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Chapter 9

Significance and Content of Juridical Military Necessity

In its juridical context, military necessity exempts measures from certain positive IHL rules that principally prescribe contrary behaviour. These measures are authorised to the extent that they are required for the attainment of military purposes and otherwise remain in conformity with positive international humanitarian law.¹ Where measures do not, or no longer, fulfil these conditions, they cease to be exempted, revert to being governed by the principal prescriptions, and become unlawful.

This chapter endeavours to elucidate the significance and content of military necessity in positive international humanitarian law. Assessing juridical military necessity involves interpreting the principal IHL rules and their exceptional clauses *vis-à-vis* the particular set of facts at issue. As an exception, military necessity contains four discernible requirements. First, the measure must be taken primarily for some specific military purpose. Second, the measure must be required for the purpose's attainment. Third, the purpose must be in conformity with international humanitarian law. Fourth, the measure itself must otherwise be in conformity with that law.² Our discussion will reveal continuing disagreements in some areas, in particular the criteria of proportionality for determining whether the measure taken was required for the attainment of the military purpose sought.

1. Juridical Military Necessity as an Exception

Exceptional military necessity has not yet been authoritatively defined. This thesis proposes the following definition: Military necessity exempts a measure from certain specific rules of positive international humanitarian law that principally prescribe contrary action, to the extent that the measure is required for the attainment of a military purpose and otherwise in conformity with that law.

It is submitted that this definition embodies custom. As seen below, the definition's various aspects find support in major military manuals reflecting state practice and/or *opinio juris*,³ and are confirmed by judicial decisions⁴ as well as scholarly writings.⁵

¹ See, e.g., Robin Geiß, "Military Necessity: A Fundamental 'Principle' Fallen into Oblivion", in Héléne Ruiz Fabri et al. (eds.), 2 *Select Proceedings of the European Society of International Law* (2010) 554, at 558-565.

² See Asa Kasher and Amos Yadlin, "Military Ethics of Fighting Terror: An Israeli Perspective", 4 *Journal of Military Ethics* 3 (2005), at 11-12.

³ See, e.g., U.S. Department of the Navy, Office of the Chief of Naval Operations et al., *The Commander's Handbook on the Law of Naval Operations* (1995), at 5-1; U.S. Department of the Army, *The Law of Land Warfare* (1956), at 4; Office of the Judge Advocate General, Canadian Forces, *Law of Armed Conflict at the Operational and Tactical Levels* (2000), at 2-1, 16-5; U.K. Ministry of Defence, *The Joint Service Manual of the Law of Armed Conflict* (2004), at 21-23; Office of General Counsel, Department of Defense, *Department of Defense Law of War Manual* (2015), at 51-58. See also Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), 2 *Customary International Law Pt. I* (2005), at 1002-1010. 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", in Nobuo Hayashi (ed.), *National Military Manuals on the Law of Armed Conflict* 2d ed. (2010) 17, at 33-34; Charles Garraway, "Military Manuals, Operational Law and the Regulatory Framework of the Armed Forces", in *ibid.*, 45, at 50, 53; David Turns, "Military Manuals and the Customary Law of Armed Conflict", in *ibid.*, 65.

⁴ See below.

⁵ See, e.g., Burleigh Cushing Rodick, *The Doctrine of Necessity in International Law* (1928), at 59-61; William Gerald Downey, Jr., "The Law of War and Military Necessity", 47 *American Journal of International Law* 251 (1953), at 254; B.V.A. Röling, "The Law of War and the National Jurisdiction Since 1945", 100 *Recueil des Cours* (1960) 377, at 382-387; N.C.H. Dunbar, "Military Necessity in War Crimes Trials", 29 *British Yearbook of International Law* 442 (1952); William V. O'Brien, "The Meaning of 'Military Necessity' in International Law", 1 *World Polity* (1957) 109; Robert W. Gehring, "Loss of Civilian Protections Under the Fourth Geneva Convention and Protocol I", 90 *Military Law Review* 49 (1980), at 54-58; Yoram Dinstein, "Military Necessity", 3 *Encyclopedia of Public International Law* (1982) 274; Christopher Greenwood, "Historical Development and Legal Basis", in Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflict* 2d ed. (2008) 1, at 36-38; Yutaka Arai-Takahashi, "Excessive Collateral Civilian Casualties and Military Necessity: Awkward Crossroads in International Humanitarian Law between State Responsibility and Individual

2. Military Necessity as an Exception v. State of Necessity as a Circumstance Precluding Wrongfulness

Before proceeding further, we need to clarify two key differences between military necessity as an exception, on the one hand, and the state of necessity as a circumstance precluding wrongfulness, on the other. The first difference concerns their status: exceptional military necessity forms part of what we call “primary rules” of international law, whereas the state of necessity is a “secondary rule”. Moreover, the two concepts have distinct contents.

2.1 Primary and Secondary Rules

For some time, our standard discourse on the international law of state responsibility has separated “primary rules” from “secondary rules”.⁶ To the former group belong those rules that determine the content of a substantive obligation and whose breach constitutes an internationally wrongful act. Exceptional clauses modify the content of the primary rules to which they are attached. It may therefore be said that juridical military necessity forms part of these rules and that acts in fulfilment of its requirements are not internationally wrongful.⁷

To the group of “secondary rules” belong the conditions for the existence of an internationally wrongful act,⁸ as well as the legal consequences that flow from it.⁹ Justifications and excuses are examples of secondary rules. Circumstances precluding *wrongfulness* – as opposed to, say, *blame-worthiness* – may be considered functionally analogous to justifications.¹⁰ In the international law of state responsibility, necessity constitutes such a circumstance.¹¹

In its earlier consideration of justificatory necessity, the International Law Commission (ILC) treated military necessity separately as an exception under international humanitarian law:

The 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

Criminal Liability”, in Freya Baetens and Christine Chinkin (eds.), *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford* (2015) 325, at 332.

⁶ See Pierre-Marie Dupuy, “The International Law of State Responsibility: Revolution or Evolution?”, 11 *Michigan Journal of International Law* 105 (1989); Y. Matsui, “The Transformation of the Law of State Responsibility”, in René Provost (ed.), *State Responsibility in International Law* (2002) 3, at 3-4; James Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (2002), at 14-16. 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, *General Theory of Law and State* (Anders Wedberg trans., 1949), at 58-61, 143-144; H.L.A. Hart, *The Concept of Law* 2d ed. (1994), at 77-96.

⁷ See also International Law Commission, 2 *Yearbook of the International Law Commission* Pt II (2001) 20, at 84 (footnotes omitted): “as embodied in article 25, the plea of necessity is not intended to cover conduct which is in principle regulated by the primary obligations. This has a particular importance in relation to the rules relating ... to the question of ‘military necessity’ ... which is, in the first place, the underlying criterion for a series of substantive rules of the law of war and neutrality, as well as being included in terms in a number of treaty provisions in the field of international humanitarian law ... while considerations akin to those underlying article 25 may have a role, they are taken into account in the context of the formulation and interpretation of the primary obligations”. See also Robert D. Sloane, “On the Use and Abuse of Necessity in the Law of State Responsibility”, 106 *American Journal of International Law* 447 (2012), at 497; Arai-Takahashi, “Excessive Collateral Civilian Casualties”, *supra* note 5, at 336, 337-338.

⁸ See Articles 1-15, Articles on the Responsibility of States for Internationally Wrongful Acts (12 December 2001).

⁹ See *ibid.*, Articles 28-41.

¹⁰ But see Robert Rosenstock, “Symposium: The ILC’s State Responsibility Articles: the ILC and State Responsibility”, 96 *American Journal of International Law* 792 (2002), at 794; Diane A. Desierto, *Necessity and National Emergency Clauses: Sovereignty in Modern Treaty Interpretation* (2012), at 103-108.

¹¹ It is in this context that the *Coleman v. Mexico* case (*Bond Coleman (U.S.A.) v. United Mexican States*, United States and Mexico General Claims Commission, 3 October 1928, 4 *Reports of International Arbitral Awards* (2006) 365, at 367-368; see also Desierto, *supra* note 10, at 51 n.60) is best understood.

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.¹²

As our discussion in Chapter 8 shows, the commission’s allusion to non-necessity “as a circumstance precluding the lawfulness of conduct which that rule normally allows” comes dangerously close to counter-*Kriegsräson*.¹³

Be that as it may, the ILC concluded that the state of necessity would be inadmissible as a justification for non-compliance with a provision of IHL conventions:

The second category of obligations to which the 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 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.¹⁴

According to the ILC, the inadmissibility of necessity as a circumstance precluding wrongfulness *vis-à-vis* positive IHL rules emanates from the very nature of the activities that these rules are intended to regulate.¹⁵ This solution, while not without merit, effectively precludes any room for *Humanitätsgebot*.¹⁶ The commission observes that “[t]here 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”, adding: “this is true of other humanitarian conventions applicable to armed conflicts”. Those “abnormal situations of peril”, however, are also situations where humanitarian considerations become particularly acute. It is to these situations that IHL conventions are “especially designed to be equally, or even particularly, applicable”. Consequently, “the bar to the invo-

¹² ILC, 2 *Yearbook of the International Law Commission* Pt II (1980) 13, at 45-46.

¹³ See Chapter 8 above.

¹⁴ ILC, 1980 *Yearbook*, *supra* note 12, at 50-51. See also Article 25(2)(a), Articles on State Responsibility: “In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if ... [t]he international obligation in question excludes the possibility of invoking necessity”.

