
REQUIREMENTS OF MILITARY NECESSITY IN INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL CRIMINAL LAW

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ABSTRACT

Understanding military necessity properly involves identifying and distinguishing between the material, normative and juridical contexts within which it appears. Within the juridical context, military necessity functions exclusively as an exceptional clause attached to provisions of

the law that envisage its admissibility expressly and in advance. As an exceptional clause, military necessity exempts a measure from certain specific rules of international humanitarian law prescribing contrary action to the extent that the measure was required for the attainment of a military purpose and otherwise in conformity with that law. This definition gives rise to four requirements: (i) that the measure be taken primarily for some specific military purpose, (ii) that the measure be required for the attainment of that purpose, (iii) that the purpose be in conformity with international humanitarian law, and (iv) that the measure itself be otherwise in conformity with that law. The International Criminal Tribunal for the Former Yugoslavia (ICTY) has generated a growing body of jurisprudence on the absence of conditions satisfying exceptional military necessity as an element of several war crimes and crimes against humanity. The ICTY has interpreted military necessity exceptions effectively even in highly complex factual circumstances such as those involving combat-related property destruction in a manner that is broadly consistent with the four requirements just noted. It remains to be seen how the International Criminal Court (ICC) will fare in this regard. The ICC would do well to treat with caution Article 31(1)(c) of its statute, which provides for the exclusion of criminal responsibility for certain acts, including those reasonably taken in defence of property essential to accomplishing a military mission.

I. INTRODUCTION

Military necessity may appear straightforward and easily grasped; yet few concepts so fundamental to warfare and its regulation are more elusive. It is prone to misunderstanding, manipulation and invocation at cross-purposes.

In a strictly material sense of the term, military necessity may simply separate competent war-making from incompetent war-making. Thus, for an encircled field commander with dwindling ammunition, supplies and manpower, it could literally be a matter of life and death that he put his resources to the most efficient and effective use possible. Such a material imperative may focus his mind on the choice of his objective - break through, dig in, or surrender? - and on what is necessary and unnecessary therefor.

Within the context of norm-creation, military necessity may furnish - or fail to furnish, as the case may be - a reason for considering certain belligerent conduct legitimate. For example, the majority of delegates at a diplomatic conference on the adoption of a humanitarian treaty might insist that certain combat situations preclude fighters distinguishing themselves from the civilian population in the manner required of "regular" soldiers. These delegates might propose revising the law whereby guerrilla fighters would be granted combatant status on the basis of less stringent criteria. This position might become part of treaty law over the objection of the

remaining delegates on the grounds that such a change in the law would render the civilian population more vulnerable to dangers of armed hostilities.¹

In positive law,² military necessity may carry a technical meaning and operate within clearly defined parameters. This would be the case for a judge tasked with applying a provision that contains an express military necessity clause to the facts before him. His job would involve identifying the requirements for the application of that clause and determining whether the evidence satisfies these requirements.

These scenarios show that military necessity must be treated with contextual awareness. This article endeavours to elucidate the notion of military necessity within the specific framework of positive international humanitarian law and international criminal law. Within this framework, military necessity has acquired a scope and requirements of application sufficiently precise to enable detailed commentary and analysis. First, military necessity is inadmissible save as an exception to provisions that expressly provide for it. Second, as an exception, military necessity contains a number of discernible requirements. Third, thanks in part to the growing body of jurisprudence generated by the International Criminal Tribunal for the Former Yugoslavia (ICTY), systematic reasoning is now feasible when making complex factual findings regarding the military necessity of property destruction in war. Finally, military necessity is admissible before the International Criminal Court (ICC) only as the negation of an explicit or implicit element of an offence, *not* as a justification or excuse.

The discussion proceeds as follows. Section I identifies and briefly explains the three major contexts in which the notion of military necessity appears - *i.e.*, material reality, norm-creation and positive law. Section II outlines the historical debate as to whether military necessity is admissible as an exception, justification and/or excuse. As the article will show, there is a solid majority view according to which military necessity has no place in contemporary international humanitarian law beyond specific exceptional clauses.

¹ This, of course, is what happened in 1977 when the Diplomatic Conference adopted Article 44(3) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3, 23 [hereinafter Additional Protocol I]; *see, e.g.*, CLAUDE PILLOUD ET AL., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 438, 519-37 (Yves Sandoz et al. eds., 1987).

² Throughout this article, the expression "positive law" is used to denote the totality of norms that have been validly posited via one or more of the generally accepted sources of the law at issue. For the present purposes, the law at issue in most cases means international humanitarian law and/or international criminal law.

Section III defines military necessity within the context of positive law as an exception that exempts a measure from certain specific rules of international humanitarian law prescribing contrary action to the extent that the measure is required for the attainment of a military purpose and is otherwise in conformity with that law. Section IV divides this definition into four requirements and explores their various aspects. The discussion will reveal continuing disagreements on some requirements, in particular the criteria of proportionality for determining whether the measure taken was “required” for the attainment of the military purpose sought.

In Section V, a detailed account is given of the relevant ICTY decisions on property destruction and forcible displacement of persons not justified by military necessity. Emphasis will be placed on military necessity concerning the destruction of property in combat, an area in which numerous ICTY chambers have made factual findings. This section also endeavours to disentangle terminology that often causes confusion and clouds one’s reasoning - such as destruction as opposed to attack, and military necessity as opposed to military objectives.

Section VI considers the availability or otherwise of military necessity pleas before the ICC. Commentators have noted with concern that Article 31(1) of the ICC Statute, which excludes criminal liability for acts taken in defence of property essential for a military mission, may be interpreted as admitting justificatory or excusory military necessity. I will argue that the practical ramifications of this exclusionary clause would be more limited than meets the eye.

II. CONTEXTUAL BACKGROUND

A. *Military Necessity Within the Context of Material Reality*

Within a strictly material context, necessity means no more than what is actually needed to achieve a particular goal. Likewise, in this context, military necessity denotes nothing more than a given course of action required for the accomplishment of a particular military goal.³ To the rational soldier of Clausewitzian cast, a good war is one in which every act is “militarily necessary” - that is, executed professionally and with the optimal resource mobilisation, and directed towards a clearly defined, strategically sound and reasonably attainable military goal. Here, military necessity is essentially a matter of identifying the range of realistic courses of action having reasonable chances of generating the desired

³ See, e.g., PIETRO VERRI, *DICTIONARY OF THE INTERNATIONAL LAW OF ARMED CONFLICT* 75 (Edward Markee & Susan Mutti trans., 1992) (“In its wider sense, military necessity means doing what is necessary to achieve war aims.”).

outcome, and selecting and pursuing one that is superior to the others on the strength of its chances and resource efficiency.⁴

Conversely, wars can be poorly fought in a variety of ways. For example, the acts taken may be insufficient, though necessary, for the achievement of their respective military goals; they may be excessive (*i.e.*, more than necessary) in relation to the goals; they may simply have no bearing whatsoever on their supposed goals; and/or they may be taken for their own sake and without any particular purpose at all. Inefficiencies would also emanate from ill advised, unrealistic or otherwise badly defined military goals. In reality, uneconomical wars are often the combined result of these acts and goals.⁵

B. *Military Necessity in the Context of Norm-Creation*

In another context, necessity may acquire a peculiarly norm-creating tenor. This occurs as soon as questions are raised about the legitimacy of a given goal and about the material necessity or otherwise of a particular act taken towards that goal. First, where the goal itself is illegitimate, whatever is done in pursuit of that goal is likewise illegitimate.⁶ Second, and more importantly, once the goal's legitimacy has been affirmed, what is deemed materially necessary in view of that legitimate goal becomes *prima facie* permissible⁷ and what is deemed materially unnecessary becomes impermissible.

The key here is the common sentiment that the lack of necessity to perform a certain act tends to undermine that act's desirability or even propriety. Matters of rational conduct thereby transform themselves into

⁴ It is not inconceivable that the options available have such limited chances of success, or that they are so inefficient resource-wise, or both, that there is no rational alternative to taking no action at all *vis-à-vis* the desired outcome.

⁵ Inefficiencies may be blamed on factors such as misguided leadership; political-ideological preconceptions; doctrinal rigidity; ineffective communication and coordination; unimaginativeness, distraction and indecision at the tactical, operational and/or strategic levels; poor intelligence; incompetent planning; inadequate training; lack of equipment; wasteful allocation and expenditure of resources; reckless bravery and adventurism; indiscipline; cowardice; low morale; defeatism; and so on.

⁶ See, e.g., MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 128 (Basic Books 4th ed. 2006) (1977) ("In the course of a bank robbery, a thief shoots a guard reaching for his gun. The thief is guilty of murder, even if he claims that he acted in self-defense. Since he had no right to rob the bank, he also had no right to defend himself against the bank's defenders. He is no less guilty for killing the guard than he would be for killing an unarmed bystander The thief's associates might praise him for the first killing, which was in their terms necessary But we won't judge him in that way, because the idea of necessity doesn't apply to criminal activity: it was not necessary to rob the bank in the first place.").

⁷ It is so *prima facie* only, because there may be additional normative constraints on the legitimacy of a particular means chosen to pursue an otherwise legitimate goal.

matters of normative imperative - that is, “that which *can* be done without *must* be done without.” Admittedly, sometimes, even material necessities for legitimate goals are too morally objectionable to be considered permissible. Meanwhile, material non-necessities such as excesses, half-measures, irrelevancies and inefficiencies may remain permissible thanks to moral indifference. Nevertheless, considerations of material necessity relative to a legitimate purpose provide weighty reasons for particular conduct to be deemed permissible or impermissible.

Military necessity has helped distinguish between acts deemed materially necessary and hence *prima facie* permissible, on the one hand, and those deemed materially unnecessary and hence “impermissible,” on the other, in war.⁸ This distinction would generally hold true - although, of course, measures deemed materially necessary for the attainment of a legitimate military goal might be too unethical to be considered permissible and those deemed materially unnecessary for the same goal might be harmless enough to be left permissible. Still, military necessity in its material sense may weigh heavily in the way in which a given rule of international humanitarian law is formulated. Indeed, it is often said that military necessity and humanitarian considerations form the two main normative bases upon which modern international humanitarian law has evolved.⁹

⁸ See, e.g., A. P. V. ROGERS, *LAW ON THE BATTLEFIELD* 6 (2d ed. 2004) (1996) (“Military necessity has threefold significance in the law of war. First, and foremost, no action may be taken which is not militarily necessary.”); see also Henri Meyrowitz, *The Principle of Superfluous Injury or Unnecessary Suffering: From the Declaration of St. Petersburg of 1868 to Additional Protocol I of 1977*, 299 INT’L REV. RED CROSS 98, 106-09 (1994) (characterising military necessity as a principle whereby the scope of permissible belligerent conduct is limited to that which is militarily necessary); Michael N. Schmitt, *Book Review: Law on the Battlefield*, 8 U.S. AIR FORCE ACAD. J. LEGAL STUD. 255, 257-58 (1997) (reviewing A. P. V. ROGERS, *LAW ON THE BATTLEFIELD* (1996)) (“To exist as a principle of law, military necessity must have independent legal valence. That can, by definition, only occur when it is characterized as a limitation, for, as a general rule, all that is not prohibited in international law is permitted. . . . As a principle, military necessity prohibits destructive or harmful acts that are unnecessary to secure a military advantage.”).

⁹ See, e.g., Yoram Dinstein, *Military Necessity*, in 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 274, 274 (1982); *Shimoda v. State*, 8 JAPANESE ANN. INT’L L. 212, 240 (Tokyo Dist. Ct. 1963); YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 16-20 (2004) [hereinafter DINSTEIN, *CONDUCT OF HOSTILITIES*]; PILLOUD ET AL., *supra* note 1, at 683; G.I.A.D. Draper, *Military Necessity and Humanitarian Imperatives*, 12 REVUE DE DROIT PÉNAL MILITAIRE ET DE DROIT DE LA GUERRE 129, 141 (1973); N. Keijzer, *Réponses à la Question 2*, 33 REVUE BELGE DE DROIT INTERNATIONAL 440, 442 (2000); Marco Pertile, “*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*”: A Missed Opportunity for International Humanitarian Law?, 14 ITALIAN Y.B. INT’L L. 121, 149-50 (2004); GEORG SCHWARZENBERGER, 2 INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS: THE LAW OF ARMED

The 1868 St. Petersburg Declaration states: “the progress of civilization should have the effect of alleviating as much as possible the calamities of war.”¹⁰ Those who negotiated the declaration “fixed the technical limits at which the necessities of war ought to yield to the requirements of humanity.”¹¹ The declaration goes on to stipulate that “*the only legitimate object* which States should endeavour to accomplish during war is to weaken the military forces of the enemy”¹² and that “*for this purpose* it is *sufficient* to disable the greatest number of men.”¹³ Disabling the greatest number of men is held to be all that any belligerent¹⁴ should ever need to do in order to weaken the military forces of his enemy - a uniquely legitimate object in war - and, accordingly, becomes permissible.

Crucially, the declaration proclaims that the disablement of the greatest number of men “would be *exceeded* by the employment of arms which *uselessly* aggravate the suffering of disabled men, or render their death

CONFLICT 135 (1968). According to Riccardo Mazzeschi, Enzo Cannizzaro holds the view that weighing military necessity *vis-à-vis* humanitarian considerations is what the principle of proportionality entails in a unitary system of international law. Riccardo Pisillo Mazzeschi, *Book Review: Il Principio Della Proporzionalità Nell’Ordinamento Internazionale*, 13 EUR. J. INT’L L. 1031, 1034 (2002) (reviewing ENZO CANNIZZARO, *IL PRINCIPIO DELLA PROPORZIONALITÀ NELL’ORDINAMENTO INTERNAZIONALE* (2000)).

¹⁰ Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, *opened for signature* Nov. 29-Dec. 11, 1868, *reprinted in* 1 AM. J. INT’L L. SUP. 95 (Supp. 1907) [hereinafter St. Petersburg Declaration].

¹¹ *Id.*

¹² *Id.* (emphasis added); *see also* INST. OF INT’L LAW, *THE LAWS OF WAR ON LAND* (1880), *reprinted in* THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 35, 37 (Dietrich Schindler & Jiří Toman eds., 3d ed. 1988). For a similar but broader formulation see BRUSSELS CONFERENCE OF 1874, *in* THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 25, 26 (“[T]he only legitimate object which States should have in view during war is to weaken the enemy without inflicting upon him unnecessary suffering.”). The St. Petersburg Declaration delegitimised any object in war - no matter how rational it may otherwise be - that is *not* concerned with weakening the military forces of the enemy. *See* St. Petersburg Declaration, *supra* note 10. So, as a corollary, any military action taken in pursuit of an illegitimate object in war would be illegitimate. That said, however, contemporary international law has not yet reached a stage where recourse to war in breach of *jus ad bellum* - e.g., aggression - renders illegitimate all action taken in pursuit thereof. *See, e.g.*, William V. O’Brien, *The Meaning of ‘Military Necessity’ in International Law*, *in* 1 WORLD POLITY 109, 142-44 (Spectrum Publishers 1957), on the unsuccessful assertions to this effect made by de Menthon, a French prosecutor at Nuremberg. It was a popular theme among Allied prosecutors in post-World War II war crimes trials.

¹³ St. Petersburg Declaration, *supra* note 10. (emphasis added).

¹⁴ In the present discussion, the term “belligerent” refers not only to a party to an armed conflict but also to a combatant member of its forces.

inevitable.”¹⁵ Pursuing anything more or other than the disablement of able-bodied, non-surrendering enemy combatants is hereby deemed materially *unnecessary* for the uniquely legitimate object of weakening the military forces of the enemy and, accordingly, becomes *impermissible*. In the words of the declaration, “the employment of such arms would, *therefore*, be contrary to the law of humanity.”¹⁶

Over the years, what it takes for the belligerent to “weaken the military forces of the enemy” has acquired a meaning and dimension not present in the minds of those gathered at St. Petersburg in 1868. The specific content of humanitarian considerations has also evolved. Yet modern international humanitarian law essentially continues to be guided in its codification and development by the same desire to delimit a normative boundary between the necessities of military action and humanitarian considerations in war wherever these two sets of interests collide.¹⁷ If one takes for granted the continued relevance of military necessity in the formulation of new rules or the modification or extinguishment of existing rules, then the continued relevance of humanitarian considerations is anchored in the celebrated Martens clause.¹⁸

¹⁵ St. Petersburg Declaration, *supra* note 10. (emphasis added).

¹⁶ *Id.* (emphasis added).

¹⁷ There is no reason to assume that, in war, humanitarian considerations inevitably interfere with the necessities of military action. On the contrary, it is perfectly conceivable that certain belligerent conduct satisfies both sets of interests simultaneously. *See, e.g.*, Christopher Greenwood, *Historical Development and Legal Basis*, in *THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS* 1, 33 (Dieter Fleck ed., 1995) (“[M]ost rules of humanitarian law reflect good military practice, and adherence by armed forces to those rules is likely to reinforce discipline and good order within the forces concerned.”). According to G.I.A.D. Draper,

[I]t may well be that much of the Law of Arms of the pre-Grotian period imposed binding legal restrictions, well understood by those engaged in warfare, for reasons that had little to do with our modern philosophy of humanitarianism. The sparing of prisoners and the system of parole had little basis in humanitarian considerations. Dead prisoners cannot pay ransom and a prisoner cannot raise the ransom unless he has the chance to go home and persuade his family and friends to put up the money for his liberty. Later, as so often in the passage of legal history, these same legal institutions, quarter and parole, get viewed in quite another light, i.e., the changing morality of a later age when humanitarianism in warfare becomes acceptable and demanded.

Draper, *supra* note 9, at 129.

¹⁸ *See, e.g.*, Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 2 AM. J. INT’L L. SUP. 90 (Supp. 1908) [hereinafter Hague Convention IV]; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 63, Aug. 12, 1949, 6 U.S.T. 3114, 3152, 75 U.N.T.S. 31, 68 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 62, Aug. 12, 1949, 6 U.S.T. 3217, 3255, 75 U.N.T.S. 85, 120 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, art. 142, Aug. 12, 1949, 6 U.S.T. 3316, 3424, 75 U.N.T.S. 135, 242

This boundary underlies some of the most important rules and principles concerning the conduct of hostilities.¹⁹ Examples include the prohibition against superfluous injury and unnecessary suffering,²⁰ the principle of distinction,²¹ the definition of military objectives²² and the protection of civilian persons and civilian objects against attacks.²³ Changes in the balance between military necessity and humanitarian considerations have often resulted in new rules being formulated²⁴ and

[hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 158, Aug. 12, 1949, 6 U.S.T. 3516, 3623, 75 U.N.T.S. 287, 392 [hereinafter Geneva Convention IV]; Additional Protocol I, *supra* note 1, art. 1(2); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) pmbl., June 8, 1977, 1125 U.N.T.S. 609, 611 [hereinafter Additional Protocol II]; Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects pmbl., Oct. 10, 1980, 1342 U.N.T.S. 137, 163-4 [hereinafter Certain Conventional Weapons Convention]; *see also* Mika Nishimura Hayashi, *The Martens Clause and Military Necessity, in THE LEGITIMATE USE OF MILITARY FORCE: THE JUST WAR TRADITION AND THE CUSTOMARY LAW OF ARMED CONFLICT* 135-59 (Howard M. Hensel ed., 2008).

¹⁹ *See, e.g.*, PILLOUD ET AL., *supra* note 1, at 396 (“Any violence which exceeds the minimum that is necessary is unlawful and it is on this principle that all law relating to the conduct of hostilities is ultimately founded.”).

²⁰ This prohibition, or the St. Petersburg Declaration, *supra* note 10, which first gave verbal expression to it, has been mentioned in a number of instruments prohibiting certain weapons. *See, e.g.*, Declaration (IV, 2) Concerning Asphyxiating Gases, July 29, 1899, *reprinted in* THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS, *supra* note 12, at 105; Declaration (IV, 3) Concerning Expanding Bullets, July 29, 1899, *reprinted in* THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS, *supra* note 12, at 109; Certain Conventional Weapons Convention, *supra* note 18; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 36 I.L.M. 1507. Elsewhere, the prohibition against superfluous injury and unnecessary suffering has itself been incorporated into treaty provisions. *See, e.g.*, Regulations Respecting the Laws and Customs of War on Land, annexed to Hague Convention (IV), *supra* note 18, art. 23(e) (hereinafter Hague Regulations); Additional Protocol I, *supra* note 1, art. 35(2).

²¹ *See* Additional Protocol I, *supra* note 1, art. 48.

²² *See id.* art. 52(2).

²³ *See id.* arts. 51, 52(1).

²⁴ Articles 27 and 56 of the Hague Regulations provided only a rudimentary framework for the protection of property dedicated to religion, the arts and sciences. *See* Hague Regulations, *supra* note 20. Since the conclusion of World War II, the protection of cultural property in the event of armed conflict has become the subject of increasing concern and promoted under the auspices of UNESCO. *See, e.g.*, Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240 [hereinafter Hague Cultural Property Convention];

existing rules modified²⁵ or extinguished.²⁶ It is in this area of norm-creation in international humanitarian law that the notion of military necessity remains most pertinent today.²⁷

C. *Military Necessity Within the Context of Positive Law*

The fact that notions such as necessity and military necessity influence the process of norm-creation does not mean that they lose relevance once a particular legal rule has been validly posited. On the contrary, they may be assigned specific roles in the rule's application to facts. Thus, for example, necessity may assume one or more of several functions. First, necessity may constitute an exception to a principal rule; as an exception, necessity relieves the principal rule's addressee of his duty to comply with its prescriptions if and to the extent required by the circumstances. Second, necessity may justify an otherwise unlawful act; where an act is justified, its wrongfulness is precluded. Finally, necessity may excuse the

Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Mar. 26, 1999, 38 I.L.M. 769 [hereinafter Hague Cultural Property Protocol II]. Another example is the protection of the environment in armed conflict which humanitarian considerations have arguably come to encompass. *See, e.g.*, Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, Dec. 10, 1976, 1108 U.N.T.S. 151; Additional Protocol I, *supra* note 1, art. 35(3).

²⁵ As noted earlier, military necessity has tilted the balance in favour of extending the combatant status to guerrilla fighters engaged in de-colonisation struggles. *See, e.g.*, Additional Protocol I, *supra* note 1, art. 44(3); PILLOUD ET AL., *supra* note 1, at 529-30. Conversely, humanitarian considerations have tilted the balance - or, at any rate, are in the process of tilting the balance - in favour of raising the definition of children in armed conflict from persons under fifteen years of age to those under eighteen years of age. *See, e.g.*, Geneva Convention IV, *supra* note 18, arts. 14, 24; Additional Protocol I, *supra* note 1, art. 77(2); Additional Protocol II, *supra* note 18, art. 4(3)(c) (stating the prohibition on children under the age of fifteen joining the armed forces or hostilities); Convention on the Rights of the Child art. 38(2)-(3), Nov. 20, 1989, 1577 U.N.T.S. 3; Rome Statute of the International Criminal Court arts. 8(2)(b)(xxvi), 8(2)(e)(vii), July 17, 1998, 37 I.L.M. 999 [hereinafter ICC Statute]; Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts pmbl., arts. 1, 3(1), 4(1), May 16, 2000, 39 I.L.M. 1285; *see also* Prosecutor v. Norman, SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), ¶ 50 (Spec. Ct. for Sierra Leone 2004).

²⁶ Humanitarian considerations have tilted the balance in favour of prohibiting a scorched earth policy in occupied territories, particularly the destruction of objects indispensable to the survival of the civilian population. *See, e.g.*, Geneva Convention IV, *supra* note 18, art. 53; Additional Protocol I, *supra* note 1, art. 54.

²⁷ A full exploration of the role of military necessity in norm-creation in international humanitarian law goes beyond the scope of this article. It is the subject of a separate, in-depth perusal by the author (work in progress).

offender for his unlawful act; excusing an offender entails precluding or reducing his blameworthiness.²⁸

Whether, to what extent, and under what conditions necessity functions as an exception, justification and/or excuse is a question to which different legal systems at different moments in history have given different answers.²⁹ Even within one legal system, necessity's scope of application and requirements in one branch of law may not be identical to its scope of application and requirements in another.³⁰

In contemporary international humanitarian law and international criminal law, does military necessity operate as an exception, justification and/or excuse? A detailed consideration of military necessity's scope of application and requirements follows.

III. IS MILITARY NECESSITY AN EXCEPTION, JUSTIFICATION AND/OR EXCUSE?

As noted earlier, international humanitarian law has been developed with a view to striking a realistic balance between military necessity and humanitarian considerations wherever they collide. It follows that the rules that emanate from this process have already taken military necessity into account. There are numerous conventional as well as customary rules of international humanitarian law that anticipate a potential collision between military necessity and humanitarian considerations, and expressly permit deviations from the prescription of these rules insofar as

²⁸ For some time, the standard discourse on the international law of state responsibility has distinguished between "primary rules" and "secondary rules." *See, e.g.*, JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* 14-16 (2002). To the group of "primary rules" belong those determining the content of a substantive obligation whose breach constitutes an internationally wrongful act, and to the group of "secondary rules" belong the conditions for the commission of an internationally wrongful act and the legal consequences that flow from it. Understood thus, it may be said that exceptions form part of certain primary rules, whereas justifications and excuses are themselves examples of secondary rules. It should be noted that legal philosophers often use the same pair of expressions to denote notions that are quite different. *See, e.g.*, HANS Kelsen, 1 *GENERAL THEORY OF LAW AND STATE* 58-61, 143-44 (Anders Wedberg trans., 3d prtg. 1949) (1945); H.L.A. HART, *THE CONCEPT OF LAW* 77-96 (2d ed., 1994) (1961).

²⁹ *See, e.g.*, David Cohen, *The Development of the Modern Doctrine of Necessity: A Comparative Critique*, in 2 *JUSTIFICATION AND EXCUSE: COMPARATIVE PERSPECTIVES* (Albin Eser et al. eds., 1987); GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 774-98, 818-29 (2000).

³⁰ Consider, for example, necessity as a defence in English criminal and tort law. *See, e.g.*, ANDREW ASHWORTH, *PRINCIPLES OF CRIMINAL LAW* 144-48 (2d ed. 1995); W. V. H. ROGERS, WINFIELD AND JOLOWICZ ON TORT 876-80 (15th ed. 1998).

such deviations are required by military necessity.³¹ Article 23(g) of the Hague Regulations is typical in this regard.³² According to this provision, in combat, “it is especially forbidden . . . [t]o destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war.” Under customary international humanitarian law, captured enemy and neutral merchant vessels may not be destroyed. They may be destroyed, however, if military circumstances preclude taking or sending such vessels for adjudication as enemy prizes and if certain other conditions have been satisfied beforehand.³³

These exceptional clauses modify the content of the rules to which they are attached. Their legal function as exceptions remains the same whether the addressees of the rules being modified are states or individuals. It cannot be taken for granted, however, that if accepted as a potential justification and/or excuse, military necessity would apply to states and individuals in the same way. Whether military necessity justifies and/or excuses a state for its conduct and, if so, under what conditions, is a matter for those rules of international law which concern themselves with state responsibility.³⁴ Whether and, if so, how, military necessity justifies the conduct of an individual which would otherwise constitute a crime under international law, and/or excuses him for such a crime, is a matter for what has come to be known as international criminal law.³⁵

Historically, different opinions have been advanced as to the status of those rules in which no express military necessity exception appears. Could it be that, when these rules emerged, their framers simply thought that both military necessity and humanitarian considerations always demand the same belligerent behaviour? If so, what would happen when, in some concrete situations, the two sets of interests did actually collide over these rules? Should military necessity be admissible in such situations as an implicit exception, justification or excuse, in respect of these rules?

³¹ See, e.g., Hague Regulations, *supra* note 20, art. 23(g); Geneva Convention I, *supra* note 18, arts. 8, 33, 34, 50; Geneva Convention II, *supra* note 18, arts. 8, 28, 51; Geneva Convention III, *supra* note 18, art. 126; Geneva Convention IV, *supra* note 18, arts. 49, 53, 143, 147; Hague Cultural Property Convention, *supra* note 24, arts. 4(2), 11(2); Additional Protocol I, *supra* note 1, arts. 54(5), 62(1), 67(4), 71(3); Additional Protocol II, *supra* note 18, art. 17(1); ICC Statute, *supra* note 25, arts. 8(2)(b)(xiii), 8(2)(e)(viii), 8(2)(e)(xii); Hague Cultural Property Protocol II, *supra* note 24, art. 6.

³² Hague Regulations, *supra* note 20, art. 23(g).

³³ See, e.g., INT’L INST. OF HUMANITARIAN LAW, SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA ¶¶ 139, 151 (Louise Doswald-Beck ed., 1995).

³⁴ See, e.g., Int’l Law Comm’n, *Report of the International Law Commission*, 56 U.N. GAOR Supp. (No. 10) at 80-84, U.N. Doc. A/56/10 (2001).

³⁵ Commentators have expressed concern that Article 31(1)(c) of the ICC Statute, *supra* note 25, opens prospects that are disconcerting.

A. *Kriegsräson*

One position essentially holds that any given military action that is in fact materially necessary for the successful prosecution of war overrides and renders inoperative any provisions of the laws and customs of war that prescribe contrary action. Although the law does indeed take military necessity into consideration, it cannot be construed so that the belligerent is denied the option to adopt such measures as may be required for the successful prosecution of his war. Where rules are formulated without an express military necessity exception, it merely means that military necessity and humanitarian considerations are considered *generally* in agreement over the normative content of these rules. Whenever there is a collision between military necessity and humanitarian consideration, however, the law does not preclude the former prevailing over the latter. This view is known as *Kriegsräson*, so called because it echoes the German maxim “*Kriegsräson geht vor Kriegsmanier.*”³⁶ The *Kriegsräson* doctrine found increasing support in Germany during the late nineteenth century and remained influential among German military and international lawyers until the end of World War II.³⁷ Since its unambiguous rejection in post-World War II war crimes trials,³⁸ *Kriegsräson* has been thoroughly discredited.

B. *Self-Preservation/Self Defence*

Some commentators who rightly reject *Kriegsräson* still advocate a scope of military necessity that would, under certain circumstances, go beyond express exceptional clauses. For example, in Julius Stone’s view, military necessity does - or should, in any event - entitle a state at war to depart from its duties under international law on account of self-preservation.³⁹ Stone clearly embraced the criticism of what he called military necessity in “such an extended German sense.”⁴⁰ His doubts concerned

³⁶ This means “the necessities of war take precedence over the rules of war.”

³⁷ For a systematic and comprehensive analysis of *Kriegsräson* and its contours see O’Brien, *supra* note 12, at 119-37; see also Hayashi, *supra* note 18, at 137-38.

³⁸ See, e.g., United States v. List (*Hostage*), 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10 757, 1255-56, 1272-73, 1296 (1950); *In re von Lewinski*, ANNUAL DIGEST AND REPORTS OF PUBLIC INTERNATIONAL LAW CASES 509, 512-13 (H. Lauterpacht ed., 1949) [hereinafter *von Manstein*]; United States v. Krupp von Bohlen und Halbach, 9 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10 1340 (1950) (regarding “total war”); United States v. von Leeb (*High Command*), 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10 1, 541 (1951).

³⁹ See JULIUS STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT: A TREATISE ON THE DYNAMICS OF DISPUTES - AND WAR - LAW (1954).

⁴⁰ *Id.* at 352.

whether this criticism, while valid in relation to *Kriegsräson*, could be defensibly extended so as to exclude self-preservation.⁴¹

In its advisory opinion on the legality of the threat or use of nuclear weapons, the International Court of Justice (ICJ) observed that such threat or use would *generally* be contrary to international humanitarian law.⁴² The opinion went on to state, however, that the court “cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defence . . . when its survival is at stake.”⁴³ The court held, by seven votes to seven, with its president’s casting vote, that it “cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence in which the very survival of a State would be at stake.”⁴⁴

It may be argued that the court’s ambivalence goes beyond the confines of *jus ad bellum* - the opinion speaks of “an extreme circumstance of self-defence”⁴⁵ - to encompass *jus in bello*.⁴⁶ Some of the dissenting judges⁴⁷ and experts⁴⁸ have noted with concern that the opinion may be

⁴¹ See *id.* at 352-53 (“This reasoning, however, would forbid departure from the rules of war-law even in face of the direst needs of survival. Yet it remains ground common to British, American, French, Italian and other publicists, as well as German, that a State is privileged, in title of self-preservation, to violate its ordinary duties under international law, even towards States with which it is at peace; and may also itself determine when its self-preservation is involved. *Neither practice nor the literature explain satisfactorily how the privilege based on self-preservation in times of peace can be denied to States at war. If, as the Writer believes, the German doctrine is properly condemned, a frank review of the meaning of the self-preservation doctrine remains all the more urgent.*”) (emphasis added, footnotes omitted). *But see* N.C.H. Dunbar, *Military Necessity in War Crimes Trials*, in *BRIT. Y.B. INT’L L.* 442, 443 (1952) (“[T]he phrase ‘necessity in self-preservation’ is more properly employed to describe a danger or emergency of such proportions as to threaten immediately the vital interests, and, perhaps, the very existence, of the state itself. Military necessity should be confined to the plight in which armed forces may find themselves under stress of active warfare.”).

