Annex A

Elements of War Crimes
under the Rome Statute of the International Criminal Court

Sources and Commentary

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Art. 8(2)(b)(xiii) – Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war

Text adopted by the PrepCom

War crime of destroying or seizing the enemy's property

1. The perpetrator destroyed or seized certain property.
2. Such property was property of a hostile party.
3. Such property was protected from that destruction or seizure under the international law of armed conflict.
4. The perpetrator was aware of the factual circumstances that established the status of the property.
5. The destruction or seizure was not justified by military necessity.
6. The conduct took place in the context of and was associated with an international armed conflict.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Commentary

Travaux préparatoires/Understandings of the PrepCom

The elements reproduce to a large extent the language from the Rome Statute, with some modifications:

The term 'enemy's property' was circumscribed by the term 'property of a hostile party' – to the knowledge of this author, not for substantive reasons.

After very controversial discussions the term 'imperatively demanded by the necessities of war', derived from the Hague Regulations and contained in the Statute, was replaced by 'military necessity'. Several delegations took the view that 'military necessity' reflects modern language, but means essentially the same as the treaty language. Other delegations were a bit more cautious and pointed out that even in the GC not only is the term 'military necessity' used, but also wording similar to that of the Hague Regulations. For example, while Arts. 49 and 53 GC IV contain the phrases 'imperative military reasons'/'rendered absolutely necessary by military operations', Art. 147 GC IV uses 'military necessity'.[1] Other delegations stated that if the term 'military necessity' is used in the elements, then it should be preceded by the term 'imperative'. This prompted a few delegations to claim that there is no gradation within the concept of 'military necessity'. Others argued that adjectives like

[1] See also Art. 17 AP II, which uses the formulation 'imperative military reasons so demand'.

'imperative' are more commonly used only in relation to special protection granted to very specific objects, such as in Art. 4 of the 1954 Convention on the Protection of Cultural Property. Given that this war crime deals with property in general, the use of words like 'imperative' would not be appropriate.

Despite these divergent views, the current text was adopted in the end. In this context it was stressed that a rule of the law of armed conflict cannot be derogated from by invoking military necessity unless this possibility is explicitly provided for by the rule in question. When this possibility is explicitly provided for, it can only be invoked to the extent that it is provided for. Military necessity cannot justify any derogation from rules that are drafted in a peremptory manner.[2] This particular clarification helped the delegations to accept the text.

Following the approach chosen for the war crime under Art. 8(2)(a)(iv), Element 3 was added. It highlights the fact that under international humanitarian law not every seizure or destruction is prohibited. The element serves as a *renvoi* to specific rules defining the protection against seizure or destruction.

Several delegations expressed the concern that applying Art. 30 of the ICC Statute, as required by para. 2 of the General Introduction, to Element 3 could create the possibility for a mistake of law defence. Therefore, again following the approach adopted for the war crime under Art. 8(2)(a)(iv), Element 4 was added. As in the case of the war crimes defined under Art. 8(2)(a),[3] this mental element recognises the interplay between Arts. 30 and 32 of the Statute, emphasising the general rule that, while ignorance of the facts may be an excuse, ignorance of the law (in this case of the rules relating to the protection of property against seizure or destruction) is not. Several delegations, however, expressed the view during negotiations that no mental element should be linked to Element 3; it was considered a

[2] See in this regard J. de Preux, 'Art. 35' in Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Martinus Nijhoff, Geneva, 1987), nos. 1389 and 1405. See also, for example, the Canadian military manual, Office of the Judge Advocate, *The Law of Armed Conflict at the Operational and Tactical Level*, in http://www.dnd.ca/jag/operational_pubs_e.html@top, p. 2-1:

> The concept of military necessity justifies the application of force not forbidden by International Law, to the extent necessary, for the realization of the purpose of armed conflict... Military necessity is not a concept that can be considered in isolation. In particular, it does not justify violation of the LOAC, as military necessity was a factor taken into account when the rules governing the conduct of hostilities were drafted... Military necessity cannot justify actions absolutely prohibited by law, as the means to achieve military victory are not unlimited. Armed conflict must be carried on within the limits set by international law.

[3] See section 5.1., subsection (2) 'Protected persons/objects'.

purely objective element not requiring mental coverage. These delegations eventually accepted the text as adopted.