¹⁵ See also ILC, 2001 *Yearbook*, *supra* note 7, at 84; David Kretzmer, “The Advisory Opinion: The Light Treatment of International Humanitarian Law”, 99 *American Journal of International Law* 88 (2005), at 99; Sarah Heathcote, “Circumstances Precluding the Wrongfulness in the ILC Articles on State Responsibility: Necessity”, in James Crawford et al. (eds.), *The Law of International Responsibility* (2010) 491, at 498; Gabriella Venturini, “Necessity in the Law of Armed Conflict and in International Criminal Law”, 41 *Netherlands Yearbook of International Law* 45 (2010), at 52.

¹⁶ See Chapter 8 above.

cability” of all *de novo* humanity pleas “then emerges implicitly, but with certainty ... from the circumstances in which [the rule] was formulated and adopted”.

2.2 Distinct Contents

In addition to their dissimilar status, military necessity and the state of necessity have 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.¹⁷ The ILC’s commentary states that “[t]he plea is excluded if there are other (otherwise) lawful means available, even if they may be more costly or less convenient”.¹⁸ In addition, Article 25(2)(b) disqualifies a state from invoking necessity if it has contributed to the situation of necessity.

As will be shown below, exceptional military necessity does not contain these conditions. In order to be eligible for military necessity exceptions, the belligerent need *not* show that its conduct was a *conditio sine qua non* for the purpose’s attainment. Nor is the belligerent’s contribution to the creation of circumstances of exceptional military necessity a ground for its inadmissibility. The mere fact that the belligerent becomes involved in an armed conflict certainly does not disqualify it from relying on military necessity clauses. The same goes for such strategic, operational and tactical decisions, or such manners in which campaigns, manoeuvres and military operations unfold, as may place the belligerent in situations where acting in a certain way becomes militarily necessary.

Nor is it a prerequisite for exceptional military necessity that the conduct should also qualify as justificatory necessity.¹⁹ Although, as a matter of fact, certain conduct may satisfy both sets of requirements simultaneously, this does not mean that exceptional military necessity and the state of necessity are identical notions or that one entails the other.

3. Specific Requirements of Juridical Military Necessity

In its juridical context, military necessity exempts a measure from certain specific rules of positive international humanitarian law that principally prescribe 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:

- (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, it being understood that “required” here means:
 - (a) That the measure was materially relevant to the military purpose’s attainment;
 - (b) That, of those materially relevant and reasonably available measures, the one taken was the least evil; and
 - (c) That the evil that the measure would cause was not disproportionate to the gain that it would achieve;

¹⁷ See also ICL, *Commentary*, *supra* note 7, at 83.

¹⁸ *Ibid.*

¹⁹ Arai-Takahashi, “Excessive Collateral Civilian Casualties”, *supra* note 5, at 337-338. But see, e.g., International Humanitarian Law Research Initiative, *The Separation Barrier and International Humanitarian Law: Policy Brief* (2004), at 6: “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 *ibid.* at 8-9, 12-13.

- (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.

These four requirements are cumulative. Should a given measure fail to satisfy any one or more of them, the measure would be “militarily unnecessary” within the meaning of exceptional military necessity clauses.

Two notable consequences follow. First, failing to satisfy these requirements is distinct from being militarily unnecessary in its strictly material sense.²⁰ Whereas criterion (2)(a) is common to both material and juridical military necessity, the latter alone contains criteria (2)(b) and (2)(c).²¹ Also, whereas juridical military necessity formally requires both the measure taken and the purpose sought to comply with international humanitarian law, compliance is, at best, merely an expedient desideratum for strictly material military necessity.²² In other words, juridical military necessity is more restrictive in scope than material military necessity. It is therefore possible that a belligerent act is consistent with military necessity in its strictly material context and yet fails to qualify for the application of a military necessity clause.

As will be seen below, the particular route chosen by the Israel Defence Forces (IDF) Commander for the erection of a separation fence in some parts of the West Bank may have constituted a material military necessity, but was found by the Israeli Supreme Court to be ineligible for the application of a military necessity exception.

Second, an act being “militarily unnecessary” in its juridical sense simply means that the exceptional clause ceases to apply to it.²³ The clause’s inapplicability exposes the conduct to the IHL rule’s principal content, which in turn renders it unlawful. The act’s unlawfulness emanates neither from its lack of judicial military necessity, nor from the now inoperative military necessity clause.

For example, Article 53 of Geneva Convention IV principally prohibits the destruction by the Occupying Power of real or personal property in territories it occupies, “except where such destruction is rendered absolutely necessary by military operations”.²⁴ Before the Eritrea-Ethiopia Claims Commission, Ethiopia declined to contend that the destruction of Tserona Town constituted a military necessity, or that the exceptional clause found in Article 53 of Geneva Convention IV applied to it. The commission proceeded to find Ethiopia responsible for the destruction, an act principally prohibited by Article 53 of Geneva Convention IV.²⁵

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.

3.1 The Measure Was Taken Primarily for Some Specific Military Purpose

This requirement is two-fold. First, it must be shown that there was, in fact, a specific purpose for which the measure was taken. Second, it must be shown that this purpose was primarily military in nature. It is not a requirement of juridical military necessity that the belligerent seek the submission of its enemy, despite occasional suggestions to the contrary.

²⁰ See Part I, Chapter 2 above.

²¹ Conversely, material military necessity alone entails the comparison between the degrees to which two reasonably available courses of action would be conducive *vis-à-vis* a common military goal under the prevailing circumstances. See *ibid.*

²² See Part I, Chapter 2, and Part II, Chapters 4 and 5 above.

²³ See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, ICJ Reports (2004) 136, para. 135 (finding that the court was 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”).

²⁴ Article 53, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (12 August 1949).

²⁵ See *Ethiopia v. Eritrea*, Eritrea-Ethiopia Claims Commission, *Partial Award Central Front – Eritrea’s Claims 2, 4, 6, 7, 8, & 22*, 28 April 2004, paras. 63, 71.

3.1.1 The Existence of a Specific Purpose

Military necessity exception is unavailable where the measure is taken for no purpose.²⁶ 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. "[N]ecessary ... for *what?*", one might ask in vain.²⁷ In the words of Myres S. McDougal and Florentino P. Feliciano,

[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.²⁸

Similarly, in *Hostage, Military Tribunal V* held:

[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.²⁹

3.1.2 The Purpose's Primarily Military Nature

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 or purportedly characterising³⁰ 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.³¹

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".³² According to commentators, the officer in question would be exempt from his duty to warn the authorities should military necessity so require.³³ One primarily military purpose cited in this regard is the aversion of danger to the attacking aircraft.³⁴ 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.

²⁶ See Part I, Chapter 2 above.

²⁷ Myres S. McDougal and Florentino P. Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion* (1961), at 525.

²⁸ *Ibid.*

²⁹ *United States of America v. Wilhelm List et al., Judgment*, 11 *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10* (1950) 757, at 1253-1254. 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. Radislav Krstić*, Case No. IT-98-33-T, *Judgment*, 2 August 2001, paras. 524-527.

³⁰ "Purportedly characterising" accounts for incompetence.

³¹ See, e.g., Ronald F. Roxburgh (ed.), 2 *Oppenheim's International Law: A Treatise* 3d ed. (1921), at 213: "[i]n every case destruction ... must not be merely be the outcome of a spirit of plunder or revenge ..."

³² Article 26, 1907 Hague Regulations.

³³ See, e.g., Julius Stone, *Legal Controls of International Conflict: A Treatise on the Dynamics of Disputes – and War – Law* (1954), at 622-623; A.P.V. Rogers, *Law on the Battlefield* 2d ed. (2004), at 88.

³⁴ See, e.g., Stone, *supra* note 33, at 622; Rogers, *supra* note 33, at 88.

No less pertinent for the requirement that the measure be taken for a primarily military purpose are situations of belligerent occupation. This is so because the occupier might present its geopolitical, demographic, ideological and/or economic ambitions as legitimate military concerns.³⁵

Two Israeli cases may be illustrative of the intricacies involved. In *Elon Moreh*, the Supreme Court of Israel, sitting as the High Court of Justice, declared null and void an order issued by the IDF Commander for the Judaea and Samaria Region to requisition privately owned Palestinian land for the establishment of a civilian settlement.³⁶ 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".³⁷

At issue in *Elon Moreh* was whether the requisition order was in conformity with the customary IHL rules 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".³⁸

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.³⁹

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.⁴⁰

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

³⁵ See HCJ 10356/20, *Yoav Hess et al. v. The Commander of IDF Forces in the West Bank, GOC Central Command and the State of Israel*, and HCJ 10497/20, *The Hebron Municipality et al. v. Major General Moshe Kaplinsky et al.*, 4 March 2004, at para. 12; HCJ 2056/04, *Beit Sourik Village Council v. The Government of Israel and Commander of the IDF Forces in the West Bank*, 30 June 2004, paras. 26-27.

³⁶ See HCJ 390/79, *Izat Muhamed Mustafa Dweikat et al. v. The Government of Israel et al.*, 22 October 1979 (reprinted in 19 *International Legal Materials* 148 (1980)).

³⁷ *Ibid.*, at 170.

³⁸ Article 52, 1907 Hague Regulations.

