made clear that ‘the requirement of grave consequences [for victims] stems from the special jurisdictional provisions of the Statute. [The discussion of grave consequences] is therefore without prejudice to the general – less stringent – requirements for the crime of plunder under international criminal law.’¹¹⁵ While the question of the gravity of the conduct was therefore addressed as a jurisdictional, rather than a definitional issue, this finding went on to significantly shape the scope of the subsequent jurisprudence on plunder at the ICTY, and also informed its interpretation at the SCSL and the ICC.

Significant from a normative perspective is how the requirement that ‘the breach must involve grave consequences for the victim’ has been interpreted in different cases. In *Mucić et al.*, in which money, watches and other valuables were stolen from prisoners at the Čelebići camp, the Trial Chamber concluded that the property taken from detainees was not ‘of sufficient monetary value for its unlawful appropriation to

¹¹¹ *Prosecutor v. Duško Tadić*, IT-94-1, ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para 94.

¹¹² *Mucić et al.* Trial Judgment (n 83), para 1154.

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ *Kordić and Čerkez* Appeal Judgment (n 88), para 82, footnote 94.

involve grave consequences for the victims'.¹¹⁶ This reasoning, interpreting the jurisdictional requirement of grave consequences for victims from the perspective of the monetary value of the property appropriated, has been echoed in several cases at the ICTY.¹¹⁷ Without doing so explicitly, this reasoning suggests something of a backwards shift in the conception of the prohibition on pillage, passing over the wider normative shift towards conceptualising international humanitarian law and its protections for property as rooted in the need to prevent civilian suffering that took place with the codification of the Geneva Conventions and the Additional Protocols, and instead harking back to the more property-rights based conception of protections for property that shaped the Hague Regulations and the post-World War II jurisprudence. Framing the analysis of the gravity of the consequences for victims in terms of monetary value raises the question of the nature of the 'consequences' that are evaluated for their gravity i.e. what *types* of consequences count towards a finding that appropriation of property caused grave consequences for victims.

In this respect, the reasoning in *Mucić et al.* and a number of other cases implied that the loss of property of sufficient monetary value may constitute a grave consequence for a victim, aside from whether or not such loss involved consequences in more obviously humanitarian terms, beyond the financial loss itself, such as in terms of the victim's fundamental needs or their economic security. From this perspective, the appropriation of property of high monetary value which nevertheless comprises only a small proportion of the property of a wealthy individual could constitute a sufficiently grave consequence to meet the threshold of seriousness to have fallen within the subject matter jurisdiction of the ICTY, regardless of whether the loss of such property involved any type of consequence for the owner beyond the pure financial loss. On this normative reading, the approach to the gravity of pillage reflected in *Mucić et al.* invokes a normative conception of the crime that protects property as an end in itself, with its loss constituting a grave consequence for victims on a scale of value and harm measured only on its own terms. This contrasts starkly with the notion that international humanitarian law, in which the crime of pillage has its conceptual and normative roots, 'is driven by a conception of property that is more instrumental, and values property in direct proportion to its role in assuring the survival of civilians.'¹¹⁸

While monetary value continued to be referred to as a relevant criterion in interpreting whether the appropriation of property constituted a serious violation of international humanitarian law under Article 1 of the ICTY Statute, the jurisprudence also evolved in this regard following the initial interpretation offered in *Mucić et al.*. In *Naletilić and*

¹¹⁶ *Mucić et al.* Trial Judgment (n 83), para 1154.

¹¹⁷ *Kordić and Čerkez* Trial Judgment (n 88), para 352; *Naletilić and Martinović* Trial Judgment (n 88), para 614; *Prosecutor v. Blagoje Simić et al.*, IT-95-9-T, ICTY, Trial Judgment, 17 October 2003, para 101.

¹¹⁸ *Brilmayer and Chepiga* (n 66), 417.

Martinović, the Trial Chamber broadened the analysis of grave consequences, noting the findings of the Trial Chamber in *Mucić et al.* with respect to monetary value, but going further to also assert that:

the seriousness of the violation must be ascertained on a case by case basis, taking into consideration the specific circumstances of each instance. Plunder may be a serious violation not only when one victim suffers severe economic consequences because of the appropriation, but also, for example, when property is appropriated from a large number of people. In the latter case, the gravity of the crime stems from the reiteration of the acts and from their overall impact.¹¹⁹

In this respect, the Trial Chamber in *Naletilić and Martinović*, and the later jurisprudence that endorsed this interpretation,¹²⁰ tempered the exclusive focus on monetary value as the measure of the gravity of the consequences. These cases constructed a normative approach to the crime that, while not explicitly addressing more humanitarian notions of the use value of property in their analysis of the gravity of the conduct, provided greater scope to capture these dimensions and the variety of consequences that may be experienced by victims of plunder, beyond simply the loss of the property as such. Indeed, the Trial Chamber in *Kordić and Čerkez* made explicit this shift to a marginally more humanitarian, civilian-protection conception of the crime in explaining that ‘a serious violation could be assumed in circumstances where appropriations take place vis-à-vis a large number of people, even though there are no grave consequences for each individual. In this case it would be the overall effect on the civilian population and the multitude of offences committed that would make the violation serious.’¹²¹ The SCSL endorsed the same reasoning, similarly finding that ‘to determine the seriousness of the violation, reference may be made to the nature, scope, dimension, or the collective scale of the looting, for instance by considering the number of people from whom property is appropriated.’¹²²

By contrast, the ICC’s case law reflects a conflicting approach both to its interpretation of the elements of the crime of pillage with respect to the issue of scale, as well as to the matter of the ‘seriousness’ of the violation of international humanitarian law for the purposes of the court’s jurisdiction. In this respect, in the Confirmation of Charges Decision in the *Bemba* case, the Pre-Trial Chamber interpreted the language contained in the Rome Statute referring to ‘pillaging a town or place, even when taken by assault’, which directly reflects Article 28 of the 1907 Hague Convention, to entail ‘a

¹¹⁹ *Naletilić and Martinović* Trial Judgment (n 88), para 614.

¹²⁰ *Simić et al.* Trial Judgment (n 117), para 101; *Kordić and Čerkez* Trial Judgment (n 88), para 82; *Hadžihasanović and Kubura* Trial Judgment (n 88), para 55-56; *Martić* Trial Judgment (n 88), 102-103.

¹²¹ *Kordić and Čerkez* Trial Judgment (n 88), para 83.

¹²² *Sesay et al.* Trial Judgment (n 98), para 209-210, para 1027.

somewhat large-scale appropriation of all types of property, such as public or private, movable or immovable property, which goes beyond mere sporadic acts of violation of property rights.¹²³ On this interpretation, the language of pillaging ‘a town or place, even when taken by assault’ requires a certain scale-requirement to be met before appropriation of property falls within the definition of pillage. The Chamber went on to depart from the jurisprudence at the ICTY, noting that ‘the Elements of Crimes do not require the property to be of a certain monetary value’ but endorsed a similar understanding of its own jurisdiction with respect to pillage in stating that:

bearing in mind the mandate of the Court as set out in article 1 of the Statute, the Chamber recalls that article 8(2)(e)(v) of the Statute is introduced as “[an]other *serious* [violation] of the laws and customs applicable in armed conflict not of an international character” [...]. In the opinion of the Chamber, this means that cases of petty property expropriation may not fall under the scope of article 8(2)(e)(v) of the Statute. A determination on the seriousness of the violation is made by the Chamber in light of the particular circumstances of the case.¹²⁴

The Trial Chamber in *Katanga* endorsed this reasoning, echoing the language of the ICTY in stating that ‘the gravity of the violation must be determined on a case-by-case basis, with due regard for the particular circumstances of the case. The Chamber will therefore determine the violation to be serious, where, for example, pillaging had significant consequences for the victims, even where such consequences are not of the same gravity for all the victims, or where a large number of persons were deprived of their property.’¹²⁵ This requirement of a certain level of gravity to the crime in its impact on victims, while still vague, somewhat tempers the extent to which the ICC and SCSL definitions of pillage offer a conception of the crime exclusively in terms of ownership interests by also taking into account, in addition to the normative question of the violation of the owner’s consent, the impact of pillage in wider, harm-based terms for its jurisdictional analysis.

At the same time, the Trial Chamber in *Ntaganda* came to the opposite conclusion on the question of gravity, stating that the reference to other serious violations of the laws and customs applicable in armed conflicts not of an international character in Article 8(e) of the Statute ‘refers to the seriousness of the nature of the crimes listed under (e), which by virtue of their inclusion in the Statute must all be considered ‘serious

¹²³ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, ICC, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, para 317 [hereafter Bemba Confirmation of Charges].

¹²⁴ *Ibid.*

¹²⁵ *Prosecutor v. Germain Katanga*, ICC-01/04-01/07, ICC, Judgment pursuant to article 74 of the Statute, 7 March 2014, para 909 [hereafter Katanga Trial Judgment]. The Trial Chamber in Bemba also endorsed this reasoning, see Bemba Trial Judgment (n 88), para 117.

violations'¹²⁶ and rejected the defence's submission that pillage must take place on a 'somewhat large-scale'.¹²⁷ The Trial Chamber in *Ongwen* similarly concluded that 'there is no requirement that appropriations must occur on a large scale basis before constituting the crime of pillaging.'¹²⁸ In this respect, the decisions of the ICC do not yet reflect a coherent approach to the gravity of the crime of pillage, with earlier decisions broadly echoing the approach adopted at the ICTY, but the more recent *Ntaganda* and *Ongwen* decisions suggesting a shift in the normative conception of the crime that instead treats pillage as 'serious' in its own right, regardless of the scale of the appropriation of property or the consequences for victims.

c. *Pillage as persecution*

Some of the most explicit statements with respect to how the crime of pillage is normatively conceptualised have appeared in contexts where acts of pillage have been charged as the crime of persecution at both the ICTY and the ICC. While a property rights-based conception of pillage appears to have underpinned implicitly and explicitly the definitions adopted at the ICTY and ICC, in *Kordić and Čerkez* at the ICTY the Trial Chamber provided an analysis of acts of wanton destruction and plunder charged as the crime of persecution, which invoked traces of a more use value-oriented approach to this crime. The Trial Chamber argued that:

If the ultimate aim of persecution is the "removal of those persons from the society in which they live alongside the perpetrators, or even from humanity itself", the widespread or systematic, discriminatory, destruction of individuals' homes and means of livelihood would surely result in such a removal from society. In the context of an overall campaign of persecution, rendering a people homeless and with no means of economic support may be the method used to "coerce, intimidate, terrorise and forcibly transfer ... civilians from their homes on discriminatory grounds, the "wanton and extensive destruction and/or plundering of Bosnian Muslim civilian dwellings, buildings, businesses, and civilian personal property and livestock" may constitute the crime of persecution.¹²⁹

Perhaps because the Trial Chamber was addressing the question of whether acts of plunder and wanton destruction of property may constitute persecution, it provided an analysis of both these crimes that points towards an understanding of their impact

¹²⁶ *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06, ICC, Trial Judgment, 8 July 2019, para 1044 [hereafter *Ntaganda Trial Judgment*].