⁴² See *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 1996 I.C.J. 226, 262-63 (July 8).

⁴³ *Id.* at 263.

⁴⁴ *Id.* at 266; *see also id.* at 263.

⁴⁵ *Id.* at 301 (separate opinion of Judge Ranjeva).

⁴⁶ See, e.g., *id.* at 301-02; Christopher Greenwood, *Jus ad Bellum and Jus in Bello in the Nuclear Weapons Advisory Opinion*, in *INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS* 247, 249-50 (Laurence Boisson de Chazournes & Philippe Sands eds., 1999).

⁴⁷ See, e.g., *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 1996 I.C.J. 226, at 590 (Judge Higgins, dissenting); *id.* at 513-20 (Judge Weeramantry, dissenting).

⁴⁸ See, e.g., Luigi Condorelli, *Le droit international humanitaire, ou l’exploration par la cour d’une terra à peu près incognita pour elle*, in *INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS*, *supra* note 46, at 229,

seen as embracing the view that situations constituting or analogous to self-preservation and involving the right of self-defence may justify the threat or use of nuclear weapons notwithstanding its general incompatibility with international humanitarian law.⁴⁹

C. *Material Impossibility/Impracticality*

According to Hillaire McCoubrey, Jean Pictet espoused a version of military necessity whereby non-compliance with a rule would be tolerated in the event of genuine material impossibility.⁵⁰ In truth, however, it is doubtful whether Pictet discussed “genuine material impossibility” really as a variant of military necessity. All that Pictet said is:

[T]here is an implicit clause in any law to the effect that no one is obliged to do what is impossible. This remains implicit because if it were stated openly the risks of abusive and tendentious interpretations would be too great Thus, when we speak of what is “impossible” we must refer only to a genuine material impossibility.⁵¹

244-45; Judith Gardam, *Necessity and Proportionality in Jus ad Bellum and Jus in Bello*, in *INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS*, *supra*, note 46, at 275, 292; Marcelo G. Kohen, *The Notion of ‘State Survival’ in International Law*, in *INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS*, *supra* note 46, at 293, 310; *see also* Hayashi, *supra* note 18, at 143-44.

⁴⁹ *See* Greenwood, *supra* note 46, at 264 (“As we have seen, the main body of the Opinion takes an orthodox view of the relationship between the law on the use of force and the principles of international humanitarian law. Moreover, for the reasons given above, the first part of paragraph 2E should not be read as assuming that all uses of nuclear weapons would be contrary to humanitarian law. The Court thus left open the possibility that the use of nuclear weapons might, in some circumstances, be compatible with the *jus in bello*. To be lawful, it would, of course, *also* have to comply with the requirements of the *jus ad bellum*, i.e. of the right of self-defence. The two requirements are, however, cumulative, not alternative. There is, therefore, no need to read the second part of that paragraph as setting up the *jus ad bellum* in opposition to the *jus in bello*.”).

⁵⁰ *See* H. McCoubrey, *The Nature of the Modern Doctrine of Military Necessity*, 30 *REVUE DE DROIT PÉNAL ET DE DROIT DE LA GUERRE* 215, 220 (1991) [hereinafter McCoubrey, *Military Necessity*] (“The second position [. . .] of military necessity appears to be reflected [into a] much more limiting model advanced by Jean Pictet Here the doctrine of military necessity is reduced to an admission that in certain cases it may be ‘impossible’ to comply with legal norms in which case a ‘defence’ in respect of *prima facie* unlawful action will arise.”) (footnotes omitted); *see also* HILAIRE MCCOUBREY, *INTERNATIONAL HUMANITARIAN LAW: MODERN DEVELOPMENTS IN THE LIMITATION OF WARFARE* 303-04 (2d ed. 1998).

⁵¹ JEAN PICTET, *DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW* 88 (1985).

Pictet's treatment of genuine material impossibility as an implicit clause stands in stark contrast to his thoroughgoing rejection of implicit military necessity clauses: "[w]e should emphasize that there is *no express or implicit clause* in the law of war giving priority to military necessity - otherwise there would be no such thing as the law of war!"⁵² McCoubrey himself suggested that, for the purposes of military necessity, "necessity connotes an immediate and overwhelming circumstance in military action, which renders wtrict [sic] compliance, upon rational abalysis [sic], impractical rather than 'impossible.'"⁵³

D. *Military Necessity Strictly as an Exception*

To most commentators, military necessity has no place in international humanitarian law outside the confines of specific exceptional clauses.⁵⁴ Permitting military necessity pleas *de novo* for deviations from unqualified rules would risk making the law unduly volatile and subservient to the exigencies of war.⁵⁵ The relevant judicial decisions to date are also in support of this view.⁵⁶

⁵² *Id.* (emphasis added).

⁵³ McCoubrey, *Military Necessity*, *supra* note 50, at 237. McCoubrey went on to qualify his position: "Impractical is a term here carefully chosen, it is by no means intended to imply the concession to tactical and strategic convenience which is implicit in the maxim *kriegsrason geht vor kriegsmanier*." *Id.* at 240.

⁵⁴ See, e.g., N.C.H. Dunbar, *The Significance of Military Necessity in the Law of War*, 67 JURID. REV. 201, 202 (1955); ROBERT W. TUCKER, *THE LAW OF WAR AND NEUTRALITY AT SEA* 33-37 (1957); Draper, *supra* note 9, at 142; FRITS KALSHOVEN, *BELLIGERENT REPRISALS* 366 (1971); Int'l Law Comm'n, *Report on the International Law Commission on the Work of Its Thirty-Second Session*, 45-46, U.N. Doc. A/35/10 (1980) [hereinafter ILC Report 1980]; PILLOUD ET AL., *supra* note 1, at 392-93, 399; HOWARD S. LEVIE, *TERRORISM IN WAR - THE LAW OF WAR CRIMES* 496-97 (1993); Meyowitz, *supra* note 8, at 108; DINSTEIN, *CONDUCT OF HOSTILITIES*, *supra* note 9, at 18-19; INT'L HUMANITARIAN LAW RESEARCH INITIATIVE, *THE SEPARATION BARRIER AND INTERNATIONAL HUMANITARIAN LAW: POLICY BRIEF* 5-6 (2004); ROBERT KOLB, *IUS IN BELLO: LE DROIT INTERNATIONAL DES CONFLITS ARMÉS* 57 (2003); G. Abi-Saab & L. Condorelli, *Réponses à la question 1, b*), 33 REVUE BELGE DE DROIT INTERNATIONAL, *supra* note 9, at 406, 407-08; A. Andries & J. Verhaegen, *Réponses à la question 2*, 33 REVUE BELGE DE DROIT INTERNATIONAL, *supra* note 9, at 428, 435; LESLIE C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 147-48 (3d ed. 2008). *But see* SCHWARZENBERGER, *supra* note 9, at 135-36.

⁵⁵ Recently, in the context of the so-called "war on terror," controversial arguments have been advanced with a view to effectively except, justify and/or excuse torture despite its unqualified prohibition under international law.

⁵⁶ See, e.g., *United States v. List (Hostage)*, 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10 757, 1255-56, 1272, 1296 (1950); von Manstein, *supra* note 38, at 512-13; *In re Rauter*, ANNUAL DIGEST AND REPORTS OF PUBLIC INTERNATIONAL LAW CASES, *supra* note 38, at 526, 543 [hereinafter Rauter]; *In re Burghoff*, ANNUAL DIGEST AND REPORTS OF PUBLIC INTERNATIONAL LAW CASES, *supra* note 38, at 551, 554-57.

Having taken military necessity into consideration, the law simply does not permit any deviation from the prescription of its norms on account of military necessity, save where such a possibility is expressly envisaged beforehand by way of exceptional clauses. The very existence of express military necessity exceptions in certain places indicates, *a contrario*, that no implicit military necessity exception, justification or excuse is intended elsewhere. That is so because, had the framers of unqualified rules intended to allow deviations on account of military necessity at all, they would surely have appended exceptional clauses to that effect. Accordingly, where the rule is unqualified, military necessity does not except, justify or excuse contrary behaviour.

One difficulty with this reasoning is that it would commit its adherents to the awkward position that humanitarian considerations do not except, justify or excuse conduct incompatible with unqualified rules either. There are rules of international humanitarian law that expressly provide for exceptions on grounds of humanitarian considerations, or, at any rate, on grounds that are arguably analogous.⁵⁷ The existence of such provisions would mean, *a contrario*, that the exclusion of humanitarian considerations as an implicit exception, justification or excuse is intended elsewhere.⁵⁸

It might be argued that McCoubrey effectively advanced his “impracticality” thesis in support of the view that international humanitarian law allows for deviations from the prescriptions of its unqualified rules on account of humanitarian considerations. During the Falklands/Malvinas conflict, a large number of Argentine prisoners of war captured by British forces were held, pending repatriation, aboard military vessels rather

⁵⁷ See, e.g., Geneva Convention IV, *supra* note 18, art. 49 (prohibiting deportation and forcible transfer of protected persons from occupied territory unless “*the security of the population* or imperative military reasons so demand” (emphasis added)); *id.* art. 127 (prohibiting the transfer of sick, wounded, or infirm internees and maternity cases involving arduous journeys “unless their safety imperatively so demands” and the transfer of internees in the event of the combat zone drawing close to their place of internment “unless their removal can be carried out in adequate conditions of safety, or unless they are exposed to greater risks by remaining on the spot than by being transferred.”) (emphasis added).

⁵⁸ Dinstein appears to have stood by this conclusion:

Each one of the laws of war discloses a balance between military necessity and humanitarian sentiments, as produced by the framers of international conventions or as crystallized in the practice of States. The equilibrium may be imperfect, but it is legally binding in the very form that it is constructed. It is not the privilege of each belligerent, let alone every member of its armed forces, to weigh the opposing considerations of military necessity and humanitarianism so as to balance the scales anew. *A fortiori*, it is not permissible to ignore legal norms on the ground that they are overridden by one of the two sets of considerations.

Dinstein, *Military Necessity*, *supra* note 9, at 274 (emphasis added).

than on land as unqualifiedly required by Article 22 of Geneva Convention III. McCoubrey noted:

Here the particular circumstances of conflict on and around South Atlantic islands rendered the primary aims of the Third Convention, humane conditions of internment and early repatriation, more readily achieved through a technical violation than through a strict “black letter” compliance and no complaint was made in respect of the procedure adopted. This may be regarded as a form of “necessity,” albeit not strictly “military,” which dictated a variation in the detailed application of a “humanitarian” provision without compromising the attainment of the fundamental objective.⁵⁹

E. *Necessity vs. Military Necessity*

Military necessity as an exception ought to be distinguished from necessity as a justification or excuse. In the international law of state responsibility, necessity may constitute a circumstance precluding wrongfulness. Circumstances precluding *wrongfulness* - as opposed to, say, *blameworthiness* - may be considered functionally analogous to justifications. In its earlier consideration of necessity as a justification, the International Law Commission (ILC) treated military necessity separately as an exception under international humanitarian law.⁶⁰ According to the ILC, necessity would be inadmissible as a justification for non-compliance with a provision of international humanitarian law conventions.⁶¹

⁵⁹ McCoubrey, *The Nature of the Modern Doctrine of Military Necessity*, *supra* note 50, at 228.

⁶⁰ The ILC noted:

The [International Law] Commission finally came to consider the cases in which a State has invoked a situation of necessity to justify actions not in conformity with an international obligation under the law of war and, more particularly, has pleaded a situation coming within the scope of the special concept described as “necessities of war.” There has been much discussion, mainly in the past, on the question whether or not “necessity of war” or “military necessity” can be invoked to justify conduct not in conformity with that required by obligations of the kind here considered. On this point a preliminary clarification is required. *The principal role of “military necessity” is not that of a circumstance exceptionally precluding the wrongfulness of an act which, in other circumstances, would not be in conformity with an obligation under international law [W]hat is involved is certainly not the effect of “necessity” as a circumstance precluding the wrongfulness of conduct which the applicable rule does not prohibit, but rather the effect of “non-necessity” as a circumstance precluding the lawfulness of conduct which that rule normally allows.*

ILC Report 1980, *supra* note 54, at 45-46 (emphasis added).

⁶¹ *See id.* at 50-51 (“The second category of obligations to which the [International Law] Commission referred, with the same aim, was that of obligations established in the text of a treaty, where the treaty is one whose text indicates, explicitly or implicitly, that the treaty excludes the possibility of invoking a state of necessity as justification for conduct not in conformity with an obligation which it imposes on the

The ILC's reasoning closely mirrors the reasoning underlying the rejection of *Kriegsräson*: international humanitarian law has developed in such a way that it already accounts for the special circumstances in which claims of necessity or military necessity would be made.⁶²

It is not a requirement of exceptional military necessity that the conduct in question also qualifies as justificatory necessity.⁶³ As a matter of law, the two notions have distinct functions - *i.e.*, one exceptional and the other justificatory - as well as distinct requirements. For example, according to Article 25(1)(a) of the ILC articles on state responsibility, necessity may be invoked by a state only where the act in question "is the only means available" to safeguard its imperilled interest.⁶⁴ It will be argued below that exceptional military necessity does not contain this requirement. Although, as a matter of fact, certain conduct may satisfy both sets of requirements simultaneously, this does not mean that exceptional military necessity and justificatory necessity are identical notions or that one entails the other.

contracting parties. This possibility is obviously excluded if the treaty explicitly says so, as in the case of certain humanitarian conventions applicable to armed conflicts. However, there are many cases in which the treaty is silent on the point. The Commission thinks it important to observe in this connection that silence on the part of the treaty should not be automatically construed as allowing the possibility of invoking the state of necessity. There are treaty obligations which were especially designed to be equally, or even particularly, applicable in abnormal situations of peril for the State having the obligation and for its essential interests, and yet the treaty contains no provision on the question now being discussed (this is true of other humanitarian conventions applicable to armed conflicts). In the view of the Commission, the bar to the invocability of the state of necessity then emerges implicitly, but with certainty, from the object and the purpose of the rule, and also in some cases from the circumstances in which it was formulated and adopted.").

⁶² See also CRAWFORD, *supra* note 28, at 185-86; David Kretzmer, *The Advisory Opinion: The Light Treatment of International Humanitarian Law*, 99 AM. J. INT'L L. 88, 99 (2005).

⁶³ *But see, e.g.*, INT'L HUMANITARIAN LAW RESEARCH INITIATIVE, *supra* note 54, 6 (Clarifying that: "The second test [of military necessity] relates to the existence of a state of necessity that justifies the measures the occupying power intends to take. This state of necessity varies according to circumstances: it could be a clear danger facing the forces of occupation, it could emerge from the requirement of military operations, or it could be a present need of the occupation forces (like food, water, medical equipments, command posts, etc.). In any case, the state of necessity refers only to situations that are *within* the occupied territory, and facing the occupying power in the course of occupation. The occupying power has the burden of demonstrating the existence of this state of necessity."). See also *id.* at 8-9, 12-13.

⁶⁴ See also CRAWFORD, *supra* note 28, at 184.

IV. MILITARY NECESSITY AS AN EXCEPTION

As of yet, there is no uniquely authoritative definition of exceptional military necessity. It is proposed here that, as an exception, military necessity exempts a measure from certain specific rules of international humanitarian law prescribing contrary action to the extent that the measure is required for the attainment of a military purpose and otherwise in conformity with that law.

This definition embodies custom. Different aspects of the definition find support in the military manuals of various states reflecting their practice and/or *opinio juris* to some extent,⁶⁵ scholarly writings⁶⁶ and, as will be seen below, numerous judicial decisions.

The aforementioned national military manuals typically treat military necessity as a principle of international law authorising only that kind and degree of force, not otherwise prohibited by the law, which is necessary for securing the submission of the enemy and applied with the minimum possible expenditure of time, life and material resources. While broadly in line with customary international humanitarian law, the manner in which these manuals define military necessity appears to go beyond the law in two respects.

⁶⁵ See, e.g., U.S. DEP'T OF THE NAVY, OFFICE OF THE CHIEF OF NAVAL OPERATIONS ET AL., THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 5-1 (1995); U.S. DEP'T OF THE ARMY, THE LAW OF LAND WARFARE 4 (1956); OFFICE OF THE JUDGE ADVOCATE GEN., CANADIAN FORCES, LAW OF ARMED CONFLICT AT THE OPERATIONAL AND TACTICAL LEVELS 2-1, 16-5 (2000); UK MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT §§ 2.2-2.3 (Oxford Univ. Press 2004). Caution may be advisable, however, because it is arguable that not all military manuals necessarily enjoy the same probative value on the practice and/or *opinio juris* of the states that issue them. See, e.g., Nobuo Hayashi, *Introduction to NATIONAL MILITARY MANUALS ON THE LAW OF ARMED CONFLICT* 17, 33-34 (Nobuo Hayashi ed., Int'l Peace Research Inst. 2008); Charles Garraway, *Military Manuals, Operational Law and the Regulatory Framework of the Armed Forces*, in NATIONAL MILITARY MANUALS ON THE LAW OF ARMED CONFLICT, *supra*, at 50, 53; David Turns, *Military Manuals and the Customary Law of Armed Conflict*, in NATIONAL MILITARY MANUALS ON THE LAW OF ARMED CONFLICT, *supra*, at 64-72.

⁶⁶ See, e.g., Greenwood, *supra* note 17, 32; William Gerald Downey, Jr., *The Law of War and Military Necessity*, 47 AM. J. INT'L L. 251, 254 (1953); BURLEIGH CUSHING RODICK, THE DOCTRINE OF NECESSITY IN INTERNATIONAL LAW 59-61 (Columbia Univ. Press 1928); B.V.A. Röling, *The Law of War and the National Jurisdiction Since 1945*, 100 HAGUE RECUEIL 377, 382-87 (1960); Dinstein, *Military Necessity*, *supra* note 9, at 274-76; Dunbar, *supra* note 41, at 442-52; O'Brien, *supra* note 12, at 109-76; Robert W. Gehring, *Loss of Civilian Protections Under the Fourth Geneva Convention and Protocol I*, 90 MIL. L. REV. 49, 54-58 (1980).

A. *Military Necessity and the Submission of the Enemy*

In one respect, the manuals embrace the idea that the measure in question ought to be necessary to secure the submission of the enemy. If taken literally, they would be suggesting that international law precludes military necessity exceptions for any other (or lesser) purpose in war. It is doubtful, however, whether this is the law. There is some authority for the view that military necessity may be admissible for purposes that are purely defensive in nature or for the sanitary requirements of an occupation force.

In *Hostage*, the U.S. Military Tribunal acquitted Lothar Rendulic of wanton destruction of private and public property in Finmark, Norway, a charge based on the rules contained in Article 23(g) of the 1907 Hague Regulations.⁶⁷ The tribunal held: "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 23g [of the Hague Regulations]."⁶⁸ At no point did the tribunal consider whether the destruction ought to have been militarily necessary to defeat the advancing Soviet troops, let alone the armed forces of the Soviet Union as a whole.⁶⁹ Similarly, A.P.V. Rogers observes:

The reference to the complete submission of the enemy, written in light of the experience of total war in the Second World War, is probably now obsolete since war can have a limited purpose as in the termination of the occupation of the Falkland Islands in 1982 or of Kuwait in 1991.⁷⁰

Admittedly, Rogers has made this observation specifically with the 1958 British Manual of Military Law⁷¹ in mind. Nevertheless, his observation would be valid *vis-à-vis* other manuals which refer to the complete submission of the enemy or adversary as an aspect of military necessity.

In *Hardman*, the Great Britain-United States Arbitral Tribunal ruled that the measures taken by an occupation force for the maintenance of its sanitary conditions constituted military necessity. The tribunal stated:

⁶⁷ United States v. List (*Hostage*), 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 757 (1950).

⁶⁸ *Id.* at 1296-97.

⁶⁹ See United States v. von Leeb (*High Command*), 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 1, 541 (1951); MYRES S. McDUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION 74-75 (Yale Univ. Press 1961).

⁷⁰ ROGERS, *supra* note 8, at 5.

⁷¹ THE WAR OFFICE, THE LAW OF WAR ON LAND, BEING PART III OF THE MANUAL OF MILITARY LAW (Her Majesty's Stationery Office 1958).

In the present case [involving an 1898 United States military campaign in Cuba], the necessity of war was the occupation of Siboney, and that occupation . . . involved the necessity, according to the medical authorities . . . , of taking the said sanitary measures, i.e., the destruction of the houses and their contents. In other words, the presence of the United States troops at Siboney was a necessity of war and the destruction required for their safety was consequently a necessity of war.⁷²

B. *Military Necessity and Economy of Resources*

Notwithstanding the apparent suggestion of some manuals - and commentators - to the contrary,⁷³ it is unlikely that military necessity creates a general obligation for the belligerent to minimise resource expenditure.

In particular, it is highly unlikely that international humanitarian law obligates the belligerent generally to minimise the expenditure of his own resources or time, or the lives of his own soldiers. As noted earlier, economy of resources is properly a matter of rational and prudent war-making; it is *not* a duty under international law. Plainly stated, excessive, irrelevant or purposeless acts of the belligerent, or bad military goals that he may set for himself, and may make such inefficiencies inevitable, are not *per se* unlawful. Rather, in principle, they are unlawful only if and only to the extent that they injure persons, objects and other interests protected under international humanitarian law.

Would those Allied commanders during World War I who kept sending thousands upon thousands of their own troops charging hopelessly and pointlessly at German barbed wires and machine guns in the Somme be not only blundering but also in breach of the laws and customs of war? It

⁷² *Hardman v. U.S. (U.K. v. U.S.)*, 6 R. INT'L ARB. AWARDS 25, 26 (Arb. Trib. 1913); see also SCHWARZENBERGER, *supra* note 9, at 131-32; McCoubrey, *Military Necessity*, *supra* note 50, at 222-23.

⁷³ See U.S. DEP'T OF THE NAVY, *supra* note 65, § 5-1 ("The employment of any kind or degree of force *not* required for the purpose of the partial or complete submission of the enemy with a minimum expenditure of time, life and physical resources, is *prohibited*" (emphasis added)); DOCUMENTS ON THE LAWS OF WAR 10 (Adam Roberts & Richard Guelff eds., Oxford Univ. Press 3d ed. 2000); see also Draper, *supra* note 9, at 130 ("[The law of war] also accepts that in achieving victory [for the purpose of one State imposing its will upon another] there is to be the minimum expenditure of blood, treasure, resources and time. That may have nothing whatever to do with humanitarian considerations and may be styled 'the doctrine of military economy'"); Schmitt, *supra* note 8, at 258 ("As a principle, military necessity prohibits destructive or harmful acts that are unnecessary to secure a military advantage."); Michael N. Schmitt, *Green War: An Assessment of the Environmental Law of International Armed Conflict*, 22 YALE J. INT'L L. 1, 52, 54 (1997); Pertile, *supra* note 9, at 149 ("Since the Lieber Code, the core meaning of military necessity is that all use of armed force, all destruction of life or property that is not necessary to achieve military goals is prohibited.").

may be that an incompetent general who wastes the precious lives of his young soldiers is a criminal in the eyes of his nation, but this is an entirely different matter.

Exceptional military necessity clauses authorise deviant conduct from the standard of behaviour prescribed by the principal rule to which they are attached if and to the extent that the conduct is required for the attainment of a lawful military goal. Where deviation is not, or is no longer, so required, it ceases to be excepted and reverts to the principal rule. In other words, the lack of military necessity renders the exceptional clause inoperative; it does *not*, by itself, render the conduct unlawful. What prohibits the destruction or seizure of enemy property that is point-less or more than required by the circumstances of combat is not military necessity but the principal content of Article 23(g) of the Hague Regulations, whereby “it is especially forbidden . . . to destroy or seize the enemy’s property.”⁷⁴

V. SPECIFIC REQUIREMENTS OF EXCEPTIONAL MILITARY NECESSITY

It was noted earlier that, as an exception, military necessity exempts a measure from certain specific rules of international humanitarian law prescribing contrary action to the extent that the measure is required for the attainment of a military purpose and otherwise in conformity with that law.

- Defined thus, the notion may be broken into four requirements, *viz.*:
- 1) That the measure was taken primarily for some specific military purpose;
 - 2) That the measure was required for the attainment of the military purpose;
 - 3) That the military purpose for which the measure was taken was in conformity with international humanitarian law; and
 - 4) That the measure itself was otherwise in conformity with international humanitarian law.

The third and fourth requirements of military necessity ensure that it is admissible only where specific obligations expressly so provide by way of exceptional clauses. Indeed, it is these last two requirements that make military necessity an exception rather than a justification or excuse. Furthermore, because these four requirements are cumulative, should a given measure fail to satisfy any one of them, the measure would be “militarily *unnecessary*” within the meaning of exceptional military necessity clauses.

It is sometimes suggested that military necessity may mean different things. Marco Pertile observes:

The scope of admitted derogation varies with regards to elements such as the degree of necessity required, the nature of the circum-

⁷⁴ Hague Regulations, *supra* note 20, art. 23(g).

stances from which the necessity arises, and the objective pursued in derogating to [*sic*] the prohibition [O]ne might realise that each conceives military necessity in a different form.⁷⁵

This may be true insofar as no two actual situations involving a *prima facie* breach of the principal rule contained in a provision to which an exceptional military necessity clause is attached are the same. In order for the belligerent to establish military necessity, he must gather and spend some time assessing the relevant information to the best of his abilities. When reviewing whether a given measure was or was not militarily necessary, it is essential that the reviewer remain alive to the peculiarities of the situation at issue and the circumstances in which the belligerent found himself. One would be particularly well advised to distinguish between the consideration of the first two of the four aforementioned requirements of military necessity in territory under belligerent occupation, on the one hand, and the consideration of the same requirements in armed hostilities, on the other. The realities of active combat might call for a measure of flexibility at times in evaluating the factual basis on which the belligerent must form opinions and make decisions.

In addition to the four requirements listed above, military necessity involves questions about both the knowledge and formal competence of the person invoking it. These questions will be considered later.

A. *The Measure was Taken Primarily for Some Specific Military Purpose*

This requirement is two-fold: (i) that there was, in fact, a specific purpose for which the measure was taken; and (ii) that this purpose was primarily military in nature.

Military necessity is inadmissible where the measure is taken for no purpose. If, for example, an area was devastated purposelessly, it would lack any meaningful point of reference against which the devastation's necessity is to be assessed.⁷⁶ "Necessary for *what?*," one might ask in

⁷⁵ Pertile, *supra* note 9, at 150.

⁷⁶ See, e.g., *United States v. List (Hostage)*, 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 757, 1253-54 (1950) ("[Military necessity] does not permit the killing of innocent inhabitants for purposes of revenge or the satisfaction of a lust to kill. The destruction of property to be lawful must be imperatively demanded by the necessities of war. Destruction as an end in itself is a violation of international law. . . . [Military necessity] does not admit the wanton devastation of a district or the willful infliction of suffering upon its inhabitants for the sake of suffering alone."). Albeit in the context of deportation/forcible transfer as a crime against humanity, one trial chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) ruled that military necessity does not justify evacuation for the sake of evacuation. See *Prosecutor v. Krstić*, Case No. IT-98-33-T, Trial Judgement, ¶¶ 524-27 (Aug. 2, 2001).

vain.⁷⁷

Even if a specific purpose is shown to have existed, it must additionally be shown that the purpose was primarily military in nature. Here, the expression “military” may be understood as a quality characterising sound strategic, operational or tactical thinking in the planning, preparation and execution of belligerent activities. It follows that military necessity is inadmissible in respect of measures taken for purposes that are *not* primarily military in the sense just described.

Thus, in the event of an aerial bombardment, “[t]he officer in command of an attacking force must, before commencing a bombardment, except in cases of assault, do all in his power to warn the authorities.”⁷⁸ According to commentators, the officer in question would be exempt from his duty to warn the authorities should military necessity so require.⁷⁹ One primarily military purpose cited in this regard is the aversion of danger to the attacking aircraft.⁸⁰ Factors such as oversight on the part of the officer and the absence of friendly local population likely to be affected by the bombardment would not suffice.

No less pertinent for the requirement that the measure be taken for a primarily military purpose is the situation of belligerent occupation. This is so because the occupier might present its geopolitical, demographic, ideological and/or economic ambitions as legitimate military concerns.⁸¹

In *Elon Moreh*, the Supreme Court of Israel declared null and void an order issued by the Israel Defence Forces (IDF) Commander for the Judaea and Samaria Region to requisition privately owned Palestinian land for the establishment of a civilian settlement.⁸² The court found that the settlement’s establishment was a predominantly political decision in which military considerations would have been of secondary importance at best. The court determined that, in the final analysis, the establishment would not have been approved by the government but for the purposes of satisfying the desire of a religious interest group and acting on “the Jewish people’s right to settle in Judaea and Samaria.”⁸³

⁷⁷ See, e.g., McDUGAL & FELICIANO, *supra* note 69, at 525 (“To speak of necessity (or lack of necessity) is simultaneously to raise the question: necessary (or unnecessary) for what? A particular combat operation, comprising the application of a certain amount of violence, can be appraised as necessary or unnecessary only in relation to the attainment of a specified objective. Obviously, further clarification of the principle of military necessity is, in corresponding part, contingent upon specification of legitimate belligerent objectives.”).

⁷⁸ Hague Regulations, *supra* note 20, art. 26.

⁷⁹ See, e.g., STONE, *supra* note 39, at 622-23; ROGERS, *supra* note 8, at 88.

⁸⁰ See, e.g., STONE, *supra* note 39, at 622; ROGERS, *supra* note 8, at 88.

⁸¹ H CJ 2056/04 Beit Sourik Village Council v. Gov’t of Israel (*Beit Sourik*) [2004] ¶¶ 26-27.

⁸² See H CJ 390/79 Izat Muhamed Mustafa Dweikat et al. v. The Gov’t of Israel (*Elon Moreh*) [1979] IsrSC 34(1) 1, translated in 19 I.L.M. 148 (1980).

⁸³ *Id.* at 170.

At issue in *Elon Moreh* was whether the requisition order was in conformity with the customary rules of international humanitarian law contained in Article 52 of the 1907 Hague Regulations. According to this article, “[r]equisitions in kind and services shall not be demanded from municipalities or inhabitants [of the territory under occupation] except for the needs of the army of occupation Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied.”⁸⁴

Traditionally, the Israeli Supreme Court has interpreted “the needs of the army of occupation” broadly to encompass:

- (i) All kinds of purposes demanded by the necessities of war;
- (ii) Military movements, quartering and the construction of defence positions;
- (iii) What is required to “safeguard public order and security” within the meaning of Article 43 of the Hague Regulations; and
- (iv) What the army needs in order to fulfil its task of defending the occupied area against hostile acts liable to originate from outside.⁸⁵

In considering the matter at hand, the court directed its attention to the decisions of the Ministerial Defence Committee and the Cabinet, as well as the professional opinion provided to them by the then Chief of Staff (C-o-S) according to which the requisition would indeed be consistent with military needs.⁸⁶

The court held:

[T]his professional view of the C-o-S would in itself not have led to the taking of the decision on the establishment of the *Elon Moreh* settlement, had there not been another reason, which was the driving force for the taking of said decision in the Ministerial Defence Committee and in the Cabinet plenum - namely, the powerful desire of the members of *Gush Emunim* to settle in the heart of Eretz-Israel, as close as possible to the town of Nablus [B]oth the Ministerial Committee and the Cabinet majority were decisively influenced by

⁸⁴ Hague Regulations, *supra* note 20, art. 52.

⁸⁵ *Elon Moreh*, 19 I.L.M. at 168-69. According to Stone, however, the expression “needs of the army of occupation” is intended to be narrower in scope than the expression “necessities of war.” STONE, *supra* note 39, at 708; *see also* SCHWARZENBERGER, *supra* note 9, at 245-46, 270-71; Kretzmer, *supra* note 62, at 97; David Kretzmer, *The Supreme Court of Israel: Judicial Review During Armed Conflict*, 2004 GERMAN Y.B. INT’L L. 392, 447; Pertile, *supra* note 9, at 135.