Several proposals suggested qualifying the term 'property' by 'private or public', in order to emphasise that both types of property are protected against seizure or destruction by the relevant rules. This clarification was initially inserted in the Rolling Text, but eventually deleted, as it was agreed that the term 'property' would cover both public and private property.

Legal basis of the war crime

The wording of this offence is directly derived from Art. 23(g) Hague Regulations. The Hague Regulations contain an extensive and detailed law for the protection of enemy property. Since Art. 154 GC IV stipulates:

> In the relations between the Powers who are bound by the Hague Conventions respecting the Laws and Customs of War on Land, whether that of 29 July 1899, or that of 18 October 1907, and who are parties to the present Convention, this last Convention shall be supplementary to Sections II and III of the Regulations annexed to the above-mentioned Conventions of The Hague,

both the Hague Regulations and the relevant provisions of the 1949 Geneva Conventions must be taken into account for the interpretation of this offence, mainly the determination of what constitutes conduct which is unlawful under international law. This war crime concerns all kinds of enemy property.

While the destruction of property during the conduct of hostilities is more specifically dealt with under other provisions of Art. 8(2)(b) of the ICC Statute, there is a certain overlapping of this offence with Art. 8(2)(a)(iv), especially as regards destruction of property. While the concept of 'appropriation' seems to be quite well defined, this is not the case with the term 'seizure'. In light of the various definitions given for the concept of 'seizure', the terms 'seizure' and 'appropriation' seem to have different meanings. With respect to 'destruction', there are no indications that the term must be interpreted in a different way for these two offences. However, the offence described under Art. 8(2)(b)(xiii) seems to have a more general scope than that under Art. 8(2)(a)(iv), since it also covers the law on the conduct of hostilities as contained in AP I and reflected in other crimes under this Statute. Besides, the threshold for constituting a war crime is slightly different: in Art. 8(2)(a)(iv) the destruction/appropriation must be 'extensive' and 'not justified by military necessity and carried out unlawfully and wantonly'

while Art. 8(b)(xiii) criminalises destruction/seizure not imperatively demanded by the necessities of war.[4]

Remarks concerning the material elements

The following conclusions may be drawn from the various sources examined below. The sources in brackets refer to the supporting sources, which are further analysed below.

- Destruction of property can be committed by means of a large range of actions. The following acts may constitute 'destruction': *inter alia* to set fire to property, to destroy, pull down, mutilate or damage (cf. post-Second World War trials).
- Property that cannot lawfully be seized obviously cannot lawfully be destroyed.
- Both private and public property are protected by specific provisions (Art. 53 GC IV, post-Second World War trials, Hague Regulations).
- In general, the lawfulness of destruction and seizure depends on the necessities of war (ICC Statute, Arts. 34, 50 GC I, Art. 51 GC II, Arts. 53, 57, 147 GC IV, Arts. 23(g), 52 Hague Regulations, post-Second World War trials, the ICTY Prosecution with various formulations). However, many other rules contained especially in the GC and AP I regulating the conduct of hostilities define a specific threshold determining the lawfulness of destruction/seizure. Therefore, it is difficult to formulate material elements as a general rule which would apply to all possible cases of destruction or seizure that would be prohibited.

(1) Destruction

In the *Kordic and Cerkez* case, the ICTY defined the elements of the offence 'wanton destruction not justified by military necessity' under Art. 3 of the ICTY Statute as follows:

(i) the destruction of property occurs on a large scale;
(ii) the destruction is not justified by military necessity.[5]

In the case of *The Prosecutor* v. *Milan Kovacevic*,[6] the ICTY Prosecution considered that the following constituted the material elements of 'extensive destruction and/or appropriation of property, not justified by military necessity carried out unlawfully and wantonly' (see Art. 8(2)(a)(iv) ICC Statute):

- The accused or the subordinate wantonly and unlawfully destroyed real or personnel property or took, obtained, or withheld such property from the possession of the owner or any other person;
- The amount of destruction was extensive and under the circumstances exceeded that required by military necessity.