¹²⁷ *Ibid.*

¹²⁸ *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15, ICC, Trial Judgment, 4 February 2021, para 2764 [hereafter *Ongwen Trial Judgment*].

¹²⁹ *Kordić and Čerkez Trial Judgment* (n 88), para 205. This analysis was endorsed by the Trial Chamber in *Simić et al.* See *Simić et al. Trial Judgment* (n 117), para 102.

in more clearly humanitarian terms than when charged exclusively as a war crime. By embedding plunder within a wider account of the use value of property and the implications of its removal in terms of 'rendering a people homeless and with no means of economic support'¹³⁰, the analysis in *Kordić and Čerkez* highlighted for the first time in the case law of the ICTY how pillage may be conceptualised in broader terms than the more limited focus on ownership interests and property rights. The Trial Chamber in *Naletilić and Martinović* went on to make this approach explicit in relation to plunder in particular. It noted that 'plunder of personal belongings may rise to the level of persecution if the impact of such deprivation is serious enough. This is so if the property is indispensable and a vital asset to the owners.'¹³¹ While plunder remains linked to the notion of ownership on this interpretation, the reference to property that is indispensable or a vital asset to the owner takes a clear step towards constructing a conceptualisation of pillage that addresses its consequences in more explicitly humanitarian terms.

The Trial Chamber in *Krajišnik* tempered the emphasis on ownership interests yet further in this respect. On the issue of the gravity of plunder or pillage when charged as persecution, the Trial Chamber in *Krajišnik* endorsed the finding in the post-World War II *Flick* case that 'the scale of the appropriation was not the critical issue when the act is considered as a crime against humanity. Rather, it was the impact of the appropriation on the victim. [...] A distinction should be made between industrial property and the dwellings, household furnishings, and food supplies of a persecuted people.'¹³² On this basis, the Trial Chamber determined that 'appropriation or plunder as an underlying act of persecution is to be understood as any intentional appropriation of public or private property that has a severe impact on the owner or user of the property.'¹³³ Here, the impact on the *user* of the property was explicitly foregrounded for the first time. This contrasts with the exclusive focus on the owner and their rights invoked by the centrality of the violation of the owner's consent in the definition of pillage adopted at the SCSL and the ICC. In this way, the Trial Chamber in *Krajišnik* constructed a normative account of plunder more closely in line with the protections for property contained in the Additional Protocols to the Geneva Conventions in terms of how the civilian-use criterion for the protection of property in the Additional Protocols protects users' rather than owners' interests.

At the ICC, by contrast, acts of pillage charged as the crime of persecution have instead been identified as being normatively rooted in a human right to property. In its analysis of the elements of persecution and the requirement that the perpetrator

¹³⁰ *Ibid.*

¹³¹ *Naletilić and Martinović* Trial Judgment (n 88), para 699.

¹³² *Prosecutor v. Momčilo Krajišnik*, IT-00-39-T, ICTY, Trial Judgment, 27 September 2006, para 767.

¹³³ *Ibid.*, para 768. The Trial Chamber in *Gotovina et al.* endorsed this finding. See *Gotovina et al.* Trial Judgment - Volume 2 (n 88), para 1821.

severely deprived, contrary to international law, one or more persons of fundamental rights, the Trial Chamber in the *Ongwen* case identified a number of human rights which it considered to constitute fundamental rights, including 'the right to life, the right to personal liberty, the right not to be held in slavery or servitude, the right not to be subjected to torture or cruel treatment, inhuman or degrading treatment, and the right to private property.'¹³⁴ On the basis of evidence of the looting of homes and shops at the Pajule IDP camp, where food items, household supplies and items such as a medicine, livestock and money were stolen,¹³⁵ the Trial Chamber found with respect to the charge of pillage as an underlying act of persecution, that 'LRA attackers severely deprived, contrary to international law, civilians of fundamental rights in the course of the attack on Pajule IDP camp. Specifically, the LRA attackers deprived civilians of [among others] the right to private property.'¹³⁶

On this interpretation, and distinct from the protections for property rights during armed conflict under international humanitarian law invoked by the ICTY, the Trial Chamber constructed a conceptualisation of pillage as engaging a fundamental human right to private property under international law. The notion of a human right to property, particularly a human right to *private* property is, however, not uncontroversial.¹³⁷ While the Universal Declaration of Human Rights contains a right to property, this was not repeated as a broadly formulated right in either the ICCPR or the ICESCR because of the 'absence of international agreement as to the exact content of property rights'¹³⁸ at the time the conventions were drafted. Underpinning this absence of consensus on the content of a human right to property was precisely the same ideological division, discussed in the previous section of this chapter, that gave rise to the exclusion of the reference to protections for 'private property' during the drafting of the Fourth Geneva Convention. This term was ultimately replaced in the Convention with the language of 'real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations'¹³⁹, in order to reflect the differing position of property in the contemporary political and economic systems of different states. While a right to property was ultimately included in the UDHR, its drafting proved contentious, with some states having abolished property in private form, while others

¹³⁴ Ongwen Trial Judgment (n 128), para 2733.

¹³⁵ Ongwen Trial Judgment (n 128), para 150. See paragraph 165 for a similar account of looting in Odek IDP camp.

¹³⁶ Ongwen Trial Judgment (n 128), para 2846. See similarly paragraph 2906 with respect to the Odek IDP camp.

¹³⁷ Catarina Krause and Guðmundur S. Alfreðsson, 'Article 17' in Guðmundur S. Alfreðsson and Asbjørn Eide (ed), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (Martinus Nijhoff 1999), 359.

¹³⁸ Theo R.G. van Banning, *The Human Right to Property* (Intersentia 2002), 5.

¹³⁹ Article 53, Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949.

pursued national welfare programmes that subordinated absolute protections for private property to the public interest. The issue was ultimately solved by removing the term 'private' from the right to property enshrined in Article 17 of the UDHR.¹⁴⁰

While the nature of the particular controversy over protections for private or collective forms of property have abated over time, other contours of the normative debate that took place during the drafting of Article 17 of the UDHR remain relevant to the continuing contestation over the content of a right to property under international human rights law in the present day,¹⁴¹ and therefore remain relevant to a normative conception of the crime of pillage as rooted in this right. In broad terms, conflicts during the drafting of Article 17 of the UDHR centred upon the distinction between a conception of a right to property 'infused with the core liberal value of individualism and [...] the right to absolutely exclude others from one's property'¹⁴² versus a right to property which would capture its social function.

A social function approach to a right to property understands this right as being 'determined by the relationship between the needs of the individual and the needs of society'¹⁴³ in relation to property, creating an obligation on states with respect to property to therefore 'act in a way which is compatible with social interests.'¹⁴⁴ In addition to the ideological East-West divide over the nature of the property system to be protected in terms of individual or collective property, during the drafting of Article 17 of the UDHR, several Latin American states also advocated in favour of a right to property that would more strongly reflect this social function. A right to property understood in these terms entails a right to such property 'as is needed for a decent living and helps to maintain the dignity of the individual and the home.'¹⁴⁵ A right to property of this nature was included in the 1948 American Declaration of the Rights and Duties of Man, Article 23 of which states that 'every person has a right to own such private property as meet the essential needs of decent living and helps to maintain the dignity of the individual and of the home.' While the negative aspect of the social function of a right to property, in the sense that the State is entitled to limit property rights in the public interest,¹⁴⁶ was less controversial, this positive notion of a right to a subsistence minimum conflicted more strongly with the views of those states that advocated for the more liberal conception of a right to private property as

¹⁴⁰ Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Belknap Press 2018), 58.

¹⁴¹ For an overview see Laura Dehaibi, 'Liberal Property and Lived Property: A Critique of Abstract Universalism in the Human Right to Property' (PhD Dissertation, McGill University 2020); Corina Heri, 'The Human Right to Land, for Peasants and for All: Tracing the Social Function of Property to 1948', (2020) 20 *Human Rights Law Review*, 433-452.

¹⁴² Heri (n 141), 434.

¹⁴³ van Banning (n 138), 148.

¹⁴⁴ *Ibid.*

¹⁴⁵ Krause and Alfreðsson (n 137), 370.

¹⁴⁶ Heri (n 141), 438, 443.

an absolute right 'inherent to human dignity, necessary for individual independence.'¹⁴⁷

Ultimately, the right to property contained in Article 17 of the UDHR, which protects 'the right to own property alone as well as in association with others' and the right not to be arbitrarily deprived of one's property, reflects protection for both individualist and collective forms of property, but ultimately excludes the social function conception of property and the idea that 'only a limited amount of property should enjoy human rights protection, or that every human has a right to a certain minimum of property necessary for survival in dignity.'¹⁴⁸ While subsequent consensus on the content of a right to property did not prove possible during the drafting of the ICCPR and the ICESCR, resulting in the absence of the right from the two principal international human rights treaties, the primary regional human rights conventions contain clauses referring to a right to property of some kind.¹⁴⁹ The particular nature of the right to property in these conventions, and how they have been applied by courts, nevertheless reflect different characteristics which 'reveal ideological preferences and sensitivity to location.'¹⁵⁰ This manifests in the differing degrees to which they reflect liberal conceptions of private property rights, how they balance individual and state interests, how they accommodate the social function of property and how they reflect the particular significance and implications of rights to property in postcolonial contexts.¹⁵¹

Understanding the right to property in international human rights law from this perspective reveals how the Trial Chamber's conclusion in the *Ongwen* case, that acts of pillage constitute the crime of persecution on the basis that they violate the right to private property, does not invoke a settled or unambiguous normative grounding for the crime of pillage in this context. This is particularly true with respect to the specific reference to 'private' property, which points explicitly to liberal ideas about individual and exclusionary rights to property, and does not represent the varying degrees to which different formulations of the right to property under international human rights law reflect this liberal premise.¹⁵² In this way, the Trial Chamber's identification of the right to private property as the normative basis of the crime of pillage when charged as persecution situates the crime in the muddy and ambiguous realm of enduring debates over the nature and scope of a human right to property.