⁸⁶ The C-o-S’s “central point,” as described by the court, was that “a settlement on that site serves as a stronghold protecting freedom of traffic on the nearby roads at the time of deployment of reserve forces on the eastern front in time of war.” *Elon Moreh*, 19 I.L.M. at 155; *see also id.* at 153-54.

reasons lying in a Zionist point of view of the settlement of the whole Land of Israel.⁸⁷

The evidence showed that political bodies initiated the civilian settlement's establishment at the site; the IDF authorities did not initiate the settlement's establishment as would be expected if the matter involved genuine military needs.⁸⁸ Quite the contrary, the C-o-S gave his approval only *post factum* to what was essentially a political programme.⁸⁹ In the court's view, this particular sequence of events did not attest to "there having been from the outset a military necessity to take private land in order to establish the civilian settlement, within the bounds of Article 52 of the Hague Regulations."⁹⁰ Justice M. Landau, writing for the unanimous court,⁹¹ concluded:

The political consideration was, therefore, the dominant factor in the Ministerial Defence Committee's decision to establish the settlement at that site, though I assume the Committee as well as the Cabinet majority were convinced that its establishment *also* (emphasis in the original - Trans.) fulfils military needs; and I accept the declaration of the C-o-S that he, for his part did not take into account political considerations, including the pressure of the Gush Emunim members, when he came to submit his professional opinion to the military level. But a secondary reason, such as the military reason in the decisions of the political level which initiated the settlement's establishment does not fulfil the precise strictures laid down by the Hague Regulations for preferring the military need to the individual's right to property. In other words: would the decision of the political level to establish the settlement at that site have been taken had it not for the pressure of Gush Emunim and the political-ideological reasons which were before the political level? I have been convinced that had it not been for these reasons, the decision would not have been taken in the circumstances which prevailed at the time.⁹²

⁸⁷ *Id.* at 169.

⁸⁸ *See id.* at 171.

⁸⁹ *See id.* at 173.

⁹⁰ *Id.* at 175.

⁹¹ Two justices concurred with Justice Landau. The other two justices also concurred but appended separate opinions of their own. *See id.* at 148.

⁹² *Id.* Justice Landau went on to (a) dispose of the problem associated with the plurality of purposes in decision-making by holding that a decision's lawfulness should be judged according to its dominant purpose, and to (b) defend the approach he had taken to purposes and motives whereby the two notions are treated as sharing a common area of meaning. *See id.* at 175 (citing S.A. DE SMITH, *JUDICIAL REVIEW OF ADMINISTRATIVE ACTION* (3d ed. 1973)); *see also* HCJ 390/79 *Izat Muhamed Mustafa Dweikat et al. v. The Gov't of Israel (Elon Moreh)* [1979] IsrSC 34(1) 1, *translated in* 19 I.L.M. 148, 175-76 (1980).

The court declined to rule upon the truth of the claim that it was militarily necessary to establish a civilian settlement at the site in question.⁹³ On this matter the court deferred, as it had done so in previous cases, to the professional opinion of the C-o-S.⁹⁴ Through this deference, the court arguably acknowledged that, had the requisition order been upheld and the settlement established, the settlement *might* have actually fulfilled the military needs as suggested by the C-o-S.

This acknowledgement is significant. It would appear that the court was prepared to annul a predominantly political decision to requisition private land in occupied territory despite its potential fulfilment of genuine military needs. It would also appear that the lawfulness of the *Elon Moreh* requisition order depended on whether it had really been decided for the right purposes,⁹⁵ *not* whether it would have generated the right results.

In *Beit Sourik*, the Israeli Supreme Court had before it a petition against orders issued by the IDF Commander in the area of Judea and Samaria to seize land for the purpose of erecting a separation fence.⁹⁶ The petitioners were landowners and village councils affected by the orders. They alleged, *inter alia*, the commander's lack of authority to issue the orders; the fence's political, non-military purpose; the lack of military necessity for the fence being erected along the planned route; defects in the procedure, which rendered the land seizures illegal; and violations of the local inhabitants' fundamental rights.⁹⁷

The court upheld the commander's authority to construct the fence.⁹⁸ It then proceeded with the examination of the fence's route chosen by the

⁹³ The court did, however, note the existence of diametrically opposing views on this subject. See *Elon Moreh*, 19 I.L.M. at 154-56.

⁹⁴ See *id.* at 152-56. The court, quoting a passage from its previous ruling (not yet published at the time), said:

In a dispute of this sort on military-professional questions, in which the course [sic] has no fixed view of its own, we shall presume that the professional views expressed in the affidavit on behalf of the respondents, speaking in the name of those who are responsible for the preservation of security in the administered territories and within the Green Line, are the correct views. Very convincing evidence is needed to contradict this presumption.

Id. at 156.

⁹⁵ See H CJ 2056/04 Beit Sourik Village Council v. Gov't of Israel (*Beit Sourik*) [2004] ¶ 27; H CJ 7957/04 Mara'abe v. Prime Minister of Israel (*Alfei Menashe*) [2005] ¶ 98.

⁹⁶ See *Beit Sourik*, H CJ 2056/04, ¶¶ 1-6.

⁹⁷ See *id.* ¶¶ 10-11.

⁹⁸ *Id.* The court dismissed the petitioners' claim that the military commander decided to erect the fence on political, not military, considerations. It also dismissed alleged defects in the seizure proceedings and the exercise of the military commander's authority therein. See *id.* ¶¶ 26-32; see also *Alfei Menashe*, H CJ 7957/04, ¶¶ 15-23, 98-101.

commander and its lawfulness under international humanitarian law.⁹⁹ The court looked, *inter alia*, to Articles 53 of Geneva Convention IV for this purpose, yet without considering whether the erection of the barrier constituted “military operations” within the meaning of that article.¹⁰⁰ Pertile suggests that it does not:

The construction of the wall, as a complex project, planned over a span of years and substantially preventive in nature is quite different from the traditional concept of military operations. A flexible interpretation of the text of Article 53 [of Geneva Convention IV] would be necessary in order to include the wall amongst military operations. Such a solution however seems to be precluded by the wording of the Article which, after stressing the overall prohibition of the destruction of property, recognises the necessities of military operations in the form of a derogatory clause. As for all derogatory clauses strict interpretation is required.¹⁰¹

It may be asked whether the expression “military operations,” even if strictly interpreted, actually precludes a project such as the one in question here simply because it is complex, involves years of planning and pursues preventive purposes. Far from being “quite different from the traditional concept of military operations,” as Pertile puts it, constructing defensive fortifications with these characteristics has been part and parcel of territorial warfare.

If it were true, however, that the wall’s erection does not constitute “military operations” within the meaning of Article 53, then it would be arguable that the seizure orders of the IDF commander have not been issued “primarily for some military purpose.”

B. *The Measure Was Required for the Attainment of the Military Purpose*

Military necessity demands that the measure be required for the attainment of the military purpose.¹⁰² Assessing military necessity pleas

⁹⁹ See *Beit Sourik*, HCJ 2056/04, ¶¶ 33-35.

¹⁰⁰ See *id.* ¶ 35.

¹⁰¹ Pertile, *supra* note 9, 135-36; see also *id.* at 150-51; Alexander Orakhelashvili, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: Opinion and Reaction*, 11 J. CONFLICT & SECURITY L. 119, 137 (2006) (“Military operations in the West Bank ceased a long time ago and the Wall itself is hardly meant to serve the needs of the Israeli army. Whatever the situation in the West Bank, it cannot currently be denoted as a state of war.”).

¹⁰² Various expressions, such as “indispensable,” “need,” “requirement,” “necessary,” and so on, have been used to denote essentially the same notion of “required.” See, e.g., THE LAWS OF ARMED CONFLICTS, *supra* note 12, at 6 (“indispensable”); O’Brien, *supra* note 12, at 138 (“indispensable”); Downey, *supra* note 66, at 254 (“need”); Gehring, *supra* note 66, at 55 (“requirement”); Dinstein,

involves evaluating the relationship between the measure taken, on the one hand, and the purpose that it was meant to attain, on the other.

No exhaustive account of the requisite relationship presently exists. It is proposed here that, within the meaning of military necessity, a measure cannot be considered required for a particular military purpose unless it satisfies the following criteria:

- (i) That the measure was materially relevant to the attainment of the military purpose;
- (ii) That, of those materially relevant measures that were reasonably available, the one taken was the least injurious; and
- (iii) That the injury that the measure would cause was not disproportionate to the gain that it would achieve.¹⁰³

It may happen that even the least injurious of those reasonably available and materially relevant measures causes or is expected to cause disproportionate injury. Where this is the case, military necessity may leave the belligerent with no alternative but to modify the military purpose or abandon its pursuit altogether.

1. The Measure Was Materially Relevant to the Attainment of the Military Purpose

Military necessity is inadmissible where the measure would have no material bearing on the attainment of the stated military purpose.¹⁰⁴ In *Peleus*, Heinz Eck was brought before a British Military Court on charges of ordering the killing of survivors of a sunken Allied vessel in violation of the laws and usages of war.¹⁰⁵ Eck argued that the elimination of the

Military Necessity, *supra* note 9, at 275 (“necessary”); MCDUGAL & FELICIANO, *supra* note 69, at 72 (“necessary”).

¹⁰³ Kretzmer observes that this three-pronged test is “accepted in some domestic systems as a general principle in international law” and “adopted by international bodies.” Kretzmer, *supra* note 85, at 450.

¹⁰⁴ See, e.g., *United States v. List (Hostage)*, 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 757, 1253-54 (1950) (“There must be some reasonable connection between the destruction of property and the overcoming of the enemy forces.”); see also, Dinstein, *Military Necessity*, *supra* note 9, at 275; MCDUGAL & FELICIANO, *supra* note 69, at 524-25; Pertile, *supra* note 9, at 151.

¹⁰⁵ The facts of *Peleus* are as follows. On the South Atlantic Ocean, the U-boat commanded by Heinz Eck sank the *Peleus*, a Greek ship chartered by the British Ministry of War Transport. Those members of the thirty-five-strong *Peleus* crew who had survived the sinking reached two rafts and floating wreckage. The submarine surfaced, called over one of the survivors for interrogation, and left the scene of the sinking for about 1,000 metres. The submarine then returned, opened machine-gun fire and threw grenades on those in the water and on the rafts. The firing went on for about five hours at night, killing all but three (a fourth died later). See JOHN CAMERON, TRIAL OF HEINZ ECK, AUGUST HOFFMANN, WALTER WEISSPFENNIG, HANS RICHARD LENZ AND WOLFGANG SCHWENDER (The *Peleus* Trial) 56-57 (John

vessel's traces with a machine gun and hand grenades was operationally necessary to save his U-boat and its crew. He contended, *inter alia*:

- That all possibility of saving the survivors' lives had lapsed;
- That it was against the order of the German U-boat Command to take them on board his U-boat;
- That he was in a vulnerable region of the Atlantic Ocean where many U-boats had been sunk;
- That he considered the rafts to be a danger since they would indicate to airplanes the exact spot of the sinking and they could be equipped with signaling communication devices;
- That no humans were seen on the rafts when he opened fire; and
- That he thought the survivors had jumped out of the rafts.¹⁰⁶

The judge advocate summarised the notion of operational necessity, as alleged by Eck, thus:

The purpose of that firing was primarily the destruction of the wreckage in order that every trace of the sinking might be obliterated. [Eck] says he realized that a consequence of the carrying out of that order must have been the death of certain survivors, and that it was a decision that he regretted: but he says . . . he was under an operational necessity to do what he did because he had as his first duty to ensure that the submarine was protected against attack by Allied aircraft. He says that the only way of doing that was to take every possible step on that night to destroy every trace of the sinking. If as a result of that survivors were killed it was unfortunate for them, but he was under the paramount necessity of protecting his boat and his crew.¹⁰⁷

Cameron ed., William Hodge and Company 1948); U.N. War Crimes Commission, *The Peleus Trial*, 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS 1-21 (vol. 1, His Majesty's Stationery Office 1947).

¹⁰⁶ See U.N. War Crimes Comm'n, *supra* note 105, at 4-5.

¹⁰⁷ CAMERON, *supra* note 105, at 126-27. For the present purposes, one might treat "operational necessity" as an alleged variant of "military necessity." McCoubrey observed:

At the post-war trial before a British Military Tribunal of the U-Boat commander, Kapitanleutnant Eck, and others of the personnel of the submarine, an argument was advanced peripherally that the massacre might have been justified by the need to prevent the survivors revealing the location of the U-Boat, in effect a form of military necessity.

McCoubrey, *supra* note 50, at 225. It is acknowledged here however that views may differ as to whether *Peleus* really involves any issue of military necessity at all. Doubts emanate primarily from the fact that the underlying prohibition does not appear to admit military necessity exceptions. See below regarding the unavailability of military necessity pleas where the conduct in question is at variance with an unqualified rule or, in any event, with a rule which does not contain military necessity exceptions.

Eck's argument was unsuccessful. The court found him guilty as charged and sentenced him to death by shooting.¹⁰⁸

In his summary to the court, the judge advocate conceded that circumstances *could* arise in which a belligerent might be justified in killing an unarmed person for the purpose of saving his own life.¹⁰⁹ Be that as it may, the judge advocate asked the court:

Do you or do you not think that the shooting of machine-guns at substantial pieces of wreckage and rafts would be an effective way of destroying every trace of this sinking? Do you or do you not think it fairly obvious that in any event a patch of oil would have been left after this steamship had sunk, which would have been an indication to any aircraft that was in the neighbourhood that a ship had recently been sunk, and that a submarine was probably in that area and it was well worth searching for it?¹¹⁰

It is possible that the judge advocate was sceptical about the truthfulness of Eck's claim that Eck had ordered the shooting in order to preserve the U-boat and the lives of its crew.¹¹¹ But if the judge advocate was sceptical, it does not appear from the trial record that he invited the court specifically to entertain this matter.

Instead, the judge advocate questioned the notion that shooting the floating rafts and wreckage would have actually resulted in every trace of the sinking being eliminated - and hence, supposedly, the location of the U-boat being concealed. He did so by suggesting that the shooting would not have erased the oil patches whose continued presence would lead to detection.¹¹²

A measure's relevance to its purpose became an issue in the *Beit Sourik* case. The petitioners in that case submitted alternative routes for the fence.¹¹³ Members of a non-governmental Council for Peace and Security, acting as *amici curiae*, provided expert opinions on security which differed in part from those of the respondents.¹¹⁴ The Israeli

¹⁰⁸ CAMERON, *supra* note 105, at 127; U.N. War Crimes Comm'n, *supra* note 105, at 20-21.

¹⁰⁹ See CAMERON, *supra* note 105, at 127; U.N. War Crimes Comm'n, *supra* note 105, at 12, 15.

¹¹⁰ CAMERON, *supra* note 105, at 127.

¹¹¹ See *id.* ("Remember [Eck] cruised about the site of this sinking for five hours. He refrained from using the speed which was at his disposal of 18 knots to get away as quickly as he could from the site of the sinking. He preferred to go round shooting, as he says, at wreckage by means of machine-guns.").

¹¹² Eck admitted to his defence counsel that he could not possibly erase all traces of the sinking. But he "only wanted to destroy the bigger pieces which were recognizable to aeroplanes." *Id.* at 52.

¹¹³ See H CJ 2056/04 Beit Sourik Village Council v. Gov't of Israel (*Beit Sourik*) [2004] ¶ 17.

¹¹⁴ See *id.* ¶¶ 17, 47.

Supreme Court ruled that Articles 23(g), 46 and 52 of the Hague Regulations as well as Articles 27 and 53 of Geneva Convention IV “create a single tapestry of norms that recognizes both human rights and the needs of the local population as well [as] recognizing security needs from the perspective of the military commander.”¹¹⁵ “Between these conflicting norms,” continued the court, “a proper balance must be found.”¹¹⁶

The court held that such a balance would be found by reference to proportionality, a principle rooted not only in international law but also in Israeli administrative law.¹¹⁷ The court divided proportionality into three subtests.¹¹⁸ According to one subtest, referred to in the judgement as the “appropriate means” or “rational means” test, “[t]he means that the administrative body uses must be constructed to achieve the precise objective which the administrative body is trying to achieve. The means used by the administrative body must rationally lead to the realisation of the objective.”¹¹⁹

Using this test, the court reiterated its traditional deference to the professional opinion of military commanders in charge. The petitioners failed to persuade the court that it should prefer the position of the Council for Peace and Security when it differed from that of the commander.¹²⁰ Consequently, the court held that the commander’s chosen route satisfied this test.¹²¹

2. Of Those Materially Relevant Measures That Were Reasonably Available, the Measure Taken was the Least Injurious

It is not necessary that the measure taken be the *only* reasonably available course of action for the attainment of a given military purpose. This, in fact, hardly ever occurs. There would almost always be two or more reasonably available courses of action that are materially relevant to the purpose. It follows that in almost no case does a measure’s “requiredness” for a military purpose depend on whether the purpose would not have been attained but for the measure taken. Here, no question of

¹¹⁵ *Id.* ¶ 35.

¹¹⁶ *Id.*

¹¹⁷ *Id.* ¶¶ 36-37.

¹¹⁸ The three subtests are: (a) the “appropriate means” or “rational means” test; (b) the “least injurious means” test; and (c) the “proportionate means” test (or proportionality “in the narrow sense”). H CJ 7957/04 *Mara’abe v. Prime Minister of Israel (Alfei Menashe)* [2005], ¶ 30.

¹¹⁹ *Beit Sourik*, H CJ 2056/04 ¶ 41.

¹²⁰ *See id.* ¶¶ 46-47, 56-57, 66, 70, 75, 80.

¹²¹ In the end, of the eight orders challenged by the petitioners, the court unanimously nullified five in their entirety and two in part. The court found that these orders failed to satisfy the third, “proportionate means” test. In respect of the remaining order, the route had already been changed and the petitioners did not raise any argument during the proceedings. The court denied the petition in respect of this latter order, as the parties had not substantially disputed it. *See id.* ¶¶ 50, 80.

counter-factual *conditio sine qua non* - which, by definition, cannot be proven - need be considered.

As an exception from certain specific rules of international humanitarian law, military necessity demands that, among all reasonably available and materially relevant measures *vis-à-vis* a given military purpose, the belligerent choose one that causes the least injury to objects and interests otherwise protected by these rules. In principle, military necessity is inadmissible where, in relation to the stated military purpose, at least one materially relevant yet less injurious measure was reasonably available to the belligerent other than the one taken.

This line of reasoning was proposed in *Peleus*, albeit indirectly. The judge advocate took issue with the amount of cruelty involved in the killing of the survivors relative to the amount of cruelty involved in an alternative course of action, which he implied had been reasonably available to Eck. The court was asked:

Do you or do you not think that a submarine commander who was really and primarily concerned with saving his crew and his boat would have done as Kapitänleutnant Schnee, who was called for the Defence, said he would have done, namely, have removed himself and his boat at the highest possible speed at the earliest possible moment for the greatest possible distance?¹²²

Implicit herein was the notion that, even if the shooting had eliminated all traces of the sinking, it would not have been operationally necessary to do so in order to save Eck's U-boat and its crew.¹²³ The judge advocate presented the court with the possibility that Eck would have achieved the same purpose by another means, namely by removing himself and his boat from the location of the sinking "at the highest possible speed at the earliest possible moment for the greatest possible distance."¹²⁴ Had Eck chosen to act as Schnee said he would, it would not have been operationally necessary for Eck to order the killing of any unarmed person¹²⁵ - although, admittedly, the survivors on the rafts and wreckage would be left to their fate.¹²⁶

¹²² CAMERON, *supra* note 105, at 127.

¹²³ That the actual elimination of all traces of the sinking would have saved Eck's boat and its crew does not appear to have been in issue.

¹²⁴ CAMERON, *supra* note 105, at 127.

¹²⁵ An unidentified reporter of the *Peleus* case noted that, "on the facts of the case this behaviour [shooting at helpless survivors of a sunken ship] was not operationally necessary, i.e. the operational aim, the saving of ship and crew, could have been achieved more effectively without such acts of cruelty." U.N. War Crimes Comm'n, *supra* note 105, at 16.

¹²⁶ The four men who survived Eck's machine gun fire and grenades spent the next twenty-five days drifting on the open sea. See CAMERON, *supra* note 105, at xxvi; U.N. War Crimes Comm'n, *supra* note 105, at 3.

The evidence showed that a man of comparable experience would have considered this alternative reasonably available to him had he found himself in a similar situation. The defence witness, Kapitänleutnant Schnee, was a member of the German U-boat Command who had sunk about thirty Allied ships and received military decorations.¹²⁷ During cross-examination, Schnee said:

What did you do after [sinking a ship]? - I have always tried to get away as quickly as possible out of the danger zone because it is well known that after the sinking of a ship the enemy is most alert to retaliate.

Is that, in your opinion, the correct thing to do after you have sunk a ship? - That is according to my opinion the most important thing for my boat.

...

What would you have done if you had been in Eck's position? - I would under all circumstances have tried my best to save life, as that is a measure which was taken by all U-boat Kommandanten; but when I am informed of this case, then I can only explain it as this, that Kapitänleutnant Eck through the terrific experience he had been through lost his nerve.

Does that mean that you would not have done what Kapitänleutnant Eck did if you had kept your nerve? - I would not have done it.¹²⁸

The *Beit Sourik* case also featured this “least injurious means” test. The Israeli Supreme Court defined it thus: “[T]he means used by the administrative body must injure the individual to the least extent possible. In the spectrum of means which can be used to achieve the objective, the least injurious means must be used.”¹²⁹

One disputed segment of the fence's route surrounded the ridge of Jebel Muktam. The petitioners described the severe damage that would afflict the nearby villages, which already suffered from 75% unemployment. The fence along the chosen route was said to affect large areas of cultivated land as well as tens of thousands of olive and fruit trees.¹³⁰ According to the affidavit provided by the Council for Peace and Security, no effective light weapon fire from Jebel Muktam was possible on any Israeli town or on Route 443 connecting Jerusalem to the centre of the country. It was argued that not every topographically controlling hill such as Jebel Muktam was required for the fence's defence. The council suggested that it would be easier to defend obstacles at a location three

¹²⁷ See U.N. War Crimes Comm'n, *supra* note 105, at 6.

¹²⁸ CAMERON, *supra* note 105, at 69-70.

¹²⁹ H CJ 2056/04 Beit Sourik Village Council v. Gov't of Israel (*Beit Sourik*) [2004] ¶ 41.

¹³⁰ See *id.* ¶ 52.

kilometres to the south of the current route. In the council's view, the local population would be dangerously and superfluously embittered by the inevitable construction of agricultural gates.¹³¹ The petitioners presented two alternative routes.¹³²

The commander responded that, topographically, the alternative routes were considerably inferior to his own. He stated that control of the Jebel Muktam hill overlooking the entire area was a matter of critical military importance; the fence would prevent the hill being taken and decrease the risk of attacks on Route 443.¹³³ The commander also differed from the petitioners on the scale of the injury.¹³⁴ It appears from the judgement that the commander had taken several concrete steps with a view to reducing the injury by creating agricultural gates, offering compensation, transferring rather than uprooting olive trees, considering the location of even unauthorised Palestinian buildings and locally correcting some portions of the route.¹³⁵

The fact that the route suggested by the Council for Peace and Security was less injurious than the route chosen by the commander was not, however, in dispute. Once again the court deferred to the commander's position that the alternative route would grant him less security than his proposed route would. The court ruled: "By our very determination that we shall not intervene in that position, we have also determined that there is no alternate route that fulfills, to a similar extent, the security needs while causing lesser injury to the local inhabitants."¹³⁶ The same was held to be the case for the other disputed segments of the commander's chosen route.¹³⁷

In fairness to the court, the comparison at issue was one between alternatives that were reasonably available to the commander and materially relevant to the same purpose. It is only among these alternatives that the commander would be called upon to choose the least injurious. In the particular circumstances surrounding each disputed segment of the fence, the court did *not* agree that the commander's chosen route and the Council for Peace and Security's alternative route achieved the same degree of security.¹³⁸

¹³¹ See *id.* ¶ 54-55.

¹³² See *id.*

¹³³ See *id.* ¶¶ 51, 55.

¹³⁴ See *id.* ¶ 53.

¹³⁵ See *id.* ¶ 55.

¹³⁶ *Id.* ¶ 58.

¹³⁷ See *id.* ¶¶ 67, 70, 76, 80.

¹³⁸ Compare this ruling in *Beit Sourik* with the ruling in *Alfei Menashe* where the Israeli Supreme Court held that the least injurious means test had not been satisfied in respect of the fence surrounding the Alfei Menashe nucleus. See H CJ 7957/04 Mara'abe v. Prime Minister of Israel (*Alfei Menashe*) [2005] ¶ 114 ("It seems to us that the required effort has not been made, and the details of an alternative route

3. The Injury that the Measure Would Cause Was Not Disproportionate to the Gain that it Would Achieve

Military necessity is inadmissible where the harm resulting from the measure is disproportionate to the purpose's military value. This is so even if the measure is the least injurious of all alternatives that are reasonably available and materially relevant to the purpose.

The precise relationship between military necessity and proportionality is not entirely clear. It appears uncontroversial that military necessity and proportionality are closely related concepts. Beyond this, however, there is no consensus as to the manner in which proportionality operates within the notion of military necessity - or *vice versa*. Some have treated proportionality as an element of military necessity.¹³⁹ Others have suggested that it is military necessity that constitutes an element of proportionality.¹⁴⁰

One difficulty here is the fact that exceptional military necessity operates in the narrow confines of express clauses, whereas proportionality is a highly open-textured concept that appears in various fields of international law and with scopes and variables that are not necessarily the same.¹⁴¹ Thus, in the context of *jus ad bellum* concerning the use of force in self-defence, proportionality is determined on the basis of (i) the geographical and destructive scope of the measure taken, its duration, the means and methods of warfare selected and the effects on third states, on the one hand, relative to (ii) the repulsion of the attack against which the right of self-defence is exercised, on the other.¹⁴² Within the context of *jus in bello* concerning the lawfulness of attacks on military objectives involving unintended civilian casualties, the relevant comparison is one between (i) "incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof," and (ii) the "concrete and direct military advantage anticipated."¹⁴³

As an element of exceptional military necessity, proportionality weighs the injury that the measure would cause to protected persons, objects and interests *vis-à-vis* the value of the military purpose that the measure would achieve. In the *Beit Sourik* case, considerations of proportionality

have not been examined, in order to ensure security with a lesser injury to the residents of the villages. Respondents must reconsider the existing route.").

¹³⁹ See, e.g., McDUGAL & FELICIANO, *supra* note 69, at 72; O'Brien, *supra* note 12, at 138, 148-49; INT'L HUMANITARIAN LAW RESEARCH INITIATIVE, *supra* note 54, at 7.

¹⁴⁰ See, e.g., Schmitt, *supra* note 8, at 257 (reviewing the first edition of Rogers' *LAW ON THE BATTLEFIELD* (Manchester Univ. Press 1996)); ROGERS, *supra* note 8, at 6 (referring to Schmitt's review of the first edition).

¹⁴¹ See, e.g., Mazzeschi, *supra* note 9, 1031-36.

¹⁴² See, e.g., JUDITH GARDAM, *NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES* 159-79 (Cambridge Univ. Press 2004).

¹⁴³ See Additional Protocol I, *supra* note 1, arts. 51(5)(b), 57(2)(b).

in this sense proved decisive.¹⁴⁴ The Israeli Supreme Court called such considerations “proportionality in the narrow sense.”¹⁴⁵ According to the court, “the damage caused to the individual by the means used by the administrative body in order to achieve its objectives must be of proper proportion to the gain brought about by that means.”¹⁴⁶

The court divided this narrow proportionality into two subgroups. One subgroup was to be applied with “absolute values [by] directly comparing the advantage of the administrative act with the damage that results from it.”¹⁴⁷ The other, to be applied in a “relative manner,” was defined as follows:

[T]he administrative act is tested vis-à-vis an alternate act, whose benefit will be somewhat smaller than that of the former one. The original administrative act is disproportionate in the narrow sense if a certain reduction in the advantage gained by the original act - by employing alternate means, for example - ensures a substantial reduction in the injury caused by the administrative act.¹⁴⁸

It is this variant of proportionality - *i.e.* “in the narrow sense” and applied in a “relative manner” - that the court applied to the facts before it.

Proportionality was examined on a segment-by-segment basis.¹⁴⁹ For each disputed segment of the route, the court weighed the injury to the local inhabitants¹⁵⁰ *vis-à-vis* the security benefit from the fence being erected along the route chosen by the commander.

As regards the Jebel Muktam segment of the fence, the court agreed that the alternative route presented by the Council for Peace and Security would substantially decrease the injury. The court so agreed against the backdrop of the commander’s opinion - which, as noted earlier, the court assumed to be correct - that he would have less security in the area as a result. Effectively, the court ruled in favour of the decrease in the injury caused to the local inhabitants over the decrease in the degree of security

¹⁴⁴ See also Kretzmer, *The Supreme Court of Israel*, *supra* note 85, at 449 (referring to “the big question”).

¹⁴⁵ HCJ 2056/04 Beit Sourik Village Council v. Gov’t of Israel (*Beit Sourik*) [2004] ¶ 41.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ See *id.* ¶ 49. The court, however, made observations about the overall injury to the local inhabitants affected by the entire length of the separation fence examined in the case. See *id.* ¶¶ 82-84.

¹⁵⁰ The court added to the injury side of the equation “human rights and the necessity of ensuring the provision of the needs and welfare of the local inhabitants” and “family honour and rights . . . protected in the framework of the humanitarian provisions of the Hague Regulations and the Geneva Convention.” *Beit Sourik*, HCJ 2056/04, ¶ 59.

accruing to the commander. In the view of the court, “the security advantage reaped from the route as determined by the military commander, in comparison to the . . . route [proposed by the Council for Peace and Security], does not stand in any reasonable proportion to the injury to the local inhabitants caused by this route.”¹⁵¹

The court found that the commander’s order to seize land for the construction of the separation fence in the Jebel Muktam area was disproportionate in its injurious effect on the local inhabitants relative to the security gain he sought by it.¹⁵² The court made similar findings regarding the other disputed segments of the fence: The “severe” injury that the commander’s route caused to the local inhabitants was held to be more disproportionate to the level of security he sought than the injury caused by an alternative route - such as the one suggested by the Council for Peace and Security - would be to the somewhat lower level of security that it would achieve.¹⁵³

Consequently, the seizure orders concerning the fence’s disputed segments were declared null and void.¹⁵⁴ The court considered the measure taken by the commander militarily *unnecessary* because it accepted the possibility of at least one alternative measure whereby a minor modification to the original purpose would result in a significantly superior security-injury ratio.

The “relative” proportionality test affected the court’s handling of the case in three important ways. Firstly, it reduced the difficulty in comparing two dissimilar variables. Had the court applied an “absolute” proportionality test, it would have had to compare the amount of injury caused to the local inhabitants with the degree of security gained through the commander’s route. Instead, thanks to the “relative” proportionality test, the court had two sets of comparison, each containing two variables to be weighed on the same measurement. These sets were:

- i. A comparison between the amount of injury to the local inhabitants resulting from the route chosen by the commander, on the one hand, and the amount of injury to the local inhabitants resulting from an alternative route, such as the one suggested by the Council for Peace and Security, on the other; and
- ii. A comparison between the degree of security sought by the commander’s route, on the one hand, and the degree of security sought by the alternative route, on the other.

Where the reduction in injury was greater than the reduction in security, the alternative route would be superior to the commander’s chosen route in terms of their security-injury ratios. Also, according to the “relative” proportionality test, the existence of such an alternative route would

¹⁵¹ *Id.* ¶ 61.

¹⁵² *See id.* ¶¶ 60-62.

¹⁵³ *See id.* ¶¶ 67, 70-71, 76, 80.

¹⁵⁴ *See id.* ¶ 86.

mean that the route chosen by the commander was disproportionate in its injurious effects *vis-à-vis* its security goal.

Secondly, the application of the “relative” proportionality test underscored the fact that the measure and the purpose were, in fact, both capable of measurement. This was particularly significant for the purpose at issue in *Beit Sourik*, namely the degree of security anticipated from the construction of the fence. A military purpose of this nature is qualitatively different from a military purpose that would be either attained or unattained but not amenable to partial attainment of different degrees. As a means of assessing military necessity, the “relative” proportionality test might not be suitable for situations such as the one in which Eck found himself where the belligerent’s purpose could not be measured in graduated terms.

Lastly - and, perhaps, most controversially - the court applied the “relative” proportionality test in an attempt to avoid some hard questions. The court observed:

Indeed, the real question in the “relative” examination of the third proportionality subtest is *not* the choice between constructing a separation fence which brings security but injures the local inhabitants, or not constructing a separation fence, and not injuring the local inhabitants. The real question is whether the security benefit reaped by the acceptance of the military commander’s position (that the separation fence should surround Jebel Muktam) is proportionate to the additional injury resulting from his position (with the fence separating local inhabitants from their lands).¹⁵⁵

Whether this is really what the “relative” proportionality test says, however, is debatable. For this test, as it was defined by the court, effectively opens a Pandora’s Box. The court’s conclusion was that, compared to the alternatives suggested by the petitioners, the route chosen by the commander was disproportionately injurious. It was *not* the court’s conclusion that those alternatives themselves were proportionately injurious.¹⁵⁶ Whether these alternatives were proportionately or disproportionately injurious would depend on the availability or other-

¹⁵⁵ *Id.* ¶ 61 (emphasis added).