³⁹ *Elon Moreh*, at 168-169. See also *Hess et al.* and *The Hebron Municipality et al.*, at para. 9. 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". See Stone, *supra* note 33, at 708. See also Georg Schwarzenberger, 2 *International Law as Applied by International Courts and Tribunals: The Law of Armed Conflict* (1968), at 245-246, 270-271; Marco Pertile, "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: A Missed Opportunity for International Humanitarian Law?", 14 *Italian Yearbook of International Law* 121 (2004), at 135; David Kretzmer, "The Supreme Court of Israel: Judicial Review During Armed Conflict", 47 *German Yearbook of International Law* 392 (2004), at 447; David Kretzmer, "The Advisory Opinion", *supra* note 15, at 97; David Kretzmer, "The Law of Belligerent Occupation in the Supreme Court of Israel", 94 *International Review of the Red Cross* 207 (2012), at 216-218.

⁴⁰ 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*, at 155; see also *ibid.*, at 153-154.

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 reasons lying in a Zionist point of view of the settlement of the whole Land of Israel.⁴¹

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.⁴² On the contrary, the C-o-S gave his approval only *post factum* to what was essentially a political programme.⁴³ 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".⁴⁴ Justice M. Landau, writing for the unanimous court,⁴⁵ 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.⁴⁶

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.⁴⁷ On this matter the court deferred, as it had done so in previous cases,⁴⁸ to the professional opinion of the C-o-S.⁴⁹ Through this deference, the court arguably acknowledged that the settlement *might* have actually fulfilled the military needs as suggested by the C-o-S if the requisition order had been upheld and the settlement established.

This arguable 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*

⁴¹ *Ibid.*, at 169.

⁴² See *ibid.*, at 171.

⁴³ See *ibid.*, at 173.

⁴⁴ *Ibid.*, at 175.

⁴⁵ Two justices concurred with Justice Landau. The other two justices also concurred but appended separate opinions of their own. See *ibid.*, at 148.

⁴⁶ *Ibid.* 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 *ibid.*, at 175 (citing S.A. de Smith, *Judicial Review of Administrative Action* 3d ed. (1973)). See also *Elon Moreh*, at 175-176.

⁴⁷ The court did, however, note the existence of diametrically opposing views on this subject. See *Elon Moreh*, at 154-156.

⁴⁸ See Kretzmer, "Law of Belligerent Occupation", *supra* note 39, at 228.

⁴⁹ See *Elon Moreh*, at 152-156. The court, quoting a passage from its previous ruling (not yet published at the time), said (*ibid.*, at 156): "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".

Moreh requisition order depended on whether it had really been decided for the right purposes,⁵⁰ 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.⁵¹ 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 that rendered the land seizures illegal; and violations of the local inhabitants' fundamental rights.⁵²

The court upheld the commander's authority to construct the fence.⁵³ It then proceeded with the examination of the fence's route chosen by the commander and its lawfulness under international humanitarian law.⁵⁴ 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.⁵⁵ Marco Pertile suggests that it does not, on the ground that

[t]he 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.⁵⁶

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. The mere fact that such a project occurs on occupied territory does not *per se* alter its character as a military operation.

If it were true that the wall's erection did not constitute "military operations" within the meaning of Article 53, however, then it would be arguable that the seizure orders of the IDF commander had arguably not been issued "primarily for some military purpose".

3.1.3 Submission of the Enemy?

⁵⁰ See *Beit Sourik*, para. 27. See also H CJ 7957/04, *Zaharan Yunis Muhammad Mara'abe et al. v. The Prime Minister of Israel et al.*, 15 September 2005, para. 98.

⁵¹ See *Beit Sourik*, paras. 1-6.

⁵² See *ibid.*, paras. 10-11.

⁵³ *Ibid.* 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 *ibid.*, paras. 26-32. See also *Alfei Menashe*, paras. 15-23, 98-101.

⁵⁴ See *Beit Sourik*, paras. 33-35.

⁵⁵ See *ibid.*, para. 35.

⁵⁶ Pertile, *supra* note 39, 135-136. See also *ibid.*, at 150-151; Alexander Orakhelashvili, "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: Opinion and Reaction", 11 *Journal of Conflict & Security Law* 119 (2006), at 137 ("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").

The military purpose sought need not be complete submission of the enemy.⁵⁷ While this formulation was found in some, typically older, military manuals,⁵⁸ it is not the case in most of the later ones⁵⁹ and commentaries.⁶⁰

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*, for instance, the U.S. Military Tribunal acquitted Lothar Rendulic of wanton destruction of private and public property in Finnmark, Norway, a charge based on the rules contained in Article 23(g) of the 1907 Hague Regulations. 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]”.⁶¹ 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.⁶²

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:

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.⁶³

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 1991.⁶⁴

Admittedly, Rogers has made this observation specifically with the 1958 British manual⁶⁵ in mind. Nevertheless, his observation would also be valid *vis-à-vis* other manuals that refer to the complete submission of the enemy or adversary as an aspect of military necessity.

⁵⁷ Roxburgh (ed.), *supra* note 31, at 212 (emphasis in original): “All destruction of, and damage to, enemy property for the purpose of offence and defence is *necessary* destruction and damage, and therefore lawful, whether it be on the battlefield during battle, or in preparation for battle or siege”.

⁵⁸ See, e.g., Office of the Judge Advocate General, *supra* note 3, at 2-1 (allowing complete submission only as “the *primary aim* of armed conflict”) (emphasis added); The War Office, *The Law of War on Land, Being Part III of the Manual of Military Law* (1958), at 1; U.S. Department of the Army, *supra* note 3, at 4.

⁵⁹ See, e.g., Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces* (1987), at 82-83 (“overpowering of the enemy”); U.K. Ministry of Defence, *supra* note 3, at 21 (“complete or partial submission of the enemy”); U.K. Ministry of Defence, *Joint Services Publication 383: The Manual of the Law of Armed Conflict Amendment* (2010) 3, at 5; U.S. Department of the Navy, *supra* note 3, at 5-2 (“partial or complete submission of the enemy”); Office of General Counsel, *supra* note 3, at 56-57.

⁶⁰ See, e.g., Schwarzenberger, *supra* note 39, at 131-132; Rogers, *supra* note 33, at 5; Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (2010), at 260; Greenwood, *supra* note 5, at 36.

⁶¹ *Hostage*, at 1296-1297.

⁶² See also *United States of America v. Wilhelm von Leeb et al., Judgment*, 11 *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10* (1950) 1, at 541; McDougal and Feliciano, *supra* note 27, at 74-75.

⁶³ *William Hardman (United Kingdom) v. United States*, 18 June 1913, 6 *Reports of International Arbitral Awards* (2006) 25, 26; 7 *American Journal of International Law* 879 (1913), at 881; 2 *British Yearbook of International Law* 197 (1921-1922), at 119. See also Schwarzenberger, *supra* note 39, at 131-132; Hilaire McCoubrey, “The Nature of the Modern Doctrine of Military Necessity”, 30 *Revue de droit militaire et de droit de la guerre* 215 (1991), at 222-223.

⁶⁴ Rogers, *supra* note 33, at 5.

⁶⁵ The War Office, *supra* note 58.

3.2 The Measure Was Required for the Attainment of the Military Purpose

In order for juridical military necessity pleas to be admissible, the measure taken must be “required”⁶⁶ for the attainment of the military purpose. Assessing the admissibility of such pleas therefore involves evaluating the relationship between the measure taken on the one hand, and the purpose that it was meant to attain on the other.

Within the meaning of juridical military necessity, a measure cannot be considered required for a particular military purpose unless it satisfies all of 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 evil; and
- (iii) That the evil that the measure would cause was not disproportionate to the gain that it would achieve.⁶⁷

Where a given measure fails to satisfy the three cumulative criteria, it is arguably better described as a military “advantage” or “convenience”⁶⁸ ineligible for exception than as a military “necessity”. A situation may also arise where even the least evil of those reasonably available and materially relevant measures causes, or is expected to cause, disproportionate injury. Where this is the case, juridical military necessity may leave the belligerent with no alternative but to modify the military purpose or abandon its pursuit altogether.⁶⁹

3.2.1 The Measure’s Material Relevance to the Military Purpose’s Attainment

Military necessity is inadmissible where the measure would have no material bearing on the attainment of the stated military purpose.⁷⁰

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. Eck argued that the elimination of the vessel’s traces with a machine gun and hand grenades was operationally necessary to save his U-boat and its crew.

⁶⁶ 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., Article 14, Instructions for the Government of Armies of the United States in the Field (24 April 1863) (“indispensable”); de Mulinen, *supra* note 59, at 83 (“indispensable”); McDougal and Feliciano, *supra* note 27, at 524, 527 (“necessary”); Downey, *supra* note 5, at 254 (“need”); Robert W. Gehring, “Loss of Civilian Protection Under the Fourth Geneva Convention and Protocol I”, 90 *Military Law Review* 49 (1980), at 55 (“requirement”); O’Brien, *supra* note 5, at 138 (“indispensable”); Dinstein, *Military Necessity* (1982), *supra* note 5, *passim* (“necessary”).

⁶⁷ David 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, “Judicial Review During Armed Conflict”, *supra* note 39, at 450.