¹⁴⁷ van Banning (n 138), 42. See also Heri (n 141), 443.

¹⁴⁸ Heri (n 141), 444-445.

¹⁴⁹ See Article 21, American Convention on Human Rights; Article 1, Protocol I to the European Convention Human Rights; Article 14, African Charter on Human and Peoples' Rights; Article 31, Arab Charter on Human Rights.

¹⁵⁰ Dehaibi (n 141), 149.

¹⁵¹ *Ibid.*, 134-149.

¹⁵² *Ibid.*

Taken together, these different definitions of the war crime of plunder or pillage, and those instances in which it has also been charged as persecution, construct a conceptualisation of the crime varyingly contextualised in a liberal commitment to the protection of property during armed conflict that emerged with the Hague Conventions, in the violation of ownership rights through the centralisation of the absence of the owner's consent as a legal element of the crime, and in a fundamental right to private property supposedly enshrined in international human rights law. By contrast, definitions of pillage that invoke a use value conception of property are much more limited, and only appear in the context of acts of pillage charged as persecution in a limited number of cases at the ICTY. This analysis suggests that, while not entirely coherent and with some exceptions, the dominant conception of the crime of pillage constructed by the definitions adopted in international criminal law draws primarily on the principle of protecting a liberal, individualised and exclusive notion of property rights for its normative basis.

3. Normative themes in the case law

Beyond purely definitional and jurisdictional questions and the normative conceptualisation of plunder or pillage they invoke, decisions involving charges for these crimes reflect relatively limited concern with their normative dimensions. The ICTY, in particular, treated acts of plunder almost entirely in baldly factual terms, without the explicit engagement with normative questions apparent in the discussion of some other crimes, such as attacks on cultural property or sexual violence. Certain dimensions of the factual accounts of pillage reflected in the decisions nevertheless contain implicit normative themes, with the decisions of the SCSL and the ICC also reflecting some evolution in this regard. The primary themes of relevance from a normative perspective in these decisions relate to the scale of the plunder or pillage, an emphasis on the use or social value of pillaged property, and a flexible interpretation of the issue of ownership, implying a widening of the conceptualisation of ownership rights invoked by the definitions of the crime.

a. Scale

In line with the identification of a gravity threshold as a jurisdictional requirement at each of the courts and tribunals that have addressed charges of pillage, the dominant normative theme around the crime, in particular at the ICTY and the SCSL, constructs the scale of the pillage that took place as the primary signifier of its gravity. The Trial Chamber's recounting of the plundering of the village of Erevnik in *Gotovina et al.* at the ICTY is paradigmatic of this type of factual account of the crime:

[G]roups of persons in camouflage uniforms, referred to as Croatian soldiers, loaded furniture, electrical appliances, and other valuable household goods

from houses in Ervenik onto civilian and military trucks and drove off. The evidence indicates that this happened on a daily basis. These persons also took cars, trucks, tractors, trailers, and farming vehicles, as well as parts from broken down vehicles, hay, and firewood on a large scale, and large numbers of livestock from farms. On one occasion a large number of goats were slaughtered, skinned, and taken away. A number of trucks left the town every day carrying property and livestock.¹⁵³

In its analysis of the plundering of Mostar, the Trial Chamber in *Naletilić and Martinović* made clear its understanding of the relevance of the scale of the plunder for its reasoning as to the gravity of the crime, stressing that ‘although single instances of plunder, taken in isolation, may not reach the threshold of seriousness set out above in order to vest the Tribunal with subject matter jurisdiction, collectively they show a clearly serious pattern of plunder against a large part of the BH Muslim population in Mostar.’¹⁵⁴ The same type of analysis is reflected in the *RUF* case at the SCSL, where the Trial Chamber found that ‘AFRC/RUF fighters engaged in a systematic campaign of looting upon their arrival in Koidu, marking the continuation of Operation Pay Yourself. The evidence demonstrates that rebels appropriated many items of significant value, such as vehicles, but also that the appropriation of minor items such as foodstuffs occurred on a sufficiently large scale to cumulatively constitute a serious violation.’¹⁵⁵

This reasoning with respect to the scale of plunder as the signifier of the gravity of the crime was further linked explicitly to the jurisdictional requirement that the crime involved grave consequences for victims in the *Martić* case at the ICTY. With respect to the theft of cars, tractors, tools, machinery, furniture and cattle from the village of Hrvatska Dubica, the Trial Chamber reasoned that, ‘given the scale of the looting, the Trial Chamber finds that it resulted in grave consequences for the victims, having regard to the overall effect on the civilian population and the multitude of offences committed.’¹⁵⁶ The Trial Chamber in *Gotovina et al.* at the ICTY spelled out this harm-based approach to the link between the scale of pillage and the notion of grave consequences:

...certain incidents [of plunder] had in themselves grave consequences for the victims. Moreover, considering the overall effect of the various incidents of plunder on the civilian population, and the multitude of offences committed,

¹⁵³ *Prosecutor v. Ante Gotovina et al.*, IT-06-90-T, ICTY, Trial Judgment - Volume 1, 15 April 2011, para 656.

¹⁵⁴ *Naletilić and Martinović* Trial Judgment (n 88), para 624-625. For similar accounts see *Hadžihasanović and Kubura* Trial Judgment (n 88), para 1873-1874 and *Brima et al.* Trial Judgment (n 84), para 238.

¹⁵⁵ *Sesay et al.* Trial Judgment (n 98), para 1336-1337. See similarly para 1334.

¹⁵⁶ *Martić* Trial Judgment (n 88), para 357. See similarly para 382.

the Trial Chamber finds that the plunder concerns property of a large number of people, and that the cumulative effect of the various incidents constitutes grave consequences. [...] Therefore, the Trial Chamber finds that the incidents referred to in the latter list above constitute plunder as violations of the laws or customs of war.¹⁵⁷

While these decisions do not spell out explicitly what the precise effects of plunder on the civilian population were understood to be in terms of the grave consequences they identify, they nevertheless incorporated an evaluation of the nature of the harm to the civilian population, through the emphasis on scale, into the analysis of whether the crime fell within the jurisdiction of the court. On this account, the normative conception of pillage is shifted to some degree in the direction of a more humanitarian, harm-based approach to the crime than that suggested by the more abstract focus on property rights in the analysis of the crime's normative roots in the case law of the ICTY. To illustrate this point it is worth contrasting this reasoning with that of the tribunal in the post-Second World War *I.G. Farben* case, which explicitly rejected an approach to pillage that would capture both the violation of the owner's consent involved in the appropriation of property, but also incorporate the impact of the crime on the economy of the occupied territory.¹⁵⁸ The focus on scale in these cases, and the highlighting of the effects of plunder on such a scale on the civilian population in this way constructs a more instrumental account of the normative dimensions of the protections for property reflected in the criminalisation of pillage than the legal elements of the crime, and its historical roots, suggest.

b. Use value

The Sentencing Decision in the *RUF* case at the SCSL fleshed out this more instrumental conception of the prohibition on pillage by beginning to provide a more concrete account of the nature of the harm that may be understood to underlie the references to 'the overall effect of [...] plunder on the civilian population'¹⁵⁹ in the case law:

[T]he Chamber notes that many victims suffered emotional and psychological harm because they powerlessly had to watch their homes and livelihood arbitrarily taken from them or burned as a means of creating immeasurable fear amidst them. Many victims were deprived of property with no remedy for reclaiming it. The Chamber considers that in such impoverished communities,

¹⁵⁷ Gotovina et al. Trial Judgment - Volume 2 (n 88), para 1787-1789.

¹⁵⁸ Krauch et al. Judgment (n 49), 1135.

¹⁵⁹ Gotovina et al. Trial Judgment - Volume 2 (n 88), para 1787.

where victims lived on a subsistence basis, all forms of appropriation or destruction by fighters adversely impacted the victims.¹⁶⁰

Highlighting the effects of large-scale pillage on livelihoods and subsistence, this analysis situates the protections for property underlying the crime of pillage clearly within a use value conception of its normative value. In constructing an account of the crime that explicitly values property 'in direct proportion to its role in assuring the survival of civilians'¹⁶¹, the Trial Chamber in the *RUF* case echoed the normative conceptualisation of protections for property reflected in the Additional Protocols to the Geneva Conventions and their 'civilian use' framework as the criterion of protection.

This turn to a theme that emphasises the use value of pillaged property is particularly pronounced in the approach adopted in the case law of the ICC, which contrasts with its absence from the narratives around plunder in cases at the ICTY, when not charged as persecution. The only other context in which this conception of pillage emerged in the decisions of the ICTY was implicitly, through the narrative around crimes of deportation or forcible transfer. For instance, in the context of its analysis of the deportation and forcible transfer of Serbs from the Krajina region, the Trial Chamber in *Gotovina et al.* noted that 'organised and systematic plunder and destruction of Serb owned or inhabited property was part and parcel of the campaign to drive out any remaining Serbs from the area and/or to prevent or discourage those who had fled from returning.'¹⁶² The Chamber similarly made reference to testimony that 'when asking a number of HV soldiers why they participated in looting and destruction, they responded that [...] their superiors had specifically authorized them to "help themselves to the goods." They further stated that the destruction was intended to prevent the Serbs from returning.'¹⁶³ Underpinning this narrative is an implicit nod in the direction of a use value conception of property; it rests on a recognition that the appropriation of certain types of property may deprive people of their ability to subsist in a place, thereby preventing their return.