¹⁵⁶ Nor, to be sure, was the court called upon to identify any particular route with an acceptable security-injury ratio. The court noted: “This is the military commander’s affair,” *Beit Sourik*, HCJ 2056/04 ¶ 71. Also of note is the court’s statement:

[W]e are of the opinion that the military commander must map out an alternate arrangement Such alternate routes were presented before us. We shall not take any stand whatsoever regarding a particular alternate route. The military commander must determine an alternative which will, provide a fitting, if not ideal, solution for the security considerations, and also allow proportionate access of Beit Daku villagers to their lands.

Id. ¶ 80.

wise of some further alternatives with a superior security-injury ratio. Such a “relative” proportionality analysis could go on *ad infinitum*.¹⁵⁷

The question, then, is this: Could there be a stage at which the IDF Commander in the West Bank would cease to be capable of proposing any route within the occupied territory that was less disproportionately injurious than, for instance, some alternative route outside the territory? Would this not mean that the construction of a fence with an acceptable security-injury ratio might possibly go beyond the commander’s authority? Would this also not mean that the commander himself might at some point have to choose not to construct the separation fence at all and therefore not to injure the local inhabitants at all? That these questions *may* yield an affirmative answer is inherent in the “relative” proportionality test itself.

It is therefore *not* because the “relative” proportionality test did not raise these questions that the court managed to avoid them. The court managed to do so for two reasons. First, it refused to question the commander’s authority in principle to erect the fence on the territory he occupied. By refusing to question the commander’s authority, the court refused to contemplate the prospect that even the least disproportionately injurious measure at his disposal might be too disproportionately injurious. Second, the specific alternatives presented by the petitioners and the Council for Peace and Security were all situated in the territory he occupied.¹⁵⁸ It would have been interesting to see the court’s reaction had some or all alternative routes proposed by the petitioners been located on the Israeli side of the “Green Line.”

These questions did not escape the attention of two international institutions. One was the International Committee of the Red Cross (ICRC), which several months before the *Beit Sourik* case issued a press release in which it expressed an unusually blunt view on the matter.¹⁵⁹ The other, the ICJ, rendered an advisory opinion on the legal consequences of the

¹⁵⁷ Thus, theoretically, petitions could keep coming before the Israeli Supreme Court every time the military commander decided on a new route which was less disproportionately injurious than the previous route. For a foretaste of this prospect, see *Alfei Menashe* in which the court noted that there had already been seven petitions arising from the new route chosen by the military commander in light of the ruling in *Beit Sourik*. See H CJ 7957/04 Mara’abe v. Prime Minister of Israel (*Alfei Menashe*) [2005] ¶ 36.

¹⁵⁸ See *Beit Sourik*, H CJ 2056/04 (maps attached to the judgement).

¹⁵⁹ See Press Release, Int’l Comm. of the Red Cross, Israel/Occupied and Autonomous Palestinian Territories: West Bank Barrier Causes Serious Humanitarian and Legal Problems (Feb. 18, 2004), <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/5WACNX?> [hereinafter ICRC Press Release]. Strictly speaking, the ICRC’s observations do not constitute judicial findings of any sort. They are nevertheless significant in view of the organization’s general policy of discreetness and the special place that it has occupied in the development and implementation of international humanitarian law.

construction of the wall within ten days of the Israeli Supreme Court's ruling.¹⁶⁰

Neither the ICRC nor the ICJ denied Israel's right to take lawful measures to protect its population.¹⁶¹ Nor is there any indication that, in their view, the construction of the barrier *as such* lacked any material bearing on Israel's efforts to combat terrorist attacks launched from the West Bank. Rather, they juxtaposed the injury done and rights denied to residents in the occupied territory against the measures taken by Israel in the light of its rights and obligations under international law.

Unlike the Israeli Supreme Court, the two organisations did not examine the wall on a segment-by-segment basis. It appears that they treated as one object the entire length of the barrier that diverted from the "Green Line" into the occupied territory.

The ICRC declared that the barrier, "insofar as its route deviates from the 'Green Line' into occupied territory," is contrary to international humanitarian law (IHL).¹⁶² To the ICRC,

[t]he problems affecting the Palestinian population in their daily lives clearly demonstrate that [the barrier] runs counter to Israel's obligation under IHL to ensure the humane treatment and well-being of the civilian population living under its occupation. The measures taken by the Israeli authorities linked to the construction of the Barrier in occupied territory go *far beyond* what is permissible for an occupying power under IHL.¹⁶³

¹⁶⁰ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9). In its Resolution the UN General Assembly requested an advisory opinion from the ICJ on the following question:

What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?

G.A. Res. ES-10/14, U.N. Doc. A/RES/ES-10/14 (Dec. 12, 2003)

¹⁶¹ The ICRC recognized "Israel's right to take measures to ensure the security of its population. However, these measures must respect the relevant rules of [international humanitarian law]." ICRC Press Release, *supra* note 159. Similarly, the ICJ observed:

The fact remains that Israel has to face numerous indiscriminate and deadly acts of violence against its civilian population. It has the right, and indeed the duty, to respond in order to protect the life of its citizens. The measures taken are bound nonetheless to remain in conformity with applicable international law.

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. at 195.

¹⁶² See ICRC Press Release, *supra* note 159.

¹⁶³ *Id.* (emphasis added).

The ICRC essentially found that Israel's actions were disproportionate to the injury caused. It called upon Israel "not to plan, construct or maintain this Barrier within occupied territory."¹⁶⁴

The ICJ declined to consider Article 23(g) of the Hague Regulations¹⁶⁵ but took note of the military necessity exception under Article 53 of Geneva Convention IV. The court held that it was, "on the material before it," not convinced that "the destructions carried out contrary to the prohibition in Article 53 of the Fourth Geneva Convention were rendered absolutely necessary by military operations."¹⁶⁶

The freedom of movement, a human right under Article 12 of the International Covenant on Civil and Political Rights,¹⁶⁷ was also considered. The court, quoting with approval General Observation No. 27 of the Human Rights Committee,¹⁶⁸ observed that restrictions to this freedom must be directed towards the ends authorised, conform to the principle of proportionality" and "be the least intrusive instrument amongst

¹⁶⁴ *Id.*

¹⁶⁵ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 185 (July 9). For views supporting the exclusion of Article 23(g) of the Hague Regulations from the scope of analysis in the ICJ's advisory opinion, see Pertile, *supra* note 9, at 134-36; Orakhelashvili, *supra* note 101, at 123. For criticisms, see Kretzmer, *The Advisory Opinion*, *supra* note 62, at 95-96.

¹⁶⁶ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. at 192.

¹⁶⁷ See *id.* at 193. Article 12 of International Covenant on Civil and Political Rights states, in part, as follows:

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
- ...
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

International Covenant on Civil and Political Rights art. 12, *opened for signature* Dec. 16 1966, 999 U.N.T.S. 171, 176. Israel is a state party to the covenant. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. at 177.

¹⁶⁸ See Human Rights Committee, *General Comment No. 27: Freedom of Movement (Art. 12)*, ¶ 14, U.N. Doc CCPR/C/21/Rev.1/Add.9. (Nov. 1, 1999) ("Article 12, paragraph 3, clearly indicates that it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.").

those which might achieve the desired result.”¹⁶⁹ Here, too, the court found, “[o]n the basis of the information available to it,” that Israel’s measures did not meet these conditions. Consequently,

[T]he Court, from the material available to it, is not convinced that the specific course Israel has chosen for the wall was necessary to attain its security objectives. The wall, along the route chosen, and its associated régime gravely infringe a number of rights of Palestinians residing in the territory occupied by Israel, and the infringements resulting from that route cannot be justified by military exigencies or by the requirements of national security or public order.¹⁷⁰

The court concluded that Israel was obligated to cease the construction of the wall in the Occupied Palestinian Territory including in and around East Jerusalem; to dismantle those parts of the wall therein that have already been built; and to repeal or render ineffective all related legislative and regulatory acts.¹⁷¹ Israel was also found to be duty-bound to make reparations to the victims by way of restitution or compensation.¹⁷²

When the court ruled that the construction of the wall in occupied Palestine by Israel was unnecessary for its security objectives, it did so on the basis of the “specific course Israel has chosen.”¹⁷³ Would this mean that the court might have arrived at a different conclusion had Israel chosen some other route? What if Israel had invited the court to consider the routes suggested by the petitioners in the *Beit Sourik* case - which, as noted earlier, still remained in the occupied territory? In other words, would the court have been prepared to consider the wall’s “relative” proportionality?

The court might have been prepared to do so. Even if it had, however, it is doubtful whether the court’s conclusion would have been different. After all, the court declared Israel’s construction of the wall to be a breach of international law as long as it occurred in the Occupied Palestinian Territory.¹⁷⁴ It would appear that, in the view of the court, the injury done and rights denied to the local inhabitants were such that no route with an acceptable security-injury ratio would conceivably exist within the occupied territory.¹⁷⁵ The same could be said of the ICRC’s view of the matter.

¹⁶⁹ See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. at 193.

¹⁷⁰ *Id.* at 193.

¹⁷¹ See *id.* at 197-98.

¹⁷² See *id.* at 198.

¹⁷³ *Id.* at 193.

¹⁷⁴ See *id.* at 201.

¹⁷⁵ For a different take of the ICJ’s position on this matter, see Kretzmer, *The Advisory Opinion*, *supra* note 62, at 100 (“The only possible explanation for the conclusion that the construction of the whole barrier contravenes international law in general, and international humanitarian law in particular, is that some principle

Israel elected to limit its involvement in the ICJ's advisory proceedings to jurisdictional issues.¹⁷⁶ As a result, at no point during the proceedings did the court benefit from the kind of detailed submissions made by the IDF commander on his security considerations that the Israeli Supreme Court had in the *Beit Sourik* case.¹⁷⁷ Instead, the ICJ found itself relying heavily on the reports and other materials submitted to it by the Secre-

forbids an occupying power from building such a barrier in occupied territory, even when this construction involves neither the attempted annexation of territory, nor a specific violation of international humanitarian law or international human rights law, such as the unlawful seizure or destruction of property, unjustified limitations on freedom of movement, or arbitrary interference with the right to privacy and family. Does such a principle exist?”).

¹⁷⁶ See Written Statement of the Government of Israel on Jurisdiction and Propriety (Jan. 30, 2004), <http://securityfence.mfa.gov.il/mfm/Data/49486.pdf> [hereinafter Written Statement of Israel]. Israel's statement was a response to the court's advisory opinion regarding the legal consequences of the wall, which stated:

According to Israel, if the Court decided to give the requested opinion, it would be forced to speculate about essential facts and make assumptions about arguments of law. More specifically, Israel has argued that the Court could not rule on the legal consequences of the construction of the wall without enquiring, first, into the nature and scope of the security threat to which the wall is intended to respond and the effectiveness of that response, and, second, into the impact of the construction for the Palestinians. This task, which would already be difficult in a contentious case, would be further complicated in an advisory proceeding, particularly since Israel alone possesses much of the necessary information and has stated that it chooses not to address the merits.

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 161 (July 9). But the court noted that “Israel's Written Statement, although limited to issues of jurisdiction and judicial propriety, contained observations on other matters, including Israel's concerns in terms of security, and was accompanied by corresponding annexes.” *Id.* at 162.

¹⁷⁷ In this connection, see Written Statement of Israel, *supra* note 176, at 107-10. Israel asserted that the court would lack sufficient information and evidence to perform “[a]ny assessment of the military necessity of the fence” including, in particular:

- a) an assessment of the security threat faced by Israel, which would in turn require an assessment of the nature and scale of terrorist attacks, the continuing nature of the threat, and the likely nature and scale of future attacks;
- b) an assessment of the effectiveness of the fence to address the security threat relative to other available means;
- c) an assessment of the motives behind the construction of the fence;
- d) an assessment of the routing of the fence, including an assessment of whether the routing was justified by military necessity so far as concerns individual sections of the fence;
- e) an assessment of the specific nature and extent of the construction, including an assessment of whether these aspects were justified by military necessity so far as concerns individual sections of the fence, to cover, for example, the issue of whether there was a justification on grounds of military necessity for those short sections of wall;

tary-General of the United Nations describing Israel's concerns and actions, as well as submissions made by other participants in the proceedings and information available in the public domain.¹⁷⁸

The court determined that it still had sufficient information and evidence upon which to render an opinion.¹⁷⁹ Indeed, the court rendered its opinion on the basis of the material “before it”¹⁸⁰ or “available to it.”¹⁸¹ Of such material, however, one cannot fail to notice the considerable discrepancy between the quantity and quality of information regarding the injury to the residents in the occupied territory, on the one hand, and the lack thereof regarding the security benefit sought by the occupying power, on the other. The advisory opinion was criticised by several ICJ judges¹⁸² and others¹⁸³ for this reason.

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- f) an assessment of the specific nature of the threat to the Israeli population at different sections of the fence;
 - g) in the light of the claim that the requirements of proportionality can better be met by different routing of the fence, an assessment of the relative threat arising as a result of such different routing and of whether the requirements of military necessity could thus be satisfied.

Id. at 108-09.

¹⁷⁸ See, e.g., *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. at 161-62.

¹⁷⁹ See *id.* at 162.

¹⁸⁰ *Id.* at 192.

¹⁸¹ *Id.* at 193.

¹⁸² See, e.g., *id.* at 244 (declaration of Judge Buergenthal) (“Instead, all we have from the Court is a description of the harm the wall is causing and a discussion of various provisions of international humanitarian law and human rights instruments followed by the conclusion that this law has been violated. Lacking is an examination of the facts that might show why the alleged defences of military exigencies, national security or public order are not applicable to the wall as a whole or to the individual segments of its route. The Court says that it “is not convinced” but it fails to demonstrate why it is not convinced, and that is why these conclusions are not convincing.”); *id.* at 268-69 (separate opinion of Judge Owada) (“What seems to be wanting, however, is the material explaining the Israeli side of the picture, especially in the context of why and how the construction of the wall as it is actually planned and implemented is necessary and appropriate It seems clear to me that here [*i.e.* where the court has stated that it is not convinced that the course Israel has chosen is essential to maintaining national security] the Court is in effect admitting the fact that elaborate material on this point from the Israeli side is not available, rather than engaging in a rebuttal of the arguments of Israel on the basis of the material that might have been made available by Israel on this point.”). But Judge Owada was prepared to accept that “no justification based on the ‘military exigencies’, even if fortified by substantiated facts, could conceivably constitute a valid basis for precluding the wrongfulness of the act on the basis of the stringent conditions of proportionality.” *Id.* at 269 (separate opinion of Judge Owada). Judge Higgins observed that, the “very partial” nature of the information directly provided by Israel notwithstanding,

Similarly, the ICRC stated that its conclusions were “based on the ICRC’s monitoring of the living conditions of the Palestinian population and on its analysis of the applicable IHL provisions.”¹⁸⁴ The extent to which the ICRC actually took into consideration the degree and nature of security sought by Israel through the construction of the barrier is not clear.

The Israeli Supreme Court, the ICJ and the ICRC all concluded that, at a minimum, military necessity was inadmissible in the particular instance of the wall being built along the route chosen by the IDF’s regional commander in some part of the Greater Jerusalem area.¹⁸⁵ But this apparent consensus among the three institutions masks their profound disagreements about what proportionality entails within the context of military necessity. Their disagreement persists in:

- i. The choice of variables - should proportionality be examined “relatively” between the rate of reduction in benefit and the rate of reduction in injury with respect to two alternative measures, or should it be examined “absolutely” between the benefit and injury with respect to one measure?;
- ii. The scale of comparison - should proportionality be examined microscopically, involving only certain identifiable portions of the measure and their discrete benefit-injury ratios, or should it be examined macroscopically, involving the totality of the measure and its overall benefit-injury ratio?¹⁸⁶; and

there is undoubtedly a significant negative impact upon portions of the population of the West Bank that cannot be excused on the grounds of military necessity allowed by those Conventions; and nor has Israel explained to the United Nations or to this Court why its legitimate security needs can be met only by the route selected.

Id. at 218 (separate opinion of Judge Higgins). Judge Kooijmans expressed his preference for more references to terrorist acts in the opinion, but agreed that the court dealt with Israel’s positions sufficiently. In his view, the court did not put the wall to the proportionality test. *Id.* at 223 (separate opinion of Judge Kooijmans). Referring to the *Beit Sourik* case, Judge Kooijmans considered that the route chosen by Israel rendered the injury caused to the inhabitants “manifestly disproportionate” to the interests that Israel sought to protect. *Id.* at 229.

¹⁸³ See, e.g., HCJ 7957/04 Mara’abe v. Prime Minister of Israel (*Alfei Menashe*) [2005] ¶¶ 62-65; Geoffrey R. Watson, *The “Wall” Decisions in Legal and Political Context*, 99 AM. J. INT’L L. 6, 25 (2005); Kretzmer, *The Advisory Opinion, supra* note 62, at 98-100; Ardi Imseis, *Critical Reflections on the International Humanitarian Law Aspects of the ICJ Wall Advisory Opinion*, 99 AM. J. INT’L L. 102, 110-14 (2005); Pertile, *supra* note 9, at 153.

¹⁸⁴ ICRC Press Release, *supra* note 159.

¹⁸⁵ For similarities between the ICJ and the Israeli Supreme Court see Watson, *supra* note 183, at 22.

¹⁸⁶ See HCJ 7957/04 Mara’abe v. Prime Minister of Israel (*Alfei Menashe*) [2005] ¶ 58 (“The ICJ held that the building of the wall, and the regime accompanying it, are contrary to international law (paragraph 142). In contrast, the Supreme Court in *The*

- iii. The choice, quality and quantity of relevant data necessary to make an informed assessment.

Admittedly, the scope and manner of scrutiny were framed, to some extent, not by the forum itself but by the particulars of the issue that was brought before it. Nevertheless, the controversy arising from Israel's conduct has revealed the fact that rules of international humanitarian law remain highly indeterminate in this area.

C. *The Military Purpose for Which the Measure was Taken was in Conformity with International Humanitarian Law*

Military necessity is inadmissible where the purpose for which the measure was taken was itself contrary to international humanitarian law.¹⁸⁷ This is so even if the belligerent chooses among the relevant and available measures the one that is the least injurious and whose injurious effect is not disproportionate to the gain. It is this requirement, together with the next requirement discussed below that makes military necessity an exception from an obligation rather than a justification or excuse for that obligation's breach. For example, Article 4(1) of the 1954 Hague Cultural Property Convention obligates the belligerent *inter alia* to refrain from using cultural property and its immediate surroundings "for purposes which are likely to expose it to destruction or damage in the event of armed conflict" ¹⁸⁸ By virtue of Article 4(2) of the same convention, this obligation may be waived "only in cases where military necessity imperatively requires such a waiver."¹⁸⁹

An ancient Benedictine abbey stood atop the hill of Monte Cassino in southern Italy. During World War II, Adolf Hitler ordered the hill incorporated into the defensive complex of the Gustav Line against the Allied advance from the south.¹⁹⁰ Monte Cassino was situated at the mouth of the Liri valley with a commanding view of all approaches.¹⁹¹ The valley

Beit Sourik Case held that it is not to be sweepingly said that any route of the fence is a breach of international law. According to the approach of the Supreme Court, each segment of the route should be examined to clarify whether it impinges upon the rights of the Palestinian residents, and whether the impingement is proportional. It was according to this approach, that the fence segments discussed in *The Beit Sourik Case* were examined. Regarding some segments of the fence, it was held that their construction does not violate international law. Regarding other segments of the fence, it was held that their construction does violate international law." *id.* ¶¶ 66, 70.

¹⁸⁷ Earlier in the discussion, the St. Petersburg Declaration, *supra* note 10, was mentioned as an embodiment of this proposition.

¹⁸⁸ Hague Cultural Property Convention, *supra* note 24, art 4(1).

¹⁸⁹ *Id.* art 4(2).

¹⁹⁰ MARTIN BLUMENSON, *THE MEDITERRANEAN THEATER OF OPERATIONS: SALERNO TO CASSINO* 399 (1993).

¹⁹¹ *See id.* at 403.

provided the most direct gateway to Rome,¹⁹² and an entry into it became all the more urgent for the Allied forces¹⁹³ in view of the protracted battle at the Anzio beachhead, another strategic point for the purposes of weakening the Gustav Line.¹⁹⁴ The German forces undertook to ensure respect for the abbey itself despite the fact that their commander, Vietinghoff, acknowledged the monastery's potential as "good observation posts" and "good positions of concealment."¹⁹⁵ Initially, some Allied commanders received intelligence to the effect that the Germans used the abbey.¹⁹⁶ Others disagreed, however, and later confirmed that that was not the case.¹⁹⁷ According to Martin Blumenson:

The German forces placed the abbey off limits. Tracing a circle around the monastery at a distance of two yards from the walls, the local unit forbade troops to cross the line and stationed military policemen at the gate to prevent soldiers from entering. The abbot was assured that no military installations of any sort would be constructed within the confines of the abbey.

But nothing outside the walls was sacred, and according to plan, since the slopes of the hill were not off limits, German troops soon demolished all the outlying buildings of the abbey to create fields of fire, set up observation posts and crew-served weapons emplacements nearby, and established at least one ammunition supply dump in a cave very close to the monestary wall.¹⁹⁸

Arguably, had the 1954 Hague Cultural Property Convention been applicable, the German action in the immediate surroundings of the abbey - placing combat positions a mere two yards away from its walls - would have been a *prima facie* breach of Article 4(1). Whether the German forces would have been entitled to the waiver envisaged in Article 4(2) would depend on, among other things, what they had wished to accomplish. If, for example, the Germans had sought to take advantage of Monte Cassino's topography, then they might have been entitled to that waiver.¹⁹⁹ But, if the intention had been to shield their positions unlawfully with their proximity to the abbey, then the waiver would not have been available.

In *Beit Sourik*, the Israeli Supreme Court noted the IDF commander's affidavit that "the fence is intended to prevent the unchecked passage of

¹⁹² See *id.* at 226.

¹⁹³ See *id.* at 401.

¹⁹⁴ See *id.* at 353, 385-96.

¹⁹⁵ *Id.* at 400, 401.

¹⁹⁶ See *id.* at 408.

¹⁹⁷ See *id.* at 413-14.

¹⁹⁸ *Id.* at 401 (footnote omitted).

¹⁹⁹ Significantly, despite their knowledge that the German forces were positioned very close to the abbey, some Allied commanders considered it militarily unnecessary to attack the abbey itself. See *id.* at 400-01.

inhabitants of the area into Israel and their infiltration into Israeli towns located in the area.”²⁰⁰ The latter part of this statement clearly refers to the settlements on the West Bank. If it were true that these settlements have been established in breach of Article 49(6) of Geneva Convention IV, would it not follow that “measures taken to protect the residents of such settlements from terror attacks are in themselves illegal”?²⁰¹

There are those who appear to respond to this question in the affirmative. In his declaration attached to the ICJ’s *Legal Consequence Advisory Opinion*, Judge Buergenthal noted that the existence of the Israeli settlements in the West Bank “violates Article 49, paragraph 6 [of Geneva Convention IV]. *It follows* that the segments of the wall being built by Israel to protect the settlements are *ipso facto* in violation of international humanitarian law.”²⁰² Ardi Imseis likewise argues that “military necessity can operate only to protect the security interests of the occupying power’s military forces, and then only within the occupied territory. An attempt to extend the concept of military necessity to protect the interests of Israeli colonies and their civilian inhabitants would offend this general principle”²⁰³

A common Latin maxim - *ex injuria jus non oritur* - comes to mind.²⁰⁴ Others disagree, however. In Kretzmer’s view:

[A] theory that posits that the fact that civilians are living in an illegal settlement should prevent a party to the conflict from taking any measures to protect them would seem to contradict fundamental notions of international humanitarian law. After all, the measures may be needed to protect civilians (rather than the settlements in which they live) against a serious violation of [international humanitarian law].²⁰⁵

Kretzmer goes on to state:

If one takes Imseis’ view, one is led to the conclusion that the Israeli forces are prevented from lifting a finger to defend civilians in the settlements. This would seem to be an unacceptable conclusion,

²⁰⁰ *Beit Sourik*, HCJ 2056/04 *Beit Sourik Village Council v. Gov’t of Israel (Beit Sourik)* [2004] ¶ 29; *see also* Kretzmer, *The Supreme Court of Israel*, *supra* note 85 at 445.

²⁰¹ Kretzmer, *The Supreme Court of Israel*, *supra* note 85, at 446; *see also* Kretzmer, *The Advisory Opinion*, *supra* note 62, at 93.

²⁰² *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, 244 (July 9) (declaration of Judge Buergenthal) (emphasis added); *see, e.g.*, Imseis, *supra* note 183, at 112; Orakhelashvili, *supra* note 101, at 138.

²⁰³ Imseis, *supra* note 183, at 112 (footnote omitted).

²⁰⁴ *See, e.g.*, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. at 254 (separate opinion of Judge Elaraby); Imseis, *supra* note 183, at 112.

²⁰⁵ Kretzmer, *The Advisory Opinion*, *supra* note 62, at 93 (footnotes omitted).

especially if one accepts (as Imseis does) that there has not been a close to military operations in the occupied territories.²⁰⁶

It is proposed here that a useful distinction might be drawn between (i) the availability or otherwise of an exceptional relief from a contrary obligation, on the one hand, and (ii) the exercise or absence of a general right, on the other. While Imseis is very clear about the former, his position on the latter may not be as categorical as Kretzmer describes. Once the distinction has been drawn, the differences between Imseis and Kretzmer may begin to seem somewhat less stark than meets the eye.

For the sake of argument, let us agree that the Israeli settlements in occupied Palestine are in breach of Article 49(6) of Geneva Convention IV. What follows this is that neither the wall nor the adoption of various measures needed for its erection is eligible for exceptional military necessity clauses attached to the relevant provisions of the Hague Regulations and/or Geneva Convention IV. It follows further that the principal rule contained in these provisions remains applicable to the matters at hand. In other words, the unlawfulness of the wall's purpose precludes its claim to military necessity.

What does *not* necessarily follow is the suggestion that the settlements' unlawfulness exposes their civilian residents to the kind of attacks and harm against which civilians are ordinarily protected.²⁰⁷ It is entirely possible that the residents of an unlawful settlement have the right to defend themselves in the event of an attack on them, and/or that Israel has the right to send IDF troops with a view to protecting their immediate safety. On this view, it is, as Kretzmer argues, indeed "not self-evident that the fact that the settlements were established in violation of international law means that *any* measures to protect civilians in those settlements are necessarily illegal."²⁰⁸

But then, Imseis's position - against which Kretzmer juxtaposes his - does not seem so sweeping either. Imseis merely states that Israel may not plead exceptional military necessity for the construction of the wall because its purpose is unlawful. Nowhere does he appear to suggest that international humanitarian law prevents "the Israeli forces . . . from lifting a finger to defend civilians in the settlements."²⁰⁹ Nor is this necessarily a conclusion to which "one is led" if one agrees with Imseis.

²⁰⁶ *Id.* at 93 n.41.

²⁰⁷ It may be said that some if not all of the civilian residents participate directly in hostilities from time to time and that they are liable to hostile acts for the duration of their direct participation therein. This, however, is a separate issue altogether.

²⁰⁸ Kretzmer, *The Advisory Opinion*, *supra* note 62, at 93.

²⁰⁹ *Id.* at 93 n.41.

D. *The Measure was Otherwise in Conformity with International Humanitarian Law*

Military necessity does not exempt measures from the prescription of unqualified rules or, in any event, rules which contain no military necessity exceptions. The prohibition against the killing of prisoners of war and enemies who have surrendered at discretion is a case in point.²¹⁰ This is an unqualified prohibition. If the circumstances surrounding the captor are such - e.g. encirclement by enemy formations, shortage of food rations - that it becomes no longer feasible to keep his prisoner of war in custody, and if he kills the prisoner of war as a result, then he is not entitled to plead military necessity. The U.S. Military Commission in Augsberg, Germany, convicted Gunther Thiele and Georg Steinert of killing an American prisoner of war notwithstanding their military necessity pleas.²¹¹ In *Hostage*, Walter Kuntze was charged with the killing of unarmed civilians in occupied Greece and Yugoslavia. He asserted that, with ground troops in short supply, intimidating the population was militarily necessary in order to maintain order and security. This assertion was rejected.²¹²

The fact that military necessity is inadmissible for measures in violation of unqualified rules could arguably be seen as a choice between all-or-nothing alternatives. Thus, where the belligerent must choose between measures which are relevant to his lawful purpose but involve unlawful acts, on the one hand, and measures which amount to abandoning that

²¹⁰ See, e.g., Hague Regulations, *supra* note 18, art. 23(c) (“Besides the prohibitions established by special conventions, it is particularly forbidden . . . [t]o kill or wound an enemy who, having laid down his arms or having no longer any means of defense, has surrendered at discretion.”); Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 6(b), Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, 288 [hereinafter Nuremberg Charter] (“War Crimes: . . . murder or ill-treatment of prisoners of war or persons on the seas”); Geneva Convention III, *supra* note 18, art. 130 (“Grave breaches . . . shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing”); ICC Statute, *supra* note 25, art. 8(2)(a)(i) (“Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention: . . . (i) wilful killing”); *id.* art. 8(2)(b)(vi) (“Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion”).

²¹¹ *Trial of Gunther Thiele and Georg Steinert* (U.S. Military Comm’n 1945), in 3 U.N. War Crimes Comm’n, LAW REPORTS OF TRIALS OF WAR CRIMINALS 56, 58 (1948); see also LEVIE, *supra* note 54, at 501 (quoting observations about the *Trial of Ludwig Klueffgen*); *United States of America v. Ludwig Klueffgen*, Case No. 12-1502 (U.S. Military Trib. 1947).

²¹² See *United States v. List (Hostage)*, 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 757, 1281 (1950).

purpose but involve no unlawful act, on the other, military necessity would demand that he choose the latter. Extreme as it might appear, an analogous view was offered in *Rauter*:

The circumstance that, if [the laws of war] are observed, a territory cannot be held under occupation, gives the Occupant no right to commit acts which are unequivocally prohibited by the law of nations; the proper alternative is for him to evacuate the whole or part of the occupied territory.²¹³

Erich von Manstein was brought before the British Military Court at Hamburg on charges including the devastation of occupied Ukraine and the deportation of local inhabitants therefrom.²¹⁴ The defence apparently alleged that the devastation had been rendered unavoidable by the military exigencies of the situation²¹⁵ and that, once it had been so rendered, “the deportation followed of necessity.”²¹⁶ The judge advocate advised the court that “[d]eportation of the population from their homes is upon a different footing. Article 23(g) [of the Hague Regulations] has no application to this, and if it is to be defended at all, it must be upon some ground other than military necessity.”²¹⁷ While the judge advocate might have thought that the prohibition against deportation admitted certain exceptions,²¹⁸ he clearly did not think that military necessity was one of them.

An ICTY trial chamber suggested in *Krstić*²¹⁹ that the judge advocate’s conclusion in *von Manstein* ran counter to the relevant provisions of Geneva Convention IV:

Indeed, the judge advocate went so far as to suggest that deportation of civilians could never be justified by military necessity, but only by concern for the safety of the population. . . . This position, however, is contradicted by the text of the later Geneva Convention IV, which does include “imperative military reasons”, and the Geneva Convention is more authoritative than the views of one judge advocate.²²⁰

The expression “imperative military reasons” appears in Article 49(2) of Geneva Convention IV.²²¹ Von Manstein’s verdict was announced in December 1949, several months after the adoption of the Geneva Con-

²¹³ *Rauter*, *supra* note 56, at 543.

²¹⁴ *See von Manstein*, *supra* note 38, at 509-10.

²¹⁵ *See id.* at 521.

²¹⁶ *Id.* at 523.

²¹⁷ *Id.*

²¹⁸ According to the judge advocate, “any suggestion that the deportation was upon humanitarian grounds was expressly repudiated.” *Id.* But the fact that he made this observation does not necessarily mean that he regarded evacuation on humanitarian grounds as a lawful exception from the prohibition against deportation.

²¹⁹ *Prosecutor v. Krstić*, Case No. IT-98-33-T, Trial Judgement (Aug. 2, 2001).

²²⁰ *Id.* ¶ 526 n.1178.