⁶⁸ See, e.g., *In re von Lewinski (called von Manstein)*, *Annual Digest and Reports of Public International Law Cases* (1949) 509, at 522 (“Now first and obvious comment on the wording of [Article 23(g) of the 1907 Hague Regulations] is that the requirement is ‘necessity’ and not ‘advantage’”); Nils Melzer, *Targeted Killing in International Law* (2008), at 291-292; Roger O’Keefe, *The Protection of Cultural Property in Armed Conflict* (2006), at 74-75, 122-123; Solis, *supra* note 60, at 264 (“Sometimes, military necessity is invoked when military convenience is closer to truth”); G.I.A.D. Draper, “Military Necessity and Humanitarian Imperatives”, 12 *Military Law and Law of War Review* 129 (1973), at 134 (“One thing seems to be clear. Military ‘necessity’ is not synonymous with ‘military convenience’” (quoting *von Manstein*, at 522)).

⁶⁹ Michael Walzer makes a similar ethical argument regarding Hiroshima. See Michael Walzer, *Just and Unjust War: A Moral Argument with Historical Illustrations* (1977), at 263-268.

⁷⁰ See, e.g., *Hostage*, at 1253-1254 (“There must be some reasonable connection between the destruction of property and the overcoming of the enemy forces”); see also, Dinstein, *Military Necessity* (1982), *supra* note 5, at 275; McDougal and Feliciano, *supra* note 27, 524-525; Pertile, *supra* note 39, at 151.

Relevant facts of the case 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).⁷¹

Eck 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 signalling 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.⁷²

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.⁷³

For our purposes, we 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.⁷⁴

Eck's argument was unsuccessful. The court found him guilty as charged and sentenced him to death by shooting.⁷⁵

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.⁷⁶ Be that as it may, the judge advocate asked the court:

⁷¹ See John Cameron, *Trial of Heinz Eck, August Hoffmann, Walter Weisspfennig, Hans Richard Lenz and Wolfgang Schwender (The Peleus Trial)* (1948), at 56-57; United Nations War Crimes Commission, “The Peleus Trial”, 1 *Law Reports of Trials of War Criminals* (1947), at 1-21.

⁷² See UN War Crimes Commission, “Peleus”, *supra* note 71, at 4-5.

⁷³ Cameron, *supra* note 71, at 126-27.

⁷⁴ McCoubrey, *supra* note 63, 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.

⁷⁵ Cameron, *supra* note 71, at 127; UN War Crimes Commission, “Peleus”, *supra* note 71, at 20-21.

⁷⁶ See Cameron, *supra* note 71, at 127; UN War Crimes Commission, “Peleus”, *supra* note 71, at 12, 15.

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?⁷⁷

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.⁷⁸ 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.⁷⁹

A measure's relevance to its purpose also became an issue in *Beit Sourik*. The petitioners in that case submitted alternative routes for the fence.⁸⁰ Members of a non-governmental Council for Peace and Security, acting as *amici curiae*, provided expert opinions on security that differed in part from those of the respondents.⁸¹ The Israeli 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”.⁸² “Between these conflicting norms”, continued the court, “a proper balance must be found”.⁸³

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.⁸⁴ The court divided proportionality into three subtests.⁸⁵ 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”.⁸⁶

Using this test, the court reiterated its traditional deference to the professional opinion of the military commanders who had been 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.⁸⁷ Consequently, the court held that the commander's chosen route satisfied this test.⁸⁸

⁷⁷ Cameron, *supra* note 71, at 127. In this connection, see also the *Llandovery Castle* case as reported by the United Nations War Crimes Commission. United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (1948) at 48-49.

⁷⁸ See Cameron, *supra* note 71, at 127. (“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”).

⁷⁹ Eck admitted to his defense 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”. *Ibid.* at 52.

⁸⁰ See *Beit Sourik*, para. 17.

⁸¹ See *ibid.* paras. 17, 47.

⁸² *Ibid.*, para. 35.

⁸³ *Ibid.*

⁸⁴ *Ibid.*, paras. 36-37. See also Kretzmer, “Law of Belligerent Occupation”, *supra* note 39, at 228-229 n.104 (citing Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (2011)).

⁸⁵ 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”). See *Alfei Menashe*, para. 30.

⁸⁶ *Beit Sourik*, para. 41.

⁸⁷ See *ibid.*, paras. 46-47, 56-57, 66, 70, 75, 80.

⁸⁸ 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 *ibid.*, paras. 50, 80.

3.2.2 Least Evil Among Materially Relevant and Reasonably Available Measures

It is not necessary that the measure taken be the *only* reasonably available course of action for the attainment of a given military purpose. Such singular availability hardly ever occurs. There would almost always be two or more reasonably available courses of action that are materially relevant to the purpose.⁸⁹ 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 counter-factual *conditio sine qua non* – which, by definition, cannot be proven⁹⁰ – need be considered.

Exceptional 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.⁹¹ 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 that 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?⁹²

Implicit herein is 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.⁹³ 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". 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 person⁹⁴ – although, admittedly, the survivors on the rafts and wreckage would be left to their fate.⁹⁵

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,

⁸⁹ See, e.g., Article 6(a)(ii), Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of armed conflict (26 March 1999). See also below.

⁹⁰ See Part I, Chapter 2 above.

⁹¹ See, e.g., *Beni-Madan Rzini Case (Great Britain v. Spain)*, Spanish Zone of Morocco Claims Commission, 29 December 1924, 2 *Annual Digest of Public International Law Cases Years 1923 to 1924* (1933) 168 ("It ought not to have been difficult for the military authorities, once they had seized the cattle, to separate the animals belonging to peaceful farmers from those owned by rebels. The slaughter of the animals was not justified by military necessity"); Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law* 3d ed. (2014), at 474 ("if the military goal could be achieved through appropriation or similar means, destruction is not permitted as it is disproportionate").

⁹² Cameron, *supra* note 71, at 127.

⁹³ 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.

⁹⁴ 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". UN War Crimes Commission, "Peleus", *supra* note 71, at 16.

⁹⁵ 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 71, at xxvi; UN War Crimes Commission, "Peleus", *supra* note 71, at 3.

Kapitänleutnant Schnee, was a member of the German U-boat Command who had sunk about thirty Allied ships and received military decorations.⁹⁶ 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.⁹⁷

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”.⁹⁸

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.⁹⁹ 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 kilometres to the south of the current route. In the council's view, the local population would be dangerously and needlessly embittered by the inevitable construction of agricultural gates.¹⁰⁰ The petitioners presented two alternative routes.¹⁰¹

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 443.¹⁰² The commander also differed from the petitioners on the scale of the injury.¹⁰³ 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.¹⁰⁴

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,

⁹⁶ See UN War Crimes Commission, “Peleus”, *supra* note 71, at 6.

⁹⁷ Cameron, *supra* note 71, at 69-70.

⁹⁸ *Beit Sourik*, para. 41.

⁹⁹ See *ibid.*, para. 52.

¹⁰⁰ See *ibid.*, paras. 54-55.

¹⁰¹ See *ibid.*

¹⁰² See *ibid.*, paras. 51, 55.

¹⁰³ See *ibid.*, para. 53.

¹⁰⁴ See *ibid.*, para. 55.

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”.¹⁰⁵ The same was held to be the case for the other disputed segments of the commander’s chosen route.¹⁰⁶

In fairness to the court, the comparison at issue was one between the 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.¹⁰⁷

3.2.3 Proportionality between the Injury and the Gain

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.¹⁰⁸ Beyond this, however, there is no consensus as to how proportionality operates within the notion of military necessity – or *vice versa*, for that matter. Some treat proportionality as an element of military necessity.¹⁰⁹ Others suggest that it is military necessity that constitutes an element of proportionality.¹¹⁰

One difficulty is the fact that exceptional military necessity operates in the narrow confines of express IHL 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.¹¹¹ In *jus ad bellum* concerning the use of force in self-defence, for example, proportionality is typically determined on the basis of (i) the quantum of force used relative to (ii) the repulsion of the imminent

¹⁰⁵ *Ibid.*, para. 58.

¹⁰⁶ See *ibid.*, paras. 67, 70, 76, 80.

¹⁰⁷ 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 *Alfei Menashe*, para. 114: “It seems to us that the required effort has not been made, and the details of an alternative route 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”.

¹⁰⁸ See, e.g., *Legal Consequences Advisory Opinion, Separate Opinion of Judge Kooijmans*, para. 34; David Luban, “Military Necessity and the Cultures of Military Law”, 26 *Leiden Journal of International Law* 315 (2013), at 343-345.

¹⁰⁹ See, e.g., McDougal and Feliciano, *supra* note 27, at 72; O’Brien, *supra* note 5, at 138, 148-149; International Humanitarian Law Research Initiative, *supra* note 19, at 7; Elizabeth Samson, “Necessity, Proportionality, and Distinction in Nontraditional Conflicts: The Unfortunate Case Study of the Goldstone Report”, in Christopher A. Ford and Amichai Cohen (eds.), *Rethinking the Law of Armed Conflict in an Age of Terrorism* (2012) 195, at 202; Arai-Takahashi, “Excessive Collateral Civilian Casualties”, *supra* note 5, at 332; *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-T, *Judgement*, 10 July 2008, para. 357.

¹¹⁰ See, e.g., Michael N. Schmitt, “Book Review: Law on the Battlefield”, 8 *U.S. Air Force Academy Journal of Legal Studies* 255 (1997), at 257 (reviewing A.P.V. Rogers, *Law on the Battlefield* 1st ed. (1996)); Rogers, *supra* note 33, at 6 (referring to Schmitt’s review of the first edition).