In contrast to the ICTY case law, the decisions of the ICC reflect a narrative that endorses the use value approach in emphatic terms. In the first case involving a conviction for pillage at the ICC, the Trial Chamber in *Katanga* recounted the attack on the village of Bogoro, in which the attackers are described as having pillaged 'everything they found'¹⁶⁴, explaining that 'regarding the value of the property stolen, various witnesses underscored before the Chamber the qualitative and quantitative

¹⁶⁰ *Prosecutor v. Issa Hassan Sesay et al. (RUF Case)*, SCSL-04-15-T, SCSL, Sentencing Judgment, 8 April 2009, para 172-176.

¹⁶¹ Brilmayer and Chepiga (n 66), 417.

¹⁶² *Gotovina et al. Trial Judgment - Volume 2* (n 88), para 1510.

¹⁶³ *Ibid.*, para 1717.

¹⁶⁴ *Katanga Trial Judgment* (n 125), para 925.

loss they had incurred as a result of the attack, whether roofing sheets, furniture from their homes or animals (cows, goats and fowl) – all considered essential to their daily life.’¹⁶⁵ The Chamber went on to stress the character of the plundered property as ‘essential to daily life’ repeatedly throughout the judgment. It noted, for instance, how ‘property belonging to the predominantly Hema civilian population of Bogoro, which was essential to its daily life, including roofing sheets, furniture and various other personal effects, food, and livestock and animals, was taken away by the attackers.’¹⁶⁶ The Chamber went on to explain the relevance of the notion of property ‘essential for daily life’ for its understanding of the value of the pillaged property:

Whereas there is a great disparity in the value of the pillaged property – kitchen-ware and furniture but also livestock, goats and chickens, as the case may be – the property represented the bulk of the owners’ possessions. To the extent that the civilians were deprived of their personal houseware and even their livestock, property essential to their daily life, the Chamber is of the view that the property was in fact of great value to them.¹⁶⁷

On this account, the pillaged property is valued in direct proportion to its use value in the daily lives of the inhabitants of Bogoro. In its analysis of the plan to attack the village, the Trial Chamber went even further, to state that it ‘considers that [...] the Ngiti militia’s objective was to drive the civilian population from Bogoro by killing it, destroying its homes and pillaging the property and the livestock essential to its survival.’¹⁶⁸ In doing so, the Chamber situated the crime of pillage at the apex of a use value approach to the protection of property, as ‘essential to meet subsistence needs’¹⁶⁹, in stressing how the stolen property was essential to the very survival of the population. Lastly, the harm caused by the pillaging of property that is essential to survival was addressed in the sentencing order, where the Trial Chamber explained that:

...the property of the mainly Hema civilian population of Bogoro which was essential for daily life, such as roofing sheets, furniture and various other personal items, food and domestic animals, above all livestock, had been taken away by attackers [...] The loss of this property had significant consequences for the daily lives of the victims, as was corroborated by the village chief, who, on 5 May 2014, testified before the Chamber that one of the most persistent consequences of the battle was poverty. Apparently, many locals have since been forced to start life afresh away from Bogoro, where they chose not to

¹⁶⁵ *Ibid.*, para 928.

¹⁶⁶ *Ibid.*, para 932. See similarly para 1660.

¹⁶⁷ *Ibid.*, para 953.

¹⁶⁸ *Ibid.*, para 1665.

¹⁶⁹ van Banning (n 138), 184.

return as they would have had to start again from scratch or simply did not have the means.¹⁷⁰

This centralising of a subsistence approach to property and the economic consequences of pillage is a feature of each of the cases that have addressed the crime at the ICC. In *Ntaganda*, the Trial Chamber echoed the language of *Katanga* in noting that:

While there is some disparity in the value of the looted items and their likely significance and use for the victims, these items represented the bulk of the victims' possessions, played an important role in the victims' day-to-day lives and/or their businesses. [...] the Chamber is satisfied that the looted items – such as the harvest, the taking of which affected their livelihood and availability of food until new crops would had [sic] grown and could be harvested – also played an important role in their day-to-day lives.¹⁷¹

The Trial Chamber in *Bemba* similarly highlighted the economic consequences of pillage, explaining in relation to acts of pillage that occurred in various locations in the Central African Republic that 'the perpetrators took numerous items from the victims, including administrative documents, clothing, furniture, tools, radios, televisions, items of personal value, money, livestock, food, vehicles, and fuel. In [a witness's] words, they took "everything" and some victims were left with nothing. The consequences on victims were far-reaching, impacting various aspects of their personal and professional lives.'¹⁷² In this respect, the Chamber highlighted how '[v]ictims of pillaging were often left with nothing. [...] P73 was unable to pay for medical treatment, V2's business has never recovered from the loss of necessary equipment, and many victims were left without, inter alia, their savings, foam mattresses, and clothes, which they had worked hard to obtain.'¹⁷³ In sentencing, the Chamber explained how '[t]he crimes impacted various aspects of the victims' lives, often leaving them without basic necessities. [...] MLC soldiers pillaged without concern for the victims' livelihood or well-being, such as the ability to seek treatment, arrange burial or funeral services, or even feed their families.'¹⁷⁴

This emphasis on the significance of the economic consequences of pillage for the normative narrative constructed around the crime in the decisions of the ICC is underscored in how the Trial Chamber in *Katanga* approached its award of

¹⁷⁰ *Prosecutor v. Germain Katanga*, ICC-01/04-01/07, ICC, Decision on sentence pursuant to article 76 of the Statute, 23 May 2014, para 52.

¹⁷¹ *Ntaganda* Trial Judgment (n 126), para 1044.

¹⁷² *Bemba* Trial Judgment (n 88), para 646.

¹⁷³ *Ibid.*, para 566.

¹⁷⁴ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, ICC, Judgment pursuant to Article 76 of the Statute, 21 June 2016, para 51-53.

reparations. Referring to the analysis in the Trial Judgment that ‘the keeping of grazing animals was a significant part of the Bogoro economy, especially amongst the Hema, who are herders by tradition’¹⁷⁵, the Chamber in the Reparations Order therefore explained that:

...in their applications for reparations, the Applicants allege that they suffered material harm as a result of the pillaging of their livestock or other animals, the destruction of their fields and harvests or the pillaging of their harvests. [...] keeping livestock was a significant activity in Bogoro and its population farmed the land. [...] the population of Bogoro’s livelihood came in part from keeping livestock and farming the land. [...] Given the importance to the local society of agriculture and keeping livestock, the Chamber considers that it is reasonable to presume that the great majority of Bogoro’s population owned livestock and/or fields to meet their daily needs.¹⁷⁶

Offering a localised and contextualised account of the economic importance of the particular type of pillaged property in its analysis of the material harm resulting from these crimes, which contrasts with the monetary value approach to harm reflected in several decisions at the ICTY, the Trial Chamber in *Katanga* further reinforced the normative narrative constructed around pillage in these cases as relating primarily to the use value of property; this property was valuable because of its role in the livelihoods and economic security of the victims of pillage.

In the *Ongwen* case, the Trial Chamber went further, foregrounding in particular the importance of the stolen property for the very survival of the inhabitants of IDP camps that were pillaged. It argued that:

In relation to the war crime of pillaging, the Chamber notes that it is a crime against the right of property. As such, it is in principle of lesser gravity than the crimes against life, physical integrity, and personal liberty and dignity. However, the actual gravity of this crime is variable and depends also on the economic consequences for the victims who were deprived of their property. When such consequences are severe, like in the present case, the crime of pillaging reaches a considerable level of gravity. This is also the case if a large number of individuals were deprived of their property. Among the items looted by the LRA attackers were foodstuffs like beans, flour, salt, sugar, cooking oil, maize, sweets, biscuits, groundnuts, soda as well as household goods such as bedding, clothing, a radio set, saucepans and items such as medicine, livestock and money. These items represented the basic means of

¹⁷⁵ Bemba Trial Judgment (n 88), para 724.

¹⁷⁶ *Prosecutor v. Germain Katanga*, ICC-01/04-01/07, ICC, Order for Reparations pursuant to Article 75 of the Statute, 24 March 2017, para 95-98.

survival for the population living in Pajule IDP camp and the deprivation of the residents of these essential items, which cannot have been without knowledge on the part of Dominic Ongwen, represents a significant factor of gravity.¹⁷⁷

In its description of attacks on other IDP camps the Chamber further recounted how ‘when the people returned in the morning after the attack, there were no food items left, the rebels took the food items as well as cooking utensils that were newly distributed. This indicates the considerable impact of the crime of pillaging on the residents of Abok IDP camp.’¹⁷⁸ Similarly, in Odek IDP camp, ‘[t]he food aid which had been recently distributed to the camp was looted by the attackers. This meant that the impact on the residents was great. Indeed, Zakeo Odora, one of the camp’s leaders, stated that the camp residents suffered a great deal as a result of the attackers having stolen the food. He stated that many people suffered from intense hunger, and that other nearby IDP camps in Awere, Acept and Aromo donated some of their food to assist the residents of Odek IDP camp.’¹⁷⁹

These narratives in the ICC decisions, which construct an account of the value of the property stolen from victims of pillage from the perspective of its role in their day to day lives and livelihoods, in fulfilling their fundamental needs, ensuring their economic security and, in some instances, their very ability to survive, situates the normative conception of the crime emphatically within a use value approach to property. This is particularly striking given the nature of the definition of pillage in the ICC Elements of Crimes, which invokes an ownership rights-based conception of the crime through its centralisation of the legal element of the absence of the owner’s consent.

c. Ownership

In this respect, how the case law of the ICC addresses the question of ownership, for the purposes of determining the legal element of the absence of the owner’s consent to the appropriation of the property, further underscores the extent to which the narrative constructed around pillage at the ICC has moved away from the conceptual roots invoked by the definition of the crime. Some decisions do make statements that gesture in the direction of a more property rights-based conception of pillage in how they discuss the crime, such as, for instance, the Pre-Trial Chamber’s statement in the *Bemba* case that, following the pillaging of property, ‘the rightful owners were no

¹⁷⁷ *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15, ICC, Sentence, 6 May 2021, para 169-170 [hereafter *Ongwen Sentence*].