In the case of *The Prosecutor* v. *Dario Kordic and Mario Cerkez*, it defined the specific elements in the following terms:

- The occurrence of extensive destruction of property;
- The destruction was not justified by military necessity;
- The property destroyed was protected property pursuant to the Geneva Conventions.[7]

In the same case it defined the following as the specific elements of the offence 'wanton destruction or devastation' under Art. 3 of the ICTY Statute:

- The occurrence of destruction or devastation of property;
- The destruction or devastation of property was not justified by military necessity.[8]

Under this offence, the ICTY Prosecution, in the above-cited case of *The Prosecutor* v. *Milan Kovacevic* dealing with wanton destruction or devastation of cities, towns, or villages, addressed specifically Art. 23(g) of the 1907 Hague Regulations. It stated that

> [a]ny destruction or devastation of cities, towns or villages that occurred during active military operations must be required by military necessity in that this destruction or devastation is closely connected with the overcoming of the enemy forces. The US Army's 1956 *Law of Land Warfare*, interpreting Article 23(g) of the 1907 Hague Regulations, stipulates that '[d]evastation as an end in itself or as a separate measure of war is not sanctioned by the law of war. There must be some reasonably close connection between the destruction of property and the overcoming of the enemy's army.' (United States Army, *Law of Land Warfare* (GPO: 1956), para. 56).[9]

[4] With respect to Art. 23(g) Hague Regulations, the Court in the *F. Holstein and Twenty-three Others* case stated that its 'careful phraseology is usually interpreted to mean that "imperative demands of the necessities of war" may occur only in the course of active military operations'. In UNWCC, *LRTWC*, vol. VIII, p. 30; 13 AD 261.

[5] ICTY, Judgment, *The Prosecutor v. Dario Kordic and Mario Cerkez*, IT-95-14/2-T, para. 346.

[6] ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor* v. *Milan Kovacevic*, IT-97-24-PT, p. 16.

[7] ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor* v. *Dario Kordic and Mario Cerkez*, IT-95-14/2-PT, p. 46.

[8] *Ibid.*, p. 49.

[9] ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor* v. *Milan Kovacevic*, IT-97-24-PT, p. 20. For the specific elements of 'wanton destruction of cities, towns, or villages, or devastation not justified by military necessity', see p. 19.

As pointed out above, there are no indications that the term 'destruction' has a different meaning under Art. 8(2)(b)(xiii) than under Art. 8(2)(a)(iv). Thus, the case law of several post-Second World War trials as well as the provisions of the GC and Hague Regulations already mentioned under the latter section and the conditions set forth in these provisions must be considered in order to determine the elements of this crime. In addition to the cases already cited, the following case addresses more specifically the problem of 'scorched earth' policies under this offence:

In the *W. List and Others* case, one accused was specifically charged with 'the wanton destruction of cities, towns and villages, ... and the commission of other acts of devastation not warranted by military necessity, in the occupied territories'.[10] The acts were committed during his retreat from Finland to Western Norway. The accused believed that the hostile army was right behind him, and he ordered complete devastation so that there would be nothing to assist the hostile army in its pursuit of him. He was wrong. The enemy army was not in immediate pursuit of him; it was several days behind him, and there was plenty of time for him to escape with his troops. Nevertheless, he carried out the 'scorched earth' policy that provided the basis for this charge of the indictment. On the facts, the Tribunal found the following:

> Villages were destroyed. Isolated habitations met a similar fate. Bridges and highways were blasted. Communication lines were destroyed. Port installations were wrecked. A complete destruction of all housing, communication and transport facilities was had ... The destruction was as complete as an efficient army could do it ... While the Russians did not follow up the retreat to the extent anticipated, there are physical evidences that they were expected to do so ... [T]here are mute evidences that an attack was anticipated.[11]

As to the legal problems, the Tribunal held:

> There is evidence in the record that there was no military necessity for this destruction and devastation. An examination of the facts in retrospect can well sustain this conclusion. But we are obliged to judge the situation as it appeared to the defendant at the time. If the facts were such as would justify the action by the exercise of judgment, after giving consideration to all the factors and existing possibilities, even though the conclusion reached may have been faulty, it cannot be said to be criminal. After giving careful consideration to all the evidence on the subject, we are convinced that the defendant cannot be held criminally responsible although when viewed in retrospect, the danger did not actually exist.[12]

[10] In UNWCC, *LRTWC*, vol. VIII, pp. 35 ff.; 15 AD 632.
[11] UNWCC, *LRTWC*, vol. VIII, p. 68; 15 AD 632 at 648.