¹¹¹ Two disciplines of particular interest here are *jus ad bellum* and *jus in bello*. See, e.g., *Ethiopia v. Eritrea*, Eritrea-Ethiopia Claims Commission, *Final Award on Ethiopia’s Damages Claims*, 17 August 2009, para. 316; Ricardo Pisillo Mazzeschi, “Book Review: Il Principio Della Proporzionalità Nell’Ordinamento Internazionale”, 13 *European Journal of International Law* 1031 (2002), at 1031-1036; Andreas Zimmermann, “*Jus ad Bellum, Jus in Bello* and the Issue of Proportionality”, 11 *Max Planck Yearbook of United Nations Law* 99 (2007); Christian J. Tams and James G. Devaney, “Applying Necessity and Proportionality to Anti-Terrorist Self-Defence”, 45 *Israel Law Review* 91 (2012); Enzo Cannizzaro, “Proportionality in the Law of Armed Conflict”, in Andrew Clapham and Paola Gate (eds.), *The Oxford Handbook of International Law in Armed Conflict* (2014) 332; Michael Newton and Larry May, *Proportionality in International Law* (2014).

or actual attack against which the right of self-defence is exercised.¹¹² Within *jus in bello* concerning the lawfulness of attacks on military objectives involving unintended civilian casualties, the most widely accepted pair of variables for 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”.¹¹³

As an element of exceptional military necessity,¹¹⁴ 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 *Beit Sourik*, considerations of proportionality in this sense proved decisive.¹¹⁵ The Israeli Supreme Court called such considerations “proportionality in the narrow sense”.¹¹⁶ 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”.¹¹⁷

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”.¹¹⁸ 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.¹¹⁹

It is this latter variant of proportionality, i.e., “in the narrow sense” and applied in a “relative manner”, that the court used when considering the facts before it.

Proportionality was examined on a segment-by-segment basis.¹²⁰ For each disputed segment of the route, the court weighed the injury to the local inhabitants¹²¹ *vis-à-vis* the security benefit derived from the fence being erected along the route chosen by the commander.

¹¹² See, e.g., Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (2004), at 159-179; Giovanni Distefano, “Use of Force”, in Andrew Clapham and Paola Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict* (2014) 545, at 555-556; Office of General Counsel, *supra* note 3, at 62.

¹¹³ See Articles 51(5)(b), 57(2)(b), Additional Protocol I. See also, e.g., Ben Clarke, “Contemporary Legal Doctrine on Proportionality in Armed Conflicts: A Select Review”, 3 *Journal of International Humanitarian Studies* 391 (2012); Ben Clarke, “Proportionality in Armed Conflicts: A Principle in Need of Clarification?”, 3 *Journal of International Humanitarian Legal Studies* 73 (2012); Geoffrey S. Corn et al., *The Law of Armed Conflict: An Operational Approach* (2012), at 123-125, 187-189; Jason Wright, “‘Excessive’ Ambiguity: Analysing and Refining the Proportionality Standard”, 94 *International Review of the Red Cross* 819 (2012); Yoram Dinstein, “The Principle of Proportionality”, in Kjetil Mjølhus, Camilla Guldhall Cooper and Gro Nystuen (eds.), *Searching for a “Principle of Humanity” in International Humanitarian Law* (2013) 72; Joshua Andresen, “New Voices: Challenging the Perplexity over *Jus in Bello* Proportionality”, 7 *European Journal of Legal Studies* 19 (2014); Jeremy Rabkin, “Proportionality in Perspective: Historical Light on the Law of Armed Conflict”, 16 *San Diego International Law Journal* 263 (2015).

¹¹⁴ Kretzmer, “Law of Belligerent Occupation”, *supra* note 39, at 228-229. See also UN War Crimes Commission, *History*, *supra* note 77, at 488 (discussing the case involving “a German officer who had completely destroyed a large Roman Catholic church when his unit left Horst-Melderslo in Holland. [Committee I] decided that, while military necessity may have existed for the destruction of the spire of the church to prevent its use as an allied observation tower, no necessity existed for the complete and utter destruction of the whole church”).

¹¹⁵ See also Kretzmer, “Judicial Review During Armed Conflict”, *supra* note 39, at 449 (referring to “the big question”); Kretzmer, “The Law of Belligerent Occupation”, *supra* note 39, at 229-230.

¹¹⁶ *Beit Sourik*, para. 41.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ See *ibid.*, para. 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 *ibid.*, paras. 82-84.

¹²¹ 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*, para. 59.

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.¹²² 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 accruing to the commander. In the court's view, "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".¹²³

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.¹²⁴ 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.¹²⁵

Consequently, the seizure orders concerning the fence's disputed segments were declared null and void.¹²⁶ The court considered the measure taken by the commander militarily *unnecessary* within the meaning of relevant IHL clauses, 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. 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 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

¹²² In other words, the commander's route may very well have constituted a strictly material military necessity relative to the council's alternative route. See Part I, Chapter 2 above.

¹²³ *Beit Sourik*, para. 61.

¹²⁴ See *ibid.*, paras. 60-62.

¹²⁵ See *ibid.*, paras. 67, 70-71, 76, 80.

¹²⁶ See *ibid.*, para. 86.

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).¹²⁷

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 veritable 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.¹²⁸ Whether these alternatives were proportionately or disproportionately injurious would depend on the availability or otherwise of some further alternatives with a superior security-injury ratio. Such a “relative” proportionality analysis could go on *ad infinitum*.¹²⁹

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.

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.¹³⁰ 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 virtually all situated in the territory he occupied.¹³¹ 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

¹²⁷ *Ibid.*, para. 61. Emphasis added.

¹²⁸ Nor, to be sure, was the court called upon to identify any particular route with an acceptable security-injury ratio. The court noted (*ibid.*, para. 71): “This is the military commander's affair”. Also of note is the court's statement (*ibid.*, para. 80): “we 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”.

¹²⁹ 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. In *Alfei Menashe*, 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 *Alfei Menashe*, para. 36.

¹³⁰ See *Beit Sourik*, paras.10-11.

¹³¹ See *Beit Sourik* (maps attached to the judgement).

issued a press release in which it expressed an unusually blunt view of the matter.¹³² The other, the International Court of Justice (ICJ), rendered an advisory opinion on the legal consequences of the construction of the wall within ten days of the Israeli Supreme Court's ruling.¹³³

Neither the ICRC nor the ICJ denied Israel's right to take lawful measures to protect its population.¹³⁴ 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.¹³⁵ 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.¹³⁶

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".¹³⁷

The ICJ declined to consider Article 23(g) of the Hague Regulations,¹³⁸ but it 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".¹³⁹

¹³² See International Committee of the Red Cross, *Press Release, Israel/Occupied and Autonomous Palestinian Territories: West Bank Barrier Causes Serious Humanitarian and Legal Problems*, 18 February 2004. Strictly speaking, the ICRC's observations do not constitute judicial findings of any sort. They are nevertheless significant for our discussion, in view of the organisation's general policy of discreetness and the special place that it has occupied in the development and implementation of international humanitarian law.

¹³³ See *Legal Consequences*. In its Resolution ES-10/14 adopted on 12 December 2003, 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?"

¹³⁴ The ICRC recognised "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, *supra* note 132. Similarly, the ICJ observed (*Legal Consequences*, para. 141): "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".

¹³⁵ See ICRC, *supra* note 132.

¹³⁶ *Ibid.* Emphasis added.

¹³⁷ *Ibid.*

¹³⁸ See *Legal Consequences*, para. 124. 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 39, at 134-136; Orakhelashvili, *supra* note 56, at 123. For criticisms, see Kretzmer, "The Advisory Opinion", *supra* note 15, at 95-96.

¹³⁹ *Legal Consequences*, para. 135.

The freedom of movement, a human right under Article 12 of the International Covenant on Civil and Political Rights,¹⁴⁰ was also considered. The court, quoting with approval General Observation No. 27 of the Human Rights Committee,¹⁴¹ 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 those which might achieve the desired result”.¹⁴² 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,

the 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.¹⁴³

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.¹⁴⁴ Israel was also found to be duty-bound to make reparations to the victims by way of restitution or compensation.¹⁴⁵

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”.¹⁴⁶ 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 for the most part? 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.¹⁴⁷ 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.¹⁴⁸ The same could be said of the ICRC’s view of the matter.

¹⁴⁰ See *ibid.*, para. 136. Article 12 of the 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.

Israel is a state party to the covenant. *Legal Consequences*, para. 103.

¹⁴¹ See Human Rights Committee, *General Comment No. 27: Freedom of Movement (Art. 12)*, 1 November 1999, para. 14: “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”.

¹⁴² *Legal Consequences*, para. 136.

¹⁴³ *Ibid.*, para. 137.

¹⁴⁴ See *ibid.*, para. 151.

¹⁴⁵ See *ibid.*, paras. 152-153.

¹⁴⁶ *Ibid.*, para. 137.

¹⁴⁷ See *ibid.*, para. 163(3)(A).

¹⁴⁸ For a different take of the ICJ’s position on this matter, see Kretzmer, “Judicial Review During Armed Conflict”, *supra* note 39, 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 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

Israel elected to limit its involvement in the ICJ's advisory proceedings to jurisdictional issues.¹⁴⁹ 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 *Beit Sourik*.¹⁵⁰ Instead, the ICJ found itself relying heavily on the reports and other materials submitted to it by the Secretary-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.¹⁵¹

The court determined that it still had sufficient information and evidence upon which to render an opinion.¹⁵² Indeed, the court rendered its opinion on the basis of the material "before it"¹⁵³ or "available to it".¹⁵⁴ 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

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?"