¹⁷⁸ *Ibid.*, para 273.

¹⁷⁹ *Ibid.*, para 201.

longer in a position to rightfully dispose of their goods.’¹⁸⁰ The Trial Chamber in *Ongwen* similarly made an explicit gesture in this direction, describing pillage as ‘a crime against the right of property’¹⁸¹ and identifying the interest protected by the crime of pillage as ‘the right to personal property.’¹⁸²

These limited appeals to a conception of pillage as normatively rooted in the protection of property rights, that partly aligns with the conception of the crime invoked when pillage has been charged as persecution at the ICC, are nevertheless diluted by the more dominant use value approach constructed through the factual narrative around the crime. This is further reinforced in how the issue of ownership in relation to the legal element of the absence of the owner’s consent to the appropriation of the property has been treated in these decisions. Often, the question of ownership has enjoyed relatively cursory analysis. For instance, in the *RUF* case at the SCSL, the Trial Chamber concluded, on the basis of general evidence of a systematic campaign of looting, that it ‘is satisfied that a significant proportion of the items appropriated belonged to civilians, and that the only reasonable inference to be drawn from the evidence is that the owners did not consent to the appropriation by the rebels.’¹⁸³ In a similar manner, in the *Katanga* case at the ICC, the Trial Chamber explained with respect to the pillaging of livestock that, while it was ‘unable to determine the owner of the cows and goats, it finds that Ngiti combatants stole cows and goats belonging to inhabitants of Bogoro and forced them to herd them to a Ngiti camp’¹⁸⁴, concluding that, given the circumstances, the appropriation took place with the owners’ consent.¹⁸⁵

Despite the centrality of ownership for the elements of the crime of pillage at the ICC, which require that the perpetrator intended to deprive the owner of the property and that this took place without the owner’s consent, both of these accounts to some extent brush aside the question of ownership, concluding instead that the circumstances in which the appropriation took place prove the owner’s lack of consent, whoever they might be. The Trial Chamber in *Ntaganda* made explicit this approach in legal terms, stating that:

For the purpose of pillage, the Chamber will consider the person who had the property under him or her as the ‘owner’. Whether or not this person was the owner in the legal sense is not relevant for the Chamber’s assessment. Moreover, in case it is not clear who the owner of a property was, for example, because at the time of the alleged appropriation the item found itself in a house

¹⁸⁰ Bemba Confirmation of Charges (n 123), para 331.

¹⁸¹ *Ongwen* Sentence (n 177), para 169.

¹⁸² *Ibid.*, para 393.

¹⁸³ *Sesay et al.* Trial Judgment (n 98), para 1337.

¹⁸⁴ *Katanga* Trial Judgment (n 125), para 938.

¹⁸⁵ *Ibid.*, para 954.

whose residents had fled, or were not otherwise present, it suffices that the perpetrator was aware that the property belonged to someone else than him- or herself, and that as such any appropriation must be assumed to have [sic] without the owner's consent.¹⁸⁶

It is unclear precisely what relationship to property the chamber intended to articulate with the phrase 'the person who had the property *under* him or her.'¹⁸⁷ It is nevertheless apparent, given the subsequent rejection of an interpretation of ownership in a purely legal sense, that the Chamber intended to capture a wider relationship to property than legal ownership, presumably also incorporating those who may have used certain property, without being its legal owners. In this respect, the Trial Chamber's approach departs from the traditionally liberal conception of property rights in their protection of the ownership right to exclude, to also capture injury to individuals whose relationship to the pillaged property may not fall into the category of 'ownership' in this narrowly defined sense.

This shift away from a conception of pillage as centring on the violation of individualised ownership rights was taken a step further in the Trial Chamber's interpretation of the very nature of property rights themselves in the *Ongwen* case. In the first direct engagement with the question of the nature of a right to property under international law in the case law on pillage, the Trial Chamber in *Ongwen* explained with respect to the element of the absence of the owner's consent that:

When the property owner has fled, such appropriations must be assumed to have been without the owner's consent absent any contrary indication. This could occur, for example, when items are appropriated from an empty house whose residents have fled. The concept of private property and the right to property must be understood as encompassing not only the property of individuals, but also the communal property of the communities. It must also take into consideration the customary law of the community (i.e. practices on possession, titles and registration).¹⁸⁸

In interpreting the right to property in this way, the Trial Chamber referred to the decisions of the African Commission on Human and Peoples' Rights (ACHPR) and the Inter-American Court of Human Rights (IACHR) on rights to property in the context of indigenous communities specifically. The Trial Chamber relied on the ACHPR's finding in the *Ogiek* case that, 'although addressed in the part of the Charter which enshrines the rights recognised for individuals, the right to property as guaranteed by Article 14 may also apply to groups or communities; in effect, the right

¹⁸⁶ Ntaganda Trial Judgment (n 126), para 1034.

¹⁸⁷ *Ibid.* Emphasis added.

¹⁸⁸ Ongwen Trial Judgment (n 128), para 2766.

can be individual or collective.’¹⁸⁹ The Trial Chamber also invoked the *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* case at the IACHR, which similarly concluded that the right to property under international human rights law includes the rights of indigenous communities to communal property.¹⁹⁰ In this case, the Court explained that:

Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community. Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.¹⁹¹

The Trial Chamber’s invocation of a communal or collective right to property by reference to the decisions of these human rights courts is conceptually significant because of how some of the characteristics of communal property directly challenge the liberal premises of property rights, specifically in terms of how communitarian traditions often regard property as inalienable or non-transferable.¹⁹² Indeed, the ACHPR highlighted this point, in explaining that the ‘classical’ characteristics of property rights, namely ‘the right to use the thing that is the subject of the right (usus), the right to enjoy the fruit thereof (fructus) and the right to dispose of the thing, that is, the right to transfer it (abusus)’¹⁹³, do not apply in the same way to the ancestral lands of indigenous peoples. The Commission went on to note that such ancestral rights to land ‘do not necessarily entail the right of ownership in its classical meaning, including the right to dispose thereof’, but instead place greater emphasis on ‘the rights of possession, occupation, use/utilization of land.’¹⁹⁴

¹⁸⁹ *African Commission on Human and Peoples’ Rights v. Republic of Kenya*, Application No. 006/2012, African Commission on Human and Peoples’ Rights, Judgment, 26 May 2017, para 123 [hereafter *African Commission on Human and Peoples’ Rights v. Republic of Kenya Judgment*]

¹⁹⁰ *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Series C No. 79, Inter-American Court of Human Rights, Judgment, 31 August 2001, para 148.

¹⁹¹ *Ibid.*, para 149.

¹⁹² Dehaibi (n 141), 218.

¹⁹³ *African Commission on Human and Peoples’ Rights v. Republic of Kenya Judgment* (n 189), para 124.

¹⁹⁴ *Ibid.*, para 124-127.

From this perspective, while the invocation of a communal or collective right to property was not directly relevant to the particular acts of pillage charged in the *Ongwen* case, the Trial Chamber's normative statements on this issue further expand the conception of the crime beyond its roots in the liberal notion of the violation of an individual's ownership rights. In this way, the Trial Chamber in *Ongwen*, while continuing to make some limited appeals to the notion of 'private' property, also outlined a conception of the crime of pillage as normatively rooted in a more expansive interpretation of the right to property than the definition of pillage at the ICC, with its centring of ownership and consent, implies.

Taken together, the themes that have emerged in the case law of the ICC on the crime of pillage reflect a degree of development in terms of how the crime is normatively constructed. The normative themes of centring the use value of property and the harm its appropriation inflicts on victims in terms of their means of subsistence and survival, of interpreting ownership in broad terms, and of conceptualising the very nature of the property rights identified to underlie the crime in terms that implicitly challenge liberal notions of individualised ownership rights, contribute to a normative picture of the crime that reflects a significant shift away from its historical roots and the conceptual nature of the definition contained in the ICC Elements of Crimes. While these different normative themes do not provide a coherent or settled conception of pillage at the ICC, taken together, they begin to build an account of the crime that incorporates a more harm-based perspective alongside a more expansive approach to the nature of the property rights protected by its criminalisation.

4. Narratives during proceedings

The narratives that have emerged around charges of plunder or pillage during the course of proceedings at the ICTY, SCSL and ICC broadly mirror those that are taken up and reflected in the case law in more limited forms. While the decisions of the ICTY and SCSL reflect relatively limited engagement with the normative dimensions of pillage, the narratives that emerged around the crime during the course of proceedings at these courts more strongly resemble the turn to an emphatically use value conception of the crime at the ICC. Proceedings at the ICC are further characterized by a focus on the nature of the harms inflicted on victims of pillage, with a particular emphasis on its implications for those already living at a subsistence minimum, while also offering elements of a localised and contextualised account of some of the more social dimensions of property, which attribute it with meaning and value in particular communities beyond its instrumental role in ensuring their survival.

a. *Subsistence and survival*

Despite the limited emphasis on a use value approach to property in the context of charges of pillage in the decisions of the ICTY, some of the testimonies in these cases nevertheless highlight the impact of such crimes in these terms. For instance, in *Kordić and Čerkez*, the following exchange highlighted the subsistence impact of plunder in terms of victims' ability to fulfil their fundamental needs:

Q. You describe the two or three thousand Croat civilians who stayed behind in Bugojno following the Muslim attacks, sir. What was life like for the people that stayed behind?

A. Impossible. They plundered everything. [...] People were frightened and we had nothing, and we didn't even have anything to eat. Because even what we had, there was this tremendous pressure, because they would come and loot our houses time and again.¹⁹⁵

Testimony in the *Blaškić* case reflects a similar experience, with a witness explaining that 'I went back home on the next morning and I realised that my house had been vandalised and demolished [...] During the first robbery they took all my food, so I did not have any food at home. For several days I remained without food, so people from the village brought me some food.'¹⁹⁶ The impact of pillage on livelihoods and subsistence also emerged in testimony which speaks to the intentional displacement of populations through the destruction and pillage of property. In *Gotovina et al.*, the Prosecution recounted the testimony of a witness who had explained that 'you understood exactly what they were saying because he comes from a farming background and to destroy the infrastructure and to destroy the means of a villager's livelihood would ensure that no one could return and live in that particular region.'¹⁹⁷ In this respect, a witness further explained how the economic context in the part of Croatia in which the destruction of property and pillage had occurred exacerbated the harm inflicted by pillage, ensuring that victims were unable to return:

So once your house was burned and all possessions looted, your farm animals killed or stolen, there was nothing for you to return to. And this, incidentally, was a very marginal part of Croatia, and people had a very low income and suffered from four years of total isolation. People were living at the margin. So when you take away their house, you burn their house, you take away their

¹⁹⁵ *Prosecutor v. Dario Kordić and Mario Čerkez*, IT-95-14/2, ICTY, Transcript 10 July 2000, 22427-22428.