More specifically addressing Art. 23(g) of the 1907 Hague Regulations, the Tribunal held:

> The Hague Regulations prohibited 'The destruction or seizure of enemy property except in case where this destruction or seizure is urgently required by the necessities of war.' Article 23(g). The Hague Regulations are mandatory provisions of International Law. The prohibitions therein contained control and are superior to military necessities of the most urgent nature except where the Regulations themselves specifically provide the contrary. The destruction of public and private property by retreating military forces which would give aid and comfort to the enemy may constitute a situation coming within the exceptions contained in Article 23(g). We are not called upon to determine whether urgent military necessity for the devastation and destruction ... actually existed. We are concerned with the question whether the defendant at the time of its occurrence acted within the limits of honest judgment on the basis of the conditions prevailing at the time.[13]

NB: This finding of the post-Second World War Tribunal must be read nowadays specifically in the context of Art. 54(5) AP I, which states:

> In recognition of the vital requirements of any Party to the conflict in the defence of its national territory against invasion, derogation from the prohibitions contained in paragraph 2 [It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as food-stuffs, agricultural areas for the production of food-stuffs, crops, livestock, drinking water installations and supplies and irrigation works] may be made by a Party to the conflict within such territory under its own control where required by imperative military necessity.

As indicated in the *List and Others* case, 'scorched earth' policies exercised by an Occupying Power withdrawing from occupied territory were judged legitimate if required by imperative military necessity. Art. 54 AP I changes that situation as regards objects indispensable to the survival of the civilian population: in the case of imperative military necessity a belligerent Power may in an extreme case even destroy these objects in

[12] UNWCC, *LRTWC*, vol. VIII, pp. 68 ff. [13] *Ibid.*, p. 69.

that part of its own territory which is under its control. On the other hand, it may not carry out such destruction in the part of its territory which is under enemy control. In other words, an occupation army which is withdrawing may, if military operations render it absolutely necessary, carry out destructions (bridges, railways, roads, airports, ports etc.) with a view to preventing or slowing down the advance of enemy troops, but may not destroy indispensable objects such as supplies of foodstuffs, crops ripe for harvesting, drinking water reservoirs and water distribution systems, or remove livestock. Any 'scorched earth' policy carried out by an Occupying Power, even when withdrawing from such territory, must not affect such objects.

Besides, as pointed out above, the interpretation of this offence in Art. 8(2)(b)(xiii) has to take into account the crimes relating to destruction of property as listed in other parts of Art. 8(b) of the Statute, which set up specific conditions for the lawfulness of destruction.

(2) Seizure

There are no provisions in the treaties of international humanitarian law which specifically clarify the concept of 'seizure of property'.

The ICRC Commentary states in this regard:

> There is a distinction in law between seizure and requisition. Seizure applies primarily to State property which is war booty; requisition only affects private property. There are, however, certain cases mentioned in Article 53, paragraph 2, of the Hague Convention in which private property can also be seized; but such seizure is only sequestration, to be followed by restitution and indemnity, whereas requisition implies a transfer of ownership.[14]

However, it should be noted that this choice of terminology is not necessarily shared in the literature. A review of leading international writers shows that there is no single meaning for the terms 'seizure' and 'requisition', and there is not always a clear distinction between these terms in the laws of armed conflict.[15] According to its legal context

[14] J. S. Pictet (ed.), *Commentary I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (ICRC, Geneva, 1958), Art. 34, p. 296 (n. 2).