²²¹ Geneva Convention IV, *supra* note 18, art. 49(2).

ventions.²²² It may very well be that the law espoused by the drafters of Geneva Convention IV, which allowed military necessity exceptions from the prohibition against deportation, was an improvement upon the law that did not allow such exceptions. Be that as it may, however, Geneva Convention IV was clearly not in force when von Manstein deported civilians from occupied Ukraine during World War II. Nor is it clear whether Article 49(2) of Geneva Convention IV codified a pre-existing customary rule. Article 6(b) of the Nuremberg Charter and Article II(1)(b) of Control Council Law No. 10, both adopted in 1945, list “deportation to slave labour or for any other purpose, of civilian population from occupied territory” as a war crime without qualification.²²³

Military necessity may be inadmissible even where it is *prima facie* admissible. One rule may expressly authorise exceptions on account of military necessity, but another (typically subsequent) rule may restrict or extinguish such exceptions. Thus, Article 53 of Geneva Convention IV prohibits the belligerent from destroying real or personal property in the territory he occupies “except where such destruction is rendered absolutely necessary by military operations.”²²⁴ It is generally agreed that the types of military operations envisaged in this exceptional clause include the so-called “scorched earth” policy by an occupying force in retreat.²²⁵ By virtue of Article 54(2) of Additional Protocol I,²²⁶ however, such a force is no longer eligible for this exception in respect of objects indispensable to the survival of the civilian population.²²⁷

²²² See von Manstein, *supra* note 38, at 510.

²²³ Nuremberg Charter, *supra* note 210, art. 6(b); Control Council Law No. 10 art. II(1)(b) (Dec. 20, 1945), reprinted in 1 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 xvi, xvii (1949).

²²⁴ Geneva Convention IV, *supra* note 18, art. 53.

²²⁵ See, e.g., 4 COMMENTARY: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 302 (Jean S. Pictet ed., 1958).

²²⁶ Additional Protocol I, *supra* note 1, art. 54(2) (“It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.”).

²²⁷ If militarily necessary, a party to the conflict may still destroy objects indispensable to the survival of the civilian population which are located in its own territory. See Additional Protocol I, *supra* note 1, art. 54(5); PILLOUD ET AL., *supra* note 1, ¶¶ 2120-23. According to the ICRC Customary Law Study, the rule contained in Article 54 embraces custom. See JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 189-93 (2005).

E. *Miscellaneous Observations*

1. Knowledge

The belligerent may not plead military necessity exclusively on the basis of hindsight. First, military necessity pleas must be assessed in the light of the purposes that the belligerent had in mind when he took the measure. The mere fact that an aimless measure happens to fulfil military purposes afterwards does not, retroactively, turn it into military necessity.

As noted earlier, in *Elon Moreh*, the Israeli Supreme Court did not dispute the strictly professional opinion of the Chief of Staff that the settlement, if established, would fulfil military purposes. Nor did the court question that he had advised the Ministerial Defence Committee of his opinion. Yet, the court nullified the requisition order on the ground that its underlying decision had been made primarily for political purposes and only secondarily for military purposes. It would appear, then, that the requisition would have been upheld only if it had been decided primarily for military purposes. This would entail the showing, at a minimum, that such purposes actually existed and were known to those who made the decision.

Justice Landau's observations in *Beit-El*²²⁸ are instructive here. In what appears to be a separate opinion, Justice Landau expressed his presumption that, on establishing the civilian settlement at Beit El, the military authorities "first gave thought and military planning to the act of settlement."²²⁹ Indeed, it is on this basis that Justice Landau distinguished the *Beit-El* case from the *Elon Moreh* case: "[t]his time [*i.e.* in the *Eron Moreh* case] it was not demonstrated . . . that in the establishment of the civilian settlement the act of settlement was preceded by the military authorities' thought and *military planning* (emphasis in the original - Trans.), as we noted in the *Beit-El* case."²³⁰

In *Hostage*, the U.S. Military Tribunal acquitted Lothar Rendulic of wanton destruction in Finmark, Norway.²³¹ Rendulic contended that he devastated the area as a precautionary measure against an anticipated

²²⁸ HCJ 606/78 Ayyub et al. v. Minister of Defence [1979], translated in 1 MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL 1967-1980: THE LEGAL ASPECTS app. A, at 371 (Meir Shamgar ed., 1982).

²²⁹ *Id.* at 386.

²³⁰ HCJ 390/79 Dweikat v. Gov't of Israel (*Elon Moreh*) [1979] IsrSC 34(1) 1, translated in 19 I.L.M. 148, 173-74 (1980). For an account of the political background to the difference between *Beit-El* and *Elon Moreh*, see DAVID KRETZMER, THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES 88-89 (2002).

²³¹ See United States v. List (*Hostage*), 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10 757 (1950).

attack by his superior Russian pursuers. A question arose as to whether the devastation was justified by military necessity.²³² The tribunal held:

We are not called upon to determine whether urgent military necessity for the devastation and destruction in the province of Finmark actually existed. We are concerned with the question whether the defendant at the time of its occurrence acted within the limits of honest judgement on the basis of the conditions prevailing at the time. The course of a military operation by the enemy is loaded with uncertainties, such as the numerical strength of the enemy, the quality of his equipment, his fighting spirit, the efficiency and daring of his commanders, and the uncertainty of his intentions. These things when considered with his own military situation provided the facts or want thereof which furnished the basis for the defendant's decision to carry out the "scorched earth" policy in Finmark as a precautionary measure against an attack by superior forces. It is our considered opinion that the conditions, as they appeared to the defendant at the time were sufficient upon which he could honestly conclude that urgent military necessity warranted the decision made. This being true, the defendant may have erred in the exercise of his judgement but he was guilty of no criminal act.²³³

The evidence adduced at trial showed that military necessity did not, in fact, exist. The tribunal ruled however that Rendulic's genuinely perceived danger of an enemy attack, under the circumstances prevailing at the time, should not be second-guessed simply because the full facts as they had become subsequently available contradicted or otherwise undermined his original perception about the danger.²³⁴ This ruling would be

²³² It is arguable that, at the relevant moment, the Finmark region resembled territory under belligerent occupation. The rule considered in the case, however, was Article 23(g) of the Hague Regulations concerning armed hostilities, rather than Articles 46-56 of the same Regulations concerning the treatment of property in occupied territory. See Hague Regulations, *supra* note 20.

²³³ *Hostage*, 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10 at 1297; see also United States v. von Leeb (*High Command*), 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10 1, 541 (1951) ("Defendants in this case were in many instances in retreat under arduous conditions wherein their commands were in serious danger of being cut off. Under such circumstances, a commander must necessarily make quick decisions to meet the particular situation of his command. A great deal of latitude must be accorded to him under such circumstances. What constitutes devastation beyond military necessity in these situations requires detailed proof of an operational and tactical nature."). Accordingly, in *High Command*, two accused were acquitted of property destruction in occupied territory. See *id.* at 609 (judgement as to defendant Hans Reinhardt); *id.* at 628 (judgement as to defendant Karl Hollidt).

²³⁴ *Hostage*, 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10 at 1296 ("There is evidence in

sensible only if it were significant that Rendulic did indeed know what the military purpose of the devastation was. If this were the case, however, the reverse would also be the case. Where the evidence makes it clear that the belligerent did not act in pursuit of any genuinely perceived military purpose, he would not be entitled to claim otherwise on account of hindsight. As noted earlier, *Elon Moreh* supports the view that the mere potentiality of “right” results does not necessarily imply the existence of “right” purposes.

Second, a given measure’s reasonable availability to the belligerent, its material relevance to his stated military purpose and the scope and nature of its injuriousness should be assessed on the basis of his contemporaneous and *bona fide* knowledge thereof. If, in view of the information available to him at the time, the belligerent honestly believed that the measure he was taking was required for the attainment of his purpose, his belief should not be second-guessed on account of subsequent events. It would follow that it need not be shown that the belligerent did in fact achieve his purpose.

Emphasis on the belligerent’s contemporaneous and *bona fide* knowledge about the measure’s requiredness is particularly important in active combat. Its exigencies may leave the belligerent with no option but to

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 judgement, 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.”); *von Manstein*, *supra* note 38, at 522. In his summary to the British Military Court at Hamburg, the judge advocate reiterated the principles of no second-guessing and *in dubio pro reo*:

In coming to a conclusion on this question as to whether the destruction caused by the accused was excusable upon this ground [of military necessity], it is essential that you should view the situation through the eyes of the accused and look at it at the time when the events were actually occurring. It would not be just or proper to test the matter in the light of subsequent events, or to substitute an atmosphere of calm deliberation for one of urgency and anxiety. You must judge the question from this standpoint: whether the accused having regard to the position in which he was and the conditions prevailing at the time acted under the honest conviction that what he was doing was legally justifiable. If, in regard to any particular instance of seizure or destruction, you are left in doubt upon the matter, then the accused is entitled to have that doubt resolved in his favour.

Id.

There is a clear link between the contemporaneous knowledge requirement of military necessity as an exception, on the one hand, and mistake of fact as a negation of the mental element required by a crime, on the other. This link, however, is a matter that goes beyond the scope of this article.

articulate a military purpose, identify a range of available and relevant measures, evaluate their relative injuriousness and assess their proportionality - and to do so in a very short period of time, on the basis of very poor information and under very stressful circumstances.

Conversely, the belligerent would not be entitled to take advantage of the hindsight and claim that the measure was required where the evidence makes it clear that he acted without such knowledge. This would be so, in principle, even if the purpose actually materialised. One may refer to the ruling of an ICTY trial chamber in the *Galija* case²³⁵ - albeit in an admittedly different context of proportionality in attacks. The chamber held: “[i]n determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack.”²³⁶

One incident considered by the chamber involved two shells landing and exploding amid an impromptu football match in a residential area of Sarajevo. All players were off-duty combatants, surrounded by approximately 200 civilian and combatant spectators. According to one military report, the explosions killed six combatants and five civilians, and wounded fifty-five combatants and thirty-two civilians.²³⁷ These numbers are classic examples of hindsight. Unless one was to somewhat arbitrarily assign different values to different types of human life, it would be difficult if not impossible to say definitively whether the attack was proportionate or disproportionate. The majority of the trial chamber declared the attack unlawful, but *not* on the basis of the eventual casualty figures. Rather, it did so on the basis of the consequences that the attack “would clearly be expected” to generate: “[a]lthough the number of soldiers present at the game was significant, an attack on a crowd of approximately 200 people, including numerous children, would clearly be expected to cause incidental loss of life and injuries to civilians excessive in relation to the direct and concrete military advantage anticipated.”²³⁸

It would appear that, in the view of the *Galija* Trial Chamber, the arguably proportionate casualty figures do not retroactively alter the clear expectations that an attack such as the one in question *would* cause disproportionate civilian casualties.

2. Urgency

According to several commentators, it is not sufficient that the measure is required for the attainment of its military purpose. In their view, it

²³⁵ Prosecutor v. *Galija*, Case No. IT-98-29-T, Judgement and Opinion (Dec. 5, 2003).

²³⁶ *Id.* ¶ 58 (footnotes omitted).

²³⁷ *Id.* ¶¶ 386-87.

²³⁸ *Id.* ¶ 387.

must be required *urgently*.²³⁹ Analogous terms are also used in several treaty provisions.²⁴⁰ Does this mean that urgency is a self-standing requirement of exceptional military necessity?

It is possible that urgency is an aspect of military necessity. But, if it is, then urgency or a lack thereof is already implied in the notion of the measure being “required” or “not required” for the attainment of its purpose. Recall that in order for a given measure to be considered “required” for a particular purpose, it must be the least injurious of the alternatives that are reasonably available and materially relevant at the time, and it must remain in proportion to the gain that it would achieve. The range of such alternatives, as well as the degree of thoroughness with which the belligerent would be expected to assess them, would in general increase or decrease with the amount of time he had before making a decision. The less urgent an action was in view of a particular purpose, the more carefully the belligerent would be expected to choose it and hence the more effectively he would be expected to minimise its injurious effect.

Thus, where the purpose was not urgent for the belligerent at the time, it would be appropriate for the trier of fact to assess critically the availability of relevant alternatives and their respective degrees of injuriousness. For example, what would have happened if Rendulic had genuinely felt the Russian attack to be less imminent? Such a feeling might not have stopped Rendulic from considering the devastation of Finmark as a plausible precautionary measure against such an attack. But he would have considered it - or, in any event, he would have been expected to consider it - against a wider range of alternatives. And this wider range of options might very well have included at least one option that would be less injurious than devastating Finmark.

Where the purpose was urgent, the trier of fact might grant that the measure taken by the belligerent - though perhaps not as carefully chosen or harmless as it would otherwise have been - was really the best anyone in his position could do at the time.

3. Degrees

In certain treaty provisions, exceptional military necessity appears with qualifying adverbs or adjectives such as “imperative(ly),”²⁴¹ “abso-

²³⁹ See, e.g., Downey, *supra* note 66, at 254-56 (“urgent need admitting of no delay”); McDougal & Feliciano, *supra* note 69, at 72 (“prompt realization”); O’Brien, *supra* note 12, at 138-41 (“immediately indispensable”).

²⁴⁰ See, e.g., Geneva Convention I, *supra* note 18, art. 33 (“urgent military necessity”); *id.* art. 34 (“urgent necessity”); Geneva Convention II, *supra* note 18, art. 28 (“urgent military necessity”).

²⁴¹ See, e.g., Hague Regulations, *supra* note 20, art. 23(g) (“imperatively demanded by the necessities of war”); Geneva Convention I, *supra* note 18, art. 8 (“imperative military necessities”); Geneva Convention II, *supra* note 18, art. 8 (“imperative

lute(ly)”²⁴² and “unavoidable.”²⁴³ In other provisions, the notion appears with no such adverbs or adjectives.²⁴⁴ This textual discrepancy has led some commentators to suggest that there is a hierarchy of military necessity.²⁴⁵ Meanwhile, other commentators have expressed their doubts.²⁴⁶

military necessities”); Geneva Convention IV, *supra* note 18, art. 49 (“imperative military reasons”); Geneva Convention III, *supra* note 18, art. 126 (“imperative military necessity”); Geneva Convention IV, *supra* note 18, art. 143 (“imperative military necessity”); Hague Cultural Property Convention, *supra* note 24, art. 4(2) (“military necessity imperatively requires”); Additional Protocol I, *supra* note 1, arts. 54(5), 62(1), 67(4), 71(3) (“imperative military necessity”); Additional Protocol II, *supra* note 18, art. 17(1) (“imperative military reasons”); ICC Statute, *supra* note 25, art. 8(2)(b)(xiii) (“imperatively demanded by the necessities of war”); *id.* art. 8(2)(e)(xii) (“imperatively demanded by the necessities of the conflict”); *id.* art. 8(2)(e)(viii) (“imperative military reasons”); Hague Cultural Property Protocol II, *supra* note 24, art. 6 (“imperative military necessity”).

²⁴² See, e.g., Hague Regulations, *supra* note 20, art. 54 (“absolute necessity”); Geneva Convention IV, *supra* note 18, art. 53 (“absolutely necessary by military operations”).

²⁴³ See, e.g., Hague Cultural Property Convention, *supra* note 24, art. 11(2) (“unavoidable military necessity”).

²⁴⁴ See, e.g., Nuremberg Charter, *supra* note 210, art. 6(b); Geneva Convention I, *supra* note 18, art. 50; Geneva Convention II, *supra* note 18, art. 51; Geneva Convention IV, *supra* note 18, art. 147; The Secretary General, *Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993)*, arts. 2(d), 3(b), *delivered to the Security Council*, U.N. Doc. S/25704 (May 3, 1993); ICC Statute, *supra* note 25, art. 8(2)(a)(iv).

²⁴⁵ See, e.g., SCHWARZENBERGER, *supra* note 9, at 134-35 (referring to the Nuremberg Charter as adopting a “more lenient” test for military necessity than the “imperatively demanded” military necessity under the Hague Regulations); E. Rauch, *Le Concept de Nécessité Militaire Dans le Droit de la Guerre*, 19 REVUE DE DROIT PÉNAL MILITAIRE ET DE DROIT DE LA GUERRE 209, 216-18 (1980) (distinguishing among *nécessité militaire* “simple,” *nécessité militaire* “inéclutable, la plus grave ou urgente,” *nécessité militaire* “absolute,” and *nécessité militaire* “impérieuse”); Sylvie-S. Junod, *Article 17*, in COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 1, ¶ 4853. Pertile states that “[n]ecessity being qualified by Article 53 [of Geneva Convention IV] as ‘absolute,’ one may moreover think that a generic military advantage would not be sufficient.” Pertile, *supra* note 9, at 136; see also *id.* at 151-52.

²⁴⁶ See, e.g., McCoubrey, *Military Necessity*, *supra* note 50, at 224 (“The practical distinction between ‘military necessity’ and ‘imperative military necessity’ is far from clear, but the details of ‘Nuremberg’ jurisprudence does not appear to support the contention of a loosening of a critical standard.”); *id.* at 234 (“The precise significance of the addition of the term ‘imperative’ is less than wholly clear”). See also ROGERS, *supra* note 8, at 145 (regarding “imperative” military necessity versus “unavoidable” military necessity); *id.* at 152 (quoting Carcione’s dismissive account of the different shades of military necessity implied in the conventional régime of cultural property protection). Dinstein observed that “[t]he addition of the adverb/adjective indicates that when military necessity is weighed, this has to be done with great care. But great care in the application of [the law of international armed conflict] must be wielded at

Indeed, there might be something counterintuitive about scaling different degrees of military necessity - such as, for example, from “mere” military necessity to “unavoidable” military necessity and then to “imperative” military necessity. It would be particularly so if military necessity were understood to denote an action without which the belligerent could not hope to achieve his professed purpose in the first place. It would be less odd, however, should one accept the three aforementioned criteria for the measures to be considered “required” for the purpose. Where the expression “military necessity” is modified by a restrictive adjective, it *could* mean, for example, that the interests protected are considered so important that the belligerent ought to:

- i. Search more extensively for measures other than the one being contemplated that may be reasonably available and materially relevant to the purpose;
- ii. Evaluate more vigorously the relative injuriousness between all reasonably available and materially relevant measures identified; and
- iii. Set a more stringent standard of acceptable benefit-injury ratio for the measure being considered.²⁴⁷

In other words, it is not inconceivable that a given measure passes the “ordinary” military necessity threshold and yet it fails to pass a “higher” military necessity threshold.

4. Competence

Under certain circumstances, a person’s reliance on military necessity may become invalid by virtue of his status alone. For example, only the commanders of forces in the field are authorised to make use of the buildings, material and stores of fixed medical establishment in case of urgent military necessity.²⁴⁸ Similarly, where fighting occurs on a warship, its sick-bays and their equipment may be used for other purposes if militarily necessary only by the commander into whose power they have fallen.²⁴⁹

Within the context of cultural property, potential abuses of military necessity exceptions became the subject of particular concern.²⁵⁰ This concern resulted in the adoption of Article 11(2) of the 1954 Hague Cul-

all times.” DINSTEN, *CONDUCT OF HOSTILITIES*, *supra* note 9, at 19-20 (footnote omitted).

²⁴⁷ Pertile appears to make similar suggestions. *See* Pertile, *supra* note 9, at 151-52.

²⁴⁸ *See* Geneva Convention I, *supra* note 18, art. 33.

²⁴⁹ *See* Geneva Convention II, *supra* note 18, art. 28.

²⁵⁰ *See, e.g.*, Jiří TOMAN, *THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT: COMMENTARY ON THE CONVENTION FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT AND ITS PROTOCOL, SIGNED 14 MAY, 1954 IN THE HAGUE, AND ON OTHER INSTRUMENTS OF INTERNATIONAL LAW CONCERNING SUCH PROTECTION* 79, 146-47 (1996).

tural Property Convention, which designates an officer competent to establish military necessity.²⁵¹ In respect of cultural property “specially protected” under Article 9 of the convention, only an officer commanding a force the equivalent of a division in size or larger may establish “unavoidable military necessity” whereby the property’s immunity is withdrawn.²⁵² Article 4(2) of the convention permits the belligerent to waive his obligations under Article 4(1) if “military necessity imperatively requires such a waiver.”²⁵³ The convention itself contains no restriction as to who is authorised to invoke Article 4(2). According to Article 6(c) of the 1999 Hague Cultural Property Protocol II, however, only an officer commanding a force the equivalent of a battalion in size or larger, or a force smaller in size where circumstances do not permit otherwise, may invoke Article 4(2).²⁵⁴

It has been suggested that IDF commanders lack the power to seize property in occupied Palestine because Israel “[does] not have such power at all.”²⁵⁵ This view emanates from the argument that Article 23(g) of the Hague Regulations - which, if applicable, would have vested the commander with such power - does not apply to situations of belligerent occupation.²⁵⁶ The issue raised in this argument is whether the law applies to the IDF commanders to begin with, rather than whether the applicable law properly authorises them.

VI. MILITARY NECESSITY AND THE ICTY

To date, the International Criminal Tribunal for the Former Yugoslavia (ICTY) has not defined military necessity. Nor has it discussed the requirements of military necessity at any length. Yet the tribunal’s various chambers have not shied away from making factual determinations about the existence or absence of military necessity in the context of specific incidents.

These factual determinations have been made in connection with two crime categories: (i) large-scale property destruction, of which the absence of military necessity appears as an element; and (ii) forcible displacement of persons. Since temporary evacuation is not unlawful if, *inter alia*, “imperative military reasons” so demand, it must be shown that the victim’s displacement was either permanent or, though temporary, not demanded by imperative military reasons.

²⁵¹ Hague Cultural Property Convention, *supra* note 24, art. 11(2).

²⁵² *Id.* art. 4(1).

²⁵³ *Id.* art. 4(2).

²⁵⁴ Hague Cultural Property Protocol II, *supra* note 24, art. 6(c).

²⁵⁵ Orakhelashvili, *supra* note 101, at 137.

²⁵⁶ *See id.*

A. *Absence of Military Necessity as an Element of Large-Scale Property Destruction*

The ICTY Statute empowers the tribunal to prosecute large-scale property destruction under three headings. They are:

- a) Article 2(d), a grave breach of the 1949 Geneva Conventions;²⁵⁷
- b) Article 3(b), a violation of the laws or customs of war;²⁵⁸ and
- c) Article 5(h), a crime against humanity.²⁵⁹

Causing “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly” constitutes a grave breach of Geneva Conventions I, II and IV.²⁶⁰ This grave breach is incorporated into Article 2(d) of the ICTY Statute.²⁶¹ As of 31 March 2009, the tribunal has considered Article 2(d) charges in respect of five cases.²⁶²

Several tribunal decisions have distinguished between two types of property under Article 2(d).²⁶³ The first type includes civilian hospitals, medical aircraft and ambulances, which are “generally protected” by the Geneva Conventions.²⁶⁴ Property of this type is “generally protected” from destruction or appropriation because it is protected irrespective of

²⁵⁷ Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, art. 2(d), U.N. Doc. S/RES/827 (May 25, 1993), *reprinted in* 32 I.L.M. 1192 [hereinafter ICTY Statute].

²⁵⁸ *Id.* art. 3(b).

²⁵⁹ *Id.* art. 5(h).

²⁶⁰ Geneva Convention I, *supra* note 18, art. 50; Geneva Convention II, *supra* note 18, art. 51; Geneva Convention IV, *supra* note 18, art. 147.

²⁶¹ ICTY Statute, *supra* note 257, art. 2(d).

²⁶² See *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Sixth Amended Indictment, count 10 (Dec. 9, 2003) (“[u]nlawful and wanton extensive destruction and appropriation of property, not justified by military necessity”); *Prosecutor v. Blaškić*, Case No. IT-95-14, Second Amended Indictment, count 11 (Apr. 25, 1997) (“extensive destruction of property”); *Prosecutor v. Kordić & Ćerkez*, Case No. IT-95-14/2, Amended Indictment, counts 37, 40 (Sept. 30, 1998) (“extensive destruction of property”); *Prosecutor v. Naletilić & Martinović (Tuta & Štela)*, Case No. IT-98-34-PT, Second Amended Indictment, count 19 (Sept. 28, 2001) (“extensive destruction of property”); *Prosecutor v. Rajić*, Case No. IT-95-12-PT, Indictment, count 5 (Aug. 23, 1995) (“destruction of property”); *id.* count 9 (Jan. 13, 2004) (“extensive destruction not justified by military necessity and carried out unlawfully and wantonly”).

²⁶³ See *Prosecutor v. Kordić & Ćerkez*, Case No. IT-95-14/2-T, Trial Judgement, ¶ 341 (Feb. 26, 2001); *Prosecutor v. Tuta & Štela*, Case No. IT-98-34-T, Trial Judgement, ¶ 575 (Mar. 31, 2003); *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Trial Judgement, ¶ 586 (Sept. 1, 2004).

²⁶⁴ See *Kordić & Ćerkez*, Case No. IT-95-14/2-T, Trial Judgement, ¶ 336; *Tuta & Štela*, Case No. IT-98-34-T, Trial Judgement, ¶ 575; *Brđanin*, Case No. IT-99-36-T, Trial Judgement, ¶ 586 n.1490.

its location.²⁶⁵ The *Naletilić and Martinović* (“*Tuta and Štela*”) and *Brđanin* Trial Chambers apparently concluded that military necessity exceptions do not apply to the prohibition against the destruction of property under “general protection.”²⁶⁶ It is debatable, however, whether this conclusion finds support in the plain language of either Article 2(d) of the ICTY Statute or in Article 50/51/147 of Geneva Convention I/II/IV, which underpins it. To be sure, those provisions of international humanitarian law cited by the two chambers²⁶⁷ protect the

²⁶⁵ It appears that the intended juxtaposition is one between “general protection” in the sense that protection is not territorially conditional, on the one hand, and “limited protection” in the sense that protection is territorially conditional, on the other. One might say instead that the former would be more appropriately described as “special protection” or “enhanced protection” and the latter as “general protection.”

²⁶⁶ See *Tuta & Štela*, Case No. IT-98-34-T, Trial Judgement, ¶¶ 575, 577 (“[T]wo types of property are protected under the grave breach regime: i) property, regardless of whether or not it is in occupied territory, that carries general protection under the Geneva Conventions of 1949, such as civilian hospitals, medical aircraft and ambulances [irrespective of any military need to destroy them]; and ii) property protected under Article 53 of the Geneva Convention IV, which is real or personal property situated in occupied territory *when the destruction was not absolutely necessary by military operations*. . . . The Chamber considers that a crime under Article 2(d) of the Statute has been committed when: . . . iii) the extensive destruction regards property carrying general protection under the Geneva Conventions of 1949, or; the extensive destruction *not absolutely necessary by military operations* regards property situated in occupied territory . . .”) (footnotes omitted) (emphasis added); see also, *Brđanin*, Case No. IT-99-36-T, Trial Judgement, ¶¶ 586, 588 (“Two types of property are protected under Article 2(d): 1. real or personal property in occupied territory, belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organisations (*except where such destruction is rendered absolutely necessary by military operations*); 2. property that carries general protection under the Geneva Conventions of 1949 regardless of its location [here reference is made to *Tuta & Štela*, Case No. IT-98-34-T, Trial Judgement, ¶ 575, just quoted above - see footnote 1490 in the judgement]. . . . *The prohibition of destruction of property situated in occupied territory* is subject to an important reservation. It does not apply in cases ‘where such destruction is rendered absolutely necessary by military operations.’”) (footnotes omitted) (emphasis added).

²⁶⁷ See *Tuta & Štela*, Case No. IT-98-34-T, Trial Judgement, ¶ 575 n.1436 (“Several kinds of property are generally protected by the Conventions, irrespective of any military need to destroy them. See Chapters III, V and VI of Geneva Convention I (Protecting medical units, vehicles, aircraft, equipment and material) and Articles 22-35 (protecting hospital ships) and Articles 38-40 (protecting medical transports) of Geneva Convention II. See also Article 18 of Geneva Convention IV which provides that a civilian hospital ‘may in no circumstances be the object of an attack, but shall at all times be respected and protected by the parties to the conflict.’”); see also *Brđanin*, Case No. IT-99-36-T, Trial Judgement, ¶ 586 n.1490 (“Several provisions of the Geneva Conventions identify particular types of property accorded general protection. For example, Article 18 (protection of civilian hospitals), Articles 21 and

property in question from *attacks* regardless of military necessity. But this does not necessarily mean that these provisions also protect the property - and, in particular, immobile property such as buildings - from *destruction* regardless of military necessity.²⁶⁸ As will be shown, the destruction of property may, but need not, constitute an attack against that property or *vice versa*.

Real and personal property in occupied territory forms the second type of property falling within the scope of Article 2(d) of the ICTY Statute.²⁶⁹ So far, all Article 2(d) charges have involved the destruction and/or appropriation of real and personal property located in what the prosecution alleged was occupied territory. Yet it has become increasingly difficult for the prosecution to prove the existence of belligerent occupation.²⁷⁰ This difficulty - together with considerations of judicial economy and a perceived lack of difference between the culpability of an accused convicted under Article 2(d) and the culpability of an accused convicted under Article 3(b) - appears to have led to a decrease in the number of charges brought under Article 2(d).

Article 3(b) of the ICTY Statute provides for the prosecution of “wanton destruction of cities, towns or villages, or devastation not justified by

22 (protection of land, sea and air medical transports), of Geneva Convention IV; Articles 38-39 (protecting ships and aircraft employed for medical transport) of Geneva Convention II, A [sic]; Articles 19-23 (protection of medical units and establishments), Articles 33-34 (protection of buildings and materials of medical units or of aid societies), Articles 35-37 (protection of medical transports), of Geneva Convention I.”).

²⁶⁸ See, e.g., COMMENTARY: GENEVA CONVENTION I FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 276 (Jean Pictet ed., 1952) (“The provision [prohibiting intentional destruction of material and stores defined in Article 33, Geneva Convention I] covers the material of both mobile units and fixed establishments. It also refers to stores of material, but only to those belonging to fixed establishments, as the nature of mobile units excludes their having stores in the real sense. *The stipulation does not, however, cover the actual buildings, which may in certain extreme cases have to be destroyed for tactical reasons.*”) (emphasis added); see also COMMENTARY GENEVA CONVENTION IV, *supra* note 225, at 601 (“[T]he destruction and appropriation mentioned here are dependent on the necessities of war.”).

²⁶⁹ See Prosecutor v. Rajiæ, Case No. IT-95-12-R61, Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence, ¶ 42 (Sept. 13, 1996); *Blaškiæ*, Case No. IT-95-14-T, Trial Judgement, ¶¶ 148-50; Prosecutor v. Kordiæ & Èerkez, Case No. IT-95-14/2-T, Trial Judgement, ¶¶ 337-41 (Feb. 26, 2001); Prosecutor v. Tuta & Štela, Case No. IT-98-34-T, Trial Judgement, ¶ 575 (Mar. 31, 2003); Prosecutor v. Bröanin, Case No. IT-99-36-T, Trial Judgement, ¶¶ 586, 588.

²⁷⁰ See *Kordiæ & Èerkez*, Case No. IT-95-14/2-T, Trial Judgement, ¶ 808; *Tuta & Štela*, Case No. IT-98-34-T, Trial Judgement, ¶¶ 586-88; *Bröanin*, Case No. IT-99-36-T, Trial Judgement, ¶¶ 637-39.

military necessity,” a violation of the laws or customs of war.²⁷¹ Several cases have been tried under this article.²⁷²

It is sometimes suggested that “wanton destruction of cities, towns or villages,” on the one hand, and “devastation not justified by military necessity,” on the other, are two distinct offences.²⁷³ On this view, the former offence would not admit military necessity exceptions. The drafting history of Article 6(b) of the Nuremberg Charter - from which Article 3(b) of the ICTY Statute is drawn verbatim - appears to indicate that the two notions could be considered distinct.²⁷⁴

²⁷¹ ICTY Statute, *supra* note 257, art. 3(b).

²⁷² See, e.g., Prosecutor v. Orić, Case No. IT-03-68-PT, Third Amended Indictment, counts 3, 5 (June 30, 2005) (“wanton destruction of cities, towns or villages, not justified by military necessity”); Prosecutor v. Strugar, Case No. IT-01-42-PT, Third Amended Indictment, count 4 (Dec. 10, 2003) (“devastation not justified by military necessity”); Prosecutor v. Brđanin, Case No. IT-99-36, Sixth Amended Indictment, count 11 (Dec. 9, 2003) (“[w]anton destruction of cities, towns or villages, or devastation not justified by military necessity”); Prosecutor v. Babić, Case No. IT-03-72, Indictment, count 4 (Nov. 6, 2003) (“wanton destruction of villages, or devastation not justified by military necessity”); Prosecutor v. Hadžihasanović & Kubura, Case No. IT-01-47-PT, Third Amended Indictment, count 5 (Sept. 26, 2003) (“wanton destruction of cities, towns or villages, not justified by military necessity”); Prosecutor v. Miodrag Jokić, Case No. IT-01-42, Second Amended Indictment, count 4 (Aug. 26, 2003) (“devastation not justified by military necessity”); Prosecutor v. Martić, Case No. IT-95-11-PT, Second Amended Indictment, count 12 (July 14, 2003) (“wanton destruction of villages, or devastation not justified by military necessity”); Prosecutor v. Naletilić & Martinović (Tuta & Štela), Case No. IT-98-34-PT, Second Amended Indictment, count 20 (Sept. 28, 2001) (“wanton destruction not justified by military necessity”); Prosecutor v. Rajić, Case No. IT-95-12-PT, Indictment, count III (Sept. 28, 2001) (“wanton destruction of the village”); *id.* count 6 (“destruction of property”); *id.* count 10 (Amended Indictment) (“wanton destruction of a city or devastation not justified by military necessity”); Prosecutor v. Kordić & Ćerkez, Case No. IT-95-14/2, Amended Indictment, count 41 (Sept. 30, 1998) (“wanton destruction not justified by military necessity”); Prosecutor v. Blaškić, Case No. IT-95-14, Second Amended Indictment, counts 2, 12 (Apr. 25, 1997) (“devastation not justified by military necessity”).