¹⁹⁶ *Prosecutor v. Tihomir Blaškić*, IT-95-14, ICTY, Transcript 29 April 1998, 8025.

¹⁹⁷ *Prosecutor v. Ante Gotovina et al.*, IT-06-90, ICTY, Transcript 11 March 2008, 458 [hereafter *Gotovina et al. Transcript Date*].

property, you kill their farm animals, there is no way that anybody can return there and make a living.¹⁹⁸

The Prosecution advanced a similar argument around pillage in the *RUF* case at the SCSL, highlighting the relevance of the pre-existing economic circumstances of victims of pillage for understanding the harm inflicted by the appropriation of their property. The Prosecution argued that:

The evidence that you have, for example, of Operation Pay Yourself, of the taking of rice, of taking of possessions of civilians was [...] clearly unlawful as it was not needed for the conduct or carrying out of any military operation and, indeed, the Prosecution would say that it was more serious as it deprived the already poor population, civilian population that is, of its means to survive.¹⁹⁹

In the *AFRC* case, the Prosecution sought to make a normative argument in these terms on the question of whether the definition of pillage could include destruction or burning of property. The Prosecution's analysis highlights the contradiction between the harm-based, economic impact narrative it sought to advance around the crime during proceedings and the constraints of the ownership-rights model of the definition of the crime applied at the SCSL. With respect to the question of whether the destruction of property could fall within the definition of pillage, the Prosecution argued that:

...the most obvious answer is to say that it falls within the concept of pillage. The answer is obvious, we submit, if one looks at the value that the prohibition against pillage is intended to protect. International Humanitarian Law exists to protect those taking no part in the conflict, such as civilians. It includes rules to protect civilian life, civilian property and civilian human rights from the ravages of armed conflict, and the law against pillage is clearly one designed to protect civilian property. Obviously, the value is to protect the victim, and looking at it from the victim's point of view, it makes no difference to the victim whether the victim's property is destroyed or whether it is stolen. In fact, if it is stolen, that may be less bad, if I can put it that way; there may still be some hope of getting it back at some time. To suggest that pillage includes only theft is looking at matters from the perpetrators' point of view and not from the victims' point of view.²⁰⁰

¹⁹⁸ Gotovina et al. Transcript 23 June 2008 (n 197), 4946.

¹⁹⁹ *Prosecutor v. Issa Hassan Sesay et al. (RUF Case)*, SCSL-2004-15-T, SCSL, Transcript 4 August 2008, 31.

²⁰⁰ *Prosecutor v. Alex Tamba Brima et al. (AFRC Case)*, SCSL-2004-16-T, SCSL, Transcript 7 December 2006, 67 [hereafter Brima et al. Transcript Date].

This submission by the Prosecution, which was rejected by the court on the grounds that the legal element of *appropriation* required by the definition of pillage is not satisfied when property is instead destroyed,²⁰¹ nevertheless illuminates precisely the disjunct between the ownership-interests model of pillage contained in the definition applied at the SCSL and the ICC and the attempts to advance a more humanitarian/civilian-suffering narrative of the crime in the cases at these courts. In this analysis, the attempt to conflate acts of pillage and of destruction of property because of the shared harms they inflict on victims, and the rejection of this argument because of the definitional requirement that pillage involve appropriation of property specifically, underscores how the very fact of distinguishing between appropriation and destruction of property carries the implication that the crime of pillage does not ultimately prioritise the use value of the property protected, and therefore the harm its loss inflicts on victims. Rather, what is centralised through the requirement of appropriation, as articulated explicitly in the Appeals Chamber's decision in the *CDF* case, and discussed in section 2(a) of this chapter, is the transfer of a property interest in violation of the owner's consent.²⁰²

This disconnect between the conceptual nature of the definition of pillage and the narratives that emerge and are highlighted during the course of proceedings is most pronounced in the cases at the ICC. At the ICC, the central theme that dominates the discourse on pillage during proceedings relates to its impact on the livelihoods and survival of individuals already living in economically precarious circumstances, and the long-term economic consequences of the loss of property for victims and their communities. For instance, in *Katanga*, the legal representative for victims explained that '[m]y clients lost their means of living which was made up chiefly of cattle, goats, property, materials linked or attached to their houses, and harvests from the fields.'²⁰³ In *Bemba*, the OTP recounted the experiences of a witness who explained that 'MLC soldiers stole in particular the bed, the mattresses, and car, as well as agricultural machinery of her husband. Previously her husband had used the agricultural machinery to earn a living, but the MLC soldiers had stolen everything that he had and that he needed for his work. The witness describes himself today as the poorest of peasants.'²⁰⁴ The OTP similarly stressed how '[t]he victims of pillaging, heads of households, widows, traders, farmers have been reduced to being beggars. They have been stripped of their savings, their savings accumulated over the years. They're unable to provide for their families and to rebuild what they once had.'²⁰⁵ It went on to explain that 'the looting [...] has left so many victims with no hope and no

²⁰¹ Brima et al. Trial Judgment (n 200), para 757.

²⁰² Fofana and Kondewa Appeal Judgment (n 106), 130 at footnote 780.

²⁰³ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/0736, ICC, Transcript 7 July 2008, 36.

²⁰⁴ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, ICC, Transcript 14 January 2009, 31 [hereafter Bemba Transcript Date].

²⁰⁵ Bemba Transcript 15 January 2009 (n 204), 99.

possessions, living a life in very difficult circumstances today having lost everything they had acquired over many long years of hard work.’²⁰⁶ In *Ongwen*, the OTP explained that ‘the LRA took everything [victims] owned, including all goods necessary to sustain life in the difficult conditions in northern Uganda; pans, cups, clothes, as well as livestock, constituting the key source of income of families.’²⁰⁷

This narrative is reinforced through a particular emphasis on the impact of pillage on the ability of victims to survive in such circumstances. In *Katanga*, the Prosecution emphasised with respect to the pillage of the village of Bogoro that ‘the purpose of the attack was to eliminate the civilian population by looting their possessions, by destroying their possessions’²⁰⁸ and that ‘the destruction and the pillaging of goods was part of a common plan aiming to eliminate the Hema civilian population because it excluded any possibility of survival or possible return to Bogoro for those who managed to escape.’²⁰⁹ In *Ntaganda*, the Prosecution similarly explained that ‘[b]y looting mattresses, roofs, crops, or medical equipment, by torching houses and destroying hospitals, but also schools and orphanages, the UPC was effectively depriving the population of all social support structures and means of survival.’²¹⁰ In *Bemba*, the Prosecution argued that ‘Jean-Pierre Bemba [sic] troops stole from the poor people of one of the poorest countries in the world’²¹¹, stressing with respect to the charge of pillage that:

[W]e need to understand what it means to be left with nothing in a socio-economic context where things cannot be replaced. If they slaughter your livestock, your goats, your animals, you are probably left with no food for you and your kids. If they steal your mattress, you have no place to sleep with you or your family. If they take your shutters, windows and doors, you and your family will be living in a house with no shutters, no windows and no doors. Persons were deprived of their essential means for sustaining their life and livelihood.²¹²

The implications of pillage for residents of IDP camps living in economically precarious circumstances is particularly pronounced in the *Ongwen* case, where the Prosecution emphasised that ‘[u]nable to cultivate, the displaced civilians of Odek

²⁰⁶ Bemba Transcript 18 May 2016 (n 204), 31.

²⁰⁷ *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15, ICC, Transcript 11 March 2020, 29 [hereafter *Ongwen Transcript Date*].

²⁰⁸ *Prosecutor v. Germain Katanga*, ICC-01/04-01/07, ICC, Transcript 6 May 2014, 6-7 [hereafter *Katanga Transcript Date*].

²⁰⁹ *Katanga Transcript* 5 May 2014 (n 208), 59.

²¹⁰ *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06, ICC, Transcript 28 August 2018, 46 [hereafter *Ntaganda Transcript Date*]. See similarly *Ntaganda Transcript* 20 September 2019 (n 210), 7.

²¹¹ Bemba Transcript 22 November 2010 (n 204), 10.

²¹² Bemba Transcript 11 January 2018 (n 204), 27.

[IDP camp] were dependent on food aid. In stealing their food, the LRA robbed them of their basic means of survival'²¹³ and that '[e]ven at its least violent [...] collecting food for the LRA meant breaking into civilian homes and shops, stealing their food, their clothes, drinks, money, even livestock. At Abok [IDP camp] and elsewhere, it meant leaving those camp residents who weren't killed or abducted to face potential starvation and certain deprivation.'²¹⁴

The centrality of this narrative, emphasising the importance of the pillaged property for the survival of individuals in precarious circumstances was particularly pronounced during the confirmation of charges hearings in the *Ongwen* case. In this respect, it is worth quoting the submissions of the Legal Representative for Victims at length for how they illustrate the centrality of survival and subsistence for the normative narrative that emerged around pillage in this case.

Your Honours, the accounts you have heard over these three days include many gruesome and appalling crimes of physical violence against people. The brutal nature of those crimes is such that we are sometimes inclined to treat the destruction and pillage of property as unimportant by comparison. But we should know - we should not do so. The victims of the LRA attacks at Odek, Lukodi and Abok consistently describe the extreme consequences of the attacks on their livelihoods.