[15] With respect to terminology, the following different views may be found in the literature:
- seizure and requisition must be distinguished on the basis of the nature of the goods appropriated: articles susceptible of a direct military use are seized; articles not susceptible of a direct military use but useful for the needs of the occupying or advancing army are requisitioned. As the interference with private rights is stronger in the second case, the legal conditions to effect a requisition are stricter (e.g. M. Greenspan, *The Modern Law of Land Warfare* (University of California Press, Berkeley and Los Angeles, 1959), pp. 293 ff., 296, 300 ff.; F. A. Freiherr von der Heydte, *Völkerrecht, Ein Lehrbuch* (Kiepenheuer & Witsch, Cologne, 1960), vol. II, pp. 324 ff.);
- the notion of seizure is confined to war at sea, requisition to war on land (e.g. L. Oppenheim, *International Law. A Treatise*, ed. H. Lauterpacht (7th edn, Longmans, London, 1952), vol. II, pp. 407 ff., 474–6);
- seizure is linked to public property, requisition to private property (e.g. P. Fauchille, *Traité de droit international public* (8th edn, Rousseau, Paris, 1921-6), vol. II, pp. 254 ff., 281 ff.);
- requisition covers all acts of appropriation of articles for the needs of the army, seizure covers movable property taken as war booty (e.g. L. H. Woolsey, 'Forced Transfer of Property in Enemy Occupied Territories', (1943) 37 *American Journal of International Law* 285);
- the difference between requisition and seizure is *ratione personae* and eventually *ratione materiae*: '*Ratione personae*, seizure extends to the property of the State and that of private persons. Requisition, however, is limited to the property of private persons and local authorities in occupied territories. *Ratione materiae*, the emphasis in seizure and requisition is on movables but, in the case of requisition, the wording of Article 52 [Hague Regulations] is sufficiently wide to include immovables' (e.g. G. Schwarzenberger, *International Law – As Applied by International Courts and Tribunals: The Law of Armed Conflict* (Sterens & Sons, London, 1968), vol. II, p. 269; see also pp. 291 ff.);
- requisition seems to be a technical term involving a legal regime, seizure being the concrete act of taking.

(e.g. occupation, military operations, sea prizes), the meaning and legal effect vary.

The following rules contained in various instruments of international humanitarian law deal particularly with specific acts of seizure/requisition and set up special conditions for their lawfulness or unlawfulness. In accordance with Art. 154 GC IV cited above, the provisions of GC IV supplement Sections II and III of the Hague Regulations. Therefore, specific norms of the Hague Regulations – containing further restrictions – are also relevant for determining the lawfulness or unlawfulness of seizure.

Public movable property

- Art. 53 Hague Regulations:

> An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations.
>
> All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depots of arms, and, generally, all kinds of munitions of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made.

- Art. 56 Hague Regulations:

> The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property.
>
> All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.

- Art. 4(3) of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict:[16]

> The High Contracting Parties further undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property. They shall refrain from requisitioning movable cultural property situated in the territory of another High Contracting Party.

- Art. 14(1) of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict:

> Immunity from seizure, placing in prize, or capture shall be granted to:
>
> (a) cultural property enjoying the protection provided for in Article 12 [Transport under Special Protection] or that provided for in Article 13 [Transport in Urgent Cases];
>
> (b) the means of transport exclusively engaged in the transfer of such cultural property.

With respect to the protection of State archives and public records, see G. von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation* (University of Minnesota Press, Minneapolis, 1957), pp. 183 ff.

Public immovable property

- Art. 55 Hague Regulations:

> The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country...

[16] See also the recently adopted Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (26 March 1999), especially Arts. 9, 15.

Private property

- Art. 46 Hague Regulations states that '... private property ... must be respected. Private property cannot be confiscated.'
- Art. 53(2) Hague Regulations:

> All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depots of arms, and, generally, all kinds of munitions of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made.

Protection of objects of personal use

- Art. 18 GC III (prisoners of war):

> All effects and articles of personal use, except arms, horses, military equipment and military documents, shall remain in the possession of prisoners of war, likewise their metal helmets and gas masks and like articles issued for personal protection. Effects and articles used for their clothing or feeding shall likewise remain in their possession, even if such effects and articles belong to their regulation military equipment...
>
> Badges of rank and nationality, decorations and articles having above all a personal or sentimental value may not be taken from prisoners of war.
>
> Sums of money carried by prisoners of war may not be taken away from them except by order of an officer, and after the amount and particulars of the owner have been recorded in a special register and an itemized receipt has been given...
>
> The Detaining Power may withdraw articles of value from prisoners of war only for reasons of security...