²⁷³ See, e.g., Prosecutor v. Hadžihasanović & Kubura, Case No. IT-01-47-AR73.3, Joint Defence Interlocutory Appeal of Trial Chamber Decision on Enver Hadžihasanović and Amir Kubura’s Rule 98bis Motions for Acquittal, ¶ 26 (Nov. 2, 2004).

²⁷⁴ The charter’s July 11, 1945 draft contained the expression “the wanton destruction of towns and villages.” See ROBERT H. JACKSON, REPORT OF ROBERT H. JACKSON UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS 197 (U.S. Dept. State 1949). This formulation remained essentially unchanged throughout the negotiations. See *id.* at 205, 293, 327, 351, 359, 373-74, 390, 392-93. It is in the U.S. revision submitted on July 31 that the expression “wanton destruction of cities, towns or villages; devastation not justified by military necessity,” separated by a semicolon, first appeared. See *id.* at 395. The record of the August 2 discussion does not reveal any information about this last-minute addition.

It is submitted here, however that, even if the two offences were to be considered distinct, they would share a common aspect in the sense that they only criminalize property destruction that is not justified by military necessity. Acts constituting “wanton destruction of cities, towns or villages” have consistently been interpreted to be those not justified by military necessity. For example, the International Military Tribunal found that “[c]ities and towns and villages were wantonly destroyed without military justification or necessity.”²⁷⁵ Article II(1)(b) of Control Council Law No. 10 lists “wanton destruction of cities, towns or villages, or devastation not justified by military necessity” as a war crime. Neither the indictments nor the judgements in *High Command* and *Hostage* divided Article II(1)(b) into subgroups.

There are only two decisions within the ICTY’s jurisprudence in which Article 3(b) was held to contain two distinct offences. In *Hadžihasanović and Kubura*, the appeals chamber discussed “the wanton destruction of cities, towns or villages” as one offence articulated in Article 3(d) of the statute, and “devastation not justified by military necessity” as another.²⁷⁶ Even there, however, the chamber did not cite any authority in support of this distinction; in any event, it noted that “wanton destruction of cities, towns or villages not justified by military necessity” was a customary prohibition.²⁷⁷ The other decision is the *Strugar* Trial Judgement, according to which “Article 3(b) codifies two crimes: ‘wanton destruction of cities, towns or villages, or devastation not justified by military necessity.’”²⁷⁸ Late in the same judgement, however, the trial chamber defined the elements of the crime of “wanton destruction not justified by military necessity.”²⁷⁹ It may be that the expressions “wanton”²⁸⁰ and “not justified by military necessity” are functionally synonymous. At any rate, it appears uncontroversial in contemporary international humanitarian law and international criminal law that large-scale, militarily unnecessary prop-

See id. at 399-419. Nor is it clear how, after August 2, the semicolon was replaced by the combination of a comma and the word “or.” The charter was adopted six days later, on August 8, 1945.

²⁷⁵ United States v. Göring, 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 411, 470 (1948) [hereinafter *Nuremberg Judgement*].

²⁷⁶ *See* Prosecutor v. Hadžihasanović & Kubura, Case No. IT-01-47-AR73.3, Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98bis Motions for Acquittal, ¶ 29 (Mar. 11, 2005) [hereinafter *Decision on Joint Defence*].

²⁷⁷ *Id.* ¶ 30.

²⁷⁸ Prosecutor v. Strugar, Case No. IT-01-42-T, Trial Judgement, ¶ 291 (Jan. 31, 2005).

²⁷⁹ *Id.* ¶ 292.

²⁸⁰ The French term used is “sans motif” - *i.e.*, “without good reason.”

erty destruction is generally prohibited, and that violation of this general prohibition is treated as a war crime.²⁸¹

Article 5(h) of the ICTY Statute specifies “persecutions on religious, political and racial grounds” as a crime against humanity.²⁸² According to the tribunal’s jurisprudence, property destruction may amount to persecutions under certain circumstances.²⁸³ The tribunal has adjudicated property destruction as an underlying act of persecutions in relation to several cases.²⁸⁴

²⁸¹ See, e.g., Hague Regulations, *supra* note 20, arts. 23(g), 56; Nuremberg Charter, *supra* note 210, art. 6(b); Control Council Law No. 10, *supra* note 223, art. II(1)(b); Geneva Convention I, *supra* note 18, art. 50; Geneva Convention II, *supra* note 18, at 51; Geneva Convention IV, *supra* note 18, arts. 53, 147; ICC Statute, *supra* note 25, arts. 8(2)(b)(xiii), 8(2)(e)(xii).

²⁸² ICTY Statute, *supra* note 257, art 5(h).

²⁸³ See, e.g., Prosecutor v. Krajišnik, Case No. IT-00-39-T, Trial Judgement, ¶¶ 773-79 (Sept. 27, 2006); Prosecutor v. Blagojević & Jokić, Case No. IT-02-60-T, Trial Judgement, ¶ 594 (Jan. 17, 2005); Prosecutor v. Kordić & Ćerkez, Case No. IT-95-14/2-A, Appeal Judgement, ¶108 (Dec. 17, 2004); Prosecutor v. Stakić, Case No. IT-97-24-T, Trial Judgement ¶ 764 (July 31, 2003); Prosecutor v. Blaškić, Case No. IT-95-14-A, Appeal Judgement, ¶ 149 (July 27, 2004); Prosecutor v. Naletilić & Martinović (*Tuta & Stela*), Case No. IT-98-34-T, Trial Judgement, ¶ 704 (Mar. 31, 2003); Prosecutor v. Krajišnik & Plavšić, Case No. IT-00-39&40/1-S, Sentencing Judgement, ¶ 15 (Feb. 27, 2003); Prosecutor v. Kvočka, Case No. IT-98-30/1-T, Trial Judgement, ¶186 (Nov. 2, 2001); Prosecutor v. Kordić & Ćerkez, Case No. IT-95-14/2-T, Trial Judgement, ¶¶ 202, 205 (Feb. 26, 2001); Prosecutor v. Blaškić, Case No. IT-95-14-T, Trial Judgement, ¶¶ 227-28, 234 (Mar. 3, 2000).

²⁸⁴ Prosecutor v. Blagojević & Jokić, Case No. IT-02-60-T, Fourth Amended Joinder Indictment, count 5 (May 14, 2004) (“persecutions on political, racial and religious grounds [by way of] destruction of personal property and effects”); Prosecutor v. Brđanin, Case No. IT-99-36-T, Sixth Amended Indictment, count 3 (Dec. 9, 2003) (“persecutions [by way of] destruction [of property]”); Prosecutor v. Babiać, Case No. IT-03-72, Indictment, count 1 (Nov. 6, 2003) (“persecutions on political, racial and religious grounds [by way of] deliberate destruction of homes, other public and private property”); Prosecutor v. Deronjić, Case No. IT-02-61-PT, Second Amended Indictment, ¶¶ 36-37 (Sept. 29, 2003) (“persecutions [by way of] destruction of property”); Prosecutor v. Martić, Case No. IT-95-11-PT, Second Amended Indictment, count 1 (July 14, 2003) (“persecutions on political, racial and religious grounds [by way of] deliberate destruction of homes, other public and private property”); Prosecutor v. Blagojević et al., Case No. IT-02-60-PT, Amended Joinder Indictment, count 5 (May 27, 2002) (“persecutions on political, racial and religious grounds [by way of] destruction of personal property”); Prosecutor v. Stakić, Case No. IT-97-24-PT, Fourth Amended Indictment, count 6 (Apr. 10, 2002) (“persecutions [by way of] destruction [of residential and commercial properties]”); Krajišnik & Plavšić, Case No. IT-00-39 & 40-PT, Amended Consolidated Indictment, count 3 (Mar. 7, 2002) (“persecutions on political, racial and religious grounds [by way of] intentional and wanton destruction of private property including houses and business premises and public property”); Naletilić & Martinović (*Tuta & Stela*), Case No. IT-98-34-PT, Second Amended Indictment, count 1 (Sept. 21, 2001); Prosecutor

While some ICTY judgements clearly indicate the absence of military necessity as an element of persecutions by way of property destruction,²⁸⁵ others do not.²⁸⁶ This discrepancy is unfortunate because the destruction of property justified by military necessity constitutes neither a grave breach of the Geneva Conventions nor a violation of the laws and customs of war. Yet this discrepancy might be taken to leave open the possibility that even militarily necessary - and, therefore, lawful - property destruction could constitute persecutions.

B. *Instances of Militarily Unnecessary Property Destruction*

In *Kordić and Ćerkez*, several trial-level findings of militarily unnecessary property destruction were overturned on appeal.²⁸⁷ The appeals chamber found that no evidence had been adduced on the scale and manner of the destruction or on the absence of military necessity therefor.²⁸⁸ With respect to Nadioci, the chamber held:

It is not sufficient for the Prosecution to prove that destruction occurred. It also has to prove when and how the destruction occurred. It has to establish that the destruction was not justified by military necessity, which cannot be presumed and especially in the context of the Indictment in which the Prosecution pleaded that fighting continued until May 1994. The Appeals Chamber considers that in the absence of further evidence as to how the destruction

v. Krstić, Case No. IT-98-33, Amended Indictment, count 6 (Oct. 27, 1999) (“persecutions on political, racial and religious grounds [by way of] destruction of personal property”); Prosecutor v. Simić, Case No. IT-95-9, Second Amended Indictment, count 1 (Mar. 25, 1999) (“persecutions on political, racial and religious grounds [by way of] destruction [of property]”); Kordić & Ćerkez, No. IT-95-14/2-PT, Amended Indictment, counts 1, 2 (Sept. 30, 1998) (“persecutions on political, racial or religious grounds [by way of] wanton and extensive destruction [of property]”); Prosecutor v. Blaškić, Case No. IT-95-14-T, Second Amended Indictment, count 1 (Apr. 25, 1997) (“persecutions on political, racial or religious grounds [by way of] destruction [of property]”).

²⁸⁵ See, e.g., *Blaškić*, Case No. IT-95-14-T, Trial Judgement, ¶ 234; *Blaškić*, Case No. IT-95-14-A, Appeal Judgement, ¶¶ 146, 149; *Blagojević & Jokić*, Case No. IT-02-60-T, Trial Judgement, ¶ 593; *Krajišnik*, Case No. IT-00-39-T, Trial Judgement, ¶ 776.

²⁸⁶ See, e.g., *Kordić & Ćerkez*, Case No. IT-95-14/2-T, Trial Judgement, ¶ 205; *Kordić & Ćerkez*, Case No. IT-95-14/2-A, Appeal Judgement, ¶¶ 108-09; *Tuta & Štela*, Case No. IT-98-34-T, Trial Judgement, ¶¶ 238, 704, 706; Prosecutor v. Plavšić, Case No. IT-00-39 & 40/1-S, Sentencing Judgement, ¶ 15 (Feb. 27, 2003); *Stakić*, Case No. IT-97-24-T, Trial Judgement, ¶ 763.

²⁸⁷ See, e.g., *Kordić & Ćerkez*, Case No. IT-95-14/2-T, Trial Judgement, ¶¶ 572, 625-49, 665, 806-07 (regarding Merdani, Nadioci, Piriaei, Rotilj, Stari Vitez, and Vitez); *Kordić & Ćerkez*, Case No. IT-95-14/2-A, Appeal Judgement, ¶¶ 429, 465-66, 495, 503, 547 (regarding Merdani, Nadioci, Piriaei, Rotilj, and Stari Vitez).

²⁸⁸ See *Kordić & Ćerkez*, Case No. IT-95-14/2-A, Appeal Judgement, ¶ 495.

occurred, no reasonable trier of fact could find that wanton destruction not justified by military necessity . . . is established.²⁸⁹

That the timing of the property destruction in Nadioci had not been proven meant that the destruction might have occurred *during* the fighting. It is reasonable to assume that this, together with the lack of evidence on the manner in which the property was destroyed, gave rise to a reasonable doubt that Nadioci's property destruction was *caused* by the fighting.

Underneath the appeals chamber's ruling lies a complex relationship between property destruction and active combat. Where property destruction occurs amid active combat, what significance does the latter have on the military necessity or otherwise of the former? Conversely, where property is destroyed outside the context of combat, is such destruction perforce militarily unnecessary?

1. Property Destruction in the Context of Combat

a. *Lawfulness of the Underlying Military Activities*

The *Blaškiæ* Trial Chamber held that the property destruction in Ahmiæi, Šantiæi, Piriæi and Nadioci, as well as in Vitez and Stari Vitez, was militarily unnecessary because the underlying offensives on these localities were without military justification.²⁹⁰ In so holding, the chamber effectively set forth two propositions: (1) as a matter of fact, there was nothing in these localities that justified the offensives; and (2) as a matter of law, where an offensive is launched on a locality without military justification, military necessity is inadmissible in respect of property destruction that occurs during the course of that offensive.

The *Blaškiæ* Appeals Chamber rejected the first proposition. It found that there was, in fact, some military justification for the offensives on the localities concerned, and consequently, that they were not *per se* unlawful.²⁹¹ This finding left the second proposition of the trial chamber unaddressed by the appeals chamber. It is submitted here that the second proposition is correct as a matter of law to the extent that the property destruction forms part of the underlying military activities. As noted earlier, military necessity does not except measures based on purposes that are contrary to international humanitarian law. It would seem logical - indeed, truistic - to say that if an offensive is unlawfully launched on a

²⁸⁹ *Id.* Since the absence of military necessity for property destruction cannot be presumed, the onus rests with the prosecution to show this absence. *See* Prosecutor v. Oriæ, Case No. IT-03-68-T, Trial Judgement, ¶ 586 (June 30, 2006) (quoting *Kordić & Ćerkez*, Case No. IT-95-14/2-A, Appeal Judgement, ¶ 495). Showing the absence of military necessity entails, in turn, proving that at least one of its requirements was unfulfilled.

²⁹⁰ *Blaškiæ*, Case No. IT-95-14-T, Trial Judgement, ¶¶ 402-10, 507-12.

²⁹¹ *See* Prosecutor v. *Blaškiæ*, Case No. IT-95-14-A, Appeal Judgement, ¶¶ 235, 331-35, 437-38, 444 (July 27, 2004) (regarding Ahmiæi, Nadioci, Piriæi, Šantiæi, Stari Vitez, and Vitez).

locality, and if the offensive involves the destruction of property therein, then this destruction is devoid of military necessity. It does not follow *a contrario*, however, that the lawfulness of an offensive on a locality renders all property destruction that accompanies that offensive militarily necessary. Plainly, the underlying offensive's lawfulness is *not* determinative of the destruction's military necessity.²⁹²

What, then, *is* determinative? Articulating informed responses to this question involves distinguishing between the destruction of property that also constitutes an attack against that property, on the one hand, and the destruction of property that does not, on the other hand.

b. *Attack vs. Destruction*

Article 49(1) of Additional Protocol I defines "attacks" as "acts of violence against the adversary, whether in offence or in defence."²⁹³ There is no formal definition of "destruction" under international humanitarian law. Nevertheless, "attacks" and "destruction" are clearly interrelated. In active combat, the destruction of property typically takes the form of an attack against that property or an attack against some other objective in its vicinity. Similarly, when particular property becomes the object of an attack, this attack often results in the property being totally or partially destroyed.

Not every successful attack necessarily entails the destruction of its objective, however. During the 1999 Kosovo crisis, the North Atlantic Treaty Organisation (NATO) attacked some of Serbia's electrical power switch stations. According to news reports, NATO released small filaments of graphite over these facilities.²⁹⁴ This material caused large-scale short circuits, but, other than burnt fuses, left no material damage to the power switch stations attacked.²⁹⁵ Likewise, in 2003, the U.S. Air Force reportedly deployed an electromagnetic pulse (EMP) as a weapon in its attack against Iraq's satellite television network.²⁹⁶ Its programmes were

²⁹² The *Blaškić* Appeals Chamber stated that it "does not therefore consider that the attack of 16 April 1993 on Vitez and Stari Vitez was unlawful *per se*, but agrees with the Trial Chamber only to the extent that crimes were committed in the course of the attack." *Id.* at ¶¶ 438, 444.

²⁹³ Additional Protocol I, *supra* note 1, art. 49(1); see FRITS KALSHOVEN & LIESBETH ZEGVELD, *CONSTRAINTS ON THE WAGING OF WAR* 97 (2d ed. 2001) (noting that "'acts of violence' means acts of warfare involving the use of violent means: the term covers the rifle shot and the exploding bombs, not the act of taking someone prisoner (even though the latter may also involve the use of force)."); see also ROGERS, *supra* note 8, 27-29.

²⁹⁴ See, e.g., "Soft Bombs" Hit Hard, BBC News, May 3, 1999, <http://news.bbc.co.uk/2/hi/europe/334361.stm>; see also ROGERS, *supra* note 8, 27-29.

²⁹⁵ *Id.*

²⁹⁶ See, e.g., Joel Roberts, *U.S. Drops "E-Bomb" On Iraqi TV*, CBS News, Mar. 25, 2003, <http://www.cbsnews.com/stories/2003/03/25/iraq/printable546081.shtml>.

disrupted for several hours after the EMP temporarily disabled the broadcaster's equipment.²⁹⁷

If one were to insist that all attacks constitute destructions and *vice versa*, one would need to argue that NATO actually attacked the electrical power switch stations' fuses (rather than the stations themselves) and that the U.S. Air Force actually attacked the television network's circuitry (rather than the network itself). It is suggested here that this would not accord with the manner in which the two notions are ordinarily understood and used.

Nor, even if the belligerent launches an attack with a view to destroying an objective, does the attack necessarily cause the objective's destruction or damage. Thus, for instance, the ordnance may simply fail to detonate; the target may move sufficiently away from the area of impact to escape or withstand the blast; an undersupplied mortar battery may exhaust its limited rounds without hitting the target. Plainly, if an attack is launched against an objective, and if the objective survives the attack, this does not mean that no attack has taken place at all.²⁹⁸

Conversely, under certain circumstances, property may be destroyed without being attacked. In September 1944, the port city of Brest in Bretagne, France, experienced fierce urban combat between German and Allied forces.²⁹⁹ According to one account:

The battle for Brest entered its final but most painful stage. The 2d and 8th Division [of the U.S. Army] became involved in street fighting against [German] troops who seemed to contest every street, every building, every square. Machine gun and antitank fire from well-concealed positions made advances along the thoroughfares suicidal, and attackers had to move from house to house by blasting

²⁹⁷ *Id.*

²⁹⁸ See ICC Statute, *supra* note 25, art. 8(2)(b)(ii) (designating as a war crime the act of "[i]ntentionally directing attacks against civilian objects, that is, objects which are not military objectives.") A war crime does not require that the attacks result in the objects being destroyed or damaged. See Elements of Crimes, art. 6(b)(1), n.3, U.N. Doc. PCNICC/2000/L.1/Rev.1/Add. 2 (Apr. 7, 2000) [hereinafter ICC Elements of Crimes]. For the elements of launching attacks in the knowledge that it will cause disproportionate collateral damage, a war crime stipulated under Article 8(2)(b)(iv) of the ICC Statute. See *id.* at 131-32. As a matter of evidence, however, the prosecution may find it difficult to prove that an attack was deliberately directed against a particular objective except by showing that the objective was in fact destroyed or damaged as a result. At the ICTY, the *Galiæ* Trial Chamber ruled that the war crime of unlawful attacks on civilian persons requires the showing that the attacks *caused* death or serious injury. See Prosecutor v. Galiæ, Case No. IT-98-29-T, Judgement and Opinion, ¶¶ 42-44, 56, 62 (Dec. 5, 2003).

²⁹⁹ MARTIN BLUMENSON, THE EUROPEAN THEATER OF OPERATIONS: BREAKOUT AND PURSUIT 646 (U.S. Army Center of Military History 2005).

holes in the building walls, clearing the adjacent houses, and repeating the process to the end of the street.³⁰⁰

Allied combat engineers played a vital role in this process. They facilitated the advance of their infantry colleagues by partially or totally destroying local civilian buildings. Another account illustrates:

During the bitter house-to-house street fighting that followed, the 2d Engineer Combat Battalion made its most valuable contribution. The engineers became adept at blowing holes in the walls of houses at points where the entering infantrymen would not have to expose themselves to enemy fire in the streets. On the eastern side, away from the enemy, the engineers blew holes through inner walls to enable the troops to pass safely from building to building and in ceilings to allow the infantry to pass from floor to floor when the Germans defended stairways. The engineers also developed several methods of quickly overcoming obstacles in the way of the advancing troops. The engineers . . . learned to fill craters and ditches quickly by blowing debris into them from the walls of adjacent buildings.³⁰¹

Had Article 49(1) of Additional Protocol I applied here, it would have been odd to characterise the actions of Allied engineers as “attacks” against local French property. After all, the violence in question was not directed against the “adversary.” Also, according to the British manual, “[i]t may be permissible to destroy a house in order to clear a field of fire”³⁰² in non-international armed conflicts. Calling the destruction of such a house an “attack” would appear counterintuitive, as the act of violence is not truly directed “against the adversary.”

For the same reason, the unintended destruction of civilian objects commonly known as “collateral damage” would not constitute an “attack” against such objects. Where an attack results in collateral damage, it means, by definition, that the act of violence is properly directed against some military objective, *i.e.*, “the adversary,”³⁰³ and *not* against the civilian objects that the act incidentally destroys or damages.

c. *Military Necessity vs. Military Objective*

The thesis that destroying property and attacking property are two conceptually distinct acts also finds support in the dissimilar grounds on which their propriety depends. Property destruction is militarily necessary only if it is required for the attainment of a military purpose and otherwise in conformity with international humanitarian law. Formulated

³⁰⁰ *Id.*

³⁰¹ ALFRED M. BECK ET AL., *THE TECHNICAL SERVICES: THE CORPS OF ENGINEERS: THE WAR AGAINST GERMANY* 384-85 (1985).

³⁰² UK MINISTRY OF DEFENCE, *supra* note 65, § 15.17.2.

³⁰³ Additional Protocol I, *supra* note 1, art. 49(1).

thus, military necessity pertains to the *measure* taken; that is, the very act of destruction. Compare this with the notion of a military objective that pertains to the *property* itself. The lawfulness of an attack against property depends primarily on whether the property constitutes a military objective. Under Article 52(2) of Additional Protocol I, property constitutes military objectives only if: (i) “by their nature, location, purpose or use [they] make an effective contribution to military action”³⁰⁴ and (ii) their “total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”³⁰⁵ If property constitutes a military objective, it is liable to attacks; if it does not, it constitutes a civilian object and is therefore immune from attacks.³⁰⁶

In other words, military necessity justifies the property’s destruction, whereas the property’s status as a military objective justifies attacks being directed against it. The acts of destroying property and attacking property are conceptually distinct from each other because the notions of military necessity and military objectives are conceptually distinct from each other. This remains so notwithstanding the fact that, in the context of combat, most instances of property destruction would also be instances of property attack and *vice versa*. It is for this reason that the *Strugar* Trial Chamber arguably erred when it stated, “military necessity may be usefully defined for present purposes with reference to the widely acknowledged definition of military objectives in Article 52 of Additional Protocol I.”³⁰⁷

³⁰⁴ *Id.* art. 52(2).

³⁰⁵ *Id.*

³⁰⁶ *See id.* art. 52(1).

³⁰⁷ Prosecutor v. Strugar, Case No. IT-01-42-T, Trial Judgement, ¶ 295 (Jan. 31, 2005); *see also* Prosecutor v. Brđanin, Case No. IT-99-36-A, Appeal Judgement, ¶ 337 (Apr. 3, 2007). The *Strugar* Appeals Chamber held:

The Appeals Chamber also agrees that military necessity is not an element of the crime of destruction of, or damage to cultural property While the latter’s requirement that the cultural property must not have been used for military purposes may be an element indicating that *an object does not make an effective contribution to military action in the sense of Article 52(2) of Additional Protocol I*, it does not cover the other aspect of military necessity, *namely the definite military advantage that must be offered by the destruction of a military objective*.

Prosecutor v. Strugar, Case No. IT-01-42-A, Appeal Judgement, ¶ 330 (July 17, 2008) (emphasis added). The chamber is clearly of the view that military necessity is to be understood by reference to the two-prong definition of military objectives found in Article 52(2) of Additional Protocol I. *See* Additional Protocol I, *supra* note 1, at art. 53(2); KRIANGSAK KITTICHAISAREE, INTERNATIONAL CRIMINAL LAW 274 n.68 (Oxford Univ. Press 2001) (“This was the subject of the decision of the Anglo-American Arbitral Tribunal in the *Hardman Claim* in 1913. It was held that the act constituted ‘military necessity.’ It is submitted, however, that the defence accepted in that case would better be characterised as ‘necessity.’ It was not ‘military necessity’ as the act did not target military objectives in order to secure military victory over the

In *Kordiæ and Èerkez*, the appeals chamber held that no evidence allowed “conclusions as to whether the shelling of Merdani was or was not justified by military necessity.”³⁰⁸ In so holding, the chamber appears to have concluded that the relevant question for determining the military necessity or otherwise of the property destruction in Merdani was whether the *shelling of that locality* was or was not justified by military necessity. The chamber’s approach here is problematic in two respects. First, the shelling of a locality is not amenable to being militarily necessary or unnecessary. Rather, it is amenable to being lawful or unlawful, depending on whether the locality contains a military objective. Second, as noted earlier, whereas combat-related property destruction is *ipso facto* militarily unnecessary where the underlying offensive is unlawful, the latter’s lawfulness is not determinative of the former’s military necessity. In other words, the shelling of Merdani itself may have been lawful but not all property destruction that took place during this offensive may have been militarily necessary. Nor, despite the position taken by the *Blaškiæ* and *Kordiæ and Èerkez* Trial Chambers to the contrary, does military necessity justify targeting civilian objects.³⁰⁹

d. *Destruction of Property Constituting a Military Objective*

As noted earlier, where property constitutes a military objective, the property’s status as a military objective justifies attacks being directed against it. The property’s status as a military objective also means that, if an attack against the property results in its destruction, then this destruction is militarily necessary. Since attacking a military objective is lawful and the objective’s resulting destruction is militarily necessary, destroying a military objective, even without attacking it, would *a fortiori* be lawful and militarily necessary. Thus, for instance, destroying enemy tanks that had already been captured would be militarily necessary.

enemy.”). Here, the confusion appears to be three-fold. First, as noted earlier, the matter at issue in *Hardman* was exceptional military necessity, not justificatory necessity. Second, it is not a requirement of military necessity that the measure in question “target military objectives.” Third, military necessity does not require military victory over the enemy to be the purpose of the measure taken.

³⁰⁸ See Prosecutor v. Kordiæ & Èerkez, Case No. IT-95-14/2-A, Appeal Judgement, ¶429 (Dec. 17, 2004).

³⁰⁹ Prosecutor v. Kordiæ & Èerkez, Case No. IT-95-14/2-T, Trial Judgement, ¶ 328 (Feb. 26, 2001); Prosecutor v. Blaškiæ, Case No. IT-95-14-T, Judgement, ¶ 180 (Mar. 3, 2000);. This error was acknowledged in *Galiæ*. See Prosecutor v. Galiæ, Case No. IT-98-29-T, Judgement and Opinion, ¶ 44 (Dec. 5, 2003); see also Prosecutor v. Kordiæ & Èerkez, Case No. IT-95-14/2-A, Corrigendum to Judgement of 17 December 2004, ¶ 54 (Jan. 24, 2005); *Strugar*, Case No. IT-01-42-PT, Trial Judgement, ¶ 278.

e. *Destruction of Property Constituting a Civilian Object*

A civilian object is *per se* immune from attacks. An attack against such an object is unlawful, be it deliberate or indiscriminate. If an attack is deliberately launched against a civilian object, and if the attack destroys that object and/or another civilian object or objects, then military necessity does not except their destruction.³¹⁰ This is so because the destruction in question does not satisfy the requirement of military necessity that the measure be in conformity with international humanitarian law. Similarly, if an attack is launched indiscriminately, and if the attack destroys a civilian object, then this destruction remains without military necessity.³¹¹

The *Strugar* Trial Chamber found that there was no military objective in the Old Town of Dubrovnik when it came under attack by the Yugoslav People's Army (JNA).³¹² The JNA's shelling of the Old Town resulted in its partial destruction. The chamber rightly concluded that the shelling was deliberate or indiscriminate³¹³ and that the destruction of the Old Town was not justified by military necessity.³¹⁴ As noted earlier, however, it did so by equating the notion of military necessity with the notion of military objectives.³¹⁵ The correct reasoning would have been as follows:

- i. Attacks launched deliberately or indiscriminately against civilian objects are unlawful;
- ii. Military necessity does not except property destruction involving unlawful measures;
- iii. The destruction of property in the Old Town took the form of unlawful shelling of civilian objects; and, therefore,
- iv. The property destruction in the Old Town was not justified by military necessity.

It may happen that civilian objects are destroyed as part of collateral damage. For example, suppose Property A is a civilian object that is destroyed as a result of an attack specifically directed against Combatant B, an able-bodied, non-surrendering enemy combatant and a military

³¹⁰ See *Kordić & Ćerkez*, Case No. IT-95-14/2-A, Appeal Judgement, ¶¶ 419, 426, 477, 485, 526.

³¹¹ *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Trial Judgement, ¶626 (Sept. 1, 2004) (“In some villages, attacks were preceded by an ultimatum: for example in the Hambarine area in late May 1992, an ultimatum was given for the surrender of a particular individual [Aziz Ališkovija, a checkpoint commander]. Following the expiration of the ultimatum, the Bosnian Muslim village of Hambarine was shelled by Bosnian Serb forces for the entire day. Houses were targeted indiscriminately. Tanks passed through the village and shelled the houses causing civilian casualties. Houses were looted and set on fire.”) (footnotes omitted).

³¹² See *Strugar*, Case No. IT-01-42-PT, Trial Judgement, ¶¶ 193-94, 214, 284.

³¹³ See *id.* ¶¶ 214, 285-88, 329.

³¹⁴ See *id.* ¶¶ 328, 330.

³¹⁵ See *id.* ¶ 295.

objective. Property A's destruction forms part of incidental civilian casualties and damage. Suppose further that such casualties and damage are proportionate to the concrete and direct military advantage anticipated by Combatant B's disablement. Property A's destruction will then be militarily necessary because the measure taken is required for the attainment of a military purpose and otherwise in conformity with international humanitarian law.³¹⁶ In this scenario, the attack against Combatant B constitutes the measure taken, while his disablement constitutes the military purpose. The measure's conformity with international humanitarian law emanates from two facts. First, Combatant B is a military objective. Second, *ex hypothesi*, the attack against him does not cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which are excessive in relation to the concrete and direct military advantage anticipated.³¹⁷

If, however, Property A's destruction is incidental yet *disproportionate* to the concrete and direct military advantage anticipated, it becomes unlawful and, accordingly, without military necessity. The measure taken runs counter to international humanitarian law since disproportionate attacks are prohibited under Article 51(5)(b) of Additional Protocol I.³¹⁸ Nor, within the meaning of military necessity, is the attack against Combatant B "required" for the concrete and direct military advantage anticipated insofar as the measure's injurious effect is disproportionate in relation to its stated purpose.

The *Martiæ* Trial Chamber observed:

The Trial Chamber recalls the evidence that there was intensive shelling in Škabrnja on the morning of the attack. Moreover, there is

³¹⁶ See Prosecutor v. Hadžihasanović & Kubura, Case No. IT-01-47-T, Trial Judgement, ¶ 45 (Mar. 15, 2006) ("The protection offered by Article 3(b) of the Statute is, however, limited by the exception of military necessity. The Chamber finds that collateral damage to civilian property may be justified by military necessity and may be an exception to the principles of protection of civilian property.").

³¹⁷ See Additional Protocol I, *supra* note 1, art. 51(5)(b).