Your Honours, from where we sit today in this modern courtroom in The Hague, the importance of a goat or cow might not be obvious. But for those living or formerly living in IDP camps in northern Uganda, these animals were prized possessions, which offered meat and resources for tilling and cultivating land or for trade. Victims who lost their goats, oxen and cows in LRA attacks are still today worse off economically than at the time of pillage. They cannot trade or exchange the animals and are without livestock for farming. Most have been unable to rebuild their herds, and the majority indulge in the markets to sell or buy a small basket of tomatoes or roast maize. And it was not only animals which were destroyed or stolen by the LRA. Most of the victims from Odek, Lukodi and Abok describe returning to their homes after the attacks to discover that their huts were burned, their livestock burned or stolen, and all their household items, including money, cooking utensils and even clothes, had been pillaged. Victims were left with quite literally nothing left.

Your Honours, the following are some accounts from victims which exemplify this situation, and I quote: "On that day, the LRA looted my goats, chicken, ducks, cooking utensils, mattresses, food, simsim, sorghum ... Now I am poor. I don't have any domestic animals ... I cannot support my children in school. Feeding has become a problem."

²¹³ Ongwen Transcript 22 January 2016 (n 207), 8.

²¹⁴ Ongwen Transcript 10 March 2020 (n 207), 84.

Another victim says, and I quote: "Starting a new life after losing all the things which I had gathered like my hut, clothes, among others has not been easy since then because also my goats and hens, which I used to sell and eat sometimes, were killed and others burned.

And another victim says, and I quote: "Our hut was burnt and all our livestock were burnt too. During the attack, I lost all my personal belongings in my hut; for example, clothes, utensils to mention only a few. In addition, my goats, which were next to the house, were also burnt. Up to this day, I have not been able to recover from the loss. Today I am in financial hardship."

Yet another witness account says that "My only pregnant cow was shot dead by a stray bullet, and all its meat was looted. In the morning, I came back and found only the head and the legs were left for me where I had tied the cow. My bicycle and chicken got burnt in the hut since all the huts in the camp were burnt that day. All my goats were looted too. I was left with nothing at all because even my clothes got burnt in my hut since my hut was burnt. From my hiding place, I saw the fire consume the entire camp. By now, my cow would have made me very wealthy. All my goats and property makes me worry a lot for all my wasted efforts and years."²¹⁵

Lastly, the proceedings at the ICC centralise not only the harm inflicted by pillage in terms of the survival and subsistence of individuals, they also highlight some of the more structural and long-term economic effects on the communities subjected to pillage. In *Katanga*, the chief of the village of Bogoro testified to the harm inflicted by pillage and destruction of property in these terms:

Q. [...] Now, let us take the case of a civilian who lost everything. Would such a person be living the same kind of life as beforehand, before the attack?

A. No.

Q. Why?

A. Well, I can give you an example. Before the attack, there was a person who had a number of cattle. Everything was looted and this person has to begin all over again by cultivating the fields. [...]

Q. If you had to describe the main consequence of the Bogoro attack that is still seen today, what would that be? What is the most distinctive consequence that the community is still experiencing today in Bogoro?

A. The main consequence is poverty.²¹⁶

The same experience is reflected in *Ntaganda*, where a witness testified that '[t]he Lendus in this area are farmers, but they no longer had any way to make a living because they were terrorised, they feared returning to the fields and being attacked.

²¹⁵ Ongwen Transcript 25 January 2016 (n 207), 27-29.

²¹⁶ Katanga Transcript 5 May 2014, (n 208), 14.

The population had lost their houses, but also their livestock, the goats, the pigs, the hens. They had lost all their belongings, the Hema militia had taken everything. There was tremendous poverty and this poverty continued.’²¹⁷ The much wider, structural impact of pillage and the destruction of property, beyond the loss of personal belongings, is also highlighted in *Ongwen*. For instance, the Legal Representative for Victims recounted how ‘the conflict had impacts on the economic structures of the communities. Our clients inform this Court that there was loss or they suffered loss of household and other family properties, including livestock, which impacts on community livelihoods and the local economy. [...] the livestock offered avenues for transactions and of course sustaining agriculture in the communities. The attacks rendered people destitute.’²¹⁸

In addition to testimony that addresses the continuing, structural impact of pillage and destruction of property on livelihoods and economic security in general terms, the particular implications of the resulting economic precarity on access to education was highlighted in a number of testimonies. For instance, a witness in *Ongwen* testified to the impact of the poor economic conditions on the community’s children:

Q. Mr Gipson, you've said a few things now about the economic impact and the livelihoods. What is the economic state of the community today?

A. Our people are poor these days, because of the variable situation that people live in. In the past people had livestock. People had cattle. People had goats, chicken and other things. But all these things have been taken away and it's not easy to gain back. For me, as an example, I had cattle, I had goats because I had worked hard. But now I'm not able to farm enough resources, to farm and raise enough resources to buy more livestock. For that matter, people are economically poor. [...] it is not easy to create wealth among the community. People are desperate, desperately in a poor, living in a poor condition. People are not able to farm and get enough money to pay for the school fees, and for that matter children who should be in school are not going to school because they can't afford school fees. Some of the children who are living in the community try to go and look for money in the town areas and they come back with infections and end up dying. People are getting sick. And you are not able to go and get medical treatment. For that matter, the life, general life condition is very poor, not like it was in the past.²¹⁹

Reflecting similar experiences, a witness in *Ntaganda* testified with respect to the harm he had suffered from looting that, ‘we have difficulties, for instance, the child is chased out of school because of the inability to pay school fees, we suffer from that. I mean,

²¹⁷ Ntaganda Transcript 20 September 2019 (n 210), 7.

²¹⁸ Ongwen Transcript 7 December 2016 (n 207), 62.

²¹⁹ Ongwen Transcript 3 May 2018 (n 207), 25-26.

we used to live better. But what happened happened, we can't do anything else.'²²⁰ Similarly, in *Ongwen*, when asked about his ability to continue running his business after having been subjected to looting, a witness testified that he was unable to do so, meaning that '[b]ecause now there are many children and there are also grown-up and how to meet their education needs is difficult. But when I do some little farming, that's when I can earn some money to try and pay for their fees. But I am not doing any business.'²²¹ The more direct impact of pillage on children's education also emerged in testimony that speaks simply to the loss of materials necessary for their schooling. In *Bemba*, a witness who was asked what the impact of the situation was on their children explained that 'my first concern was for my school-going children. I lost all their school books. After the events, I was no longer able to buy other text-books in order to enable my children to continue with their studies.'²²² Similarly, in *Ntaganda*, a witness testified to how during the pillaging of the town of Bambu the 'primary, secondary school [was] looted, so there is no teaching available, no education.'²²³

Overall, the normative discourse around pillage in the proceedings of the ICC is in this way very much dominated by a use value approach to the nature of the property protected through its criminalisation, with a particular emphasis on the role of property in ensuring the livelihoods and survival of individuals already experiencing economic precarity. In addition, the discourse during proceedings at times also reflects some of the more structural implications of crimes of pillage, in inflicting greater poverty on communities and in moving somewhat beyond a subsistence and survival framework by highlighting the impact of the poverty inflicted by pillage on wider issues such as access to education.

At the same time, numerous acts of pillage involving items that would not necessarily fit as straightforwardly within this subsistence or survival narrative were also charged in many of these cases. For instance, the theft of, among many other types of items, vehicles, televisions and radios form part of the charges of pillage in the *Bemba* and *Ntaganda* cases²²⁴ while the theft of similar items as well as, often, watches, featured heavily in the charges of pillage brought in various cases at the SCSL.²²⁵ The pillage of such items nevertheless gives rise to little normative discussion during proceedings, leaving open the question of how they fit into the dominant subsistence and survival narrative that has emerged around these crimes at the ICC and the SCSL.

²²⁰ Ntaganda Transcript 18 November 2015 (n 210), 7.

²²¹ Ongwen Transcript 7 November 2017, (n 207), 56.

²²² Bemba Transcript 26 June 2012 (n 204), 6.

²²³ Ntaganda Transcript 3 February 2017 (n 210), 54.

²²⁴ See Bemba Trial Judgment (n 88), para 502, 509, 547, 646; Ntaganda Trial Judgment (n 126), para 514, 1035, 1042; *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06, ICC, Sentencing Judgment, 7 November 2019, para 139.

²²⁵ Brima et al. Trial Judgment (n 84), para 1426; Fofana and Kondewa Trial Judgment (n 98), para 460; Sesay et al. Trial Judgment (n 67098 para 1535, 1594; Taylor Trial Judgment (n 98), para 1939.

b. *Culture and emotion*

While the dominant normative narrative that has emerged around pillage during proceedings at the ICC relates in this way to the use value of property, with an emphasis on the role of the pillaged property in meeting the fundamental needs of victims, traces of other dimensions of the value of pillaged property nevertheless appear in a small number of instances. Most prominently, the discourse on pillage in the *Katanga* and *Ongwen* cases at the ICC also captures some of the particularised social role of some of the pillaged property, highlighting in contextualised, local terms the cultural role of livestock in the communities that were subjected to pillaging. For example, in *Katanga* the Prosecution recounted how during the attack on Bogoro 'there was looting of chickens, of goats, cattle, and in the Hema tradition this is of great importance. Cattle is in actual fact a local way of saving money. It is - cattle are used as a form of savings so that one can pay a dowry, so that one can school one's children or buy possessions.'²²⁶ Further highlighting the centrality of livestock in cultural-economic practices, a witness explained:

A. Before the war, there were stock breeders in this groupement. You had people who were raising cattle, raising goats, and raising poultry. These individuals were carrying out the activities very well, and it was only after the war that these people were scattered, and several of them had their livestock pillaged, and so they scattered and went to live in other places. [...]

Q. Thank you. In your answer you talked about stock breeders. My question to you is the following: Were all inhabitants of Bogoro or all the families in Bogoro involved in stock breeding activities, or was this an activity that was reserved for a particular group of people?

A. I think that this was an activity that was carried out by (Expunged) involved in this. You know, when a Hema dies, his son takes over his stock breeding activities. And when the girls reached the age of marriage, the girl's family would receive cattle as dowry from her husband's family, and so people who do not have cattle could agree with the girl's family that they will pay the dowry in cash instead of giving cattle. However, the money paid should be equivalent to the value of the cattle requested. The raising of cattle is something which is of capital importance to the Hemas.²²⁷

Similarly, in *Ongwen* the Prosecution explained how 'the LRA took everything [the victims] owned, including all goods necessary to sustain life in the difficult conditions in northern Uganda [...] and other properties carrying a specific meaning for the affected communities, notably [...] for the accomplishment of traditional rituals.'²²⁸ It

²²⁶ Katanga Transcript 6 May 2014 (n 208), 5.