- Art. 97 GC IV (internees):

> Internees shall be permitted to retain articles of personal use. Monies, cheques, bonds, etc., and valuables in their possession may not be taken from them except in accordance with established procedure...
>
> Articles which have above all a personal or sentimental value may not be taken away...
>
> On release or repatriation, internees shall be given all articles, monies or other valuables taken from them during internment and shall receive in currency the balance of any credit to their

> accounts kept in accordance with Article 98, with the exception of any articles or amounts withheld by the Detaining Power by virtue of its legislation in force. If the property of an internee is so withheld, the owner shall receive a detailed receipt.
>
> Family or identity documents in the possession of internees may not be taken away without a receipt being given . . .

Property of aid societies, hospitals

- Art. 34 GC I rules on the requisition of real and personal property of aid societies and states:

> The right of requisition recognized for belligerents by the laws and customs of war shall not be exercised except in case of urgent necessity, and only after the welfare of the wounded and sick has been ensured.

- Art. 57 GC IV:

> The Occupying Power may requisition civilian hospitals only temporarily and only in cases of urgent necessity for the care of military wounded and sick, and then on condition that suitable arrangements are made in due time for the care and treatment of the patients and for the needs of the civilian population for hospital accommodation.
>
> The material and stores of civilian hospitals cannot be requisitioned so long as they are necessary for the needs of the civilian population.

In the *A. Krupp* trial the Tribunal addressed one aspect of the legality of seizure under the Hague Regulations, quoting from J. W. Garner, *International Law and the World War* (Longmans, London and New York, 1920), vol. II, footnote on p. 126:

> The authorities are all in agreement that the right of requisition as recognised by the Hague Convention is understood to embrace only such territory occupied and does not include the spoliation of the country and the transportation to the occupant's own country of raw materials and machinery for use in his home industries . . . The Germans contended that the spoliation of Belgian and French industrial establishments and the transportation of their machinery to Germany was a lawful act of war under [Art.] 23(g) of the Hague Convention which allows a military occupant to appropriate enemy private property whenever it is 'imperatively demanded by the necessities of war'. In consequence of the Anglo-French blockade which threatened the very existence of Germany it was a military necessity that she should draw in part on the supply of raw materials and machinery available in occupied territory. But *it is quite clear from the language and context of Art. 23(g) as well as the discussions on it in the Conference, that it was never intended to authorise a military occupant to despoil on an extensive scale the industrial establishments of occupied territory or to transfer their machinery to his own country for use in his home industries. What was intended merely was to authorise the seizure or destruction of private property only in exceptional cases when it was an imperative necessity for the conduct of military operations in the territory under occupation.* This view is further strengthened by Art. 46 which requires belligerents to respect enemy private property and which forbids confiscation, and by Art. 47 which prohibits pillage.[17]

The Tribunal also rejected the Defence's contention that 'the laws and customs of war do not prohibit the seizure and exploitation of property in belligerently occupied territory, so long as no definite transfer of title was accomplished . . . [I]f, for example, a factory is being taken over in a manner which prevents the rightful owner from using it and deprives him from lawfully exercising his prerogative as owner, it cannot be said that his property "is respected" under Article 46 as it must be.'[18]

Remarks concerning the mental element

In the *Blaskic* case, the ICTY defined the mental element of the offence 'devastation of property not justified by military necessity' as contained in Art. 3(b) of the ICTY Statute as follows:

> the devastation must have been perpetrated intentionally or have been the foreseeable consequence of the acts of the accused.[19]

In the *Kordic and Cerkez* case it defined the mental element for wanton destruction not justified by military necessity in the following terms:

> the perpetrator acted with the intent to destroy the property in question or in reckless disregard of the likelihood of its destruction.[20]

In the case of *The Prosecutor* v. *Milan Kovacevic*[21] the Prosecution of the ICTY considered the following to constitute the mental element of 'extensive destruction and/or appropriation of property, not justified by

[17] In UNWCC, *LRTWC*, vol. X, pp. 136 ff.; 15 AD 620. [18] UNWCC, *LRTWC*, vol. X, p. 137.
[19] ICTY, Judgment, *The Prosecutor* v. *Tihomir Blaskic*, IT-95-14-T, para. 183; 122 ILR 1 at 72.
[20] ICTY, Judgment, *The Prosecutor* v. *Dario Kordic and Mario Cerkez*, IT-95-14/2-T, para. 346.
[21] ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor* v. *Milan Kovacevic*, IT-97-24-PT, p. 16.

military necessity carried out unlawfully and wantonly' (see Art. 8(2)(a)(iv) ICC Statute):

> The taking, obtaining, or withholding of such property by the accused or a subordinate was committed with the intent to deprive another person of the use and benefit of the property, or to appropriate the property for the use of any person other than the owner.