¹⁴⁹ See *Written Statement of the Government of Israel on Jurisdiction and Propriety*, 30 January 2004. Israel stated (*Legal Consequences*, para. 55): "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". The court noted however 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". *Ibid.*, para. 57.

¹⁵⁰ In this connection, see Government of Israel, *supra* note 149, at 107-110. 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 (*ibid.*, at 108-109):

- (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;
- (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.

¹⁵¹ See, e.g., *Legal Consequences*, para. 57.

¹⁵² See *ibid.*, para. 58.

¹⁵³ *Ibid.*, para. 135.

¹⁵⁴ *Ibid.*, para. 137.

power, on the other. The advisory opinion was criticised by several ICJ judges¹⁵⁵ and others¹⁵⁶ for this reason.

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”.¹⁵⁷ 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.¹⁵⁸ Yet this apparent consensus among the three institutions masks their profound disagreements about what proportionality entails within the context of exceptional 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?¹⁵⁹
- (iii) The choice, quality and quantity of relevant data necessary to make an informed assessment.

¹⁵⁵ See, e.g., *Declaration of Judge Buergenthal, ibid.*, 244, para. 7 (“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”); *Separate Opinion of Judge Owada, ibid.*, 260, paras. 22-23 (“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”. *Ibid.*, para. 24. Judge Higgins observed that, the “very partial” nature of the information directly provided by Israel notwithstanding, “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”. *Separate Opinion of Judge Higgins, ibid.*, 207, para. 40. 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. *Kooijmans Separate Opinion, supra* note 108, 219, para. 13. 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. *Ibid.*, para. 34.

¹⁵⁶ See, e.g., *Alfei Menashe*, paras. 62-65; Geoffrey R. Watson, “The ‘Wall’ Decisions in Legal and Political Contexts”, 99 *American Journal of International Law* 6 (2005), at 25; Kretzmer, “The Advisory Opinion”, *supra* note 15, at 98-100; Ardi Imseis, “Critical Reflections on the International Humanitarian Law Aspects of the ICJ *Wall* Advisory Opinion”, 99 *American Journal of International Law* 102 (2005), at 110-114; Pertile, *supra* note 39, at 153.

¹⁵⁷ ICRC, *supra* note 132.

¹⁵⁸ For similarities between the ICJ and the Israeli Supreme Court see Watson, *supra* note 156, at 22.

¹⁵⁹ See *Alfei Menashe*, para. 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 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”. See also *ibid.*, paras. 66, 70.

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 reveals that rules of international humanitarian law remain highly indeterminate in this area.

3.2.4 Note on 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 must be required *urgently*.¹⁶⁰ Analogous terms are also used in several treaty provisions.¹⁶¹

It is possible that urgency is an aspect of military necessity. If it is, however, then urgency or a lack thereof appears to be already implied in the notion of the measure being “required” or “not required” for the attainment of its purpose. The range of reasonably available and materially relevant 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 or she 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 or she 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. Nevertheless, 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 or her position could do at the time.

3.2.5 Note on Degrees

In certain treaty provisions, exceptional military necessity appears with qualifying adverbs or adjectives such as “imperative(ly)”,¹⁶² “absolute(ly)”¹⁶³ and “unavoidable”.¹⁶⁴ In other provisions,

¹⁶⁰ See, e.g., Downey, *supra* note 5, at 254-256 (“urgent need admitting of no delay”); McDougal and Feliciano, *supra* note 27, at 72 (“prompt realization”); O’Brien, *supra* note 5, at 138-141 (“immediately indispensable”).

¹⁶¹ See, e.g., Articles 33 (“urgent military necessity”), 34 (“urgent necessity”), Geneva Convention I; Article 28 (“urgent military necessity”), Geneva Convention II.

¹⁶² See, e.g., Article 23(g) (“imperatively demanded by the necessities of war”), 1907 Hague Regulations; Article 8 (“imperative military necessities”), Geneva Convention I; Article 8 (“imperative military necessities”), Geneva Convention II; Article 126 (“imperative military necessity”), Geneva Convention III; Articles 49 (“imperative military reasons”), 143 (“imperative military necessity”), Geneva Convention IV; Article 4(2) (“military necessity imperatively requires”), Hague Cultural Property Convention; Articles 54(5), 62(1), 67(4), 71(3) (“imperative military necessity”), Additional Protocol I; Article 17(1) (“imperative military reasons”), Additional Protocol II; Articles 8(2)(b)(xiii) (“imperatively demanded by the necessities of war”), 8(2)(e)(xii) (“imperatively demanded by the necessities of war”), 8(2)(e)(xii) (“imperatively demanded by the necessities of the conflict”), ICC Statute; Article 6 (“imperative military necessity”), Hague Cultural Property Protocol II.

¹⁶³ See, e.g., Article 54 (“absolute necessity”), 1907 Hague Regulations; Article 53 (“absolutely necessary by military operations”), Geneva Convention IV.

¹⁶⁴ See, e.g., Article 11(2) (“unavoidable military necessity”), Hague Cultural Property Convention.

the notion appears with no such adverbs or adjectives.¹⁶⁵ This textual discrepancy has led some commentators to suggest that there is a hierarchy of military necessity.¹⁶⁶ Meanwhile, other commentators have expressed their doubts.¹⁶⁷

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 or her 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.¹⁶⁸

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

¹⁶⁵ See, e.g., Article 6(b), Nuremberg Charter; Article 50, Geneva Convention I; Article 51, Geneva Convention II; Article 147, Geneva Convention IV; Articles 2(d), 3(b), ICTY Statute; Article 8(2)(a)(iv), ICC Statute.

¹⁶⁶ See, e.g., Schwarzenberger, *supra* note 39, at 134-135 (referring to the Nuremberg Charter as adopting a “more lenient” test for military necessity than the “imperatively demanded” military necessity under the 1907 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 (1980), at 216-218 (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 – Prohibition of Forced Movement of Civilians”, in Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) 1471, at 1472-1473; Andreas Zimmermann, “Prohibited Destruction”, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* 2d ed. (2008) 395, at 400; Roger O’Keefe, “Protection of Cultural Property”, in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law* 3d ed. (2013) 425, at 440. Pertile states (Pertile, *supra* note 39, at 136): “Necessity being qualified by Article 53 [of Geneva Convention IV] as ‘absolute’, one may moreover think that a generic military advantage would not be sufficient”. See also *ibid.*, at 151-152.

¹⁶⁷ See, e.g., McCoubrey, *supra* note 63, 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”), 234 (“The precise significance of the addition of the term ‘imperative’ is less than wholly clear”). See also Rogers, *supra* note 33, at 145 (regarding “imperative” military necessity versus “unavoidable” military necessity), 152 (quoting Carcione’s dismissive account of the different shades of military necessity implied in the conventional régime of cultural property protection). Dinstein observes (Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* 2d ed. (2010), at 7-8 (footnote omitted): “Each of these adverbs or adjectives is devised to stress that military necessity has to be mulled over attentively and not acted upon flippantly. But this is true of all [law of international armed conflict] strictures”. See also *ibid.*, at 177; de Mulinen, *supra* note 59, at 83; Hans Boddens Hassang, “Article 8(2)(b)(xiii) – Destroying or Seizing the Enemy’s Property”, in Roy S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001) 171; Eve La Haye, “Displacing Civilians”, in *ibid.*, 215, at 216; Melzer, *supra* note 68, at 295-296; O’Keefe, *Protection of Cultural Property*, *supra* note 68, at 123, 157-159; Rogers, *supra* note 33, at 145, 152; Gabriella Venturini, “Necessity in the Law of Armed Conflict and in International Criminal Law”, 41 *Netherlands Yearbook of International Law* 45 (2010), at 53; Yoram Dinstein, “Military Necessity”, *Encyclopedia of Public International Law* 2d ed. (2009), para. 13; Lindsay Moir, “Conduct of Hostilities – War Crimes”, in José Doria, Hans-Peter Gasser and M. Cherif Bassiouni (eds.), *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko* (2009) 487, at 524; Lindsay Moir, “Displacement of Civilians as a War Crime Other Than a Violation of Common Article 3 in Internal Armed Conflicts”, in *ibid.*, 639, at 641; Werle and Jessberger, *supra* note 91, at 472.

¹⁶⁸ Pertile appears to make similar suggestions. See Pertile, *supra* note 39, at 151-152.

Article 6(a) of the 1999 Second Protocol to the 1954 Hague Cultural Property Convention is arguably a case in point. The “imperative military necessity” exception available under Article 4(2) of the latter convention is further restricted to acts of hostility against cultural property where:

- (i) That cultural property has, by its function, been made into a military objective; and
- (ii) There is no feasible alternative available to obtain a similar military advantage to that offered by directing an act of hostility against that objective.¹⁶⁹

3.3 The Military Purpose for Which the Measure Was Taken Was in Conformity with International Humanitarian Law

Military necessity pleas are inadmissible where the purpose for which the measure was taken was itself contrary to international humanitarian law. This is so, even if the belligerent chooses among the relevant and available measures the one that is the least evil and whose injurious effect is not disproportionate to the gain.