²²⁷ Katanga Transcript 30 November 2010 (n 208), 62-63.

²²⁸ Ongwen Transcript 11 March 2020 (n 207), 28.

went on to emphasise that, '[c]ommunities' livestock, one of the primary sources of wealth, was looted. As you heard from many witnesses, livestock plays a key role in the lives of family and community. As well as being a source of food and/or a means of farming, these animals are used for traditional rituals, marriage and economic transactions.'²²⁹ The testimony of one witness in the *Ongwen* case illustrated the social value of the pillaged livestock in this respect, explaining the particular cultural practices attached to certain animals in Acholi communities:

You've spoken about the impact of people losing their livestock. If you look around you in the courtroom you'll see a lot of people who are lawyers and city people. Can you help us understand what the value of livestock was in your community before the conflict? What did people use the livestock for?

A. Livestock, especially cattle, was very useful in the community. It was used for paying bride wealth. It is used for ploughing. It is used as a source of beef. You also use the cattle to pay school fees because you sell and pay with this. When you are sick, you sell your livestock to get treatment. Things like goats, for example, help also in the same way. Goats are used for helping treat people in so many ways. There are some conditions like madness, they use goats in a traditional way to heal it. And for rituals that are culturally important to the community, they use goats to carry outside rituals. When there are funerals that are taking place in the community, the guests are fed on goats and cattle, and for that matter, this was an important element in the culture of Acholi, economically and socially. If you don't have, you are considered poor then, and they were very important. You are not able to do farming with the hand hoe, but if you have ox ploughs you are able to farm a larger land and get enough food to feed your family. That is the importance of livestock in the community where I live.

Q. Thank you. That's extremely helpful. You've said that the livestock is very important for Acholi cultural practices. What's been the impact now then when people don't have access to livestock on their ability to live in a traditional Acholi way?

A. Cultural practices require that you should find these animals to use for the rituals. For example, if someone was raped in the bush and there is a need to use a goat to carry out a ritual to cleanse the person, because if you don't cleanse it, the person may get mad or may not bear children or may actually die. You have to look for a goat so that a ritual is conducted and the person is cleansed. You have to look for a goat in all ways possible to find a goat. They are some of the things which are listed as the challenges that people are facing in this condition as a result of the war. It results from the lack of resources such as livestock which has affected the cultural practices to be carried out.²³⁰

²²⁹ *Ibid.*, 18.

²³⁰ Ongwen Transcript 3 May 2018 (n 207), 26-27.

While not prominent in these cases, these accounts of the role of livestock in the cultural practices of the communities, and therefore of the disruption caused by pillage to the communities' ability to maintain their cultural practices, invoke an additional cultural dimension to the value of property that is not captured by the more economically-oriented subsistence/survival account of the crime that dominates the discourse during proceedings as well as the narratives that are ultimately constructed around pillage in the decisions.

In a similar, although much more limited manner, a small number of cases also reflect elements of an emotional relationship between people and certain items of pillaged property. For example, during questioning on the possible theft of an individual's wedding ring in the *Mucić et al.* case at the ICTY, the Prosecution asked a witness '[s]ir, do you have any possessions anywhere in the world that have what we would call a sentimental value, where the value to you is much more than the cash value of the item?', to which the witness responded '[y]es, those are personal items such as rings, watches.'²³¹ In the *Martić* case, a witness made reference to the loss of family photographs during the looting of their property²³² while in *Brđanin*, a witness described a watch that was appropriated as a 'memento'.²³³ In *Bemba* at the ICC, a witness similarly explained with respect to the looting of his home, that 'they had even taken the tombstone that I had prepared, a granite slab that I had bought in Paris, and this was intended for the grave of my father who had passed away in 2001. They even stole that, and from an emotional point of view that was a very important item to me.'²³⁴

Discussion of this more emotional dimension of the value of certain items of pillaged property is evidently very limited in these cases. However, in a similar way to the recognition of the specific cultural significance of certain types of property for particular communities, these few examples also imply a thicker possible normative account of the value of the property protected through the criminalisation of pillage than both the use value narrative, with its centralisation of the value of property in ensuring the survival of civilians, as well as the more abstract conception of pillage as a violation of ownership rights, embodied in the legal definition of the crime at the ICC, capture. These examples suggest a conception of people's relationships to material objects that is not exclusively economic. They invoke an approach to the value of property that captures how affective connections may exist between people and their possessions, in how people may develop 'emotional attachment to a specific material object [...] based on an ongoing personal history between the person and the

²³¹ *Prosecutor v. Zdravko Mucić et al.*, IT-96-21, ICTY, Transcript 4 September 1997, 6819-6820.

²³² *Prosecutor v. Milan Martić*, IT-95-11, ICTY, Transcript 31 March 2006, 3004.

²³³ *Prosecutor v. Radoslav Brđanin*, IT-99-36, ICTY, Transcript 28 March 2002, 6184.

²³⁴ *Bemba* Transcript 14 September 2012 (n 204), 50.

possession'²³⁵, which goes beyond owning, possessing or valuing the object in economic terms.

The recognition of the particular cultural role of certain types of property and the sentimental significance of some of the objects appropriated, while only incipient in these cases, nevertheless begins to invoke a conception of the criminalisation of pillage that may also capture the human relationships to the property that it protects in terms that construct property in more complex terms than simply a commodity over which individuals exercise ownership rights.

5. Conclusion

Tracing the development of the prohibition on pillage from its historical roots in concerns with military discipline, through its codification in international humanitarian law, to its prosecution as a war crime under international criminal law, reveals a significant degree of normative evolution in how the protections for property that underlie the crime, and the justification for its criminalisation and prosecution, have been conceptualised. This conceptual evolution has nevertheless not taken place in a linear fashion. The early self-interested concern with ensuring military discipline on the battlefield evolved into a more normative commitment to the sanctity of private property informed by the emergence of liberalism in Europe in the 17th and 18th centuries, which in turn shaped the initial international codifications of the prohibition on pillage in the law of armed conflict. This liberal spirit continued to dominate the approach to pillage adopted in the post-Second World War industrialists trials, which distilled the normative core of the crime down to the violation of ownership interests, explicitly excluding a more harm-based conception of the crime that would also have captured its impact on the economies of occupied territories.

While the subsequent codification of the Geneva Conventions contributed little to the development of the prohibition on pillage in legal terms, the wider shift towards a conception of the laws of war as increasingly concerned with the humanitarian protection of victims of war that the Conventions have been understood to represent, alongside the abolition of the institution of private property among socialist states, initiated a dilution of the centrality of this principle in the understanding of the protections accorded to property during armed conflict. This change was consolidated in legal terms with the codification of the Additional Protocols to the Geneva Conventions, which turned to an explicitly 'civilian-use' framework for the protection of property during armed conflict, centralising the use value of protected property in mitigating civilian suffering.

²³⁵ Heather Conway and John Stannard, 'Property and Emotions', (2015) 8(1) *Emotion Review*, 39.

The definitions of pillage adopted at the ICTY, SCSL and ICC, the nature of the normative themes that are constructed in the case law and the narratives that emerge around the crime during the course of proceedings to some extent embody this inconsistent normative history. While the conceptual account of the crime invoked by the definitions adopted, particularly at the SCSL and ICC, appear to hark back to the normative approach of the Hague Conventions and the post-war industrialists trials, to capture an individual ownership rights-based conception of the crime, the dominant narrative that emerges from the case law and during proceedings tells an entirely different story.

Various dimensions of the approach adopted to the crime, in terms of the gravity of its consequences for victims as a jurisdictional threshold, an emphasis on the role of the pillaged property in the daily lives of victims as well as a more expansive interpretation of the element of ownership, significantly moderate the extent to which the conceptual model underpinning the definition is reproduced in the normative narratives of the cases, in particular at the ICC. Instead, while the case law of the ICTY and SCSL reflect more limited engagement with the normative dimensions of the crime, the decisions of the ICC construct an emphatically use value conception of the property protected through the criminalisation of pillage, rooting this in its role in ensuring the subsistence and survival of victims, in particular those already living at a subsistence minimum.

While normative appeals to rights to private property do take place in the decisions of the ICC, the most recent case involving charges of pillage offers an interpretation of the right to property under human rights law that conceptually distances itself from the classical property rights paradigm. This decision reflects developments at human rights courts that capture a broader relationship between people and the material world than is allowed for by the liberal conception of individual ownership rights. Indications of some other dimensions to the value of pillaged property, such as certain elements of their role in cultural practices and traces of an affective relationship between individuals and particular objects, also underscore the move away from the individual property-rights conception of the crime, although these remain minimal at present.

The normative narratives around pillage in these cases are in this way not unified or fully coherent. The dominant 'use value' narrative constructed around the value of the property protected by pillage nevertheless ultimately reveals a degree of tension between the conceptual underpinnings of the legal elements of the crime, and the emphatically humanitarian, harm-based narrative used to justify its prosecution. In this respect, the fact that several of the cases at the SCSL and the ICC, where the use value narrative around the crime is most prominent, involve charges of pillage based on the appropriation of items such as cars, televisions, radios or watches, that do not fit as straightforwardly into the subsistence-survival framework as items such as

livestock, food, cooking equipment or medicine, underscores a degree of incoherence between the definition of the crime, and what it can therefore capture, and the normative narrative constructed around it. Indeed, the normative justification for pursuing charges for the former types of objects is left largely unaddressed in these cases.

Seen from this perspective, the normative account of the criminalisation and prosecution of pillage invoked in these cases appears in some ways to seek to blur the lines between the notions of 'crimes against persons' and 'crimes against property' by constructing a narrative that centralises those instances of crimes against property that have a concrete and direct impact on the lives and physical security of persons. This ultimately suggests an attempt to distance the crime from its roots in the protection of property rights, to anchor it unequivocally within the basic security rights framework typically understood to underlie international criminal law.