³¹⁸ See, e.g., Blaškić, Case No. IT-95-14-T, Trial Judgement, ¶ 510 ("Consequently, it was impossible to ascertain any strategic or military reasons for the 16 April 1993 attack on Vitez and Stari Vitez. In the event that there had been, the devastation visited upon the town was of out of all proportion with military necessity."); see also Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2-T, Judgement, ¶ 734 (Feb. 26, 2001) ("On 8 September 1993 the HVO launched a successful attack on the village of Grbavica, a hillside feature to the west of Vitez and close to the Britbat camp at Bila. This feature had been used by the ABiH as a position for the purposes of sniping and, according to the evidence of Britbat officers who saw the attack, it was a legitimate military target. However, according to the same witnesses, the attack was accompanied by unnecessary destruction. For instance, Brigadier Duncan said that the objective was secured by an excessive use of force against the local population, causing massive destruction of property beyond any military necessity . . .") (footnotes omitted).

evidence that fire was opened on private houses by JNA tanks and using hand-held rocket launchers. The Trial Chamber recalls the evidence that members of Croatian forces were in some of the houses in Škabrnja. In the Trial Chamber's opinion, this gives rise to reasonable doubt as to whether the destruction resulting from these actions was carried out for the purposes of military necessity. The elements of wanton destruction of villages or devastation not justified by military necessity (Count 12) have therefore not been met.³¹⁹

It might be said that some of the houses in Škabrnja were incidentally destroyed when JNA tanks engaged members of Croatian forces inside them. As far as these houses are concerned, the relevant consideration would be whether their destruction was excessive in relation to the objective of disabling the Croatian fighters. If the destruction was proportionate, then it was militarily necessary; if not, it was militarily unnecessary.

Accordingly, where the destruction of a civilian object takes the form of an unlawful attack, the attack's unlawfulness conclusively indicates the absence of military necessity for the object's destruction.³²⁰ Here, the attack is unlawful if:

- i. It is deliberately directed against the civilian object concerned, or against another civilian object or objects;
- ii. It is indiscriminate; or
- iii. It is directed against a military objective but causes disproportionate collateral damage.

If a civilian object is destroyed as a result of such an attack, then it means that the object's destruction lacks military necessity.

As noted earlier, however, there are situations during active combat in which a belligerent destroys a civilian object without attacking that object or any other object. Where this occurs, the object's destruction is militarily necessary if it satisfies all the requirements of military necessity. If the destruction fails to satisfy one or more of the requirements, then it is without military necessity.

The *Oriæ* Trial Chamber held that property was destroyed without military necessity in Bračevina.³²¹ The Chamber held, "at the time of the attack, the property destroyed in Bračevina was neither of a military

³¹⁹ Prosecutor v. Martić, Case No. IT-95-11-T, Trial Judgement, ¶ 394 (June 12, 2007).

³²⁰ Arguably, this is what the *Hadžihasanović & Kubura* Appeals Chamber meant when it held that "the conventional prohibition on attacks on civilian objects . . . has attained the status of customary international law and that this covers 'wanton destruction of cities, towns or villages not justified by military necessity.'" Prosecutor v. Hadžihasanović & Kubura, Case No. IT-01-47, Interlocutory Appeal of Trial Chamber, ¶ 30.

³²¹ See Prosecutor v. Orić, Case No. IT-03-68-T, Trial Judgement, ¶ 618 (June 30, 2006).

nature, nor was it used in a manner such as to make an effective contribution to the military actions of the Bosnian Serbs”³²² and that, “[c]onsequently, the destruction of property in Brađevina was not required for the attainment of a military objective.”³²³

With the first ruling, the trial chamber determined in effect that the haystacks, sheds, houses, stables and livestock destroyed in Brađevina constituted civilian objects. If, as civilian objects, they were destroyed by deliberate, indiscriminate or disproportionate attacks, then this would *ipso facto* mean that their destruction was militarily unnecessary. The circumstances of property destruction in Brađevina, as described in the judgement,³²⁴ were such that it would not have been unreasonable for the trial chamber to conclude that the objects destroyed not only constituted civilian objects but were, in fact, attacked *as such* - *i.e.*, deliberately.

But the trial chamber did not do so. In fact, nowhere in the judgement is there any specific finding that, as civilian objects, the property destroyed in Brađevina was destroyed by attacks, let alone by unlawful ones.³²⁵ Rather, it appears that, having determined the objects’ civilian status, the trial chamber simply concluded - “consequently” is the expression used - that their destruction is incapable of satisfying any military purpose. The way in which the chamber discussed the events in Brađevina leaves open the possibility that some civilian property was destroyed by acts not constituting attacks. Where such a possibility exists, whether the destruction of the property in question was or was not required for the attainment of a military purpose is a matter that must be considered on a case-by-case basis.

³²² *Id*; see also *id.* at ¶¶ 607, 618, 632, 675 (holding, *inter alia*, that the property destroyed in Ježestica and Ratkoviæi was “neither of a military nature, nor . . . used in a manner such as to make an effective contribution to the military actions of the Bosnian Serbs”).

³²³ *Id.* ¶ 618.

³²⁴ See *id.* ¶ 613 (“The attack on Brađevina was launched from the direction of Kaludra. The attackers entered Brađevina from its lower part, and surrounded it. They met with no resistance. The attack came in two waves, the first by fighters approaching the houses of Brađevina firing upon the prone position, and the second by fighters following behind. Witnesses heard detonations and saw burning of haystacks and sheds. In the course of the attack, Bosnian Muslim fighters torched houses after taking out goods. Bosnian Muslim civilians joined fighters in torching stables and burning livestock in the meadows between Brađevina and Magudoviæi. Eventually, all the buildings of Brađevina, except those used for storing grain and food, were set on fire. Bosnian Muslim civilians remained in the area after the attack, searching for food and other goods.”) (footnotes omitted).

³²⁵ As noted earlier, lawful attacks, *i.e.*, those properly directed against military objectives and not disproportionate in their injurious effects on civilian persons and objects, render the resulting property destruction lawful and militarily necessary.

In *Kordić and Ćerkez*, the appeals chamber upheld the trial chamber's ruling that the property destruction in Novi Travnik was not justified by military necessity:

[A]part from the buildings destroyed or damaged due to the fighting along the separation line between the two forces, a number of buildings with no military interest belonging to civilian Muslims were destroyed in the part of the old town called Bare (the lower part, Ratanjska, at the entry of Novi Travnik). The nearest military objective was approximately 200-300 metres from there and other destroyed Muslim buildings were 700-800 metres from the front line . . . The Appeals Chamber is of the view that, although part of the HVO attack on Novi Travnik might have pursued a legitimate military purpose, a reasonable trier of fact could have, on the basis of the evidence in question, come to the conclusion beyond reasonable doubt that wilful and large scale destruction of Muslim properties not justified by military necessity also occurred in its course.³²⁶

It was found that there was a considerable distance between the properties destroyed, on the one hand, and the nearest military objective ("approximately 200-300 metres") and the front line ("700-800 metres"), on the other hand.³²⁷ This distance would effectively eliminate the possibility that the destruction of Muslim buildings was incidental to attacks directed against military objectives nearby. The distance would also make it unlikely that stray shells and the like launched across the front line accidentally destroyed the properties. It would follow that they were destroyed either by deliberate or indiscriminate attacks, or by acts not constituting attacks.

The appeals chamber also found that the Muslim buildings had "no military interest."³²⁸ This might mean that the properties destroyed constituted civilian objects. If they constituted civilian objects and if their destruction was the result of deliberate or indiscriminate attacks, then the attacks would be unlawful and the destruction would be without military necessity. If, however, the properties were destroyed by acts other than attacks, then the mere fact that they constituted civilian objects would not conclusively demonstrate the absence of military necessity for their destruction.

Alternatively, "no military interest" might mean not only the properties' status as civilian objects but also the lack of military purpose served by their destruction. Provided this is the meaning that the appeals chamber had in mind, the destruction in question would fail to satisfy the

³²⁶ The acronym "HVO" refers to *Hrvasko Vijeće Obrane*, or "Croatian Defence Council." The HVO was the army of the Bosnian Croats. *Prosecutor v. Kordić & Ćerkez*, Case No. IT-95-14/2-A, Appeal Judgement, ¶ 391 (Dec. 17, 2004).

³²⁷ *Id.*

³²⁸ *Id.* ¶ 391.

requirement of military necessity that the measure be taken for some specific military purpose and would, accordingly, remain militarily unnecessary.

f. *Property Destruction in the Context of Combat - Summary*

When considering the military necessity of combat-related property destruction, the trier of fact would consider the following questions:

- Was there any military justification for the combat activities of which the property destruction formed part? Absent any military justification, the trier of fact would find that the property destruction was militarily unnecessary. If at least some military justification existed,³²⁹ then he would turn his attention to the property itself.
- Where there was some military justification for the underlying combat activities, did the individual property destroyed constitute a military objective? If it did, its destruction, whether caused by an attack or not, was militarily necessary. If it constituted a civilian object, then the trier of fact would examine the particular circumstances of its destruction.
- Was the property at issue, a civilian object, either made the object of a deliberate attack, destroyed as a result of a deliberate attack against another civilian object or destroyed by an indiscriminate attack? An affirmative answer would yield the finding that the destruction was without military necessity; a negative answer would bring the trier of fact to the next question.
- Was the civilian object destroyed as a result of an attack directed against a military objective? If so, were the incidental civilian casualties and damage - of which the object's destruction formed part - in proportion to the concrete and direct military advantage anticipated? The lack of proportion between the injury and advantage would mean that the destruction at issue was militarily unnecessary, whereas the existence of proportion would indicate the destruction's military necessity.
- Lastly, where the civilian object was destroyed by an act not constituting an attack, did the destruction satisfy the requirements of military necessity?

The table below represents the relevant considerations for the military necessity of property destruction where the underlying combat activities are held to have some military justification:

³²⁹ Launching an offensive on a locality would be militarily justified if, for example, the locality contained military objectives. A strategically important locality may contain exclusively civilian objects, but that does not mean that no offensive may be lawfully launched on it. Such an offensive would be lawful if it is met with no resistance and no attack is directed against any object. If an object is destroyed during such an offensive, its military necessity would depend on whether the destruction satisfied all the requirements of military necessity.

The property was destroyed . . .	Property destroyed was a military objective.	Property destroyed was a civilian object.
. . . as a result of a deliberate attack against it.	Lawful <i>per se</i> and therefore militarily necessary.	Unlawful <i>per se</i> and therefore militarily unnecessary.
. . . as a result of a deliberate attack against a(nother) civilian object.	Lawful <i>per se</i> and therefore militarily necessary.	Unlawful <i>per se</i> and therefore militarily unnecessary.
. . . as a result of an indiscriminate attack.	Lawful <i>per se</i> and therefore militarily necessary.	Unlawful <i>per se</i> and therefore militarily unnecessary.
. . . as a result of an attack against a(nother) military objective.	Lawful <i>per se</i> and therefore militarily necessary.	If not part of proportionate civilian casualties and/or damage, then unlawful and therefore militarily unnecessary.
		If part of proportionate civilian casualties and/or damage, then lawful and therefore militarily necessary.
. . . not as a result of an attack.	Lawful <i>per se</i> and therefore militarily necessary.	Depends on whether the act of destruction was: (a) required for the attainment of (b) a military purpose, and (c) otherwise in conformity with international humanitarian law.

In order for the prosecution to show beyond a reasonable doubt that the destruction of particular property in combat was without military necessity, it must prove:

- 1) That the underlying combat activities (such as an offensive on a locality), of which the property's destruction formed part, lacked any military justification; or
- 2) That, although some military justification (such as the strategic importance of the locality or the presence of military objectives therein) existed for the underlying combat activities:
 - a) The property destroyed was a civilian object; and
 - b) The property was destroyed by:
 - i) An attack:
 - (1) directed deliberately against it or against another civilian object;
 - (2) directed indiscriminately; or
 - (3) directed against a military objective yet disproportionate in its harmful effect on civilian persons and/or objects; or
 - ii) An act, not constituting an attack, such that the property's destruction failed to satisfy at least one requirement of military necessity.

The extent to which the prosecution can discharge its onus successfully depends on the quantity and quality of the evidence adduced. The prosecution's ability in this regard may be limited by the realities of active

combat that make it difficult, if not impossible, to obtain the relevant evidence.

The April 1993 destruction of Muslim houses in Vitez/Stari Vitez is a case in point. The *Kordić and Ćerkez* Trial Chamber found that the destruction was without military necessity.³³⁰ This finding was, however, overturned on appeal:

The Appeals Chamber takes into account the testimony of Col. Watters according to which most of the destruction during the April attacks was in the Muslim area of the town of Vitez, but has already held that the scale of such destruction is unknown. Exh. Z2715 does not specify when eighty houses were destroyed in the town of Vitez; part of these houses were obviously destroyed as a result of the 18 April truck bomb, which the Trial Chamber did not link with either of the Accused. Moreover, there were military objectives in Vitez/Stari Vitez, including the headquarters of the Muslim TO and the private houses from where combatants, (including members of the ABiH, the TO and every person taking a direct part in hostilities), were resisting.

In the absence of evidence as to the scale of the destruction and as to the lack of military justification, the Appeals Chamber finds that no reasonable Trial Chamber could have concluded that destruction not justified by military necessity occurred in Vitez/Stari Vitez in April 1993.³³¹

It appears that the insufficiency of evidence with respect to Vitez/Stari Vitez left, *inter alia*, the following three reasonable doubts unresolved. First, the presence of military objectives in Vitez/Stari Vitez could have militarily justified the underlying combat activities taking place in these localities. Second, at the time of their destruction, some Muslim houses might have constituted military objectives themselves. Third, even if the houses destroyed in Vitez/Stari Vitez were all civilian objects, it was not shown that they were destroyed by deliberate, indiscriminate, or disproportionate attacks, or by acts such that their destruction failed to satisfy one or more requirements of military necessity.³³²

³³⁰ See *Prosecutor v. Kordić & Ćerkez*, Case No. IT-95-14/2-T, Trial Judgement, ¶ 808 (Feb. 26, 2001).

³³¹ The acronym “TO” refers to *teritorijalna odbrana*, or “territorial defence,” a militia organization originating from the defence structure of the former Social Federal Republic of Yugoslavia. The acronym “ABiH” refers to *Armija Bosne i Hercegovine*, or “Army of Bosnia and Herzegovina.” *Kordić & Ćerkez*, Case No. IT-95-14/2-A, Appeal Judgement, ¶¶ 465-66.

³³² *Id.*; see also *Prosecutor v. Hadžihasanović & Kubura*, Case No. IT-01-47-T, Trial Judgement, ¶¶ 1794, 1797, 1799, 1806-07, 1830, 1832 (regarding Guèa Gora, Maline, Šušanj, Ovnak, Brajkovièi and Grahovèièi).

2. Property Destruction Outside the Context of Combat

In *Tuta and Štela*, the prosecution restricted the scope of its property destruction charges to events that occurred after the attacks.³³³ The post-World War II United Nations War Crimes Commission took a similar approach.³³⁴

The absence of combat activities is relevant to the determination of the military necessity of property destruction. The absence of combat, however, does not *per se* indicate the absence of military necessity.³³⁵ Indeed, where an ICTY chamber made a finding of militarily unnecessary property destruction on the basis of little or no fighting, it typically did so on the ground that the destruction was ethnically driven.³³⁶ In many cases,

³³³ See Prosecutor v. Naletiliæ & Martinoviæ (*Tuta & Štela*), Case No. IT-98-34-PT, Second Amended Indictment, ¶¶ 55-56, 58 (Sept. 28, 2001) (“[f]ollowing the capture” of villages).

³³⁴ See THE UNITED NATIONS WAR CRIMES COMMISSION, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 488 (1948) (“Committee I [of the Commission] often had to decide whether a given set of facts arising from the destruction of personal property, public property, or local monuments was a war crime, or whether such destruction was justified on the basis of military necessity in time of war. For example, the Committee refused to list for war crimes those Germans responsible for the demolition of a French lighthouse at Pas-de-Calais in September, 1944 (Commission No. 3603). Generally, the test applied was whether military operations were in progress, or were imminent.”).

³³⁵ As noted earlier, in the *Hardman* claim, an occupation force’s destruction of a house and its contents for the maintenance of sanitary conditions among its members was held to constitute military necessity. The destruction in question did not occur in the context of active combat. See *Hardman v. U.S. (U.K. v. U.S.)*, 6 R. INT’L ARB. AWARDS 25, 26 (Arb. Trib. 1913). Similarly, Article 53 of Geneva Convention IV envisages the existence of military necessity justifying the destruction of property in occupied territories. Geneva Convention IV, *supra* note 18 at art. 53. The very notion of belligerent occupation entails the belligerent’s exercise of effective authority over the territory which he occupies. See Hague Regulations, *supra* note 20, art. 42. Therefore, both the *Hardman* claim and the Geneva Convention imply that military necessity may exist even in the absence of active combat.

³³⁶ See, e.g., Prosecutor v. Kordiæ & Èerkez, Case No. IT-95-14/2-A, Appeal Judgement, ¶¶ 484-85, 583-86 (Dec. 17, 2004) (holding that damage done in Šantiæi and Ahmiæi was restricted to Muslim houses and that a reasonable trier of fact could have found that it was “of such a nature that it could not have been caused by the fighting” and “thus not justified by military necessity” and that a reasonable trier of fact could have found that property destruction in Han Ploëa Grahovci in Kiseljlkak was not justified by military necessity “[s]ince only Muslim houses were destroyed, and the destruction occurred when there was not much fighting.”). See also Prosecutor v. Blaškiæ, Case No. IT-95-14-T, Trial Judgement, ¶¶ 543-44, 549-50, 556-57, 559 (Mar. 3, 2000) (regarding Donja Veèeriska, Gaëice, and Grbavica); Prosecutor v. Tuta & Štela, Case No. IT-98-34-T, Trial Judgement, ¶¶ 583, 585 (Mar. 31, 2003) (regarding Soviæi and Doljani). The *Blagojeviæ & Jokiæ* Trial Chamber found that the destruction of personal property taken from Bosnian Muslim detainees was not

property destruction occurred in localities inhabited predominantly by members of a targeted ethnicity.³³⁷ In other localities, only the property belonging to members of a targeted ethnicity or ethnicities was destroyed.³³⁸

It is submitted here that ethnically driven property destruction is *ipso facto* devoid of military necessity both within and without the context of combat. Any decision to destroy property based on its owner's ethnicity would fail to satisfy the requirement of military necessity that the measure's purpose be in conformity with international humanitarian law. There are two reasons for this failure. First, ethnicity-based selectiveness in the treatment of property would amount to adverse distinction: International humanitarian law prohibits adverse distinction in its application based on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria.³³⁹ Whatever disagreement there might be about the definition of ethnicity, it would undoubtedly fall within one or more of these criteria. Second, where property is selectively destroyed with a view to adversely distinguishing its owners on the basis of their ethnic-

justified by military necessity. See *Prosecutor v. Blagojević & Jokić*, Case No. IT-02-60-T, Trial Judgement, ¶ 615 (Jan. 17, 2005).

³³⁷ See, e.g., *Blaškić*, Case No. IT-95-14-T, Trial Judgement, ¶¶ 565, 569, 579, 595-96 (regarding Lončari and Ožehnići in Busovača, and Behrići and Gomionica in Kiseljak); *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Judgement, ¶¶ 600, 608-34 (Sept. 1, 2004) (regarding Bosanska Krupa; Bosanki Novi; Blagaj Rijeka in Bosanski Novi; Donji Agići in Bosanski novi; Bosanski Petrovac; Ćelinac; Bašići in Ćelinac; Ključ; Kotor Varoš; Stari Grad in Prijedo; Biševani, Kozaruša, Kamišani, Kevljani, Rakovani, Ćerakovo and Rizvanovići in Prijedor; Hambarine in Prijedor; Kozarac in Prijedor; Briševo in Prijedor; Mahala in Sanski Most; Begići in Sanski Most; and Šipovo); *Prosecutor v. Kordić & Ćerkez*, Case No. IT-95-14/2-T, Trial Judgement, ¶¶ 740, 807 (Feb. 26, 2001) (regarding Stupni Do).

³³⁸ See, e.g., *Blaškić*, Case No. IT-95-14-T, Trial Judgement, ¶¶ 418, 510, 544, 598, 600, 605, 608, 613-14, 616, 619, 620, 622 (regarding Ahmići, Šantići, Pirići, Nadići, Vitez, Stari Vitez, Donja Večeriska, Gromiljak in Kiseljak, Polje Višnjica, Višnjica in Kiseljak, Svinjarevo in Kiseljak, Grahovci, Han Ploča, and Tulica); *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeal Judgement, ¶ 444 (July 27, 2004) (regarding Vitez and Stari Vitez); *Kordić & Ćerkez*, Case No. IT-95-14/2-T, Trial Judgement, ¶¶ 635, 643, 807(i), 645, 659-60, 677, 805, 807(iv) (regarding Ahmići, Vitez, Donja Večeriska, Ožehnići in Busovača, and Gačice); *Prosecutor v. Kordić & Ćerkez*, Case No. IT-95-14/2-A, Appeal Judgement, ¶¶ 484-85, 534, 558, 562, 563-64, 583-86 (Dec. 17, 2004) (regarding Šantići in Ahmići, Ožehnići, Gomionica, Višnjica, Polje Višnjica, and Han Ploča-Grahovci in Kiseljak); *Tuta & Štela*, Case No. IT-98-34-T, Trial Judgement, ¶¶ 582-85 (regarding Sovići and Doljani); *Brđanin*, Case No. IT-99-36-T, Trial Judgement, ¶ 1022 ("Unlike non-Serb property, Bosnian Serb property was systematically left intact and only sporadically damaged"); *Prosecutor v. Martić*, Case No. IT-95-11-T, Trial Judgement, ¶¶ 258, 381, 383 (regarding Saborsko).

³³⁹ See HENCKAERTS & DOSWALD-BECK, *supra* note 227, at 308.

ity,³⁴⁰ and where other relevant facts are present,³⁴¹ the conduct may also constitute persecutions, a crime against humanity.

The *Hadžihasanoviæ and Kubura* and *Oriæ* Trial Judgements are exceptional in the treatment of property destruction outside the context of combat. Regarding Vareš, the *Hadžihasanoviæ and Kubura* Trial Chamber noted that the indictment had alleged militarily unnecessary destruction of dwellings, buildings and civilian personal property belonging to Bosnian Croats and Bosnian Serbs.³⁴² The chamber found that such destruction did indeed occur following the cessation of armed hostilities in Vareš.³⁴³ In so doing, however, the chamber made no determination as to the ethnicity of the owners of the property destroyed. Rather, according to the judgement, the Bosnian Muslim perpetrators destroyed the doors and windows of the houses in Vareš for the “sole purpose” of committing plunder.³⁴⁴ To the extent that this was in fact what the perpetrators intended, it is indeed militarily unnecessary because the purpose pursued was neither military nor in conformity with international humanitarian law.

The *Oriæ* Trial Chamber noted that the villages in which post-combat property destruction occurred were inhabited exclusively or almost exclusively by Bosnian Serbs.³⁴⁵ This ethnic component of the destruction, however, does not appear to have had any impact on the Chamber’s ruling that the destruction was militarily unnecessary. The judgement indicates that the Chamber viewed the absence of combat to mean the absence of military necessity:

[A]fter the fighting has ceased, destruction can in principle no longer be justified by claiming ‘military necessity’. A different situation arises if a military attack is launched against a settlement from which previously, due to its location and its armed inhabitants, a serious danger emanated for the inhabitants of a neighbouring village who are now seeking to remove this danger through military action. It may be that, after such a settlement has been taken, destruction of houses occurs in order to prevent the inhabitants, including combatants, [from returning and resuming attacks] . . . [E]xcept for the rare occasions in which such preventive destruction could arguably fall

³⁴⁰ The prohibition against adverse distinction under international humanitarian law is equivalent to the principle of non-discrimination under international human rights law. *Id.* at 309.

³⁴¹ Such as, for example, where the property was destroyed within the context of a widespread or systematic attack against a civilian population.

³⁴² See Prosecutor v. Hadžihasanoviæ & Kubura, Case No. IT-01-47-T, Trial Judgement, ¶ 1833 (Mar. 15, 2006).

³⁴³ *Id.* ¶ 1846.

³⁴⁴ See *id.* ¶¶ 1844-46.

³⁴⁵ See Prosecutor v. Oriæ, Case No. IT-03-68-T, Judgement, ¶¶ 593-94, 621, 660 (June 30, 2006) (regarding Gornji Ratkoviæi and Ježestica).

within the scope of ‘military necessity’, the principle must be upheld that the destruction of civil settlements, as a rule, is punishable as a war crime.³⁴⁶

The Chamber’s decision, it is submitted here, is at variance with the law. No authority or rationale exists for the view that, in the event of post-combat property destruction, military necessity is admissible only for one military purpose - *i.e.*, to prevent members of the adversary party from re-occupying their combat positions. The two cases cited in the judgement fail to provide valid support, for the following reasons.

The judgement refers to *Peleus* in support of the proposition that “after the fighting has ceased, destruction can in principle no longer be justified by claiming ‘military necessity’.”³⁴⁵ At issue in *Peleus*, however, was *not* whether military necessity pleas should be admissible once the fighting had ceased. As noted earlier, the judge advocate in that case had conceded that circumstances *could* arise in which a belligerent in Eck’s position might be justified in killing an unarmed person for the purpose of saving his own life. At no point did the judge advocate limit the scope of his concession to situations where active combat was in progress. Rather, he questioned whether the measure taken by Eck had any material relevance to his stated purpose and, even if it did, whether it was the least injurious of those means that were materially relevant to the purpose and reasonably available to him.

The *Oriæ* Trial Judgement also relies on the ruling by the International Military Tribunal (IMT) against Aftred Jodl for the view that “the principle must be upheld that the destruction of civil settlements, as a rule, is punishable as a war crime.”³⁴⁷ In so doing, the judgement notes that “[a] policy of ‘scorched earth’, *i.e.*, the destruction of any facilities that might be useful to the enemy while withdrawing from an area, was not recognised at the Nuremberg Tribunal to be justified by military necessity”³⁴⁸

This reliance is unhelpful because the IMT offered virtually no reason when it made the relevant ruling. One cannot hope to establish, for instance, whether the tribunal considered (i) that scorching earth *as such* could never be militarily necessary, or (ii) that the evidence rendered Jodl’s specific order concerning northern Norway militarily unnecessary.

³⁴⁶ *Id.* ¶ 588 (footnotes omitted); *see also id.* ¶¶ 607, 632-33, 674-75 (regarding Gornji Ratkoviæi and Ježestica).

³⁴⁷ *Id.* ¶ 588.

³⁴⁸ *Id.* at 207 n.1581. The relevant passage of the International Military Tribunal ruling reads as follows:

By teletype of 28 October 1944, Jodl ordered the evacuation of all persons in northern Norway and the burning of their houses so they could not help the Russians. Jodl says he was against this, but Hitler ordered it and it was not fully carried out. A document of the Norwegian Government says such an evacuation did take place in northern Norway and 30,000 houses were damaged.

Nuremberg Judgement, *supra* note 275, at 571.

The first interpretation, while possible, is unlikely. It appears to have been uncontroversial during World War II that scorching occupied territory was considered lawful if required by military necessity.³⁴⁹ The second interpretation is more likely, although it suffers from the complete absence of any analysis in the IMT's ruling. Compare this with the U.S. Military Tribunal in *Hostage*. As noted earlier, this latter tribunal actually did offer legal and factual reasons for acquitting Rendulic of devastating the Finnmark area, a measure carried out on Jodl's orders.³⁵⁰

C. *Absence of Military Necessity as an Element of Forcible Displacement*

Article 49 of Geneva Convention IV prohibits deportation and transfer of protected persons from occupied territory, except in situations of temporary evacuation where "the security of the population or imperative military reasons so demand."³⁵¹ According to the ICRC, "imperative military reasons" exist "when the presence of protected persons in an area hampers military operations."³⁵² Permanent transfer of protected persons for any reason, as well as their temporary evacuation not demanded by their security or imperative military reasons, constitutes a grave breach of the convention.³⁵³ This grave breach is incorporated into Article 2(g) of the ICTY Statute.³⁵⁴ So far, the ICTY has considered Article 2(g) charges against numerous defendants.³⁵⁵

Deportation is also a crime against humanity eligible for prosecution under Article 5(d) of the ICTY Statute. Whether deportation requires the victim to have crossed at least one international border remains a

³⁴⁹ The relevant jurisprudence has been examined elsewhere in this article. By virtue of Article 54 of Additional Protocol I, scorching earth no longer admits military necessity exceptions where it involves a party to the conflict destroying "objects indispensable to the survival of the civilian population" not located in its own territory. See Additional Protocol I, *supra* note 1, art. 54.

³⁵⁰ This is not to say that the *Hostage* ruling on this matter is without criticism. See, e.g., GEOFFREY BEST, *WAR AND LAW SINCE 1945* 328-30 (Clarendon Press 1994)

³⁵¹ Geneva Convention IV, *supra* note 18, art. 49.

³⁵² COMMENTARY: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR, *supra* note 225, at 280. The commentary continues: "[e]vacuation is only permitted in such cases, however, when overriding military considerations make it imperative; if it is not imperative, evacuation ceases to be legitimate." *Id.*; see also Kretzmer, *The Advisory Opinion*, *supra* note 62, at 93-94 n.43 (discussing the ICJ's failure to discuss Article 49 of Geneva Convention IV).

³⁵³ See Geneva Convention IV, *supra* note 18, art. 147.

³⁵⁴ ICTY Statute, *supra* note 257, art. 3(b).

³⁵⁵ See *Prosecutor v. Simić*, Case No. IT-95-9-T, Trial Judgement, ¶¶ 120, 1117, 1121, 1125 (Oct. 17, 2003); *Prosecutor v. Naletilić & Martinović (Tuta & Stela)*, Case No. IT-98-34-T, Trial Judgement, ¶¶ 569-71, 763, 767 (March 31, 2003); *Prosecutor v. Todorović*, Case No. IT-95-9/12, Sentencing Judgement, ¶ 8 (July 31, 2001).

matter of dispute.³⁵⁶ Owing in part to this unsettledness, the prosecution has developed a practice whereby one charge under Article 5(d) would frequently be accompanied by another, “back-up” charge of inhumane acts under Article 5(i) - also a crime against humanity - perpetrated through forcible transfer within the territory of one state. Charges of deportation and/or forcible transfer have been ruled upon in numerous trials.³⁵⁷

Lastly, under Article 5(h) of the ICTY Statute, persecutions may be committed by way of deportation and/or forcible transfer.³⁵⁸ This form of persecutions has been adjudicated in many trials.³⁵⁹

³⁵⁶ This particular issue need not detain us here. Suffice it to note the contrast between the growing majority of ICTY decisions upholding the existence of a cross-border element, on the one hand, and a minority of decisions rejecting its existence, on the other. Those decisions upholding the requirement include: *Tuta & Štela*, Case No. IT-98-34-T, Trial Judgement, ¶ 670; *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Trial Judgement, ¶ 474 (Mar. 15, 2002); *Prosecutor v. Krstić*, Case No. IT-98-33-T, Trial Judgement, ¶ 521 (Aug. 2, 2001); *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Trial Judgement, ¶ 542 (Sept. 1, 2004); *Simić*, Case No. IT-95-9-T, Trial Judgement, ¶¶ 123, 129; *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Motion for Judgement of Acquittal, ¶ 68 (June 16, 2004). Those decisions rejecting the requirement include: *Prosecutor v. Nikolić*, Case No. IT-94-2-R61, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, ¶ 23 (Oct. 20, 1995); *Prosecutor v. Stakić*, Case No. IT-97-24-T, Trial Judgement, ¶¶ 671-84 (July 31, 2003). The *Stakić* Appeal Judgement held that deportation must involve expulsion across a *de jure* border to another country or across a *de facto* border of occupied territory. See *Prosecutor v. Stakić*, Case No. IT-97-24-A, Appeal Judgement, ¶¶ 289-303, 308 (Mar. 22, 2006). As far as the ICTY jurisprudence is concerned, the *Stakić* Appeal Judgement has put the matter to rest. See *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Trial Judgement, ¶¶ 165, 169 (Feb. 26, 2009); *Prosecutor v. Krajišnik*, Case No. IT-00-39-T, Trial Judgement, ¶ 723 (Sept. 27, 2006); *Prosecutor v. Naletilić & Martinović (Tuta & Štela)*, Case No. IT-98-34-A, Appeal Judgement, ¶ 152, 212-13 (separate opinion of Judge Schomburg).

³⁵⁷ See, e.g., *Brđanin*, Case No. IT-99-36-T, Trial Judgement, ¶¶ 539-70; *Prosecutor v. Šainović et al.*, Case No. IT-05-87, Trial Judgement, ¶¶ 475, 477, 1208 (Feb. 26, 2009).