In *Beit Sourik*, the Israeli Supreme Court noted the IDF commander’s affidavit that “the fence is intended to prevent the unchecked passage of inhabitants of the area into Israel and their infiltration into Israeli towns located in the area”.¹⁷⁰ 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 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”?¹⁷¹

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”.¹⁷² 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”.¹⁷³

A common Latin maxim – *ex injuria jus non oritur* – springs to mind.¹⁷⁴ 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].¹⁷⁵

¹⁶⁹ See Article 6(a), Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (26 March 1999). See also *ibid.*, Articles 10, 13 (regarding the granting and lifting of enhanced protection); O’Keefe, *Protection of Cultural Property*, *supra* note 68, at 252-256, 271-274; Jean-Marie Henckaerts, “New Rules for the Protection of Cultural Property in Armed Conflict: The Significance of the Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict”, in María Teresa Dutli, *Protection of Cultural Property in the Event of Armed Conflict: Report on the Meeting of Experts (Geneva, 5-6 October 2000)* (2002) 27, at 35-46.

¹⁷⁰ *Beit Sourik*, para. 29. See also Kretzmer, “Judicial Review During Armed Conflict”, *supra* note 39, at 445.

¹⁷¹ Kretzmer, “Judicial Review During Armed Conflict”, *supra* note 39, at 446. See also Kretzmer, “The Advisory Opinion”, *supra* note 15, at 93.

¹⁷² *Buergenthal Declaration*, *supra* note 155, 240, para. 9 (emphasis added). See also Imseis, *supra* note 156, at 112; Orakhelashvili, *supra* note 56, at 138.

¹⁷³ Imseis, *supra* note 156, at 112. Footnote omitted.

¹⁷⁴ See, e.g., *Legal Consequences Advisory Opinion, Separate Opinion of Judge Elaraby*, 246, para. 3.1; Imseis, *supra* note 156, at 112.

¹⁷⁵ Kretzmer, “The Advisory Opinion”, *supra* note 15, at 93. Footnotes omitted.

Kretzmer goes on to state that

[i]f 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, especially if one accepts (as Imseis does) that there has not been a close to military operations in the occupied territories.¹⁷⁶

It is proposed here that a useful distinction might be drawn between (i) the availability of an exceptional relief from a contrary obligation, on the one hand, and (ii) the exercise 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 this 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 of Geneva Convention IV. What follows this is that, insofar as the wall is erected to perpetuate unlawfulness by securing these settlements, 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 1907 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 its purpose precludes the wall's erection falling within the ambit of military necessity clauses.

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.¹⁷⁷ It is entirely possible that the residents of an unlawful settlement have the right to defend themselves in the event of unlawful attacks on them, and/or that Israel has the right to send IDF troops with a view to protecting their immediate safety against such attacks. The wall may disqualify itself as a lawful measure because it breaches Article 49's principal prohibition, but this disqualification is surely without prejudice to measures that may be lawful based on separate foundations. 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".¹⁷⁸

But then, Imseis's position – against which Kretzmer juxtaposes his – does not seem so sweeping either. Imseis essentially holds 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".¹⁷⁹ Nor is this necessarily a conclusion to which "one is led" if one agrees with Imseis.

In October 2015, a growing number of incidents occurred in Israel and Occupied Palestinian Territories, including the city of Hebron in the West Bank, where armed Palestinian individuals attacked Israeli settlers and were killed as a result.¹⁸⁰ This author suggests that the issue be best looked at from the angle of self-defence for the Israelis, and questions asked as to whether the response was necessary and proportionate.

3.4 The Measure Itself Was Otherwise in Conformity with International Humanitarian Law

¹⁷⁶ *Ibid.*, at 93 n.41.

¹⁷⁷ 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.

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*, at 93 n.41.

¹⁸⁰ See, e.g., "Israeli-Palestinian Violence: Knife Attackers Shot Dead", *BBC News*, 17 October 2015.

Juridical military necessity does not exempt measures from the prescription of unqualified IHL rules.¹⁸¹ The unqualified prohibition against the killing of POWs and enemies who have surrendered at discretion¹⁸² is a case in point. If the circumstances surrounding the captor are such that it becomes no longer feasible to keep his prisoner of war in custody – e.g., encirclement by enemy formations, shortage of food rations – , and if the captor kills the prisoner of war as a result, then he or she is not entitled to plead military necessity.¹⁸³ The U.S. Military Commission in Augsburg, Germany, convicted Gunther Thiele and Georg Steinert of killing an American prisoner of war notwithstanding their military necessity pleas.¹⁸⁴ 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.¹⁸⁵

The fact that military necessity is inadmissible for measures in violation of unqualified IHL 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 or her lawful purpose but involve unlawful acts, on the one hand, and measures which amount to abandoning that purpose but involve no unlawful act, on the other, juridical military necessity would demand that the belligerent 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.¹⁸⁶

In 1949, 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 during World War II.¹⁸⁷ The defence apparently alleged that the devastation had been rendered unavoidable by the military exigencies of the situation¹⁸⁸ and that, once it had been so rendered, “the deportation followed of necessity”.¹⁸⁹ 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”.¹⁹⁰ While the judge advocate might have thought that the prohibition against deportation admitted certain exceptions,¹⁹¹ he clearly did not think that military necessity was one of them. As

¹⁸¹ See Part II, Chapter 7, and Chapter 8 above. See also *United States of America v. Alfred Felix Alwyn Krupp von Bohlen und Halbach et al.*, 10 *Law Reports of Trials of War Criminals* (1949) 69, at 138-139; *in re Wintgen*, Special Criminal Court, Amsterdam, 11 February 1949; Special Court of Cassation, 6 July 1949, 16 *Annual Digest and Reports of Public International Law Cases Year 1949* (1955) 484.

¹⁸² See, e.g., Article 23(c), 1907 Hague Regulations; Article 6(b), Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (8 August 1945); Article 130, Geneva Convention III; Articles 8(2)(a)(i), 8(2)(b)(vi), ICC Statute.

¹⁸³ See also Article 41(3), Additional Protocol I.

¹⁸⁴ *Trial of Gunther Thiele and Georg Steinert*, 3 *Law Reports of Trials of War Criminals* (1948) 56, at 58. See also Howard S. Levie, *Terrorism in War – The Law of War Crimes* (1993), at 501 (quoting observations about *United States of America v. Ludwig Klüttgen*, Case No. 12-1502 (1947)).

¹⁸⁵ See *Hostage*, at 1281.

¹⁸⁶ *In re Rauter*, *Annual Digest and Reports of Public International Law Cases* (1949) 526, at 543.

¹⁸⁷ See *von Manstein*, at 509-510.

¹⁸⁸ See *ibid.*, at 521.

¹⁸⁹ *Ibid.*, at 523.

¹⁹⁰ *Ibid.*

¹⁹¹ According to the judge advocate, “any suggestion that the deportation was upon humanitarian grounds was expressly repudiated”. *Ibid.* 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. In this connection, see Roxburgh (ed.), *supra* note 31, at 216 (footnote omitted): “whenever a belligerent resorts to general devastation, he ought, if possible, to make some provision for the unfortunate peaceful population of the devastated tract of territory. It would be more humane to take them away into captivity rather than let them perish on the spot. The practice, resorted to during the South

noted earlier,¹⁹² Article 49 of Geneva Convention IV does allow military necessity exceptions from the prohibition against deportation.

In a somewhat similar development, the 1935 Roerich Pact on the protection of artistic and scientific institutions and historic monuments protects eligible property without reference to military necessity exceptions.¹⁹³ Its successor, the 1954 Hague Cultural Property Convention, does make allowances for such exceptions.¹⁹⁴ Roger O’Keefe quotes the UNESCO expert committee as saying that “the law regulating the protection of cultural property in the course of hostilities had always been qualified by reference to military necessity [and declaring] the need to preserve this qualification”.¹⁹⁵

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. Article 53 of Geneva Convention IV prohibits the belligerent from destroying real or personal property in the territory he or she occupies “except where such destruction is rendered absolutely necessary by military operations”.¹⁹⁶ 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.¹⁹⁷ By virtue of Article 54(2) of Additional Protocol I,¹⁹⁸ however, such a force is no longer eligible for this exception in respect of objects indispensable to the survival of the civilian population.¹⁹⁹

The same is arguably true of demolishing or using cultural property that is covered both under Article 4(1) of the 1954 Hague Cultural Property Convention and under Article 53 of Additional Protocol I. Whereas the former is subject to the imperative military necessity exception found in Article 4(2) of the Hague Convention, the latter is not subject to any such exception.²⁰⁰

4. Miscellaneous Observations

The foregoing elucidates what juridical military necessity contains. In addition to its content, however, the notion involves factors such as requisite knowledge and formal competence.

4.1 Knowledge

Exceptional military necessity pleas based solely on hindsight are inadmissible. They must be assessed in light of the particular purpose that the belligerent had in mind when he or she took the

African War, of housing the victims of devastation in concentration camps, must be approved. The purpose of war may even oblige a belligerent to confine a population forcibly in concentration camps”.

¹⁹² See Part II, Chapter 7 above.

¹⁹³ See Articles 1, 5, Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (15 April 1935).

¹⁹⁴ See Article 4(2), Convention for the Protection of Cultural Property in the Event of Armed Conflict (14 May 1954).

¹⁹⁵ O’Keefe, *Protection of Cultural Property*, *supra* note 68, at 122.

¹⁹⁶ Article 53, Geneva Convention IV.