However, it seems questionable whether this special intent requirement applies also to the offence of 'destroying or seizing the enemy's property'.

In the *Kordic and Cerkez* case[22] the ICTY Prosecution defined the mental element of the offences 'extensive destruction and/or appropriation of property, not justified by military necessity carried out unlawfully and wantonly' and 'wanton destruction or devastation' in the following way:

> The destruction [or devastation] was committed wilfully.[23]

The *mens rea* required in the above-cited post-Second World War cases is that the offence must be committed 'wilfully and knowingly', as was decided in the case of *Flick and Five Others* (pp. 3 ff.), the *IG Farben* trial and the *A. Krupp* trial.

With respect to the question of knowledge of facts and mistake of facts concerning military necessity, see the above-cited parts of the *W. List and Others* case under the subsection 'Destruction'.

[22] ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor* v. *Dario Kordic and Mario Cerkez*, IT-95-14/2-PT, pp. 46, 49.

[23] In the *Simic and Others* case the ICTY Prosecution defined the notion of 'wilful' as 'a form of intent which includes recklessness but excludes ordinary negligence. "Wilful" means a positive intent to do something, which can be inferred if the consequences were foreseeable, while "recklessness" means wilful neglect that reaches the level of gross criminal negligence.' ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor* v. *Milan Simic and Others*, IT-95-9-PT, p. 35.

Art. 8(2)(e)(xii) – Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict

Text adopted by the PrepCom

War crime of destroying or seizing the enemy's property

1. The perpetrator destroyed or seized certain property.
2. Such property was property of an adversary.
3. Such property was protected from that destruction or seizure under the international law of armed conflict.
4. The perpetrator was aware of the factual circumstances that established the status of the property.
5. The destruction or seizure was not required by military necessity.
6. The conduct took place in the context of and was associated with an armed conflict not of an international character.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Commentary

Travaux préparatoires/Understandings of the PrepCom

The PrepCom concluded that the elements of this war crime are identical to the elements of the corresponding war crime in an international armed conflict (Art. 8(2)(b)(xiii) ICC Statute). On the basis of the slightly different statutory language, the term 'adversary' was used in Element 2 instead of 'hostile party'.

Legal basis of the war crime

The term 'destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict' is derived to a large extent from Art. 23(g) of the Hague Regulations. However, it must be noted that the Hague Regulations do not directly apply to non-international armed conflicts. An explicit treaty reference for this offence in internal armed conflicts does not exist.

Remarks concerning the elements

The conclusions stated under the section dealing with the offence of '[d]estroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of the war' (Art. 8(2)(b)(xiii) ICC Statute) in the context of international armed conflicts also apply to this offence when committed in the context of a non-international armed conflict. Although the wording used to define the

crime in a non-international armed conflict is slightly different – the term 'property of an adversary' is used instead of 'enemy's property', and the words 'necessities of the conflict' instead of 'necessities of war' – there are no indications in the ICC Statute or other sources that this offence has different constituent elements in an international or non-international armed conflict. However, in order to determine the lawfulness of destruction or seizure, the specific provisions applicable in non-international armed conflicts, in particular regulating the conduct of hostilities as reflected in other crimes under this Statute or as contained in AP II as well as customary international law, must be considered.

Elements of War Crimes under the Rome Statute of the International Criminal Court

The Elements of Crimes are intended to assist the International Criminal Court (ICC) in the interpretation and application of the articles of the ICC Statute defining the crimes under its jurisdiction. These will not only be of crucial importance for the future work of the ICC in interpreting the crimes provisions, but also for national courts, which have the primary responsibility in the prosecution of international crimes under the Rome Statute. This commentary provides a critical insight into the *travaux préparatoires* of the Preparatory Commission leading to the adoption of the elements of war crimes. It contains an analysis of existing case law related to each war crime in the Statute. The aim is to provide States, judges, prosecutors and international and national lawyers with the necessary background information to implement international humanitarian law in future cases dealing with war crimes under the ICC Statute. A unique, indispensable tool for anyone working in international criminal law.

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