³⁵⁸ See, e.g., *Krnojelac*, Case No. IT-97-25-T, Trial Judgement, ¶ 433-34; *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Appeal Judgement, ¶ 222 (Sept. 17, 2003); *Prosecutor v. Naletilić & Martinović (Tuta & Štela)*, Case No. IT-98-34-T, Trial Judgement, ¶¶ 671-72 (Mar. 31, 2003); *Simić*, Case No. IT-95-9-T, Trial Judgement, ¶ 48; *Blagojević & Jokić*, Case No. IT-02-60-T, Trial Judgement ¶¶ 629-31.

³⁵⁹ See, e.g., *Milutinović et al.*, Case No. IT-05-87, Trial Judgement vol. 3, ¶¶ 1207-12; *Prosecutor v. Martić*, Case No. IT-95-11, Trial Judgement, ¶ 432 (June 12, 2007); *Prosecutor v. Krajišnik*, Case No. IT-00-39, Trial Judgement, ¶¶ 748-49, 807-09, 1182 (Sept. 27, 2006); *Prosecutor v. Blagojević & Jokić*, Case No. IT-02-60, Trial Judgement, ¶¶ 616-18, 621 (Jan. 17, 2005); *Brđanin*, Case No. IT-99-36, Trial Judgement, ¶¶ 556, 1082, 1088, 1152; *Prosecutor v. Babić*, Case No. IT-03-72, Sentencing Judgement, ¶¶ 11, 15 (June 29, 2004); *Prosecutor v. Đeronjić*, Case No. IT-02-61, Sentencing Judgement, ¶¶ 29, 99-101 (Mar. 30, 2004); *Prosecutor v. Nikolić*,

The crimes against humanity of deportation, inhumane acts by way of forcible transfer, and persecutions by way of deportation/forcible transfer all contain the element that the victim was forcibly displaced “without grounds permitted under international law.”³⁶⁰ Such grounds include “imperative military reasons” within the meaning of Article 49 of Geneva Convention IV and Article 17(1) of Additional Protocol II.³⁶¹

The tribunal has not dealt extensively with “grounds permitted under international law” or “imperative military reasons” in this context. In some cases, such as *Tuta and Štela* and *Brōanin*, the description of victims leaving or being transferred was followed by a general finding that their departure was “unlawful”³⁶² or that it was not demanded by imperative military reasons.³⁶³ No further insight was offered. In *Martiā*, the trial chamber acknowledged that the absence of “grounds permitted under international law” and “imperative military reasons” was an element of deportation³⁶⁴ but did not engage in any factual discussion on this matter.³⁶⁵ In a somewhat more elaborate manner, the *Krstiā* Trial Chamber found:

Case No. IT-02-60/1, Sentencing Judgement, ¶¶ 12, 40-42 (Dec. 2, 2003); *Simiā*, Case No. IT-95-9, Trial Judgement, ¶¶ 1034-50, 1115, 1119, 1123; Prosecutor v. Stakiā, Case No. IT-97-24, Trial Judgement, ¶¶ 881-82 (July 31, 2003); *Tuta & Štela*, Case No. IT-98-34, Trial Judgement, ¶¶ 669-72, 711, 763, 767; Prosecutor v. Plavšić, Case No. IT-00-39&40/1, Sentencing Judgement, ¶¶ 5, 15 (Feb. 27, 2003); *Krnjelac*, Case No. IT-97-25, Trial Judgement, ¶¶ 472-85, 534; *Krstiā*, Case No. IT-98-33, Trial Judgement, ¶¶ 537, 676, 727; *Todoroviā*, Case No. IT-95-9/1, Sentencing Judgement, ¶ 45; Prosecutor v. Kordić & Ćerkez, Case No. IT-95-14/2, Trial Judgement, 305 (Feb. 26, 2001); Prosecutor v. Blaškić, Case No. IT-95-14, Trial Judgement, at 267 (Mar. 3, 2000).

³⁶⁰ See, e.g., *Stakiā*, Case No. IT-97-24-T, Trial Judgement, ¶ 672; *Stakiā*, Case No. IT-97-24-A, Appeal Judgement, ¶ 278; *Simiā et al.*, Case No. IT-95-9-T, Trial Judgement, ¶ 125; *Tuta & Štela*, Case No. IT-98-34-T, Trial Judgement, ¶ 521; *Krnjelac*, Case No. IT-97-25-T, Trial Judgement, ¶ 475; *Krnjelac*, Case No. IT-97-25-A, Appeal Judgement, ¶ 222; *Blagojević & Jokić*, Case No. IT-02-60-T, Trial Judgement, ¶ 595; *Blaškić*, Case No. IT-95-14-T, Trial Judgement, ¶ 234; *Blaškić*, IT-95-14-A, Appeal Judgement, ¶¶ 150-53; *Martiā*, Case No. IT-95-11-T, Trial Judgement, ¶¶ 107, 109; Milutinović et al., Case No. IT-05-87-A, Trial Judgement, ¶ 166.

³⁶¹ See, e.g., *Brōanin*, Case No. IT-99-36-T, Trial Judgement, ¶ 556; Milutinović et al., Case No. IT-05-87-T, Trial Judgement, ¶ 166; Geneva Convention IV, *supra* note 18, art. 49; Additional Protocol II, *supra* note 18, art. 17(1).

³⁶² See, e.g., Prosecutor v. Naletilić & Martinović (*Tuta & Stela*), Case No. IT-98-34-T, Trial Judgement, ¶¶ 542, 544, 551, 563 (Mar. 31, 2003) (regarding Mostar generally, and Mostar on May 9, 1993, June 12-14, 1993, and Sept. 29, 1993).

³⁶³ See, e.g., *id.* ¶ 526 (regarding Savić and Doljani); Prosecutor v. Brōanin, Case No. IT-99-36-T, Trial Judgement, ¶ 556 (Sept. 1, 2004) (in general, except Ćelinac).

³⁶⁴ See Prosecutor v. Martić, Case No. IT-95-11, Trial Judgement, ¶ 107 (June 12, 2007).

³⁶⁵ See *id.* ¶¶ 426-32.

In this case no military threat was present following the taking of Srebrenica. The atmosphere of terror in which the evacuation was conducted proves, conversely, that the transfer was carried out in furtherance of a well organised policy whose purpose was to expel the Bosnian Muslim population from the enclave. The evacuation was itself the goal and neither the protection of the civilians nor imperative military necessity justified the action.³⁶⁶

This relative brevity stands in contrast to the considerable factual detail in which the tribunal has examined the military necessity of property destruction.

VII. MILITARY NECESSITY AND THE ICC

It is generally agreed that, within the context of positive international humanitarian law, military necessity has no role outside express exceptional clauses. It exempts deviations from the prescription of a rule only if the rule itself provides for military necessity exceptions. In this respect, the Rome Statute of the International Criminal Court (ICC) raises some awkward questions concerning the potential use before ICC proceedings of military necessity not only as an exception but also as a “ground[] for excluding criminal responsibility.”³⁶⁷

A. *Article 8 and Elements of Crimes - Military Necessity as an Exception*

The ICC has jurisdiction over crimes specified in Articles 5-8 of its statute.³⁶⁸ They are defined in the Elements of Crimes document, an instrument by which the court is to guide itself when considering cases before it.³⁶⁹ Four war crimes under Article 8 expressly admit exceptions on account of military necessity.³⁷⁰ The absence of military necessity is an element of each of these crimes. They are:

- a) Extensive destruction and appropriation of property, a grave breach of the Geneva Conventions;³⁷¹

³⁶⁶ Prosecutor v. Krstić, Case No. IT-98-33-T, Trial Judgement, ¶ 527 (Aug. 2, 2001).

³⁶⁷ ICC Statute, *supra* note 25, art. 31(1).

³⁶⁸ See *id.* arts. 5-8.

³⁶⁹ See *id.* arts. 9(1), 21(1)(a).

³⁷⁰ There are also offenses which implicitly admit exceptions on account of military necessity. See below. These offenses typically involve deportation or transfer of persons.

³⁷¹ See *id.* art. 8(2)(a)(iv) (“Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”). One of the elements of this war crime is “[t]he destruction or appropriation was not justified by military necessity.” ICC Elements of Crimes, *supra* note 298, at 20-21.

- b) Destruction or seizure of the enemy's property, a serious violation of the laws and customs of war in international armed conflict;³⁷²
- c) Ordering the displacement of the civilian population for reasons related to the conflict, a serious violation of the laws and customs of war in non-international armed conflict;³⁷³ and
- d) Destruction or seizure of the property of an adversary, a serious violation of the laws and customs of war in non-international armed conflict.³⁷⁴

The absence of military necessity also appears as part of an element of pillage,³⁷⁵ a serious violation of the laws and customs of war in international and non-international armed conflict.³⁷⁶

For the most part, the corresponding rules of international humanitarian law expressly provide for military necessity exceptions.³⁷⁷ When a rule envisages an exception, and when the rule's violation constitutes a

³⁷² See ICC Statute, *supra* note 25, 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." One of the elements of this crime is that "[t]he destruction or seizure was not justified by military necessity." ICC Elements of Crimes, *supra* note 298, at 30-31.

³⁷³ See ICC Statute, *supra* note 25, art. 8(2)(e)(viii). "Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand." One of the elements of this crime is that "[s]uch order was not justified by the security of the civilians involved or by military necessity." ICC Elements of Crimes, *supra* note 298, at 46.

³⁷⁴ See ICC Statute, *supra* note 25, 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." One of the elements of this crime is that "the destruction or seizure was not justified by military necessity." ICC Elements of Crimes, *supra* note 298, at 48.

³⁷⁵ The second element of the crime of pillage is that "the perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use." ICC Elements of Crimes, *supra* note 298, at 31-32. But, an explanatory footnote is appended to this element: "As indicated by the use of the term 'private or personal use', *appropriations justified by military necessity cannot constitute the crime of pillaging.*" *Id.* (emphasis added). In earlier drafts of the elements of this war crime, the absence of military necessity appeared as an independent element. See KNUT DÖRMANN, *ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: SOURCES AND COMMENTARY* 272-73 (Cambridge Univ. Press 2002).

³⁷⁶ See ICC Statute, *supra* note 25, arts. 8(2)(b)(xvi), 8(2)(e)(v).

³⁷⁷ As regards extensive destruction and appropriation of property, a grave breach of the Geneva Conventions, see Geneva Convention I, *supra* note 18, art. 50; Geneva Convention II, *supra* note 18, art. 51; Geneva Convention IV, *supra* note 18, art. 147. As regards destruction or seizure of the property of the enemy or adversary, see Hague Regulations, *supra* note 20, art. 23(g). As regards ordering the displacement of the civilian population, see Additional Protocol II, *supra* note 18, art. 17(1). The sole exception in this regard is pillage. See DÖRMANN, *supra* note 375, at 272-73.

crime, it is only logical that the absence of circumstances satisfying the exception's requirements is an element of that crime.

Where the absence of military necessity is an element of a war crime, the onus rests with the prosecution to show this absence. Showing the absence of military necessity entails, in turn, proving that at least one of its requirements was unfulfilled.³⁷⁸ The prosecution's failure to do so means that it has not proved that the crime was committed. When an accused is charged with a war crime of which the absence of military necessity is an element, and when he pleads military necessity, he challenges the notion that the crime was committed at all. Therefore, strictly speaking, pleading military necessity in this context does not constitute a "defence."³⁷⁹ Conversely, in no other crimes enumerated under the ICC Statute does military necessity expressly appear as an exception. Nor does the absence of military necessity appear implicitly as one of their elements or part thereof. This is in line with the fact that the underlying rules of international humanitarian law contain no military necessity exceptions.

There are, however, several offences in the ICC Statute which would admit, albeit implicitly, exceptions on account of military necessity. One is the crime of unlawful deportation or transfer, a grave breach of the Geneva Conventions listed under Article 8(2)(a)(vii) of the ICC Statute.³⁸⁰ This grave breach emanates from Article 147 of Geneva Convention IV, which in turn is based on the convention's Articles 45 and 49. Article 49 exceptionally permits temporary evacuation of an area in occupied territory if, *inter alia*, "imperative military reasons so demand."³⁸¹ Temporary evacuations demanded by such reasons are not "unlawful" within the meaning of Article 8(2)(a)(vii) of the ICC Statute.³⁸² Similarly, the offence of deportation or transfer, a crime against humanity under Article 7(1)(d), contains as one of its elements the requirement that the victim was forcibly displaced "without grounds permitted under international law."³⁸³ As noted earlier, the ICTY has interpreted that these grounds include "imperative military reasons" demanding temporary evacuation of an area in occupied territory. Lastly, offences within

³⁷⁸ See ICC Statute, *supra* note 25, art. 67(1)(i) (protecting the accused against having any reversal of the burden of proof imposed on him). It is unclear, however, whether the prosecution would be required to allege specifically and in advance which requirement or requirements of military necessity remained unfulfilled.

³⁷⁹ This is so even though, in an adversarial setting, the accused would most likely plead military necessity during his "defence" case and his pleas would be colloquially referred to as a "defence." See, e.g., GEORGE P. FLETCHER, *BASIC CONCEPTS OF CRIMINAL LAW* 93-110 (Oxford Univ. Press 1998).

³⁸⁰ See ICC Statute, *supra* note 25, art. 8(2)(a)(vii).

³⁸¹ Geneva Convention IV, *supra* note 18, art. 49.

³⁸² See DÖRMANN, *supra* note 375, 106 ("Arts. 45 and 49 [of Geneva Convention IV] set forth the conditions for unlawfulness").

³⁸³ ICC Elements of Crimes, *supra* note 298, at 10.

the jurisdiction of the ICC - including those of which the absence of military necessity is an explicit or implicit element - may amount to persecutions under Article 7(1)(h) of the statute.³⁸⁴

As of 31 March 2009, the ICC has issued arrest warrants against the following individuals for some of the crimes in question:

- a) Ali Muhammad Al Abd-Al-Rahman (“Ali Kushayb”),³⁸⁵ Jean-Pierre Bemba Gombo,³⁸⁶ Ahmad Muhammad Harun (“Ahmad Harun”),³⁸⁷ Germain Katanga,³⁸⁸ Joseph Kony,³⁸⁹ Raska Lukwiya,³⁹⁰ Mathieu Ngudjolo Chui,³⁹¹ Okot Odhiambo,³⁹² Dominic Ongwen,³⁹³ Vincent Otti³⁹⁴ and Omar Hassan Ahmad Al Bashir (“Omar Al Bashir”)³⁹⁵ for pillaging (Article 8(2)(e)(v));
- b) Harun³⁹⁶ and Kushayb³⁹⁷ for property destruction (Article 8(2)(v)(xii));

³⁸⁴ See ICC Elements of Crimes, *supra* note 298, at 14.

³⁸⁵ See Prosecutor v. Harun & Al Abd-Al-Rahman (“Ali Kushayb”), Case No. ICC-02/05-01/07, Warrant of Arrest for Ali Kushayb, counts 18, 36, 49 (Apr. 27, 2007) [hereinafter *Kushayb Arrest Warrant*].

³⁸⁶ See Prosecutor v. Gombo, Case No. ICC-01/05-01/08, Warrant of Arrest for Jean-Pierre Bemba Gombo Replacing the Arrest of Warrant Issued on 23 May 2008, ¶¶ 16, 24(vii) (June 10, 2008).

³⁸⁷ See Prosecutor v. Harun, Case No. ICC-02/05-01/07, Warrant of Arrest for Ahmad Harun, counts 18, 36, 37, 49 (April 27, 2007) [hereinafter *Harun Arrest Warrant*].

³⁸⁸ See Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Urgent Warrant of Arrest for Germain Katanga, at 6 (July 2, 2007).

³⁸⁹ See Prosecutor v. Kony, Case No. ICC-02/04-01/05, Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005, counts 9, 15, 19, 26, 33 (Sept. 27, 2005).

³⁹⁰ See Prosecutor v. Lukwiya, Case No. ICC-02/04, Warrant of Arrest for Raska Lukwiya, count 9 (July 8, 2005). On July 11, 2007, the pre-trial chamber terminated the proceedings against Lukwiya. See Prosecutor v. Kony, Case No. ICC-02/04-01/05, Decision to Terminate the Proceedings Against Raska Kukwiya (July 11, 2007).

³⁹¹ See Prosecutor v. Chui, Case No. ICC-01/04-02/07, Warrant of Arrest for Mathieu Ngudjolo Chui, at 6 (July 6, 2007).

³⁹² See Prosecutor v. Odhiambo, Case No. ICC-02/04, Warrant of Arrest for Okot Odhiambo, counts 15, 19 (July 8, 2005).

³⁹³ See Prosecutor v. Ongwen, Case No. ICC-02/04, Warrant of Arrest for Dominic Ongwen, count 33 (July 8, 2005).

³⁹⁴ See Prosecutor v. Otti, Case No. ICC-02/04, Warrant of Arrest for Vincent Otti, counts 9, 15, 19, 26, 33 (July 8, 2005).

³⁹⁵ See Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, 7 (Mar. 4, 2009) [hereinafter *Al Bashir Arrest Warrant*].

³⁹⁶ See *Harun Arrest Warrant*, *supra* note 387, counts 8, 19, 38, 50.

³⁹⁷ See *Kushayb Arrest Warrant*, *supra* note 385, counts 8, 19, 38, 50.

- c) Harun,³⁹⁸ Kushayb³⁹⁹ and Omar Al Bashir⁴⁰⁰ for forcible transfer (Article 7(1)(d));
- d) Harun⁴⁰¹ and Kushayb⁴⁰² for persecution by way of pillaging (Article 7(1)(h));
- e) Harun⁴⁰³ and Kushayb⁴⁰⁴ for persecution by way of property destruction (Article 7(1)(h)); and
- f) Harun⁴⁰⁵ and Kushayb⁴⁰⁶ for persecution by way of forcible transfer (Article 7(1)(h)).

No definitive legal or factual findings have been made in respect of these charges.

B. *Article 31 - Military Necessity as a Justification/Excuse?*

The potential use of military necessity as a justification or excuse affects those war crimes that do not provide for military necessity exceptions and, accordingly, of which the absence of military necessity is not an element. A person charged with one of these war crimes who pleads military necessity does not seek to negate its element. Rather, that person seeks to deny wrongdoing (hence justified) or blameworthiness (hence excused) in the event that the prosecution proves every element of the offence. The defendant's reliance on military necessity in this fashion would constitute a "defence" properly so called.

That military necessity should be admitted as a genuine defence, however, is a highly controversial proposition. As noted earlier, rules of international humanitarian law already embody a realistic compromise between military necessity and humanitarian considerations where they collide. Admitting military necessity as a genuine defence would amount to admitting it *de novo* for deviations from these rules. The entire *corpus juris* of international humanitarian law would risk being unduly volatile and subservient to the exigencies of war.

Article 31(1) of the ICC Statute envisages several "grounds for excluding criminal responsibility."⁴⁰⁷ According to one ground:

³⁹⁸ See *Harun Arrest Warrant*, *supra* note 387, counts 9, 20, 51.

³⁹⁹ See *Kushayb Arrest Warrant*, *supra* note 385, counts 9, 20, 51.

⁴⁰⁰ See *Al Bashir Arrest Warrant*, *supra* note 395, at 7.

⁴⁰¹ See *Harun Arrest Warrant*, *supra* note 387, counts 10, 21, 39.

⁴⁰² See *Kushayb Arrest Warrant*, *supra* note 385, counts 10, 21, 39.

⁴⁰³ See *Harun Arrest Warrant*, *supra* note 387, counts 1, 10, 21, 39.

⁴⁰⁴ See *Kushayb Arrest Warrant*, *supra* note 385, counts 1, 10, 21, 39.

⁴⁰⁵ See *Harun Arrest Warrant*, *supra* note 387, counts 1, 10, 39.

⁴⁰⁶ See *Kushayb Arrest Warrant*, *supra* note 385, counts 1, 10, 39.

⁴⁰⁷ It is not clear whether, within the meaning of Article 31, a "ground for excluding criminal responsibility" constitutes a justification or excuse, or both. See, e.g., Albin Eser, *Article 31*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 863, 871-72 (2d ed., Otto Triffterer ed. 2008); KITTICHAISAREE, *supra* note 307, at 269; E.

[A] person shall not be criminally responsible if, at the time of that person's conduct . . . (c) [t]he person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph.⁴⁰⁸

Note here that a person shall not be criminally responsible for war crimes if he acts "reasonably to defend . . . property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the . . . property protected."⁴⁰⁹

Could this clause be construed as introducing, in substance, a military necessity-like justification or excuse for war crimes?⁴¹⁰ Several commen-

VAN SLIEDREGT, *THE CRIMINAL RESPONSIBILITY OF INDIVIDUALS FOR VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW* 258 (T.M.C. Asser Press 2003).

⁴⁰⁸ ICC Statute, *supra* note 25, art. 31(1)(c).

⁴⁰⁹ *Id.*

⁴¹⁰ It appears from the drafting history that military necessity was treated at first as a potentially separate ground for excluding criminal responsibility.

Article R: Possible defences specifically referring to war crimes and grave breaches of the Geneva Conventions of 1949

Such defences might include:

- Military necessity;
- Reprisals.

[Note. It was questioned whether defences under public international law should be included in the General Part of the Statute, since they to a large extent relate to inter-state relations. It was also questioned which set of rules governing reprisals should apply.

. . .

It was questioned whether such defences could be dealt with in connecting [sic] with the definition of war crimes and grave breaches of the Geneva Conventions of 1949.]

Preparatory Committee, *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. II (Compilation of Proposals)* 103, G.A. 51st Sess., Supp. No. 22, A/51/22, 1996 (underline in original), in *THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY* 441, 495 (1998); see also, Preparatory committee, *Addendum, Report of the Preparatory Committee on the Establishment of an International Criminal Court*, 59 n.39, A/Conf.183/2/Add.1 (Apr. 14, 1998) ("It was questioned whether such grounds as military necessity could be dealt with in connection with the definition of war crimes"). During the final negotiations of the statute, the expression "in the case of war crimes, property which is essential for accomplishing a military mission" was added to what is now Article 31(1)(c). See, e.g., Eser, *supra* note 407, at 548; VAN SLIEDREGT, *supra* note 407, at 258.

tators have expressed their concern that it might be so construed.⁴¹¹ That there is such a risk seems undeniable, at least as a matter of principle. It is submitted here, however, that the clause's inclusion in Article 31(1)(c) would have more limited practical ramifications than it might appear.

The way in which the clause is formulated indicates that its admissibility is subject to the satisfaction of several requirements. They are:

- a) That the act was taken to defend property;
- b) That the act was reasonable;
- c) That the property was essential for accomplishing a military mission;
- d) That the act was taken against force;
- e) That the force was imminent;
- f) That the force was unlawful; and
- g) That the act was taken in a manner proportionate to the degree of danger to the property protected.

The requirement that the act be taken with a view to defending certain property is utterly foreign to the traditional understanding of military necessity. It was noted earlier that, in its legal function as an exception, military necessity encompasses a far wider range of purposes - from the maintenance of the belligerent's sanitary condition to the military defeat of his enemy. Typically, the purposes concerned are abstract (*e.g.* the attainment of a degree of security for the occupation force), rather than material (*e.g.* the protection of an object), in nature. It is, among other things, this broad and abstract scope of permissible purposes that makes the potential introduction of military necessity as a genuine defence so contentious. If, as is the case with the exclusionary ground under Article 31(1)(c), the very notion of military necessity had been restricted to measures taken in defence of property, virtually none of the successful military necessity pleas in the history of international humanitarian law would have been successful.

Nor, for the exclusionary ground to be admissible under Article 31(1)(c), is it sufficient that the act be taken to defend *any* property. Rather, the property must be essential for accomplishing a military mission. Whatever it may mean for particular property to be "essential for accomplishing a military mission,"⁴¹² it seems exceedingly likely that such

⁴¹¹ Van Sliedregt observed that the lack of clarity in the wording of Article 31(1)(c) "might be interpreted as allowing for a plea of military necessity. The clause 'property which is essential for accomplishing a military mission' might be taken to constitute a blank and open-ended allowance for a plea of military necessity, which would, however, be a violation of the laws of war." VAN SLIEDREGT, *supra* note 407, at 259. See, *e.g.*, GEERT-JAN G.J. KNOOPS, DEFENSES IN CONTEMPORARY INTERNATIONAL CRIMINAL LAW 89-91 (Transnational Publishers 2001) (quoting Keijzer, *supra* note 9, 443); Keijzer, *supra* note 9, 444-45; Catherine Denis & Miguel Romero, *Synthèse des débats de l'atelier du 12 juillet 2000*, REVUE BELGE DE DROIT INTERNATIONAL, *supra* note 9, 463, 480.

⁴¹² The looseness of this expression, as well as the difficulty that may arise in connection with its interpretation, has been noted elsewhere. See, *e.g.*, Eser, *supra*

property also constitutes a military objective. As a military objective, the property is liable to all lawful attacks and acts of destruction and its destruction would *ipso facto* be militarily necessary. Conversely, only rarely would property “essential for accomplishing a military mission” retain its status as a civilian object. Where particular property does constitute a civilian object, it is immune from deliberate, indiscriminate or disproportionate attacks.

A person is not eligible for the exclusionary ground under Article 31(1)(c) if the use of force against which he acts to defend the property is lawful. Since, as noted above, the type of property at issue here is almost always a military objective, he will be eligible only in a highly limited set of circumstances where the force in question involves prohibited means and methods of combat and/or direct participation of civilians, or in the unlikely event that the property defended is essential for a military mission and yet enjoys immunity as a civilian object.⁴¹³

The remaining requirements of Article 31(1)(c) are substantively similar, if not identical, to those of military necessity as an exception. Thus, the clause requires that the act be “reasonable” for the property’s defence.⁴¹⁴ This would resemble the requirement of exceptional military necessity that the measure be “materially relevant” to and the “least injurious” for the attainment of a military purpose. There is some authority for the view that the “reasonable act” test is an objective one.⁴¹⁵ If true, this test would arguably be more stringent than the belligerent’s contemporaneous and *bona fide* knowledge, *i.e.*, subjective awareness, of the various requirements of exceptional military necessity discussed earlier.⁴¹⁶

The clause also requires that the act be taken against an “imminent” use of force.⁴¹⁷ This requirement would be akin to the notion of “urgency” implied in military necessity. Finally, the clause requires that the act be “proportionate” to the degree of danger to the property defended.⁴¹⁸ It would appear that the relevant ratio here is one between the danger to the property averted by the defensive act, on the one hand, and the harm caused by the same act, on the other.⁴¹⁹ Such a ratio would

note 407, at 549; Antonio Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, 10 EUR. J. INT’L L. 144, 155 (1999).

⁴¹³ See, e.g., Gabor Rona, *Réponses à la Question 2*, 33 REVUE BELGE DE DROIT INTERNATIONAL 446, 449-50 (2000).

⁴¹⁴ ICC Statute, *supra* note 25, art. 31(1)(c).

⁴¹⁵ See, e.g., VAN SLIEDREGT, *supra* note 407, at 260-61.

⁴¹⁶ The ICC Statute treats mistake of fact separately, under Article 32(1). See ICC Statute, *supra* note 25, art. 32(1).

⁴¹⁷ ICC Statute, *supra* note 25, art. 31(1)(c).

⁴¹⁸ *Id.*

⁴¹⁹ See, e.g., Rona, *supra* note 413, at 450.

be analogous to the benefit-injury ratio used for the proportionality requirement of military necessity.

In view of the foregoing, the clause would not affect war crimes that already provide for military necessity exceptions. To the extent that it would affect those crimes which envisage no military necessity exceptions, its scope is so restrictive that it would justify or excuse a far narrower range of measures than military necessity, if introduced as a genuine defence, would. The fact remains however that, no matter how restrictive in scope, Article 31(1)(c) is a qualitatively new defence to war crimes hitherto unknown in international humanitarian law.⁴²⁰ To be sure, international humanitarian law does appear as part of the law that the court is bound to apply by virtue of Article 21 of its statute.⁴²¹ But the statute contains no interpretational device whereby international humanitarian law mandatorily trumps its statutory provisions such as Article 31(1)(c).⁴²² It would be incumbent upon the court itself to keep this clause in check by using its Article 31(2) powers wisely.⁴²³

Lastly, Article 31(3) of the statute provides for exclusionary grounds not enumerated under Article 31(1) where such grounds are derived from applicable law as set forth in Article 21.⁴²⁴ Whether military necessity could constitute such a ground would depend on the manner in which the court interprets the “applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict.” The foregoing discussion on the nature and scope of military necessity exclusively as an exception makes it abundantly clear that no treaty, principle or rule of international law admits military necessity as a genuine defence.⁴²⁵ Nor, in all likelihood, would the court recognise military necessity as an unenumerated exclusionary ground under Article 31(3).

⁴²⁰ See, e.g., Cassese, *supra* note 412, at 154-55 (“via international criminal law a norm of international humanitarian law has been created whereby a serviceman may now lawfully commit an international crime for the purpose of defending any ‘property essential for accomplishing a military mission’ against an imminent and unlawful use of force. So far such unlawful use of force against the ‘property’ at issue has not entitled the military to commit war crimes. They could only react by using lawful means or methods of combat or, *ex post facto*, by resorting to lawful reprisals against enemy combatants.”)

⁴²¹ See ICC Statute, *supra* note 25, art. 21 (“The Court shall apply . . . (b) [i]n the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict”).

⁴²² This problem would remain notwithstanding Article 21(3).

⁴²³ See ICC Statute, *supra* note 25, art. 31(2) (“The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it”).

⁴²⁴ See ICC Statute, *supra* note 25, art. 31(3).

⁴²⁵ See, e.g., Denis & Romero, *supra* note 411, at 480.

VIII. CONCLUSIONS

Philosophers, historians, military thinkers, diplomats, human rights activists, prosecutors, defence counsel and judges all have their own (often dissimilar) ideas about what military necessity means or should mean. Underlying presuppositions and perspectives frequently remain unarticulated or, worse still, sometimes not well understood by the very people who offer opinions on the matter. Inarticulation and equivocation leads to confusion, *e.g.*, between military necessity, on the one hand, and proportionality, distinction, prudence and other related notions, on the other. Different historical understandings - *i.e.*, doing X may be considered militarily necessary at time T in a particular type of warfare prevalent during that period, but it may not be so considered at time T+1 in another type of warfare that has since become prevalent - exacerbate these confusions.

Identifying the contexts of material reality, norm-creation and positive law enhances clarity and precision in one's treatment of military necessity. It enables him to say, for example, that certain belligerent conduct may be materially necessary, morally objectionable and not clearly forbidden by law,⁴²⁶ or that some action may be effective and ethical yet unequivocally prohibited.⁴²⁷ Contextuality helps him understand how the notion of military necessity may "travel," as it were, from the mind of an encircled field commander contemplating urgent action to that of a delegate at diplomatic conferences negotiating new rules and to that of a judge interpreting provisions of international humanitarian law, and assume distinct meanings and nuances.

This article has examined military necessity within the context of positive law. Here, military necessity has no function but as exceptional clauses to principal rules of international humanitarian law where the latter rules envisage them expressly and in advance. Over time, various authorities have contributed to elucidating the substantive requirements of exceptional military necessity. The four requirements that derive from this - namely, that the measure was taken primarily for the attainment of some specific military purpose, that the measure was required for the purpose's attainment, that the purpose was in conformity with international humanitarian law, and that the measure itself was also otherwise in conformity with the law - must be cumulatively satisfied.

The ICTY jurisprudence on exceptional military necessity reveals an encouraging prospect for its effective interpretation even in highly complex circumstances such as those involving combat-related property destructions. Other than the small number of rulings that are perhaps

⁴²⁶ This would arguably be the case where a party to the conflict destroys objects indispensable to the survival of the civilian population that are located in its own territory.

⁴²⁷ This would arguably be the case where prisoners-of-war are detained aboard an enemy military vessel for better accommodation and speedier repatriation.

unfortunate,⁴²⁸ ICTY chambers have by and large evaluated military necessity in accordance with its requirements and come to sensible factual conclusions.

Whether the ICC will continue with this prospect remains to be seen. Property-related charges of which the absence of military necessity is an express element have already been confirmed against several accused persons. At their trials, military necessity claims are likely to be argued alongside those under Article 31(1)(c) of the ICC Statute. Although, on its own, Article 31(1)(c) may have relatively modest practical ramifications on the applicable law, there is a real danger that it will undermine the clarity and precision with which the ICC builds its case law on exceptional military necessity proper. The court has all the more reasons to adjudicate its first cases with care.

⁴²⁸ Examples include the view that military necessity justifies attacks on civilian objects - subsequently corrected, to the tribunal's credit - and that military necessity is synonymous with military objectives.