¹⁹⁷ See, e.g., Jean S. Pictet (ed.), *Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (1958), at 302.

¹⁹⁸ Article 54(2), Additional Protocol I: “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”.

¹⁹⁹ 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 Article 54(5), Additional Protocol I; Claude Pilloud and Jean Pictet, “Article 54 – Protection of Objects Indispensable to the Survival of the Civilian Population”, in Sandoz, Swinarski and Zimmermann (eds.), *Commentary*, *supra* note 166, 651, at 659. According to the ICRC’s *Customary Law Study*, the rule contained in Article 54 embraces custom. See Jean-Marie Henckaerts and Louise Doswald-Beck, 1 *Customary International Humanitarian Law* (2005), at 189-193.

²⁰⁰ See O’Keefe, *Protection of Cultural Property*, *supra* note 68, at 217, 251.

measure. The mere fact that a measure taken initially for some non-military purpose happens to fulfil a military one afterwards does not, retrospectively, turn it into military necessity. A given measure's reasonable availability to the belligerent, its material relevance to his or her stated military purpose, and the scope and nature of its evil, should also be assessed on the basis of that belligerent's contemporaneous and *bona fide* knowledge thereof.²⁰¹

4.1.1 Knowledge of Purpose

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*²⁰² 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".²⁰³ 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".²⁰⁴

In *Hostage*, the U.S. Military Tribunal acquitted Lothar Rendulic of wanton destruction in Finmark, Norway. Rendulic contended that he devastated the area as a precautionary measure against an anticipated attack by his superior Russian pursuers. A question arose as to whether the devastation was justified by military necessity.²⁰⁵ 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

²⁰¹ See, e.g., *Affaire des bien britannique au Maroc espagnol (Spain v. United Kingdom)*, 1 May 1925, 2 *Reports of International Arbitral Awards* (2006) 615, at 645 ("Cela admis, il faut se souvenir, d'autre part, que le règlement auquel la clause susmentionnée se rattache fait une place très grande aux nécessités militaires. L'appréciation de ces nécessités doit être laissée dans une large mesure aux personnes mêmes qui sont appelées à agir dans des situations difficiles, ainsi qu'à leurs chefs militaires"); *von Manstein*, at 522; Melzer, *supra* note 68, at 296-297; Brian J. Bill, "The Rendulic 'Rule': Military Necessity, Commander's Knowledge, and Methods of Warfare", 12 *Yearbook of International Humanitarian Law* 119 (2009), at 125 (quoting *Hostage*, at 1295-1297); Dinstein, *Military Necessity* (2009), *supra* note 167, para. 28; Office of General Counsel, *supra* note 3, at 57.

²⁰² H CJ 606/78, *Ayub et al. v. Minister of Defence*, 15 March 1979, in Meir Shamgar (ed.), 1 *Military Government in the Territories Administered by Israel 1967-1980: The Legal Aspects* (1982) 382.

²⁰³ *Ibid.*, at 386.

²⁰⁴ *Elon Moreh*, at 173-174. 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* (2002), at 88-89.

²⁰⁵ 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.

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.²⁰⁶

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.²⁰⁷ This ruling would be sensible only if it were significant that Rendulic knew 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 or she 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.

4.1.2 Knowledge of Pertinence, Injuriousness and Proportionality

Whether a given measure was "required" for the attainment of its stated military purpose is also a matter that should be assessed on the basis of the belligerent's contemporaneous and *bona fide* knowledge. If, in view of the information available at the time, the belligerent honestly believed that the measure taken was required for the attainment of his or her purpose, the belligerent's belief should not be second-guessed on account of subsequent events.

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 articulate a military purpose, identify a range of available and relevant measures, evaluate their relative injuriousness, and assess their proportionality – all in an extremely short period of time, on the basis of fragmented, incomplete and often contradictory information, and under highly stressful circumstances.

²⁰⁶ *Hostage*, at 1297. See also *High Command*, at 541: "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 *ibid.*, at 609 (judgement as to defendant Hans Reinhardt), 628 (judgement as to defendant Karl Hollidt).

²⁰⁷ *Hostage*, at 1296: "There is evidence in the record that there was no military necessity for this destruction and devastation. An examination of the facts in retrospect can well sustain this conclusion. But we are obliged to judge the situation as it appeared to the defendant at the time. If the facts were such as would justify the action by the exercise of 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". See also *von Manstein*, 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.

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 chapter.

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 or she acted without such knowledge. One may refer to the ruling of an ICTY trial chamber in *Galić* – albeit in an admittedly different context of proportionality in attacks.²⁰⁸ The chamber held:

In 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.²⁰⁹

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.²¹⁰ These numbers are classic examples of hindsight. Unless one was somewhat arbitrarily to 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:

Although 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.²¹¹

It would appear that, the majority’s view, 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.²¹²

4.2 Competence

Under certain circumstances, a person’s reliance on military necessity may become invalid by virtue of his or her 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 establishments in case of urgent military necessity.²¹³ Similarly, where fighting occurs on a warship, its sick-bays and their equipment

²⁰⁸ See, e.g., Harvard Program on Humanitarian Policy and Conflict Research, *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare* (2010), para. 5; Christine Byron, “International Humanitarian Law and Bombing Campaigns: Legitimate Military Objective and Excessive Collateral Damage”, 13 *Yearbook of International Humanitarian Law* 175 (2010), at 192; Yutaka Arai-Takahashi, “A Battle Over Elasticity – Interpreting the Concept of ‘Concrete and Direct Military Advantage Anticipated’ under International Humanitarian Law”, in Yves Haeck et al. (eds.), *The Realisation of Human Rights: When Theory Meets Practice: Studies in Honour of Leo Zwaak* (2014) 351, at 352.

²⁰⁹ *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, *Trial Judgement*, 5 December 2003, para. 58 (footnotes omitted).

²¹⁰ *Ibid.*, paras. 386-387.

²¹¹ *Ibid.*, para. 387.

²¹² Judge Nieto Navia dissented. See *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, *Separate and Partially Dissenting Opinion of Judge Nieto-Navia*, 5 December 2003, paras. 63-65, esp. para. 65: “In light of the preceding evidence regarding [defending forces’] presence in and near the site of the incident, I conclude that the Prosecution has not established beyond a reasonable doubt that the two shells that exploded on 1 June 1993 in Dobrinja were fired deliberately or indiscriminately by the [attacking forces] at civilians”.

²¹³ See Article 33, Geneva Convention I.

may be used for other purposes only if considered militarily necessary by the commander into whose power they have fallen.²¹⁴

Within the context of cultural property, potential abuses of military necessity exceptions became the subject of particular concern.²¹⁵ This concern resulted in the adoption of Article 11(2) of the 1954 Hague Cultural Property Convention, which designates an officer competent to establish military necessity.²¹⁶ 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.²¹⁷ 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”.²¹⁸ 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).²¹⁹ As regards the lifting of cultural property’s enhanced protection under Article 10 of the protocol, an attack may be ordered only “at the highest operational level of command”.²²⁰

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”.²²¹ 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.²²² 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.

5. Conclusion

This chapter shows how juridical military necessity appears as express clauses attached to those rules that principally prescribe contrary action.

We began by noting that military necessity as an exception under international humanitarian law is distinct in status and content from necessity as a circumstance precluding wrongfulness under the international law of state responsibility. Our discussion also identified and substantiated four cumulative requirements of exceptional military necessity. In order to be eligible, the measure must be taken primarily for the attainment of some specific military purpose; it must be required for the purpose’s attainment; the purpose must be in conformity with international humanitarian law; and the measure itself must otherwise be in conformity with that law.

When a measure can be said to be “required” for a purpose’s attainment is an area that is in need of further clarification. Beyond the fact that some reasonable ratio ought to be struck between the harm occasioned by the measure and the gain sought by it, much remains unsettled. There are also issues associated with the application of military necessity clauses, such as the requisite kind and scope of knowledge and the competence of the person relying on the notion.

²¹⁴ See Article 28, Geneva Convention II.

²¹⁵ 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* (1996) at 79, 146-147.

²¹⁶ Article 11(2), Hague Cultural Property Convention. See also O’Keefe, *Protection of Cultural Property*, *supra* note 68, at 159-160.

²¹⁷ *Ibid.*, Article 4(1).

²¹⁸ *Ibid.*, Article 4(2).

²¹⁹ Article 6(c), Hague Cultural Property Protocol II.

²²⁰ See *ibid.*, Article 13(2)(c)(i).

²²¹ Orakhelashvili, *supra* note 56, at 137.

²²² See *ibid.* But see *Hostage*, at 1296-1297, where the tribunal found Rendulic not guilty of wanton destruction in Finland by applying Article 23(g) of the 1907 Hague Regulations.

This leaves us with one major form of juridical military necessity yet to be examined. Several property- and displacement-related war crimes contain an element according to which the underlying act, such as destruction and forcible transfer, must be shown to lack military necessity.²²³ The same is true of their corresponding crimes against humanity. In Chapter 10, we will explore the sizable case law developed by the ICTY, as well as the ICC's nascent jurisprudence, to see how these fora have grappled with the complex factual and legal issues that surround this element.

²²³ See, e.g., *In re Esau*, Special Criminal Court, 's-Hertogenbosch, 27 April 1948; Special Court of Cassation, 21 February 1949, 16 *Annual Digest and Reports of Public International Law Cases Year 1949* (1955) 482.