Military necessity

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Chapter 10

Juridical Military Necessity and Elements of Crimes

Chapters 8 and 9 dealt with how juridical military necessity manifests itself through exclusion and as exceptional clauses, respectively. In this chapter, we will study juridical military necessity's third form, i.e., as a negative element of several war crimes and crimes against humanity.

That military necessity in this context appears as a negative element of specific criminal acts – rather than as a justificatory or excusory plea – should not be surprising. First, this is a direct result of the inadmissibility of *de novo* military necessity pleas under positive international humanitarian law (IHL).[1] As will be seen below, substantive IHL rules form the basis on which all war crimes and some crimes against humanity are built. Where a given IHL prohibition is unqualified, there is no reason why the *actus reus* of its corresponding war crime or crime against humanity should admit military necessity as an exception. Nor, for that matter, should the crime be susceptible to military necessity pleas as a justification or excuse.

Second, the reverse is also true. We have seen that a number of IHL rules expressly permit deviations from their principal prescriptions on account of military necessity. If penal provisions were to criminalise these rules' breaches, their *actus reus* would also reflect the availability of such deviations. This is particularly the case for offences involving property destruction[2] and forcible population displacements.

The foregoing observations are broadly consistent with the material available in international criminal law.[3] Of such material, however, that produced under today's two major international criminal jurisdictions – i.e., the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Court (ICC) – is by far the most comprehensive, systematic and detailed. Our discussion in this chapter will therefore focus on the ICTY and the ICC.

This chapter proceeds as follows. We will begin by reviewing how the ICTY has identified and articulated military necessity as a negative element of offences involving property destruction and forcible population displacement. We will then assess the quality of judicial reasoning and application of the law to the facts in the tribunal's voluminous cases. Three themes will receive our critical attention: (i) property destruction in the context of combat; (ii) property destruction outside of combat; and (iii) deportation and forcible transfer. It will be shown that, despite some mishaps, the ICTY jurisprudence as a whole is capable of presenting a coherent picture of exceptional military necessity as an element of crimes.

The chapter will then move on to the ICC. Its statutory treatment of military necessity exceptions largely mirrors the ICTY case law and corresponding IHL rules on the matter. The court finds itself at a much earlier stage of jurisprudential development, however. Its rulings to date are more limited in content and sophistication as a result. One potential source of contention concerns some of the grounds for excluding individual criminal responsibility under Article 31 of the Rome Statute. These grounds are vulnerable to abuse as backdoors through which defendants may attempt to introduce *de novo* military necessity pleas as a justification or excuse for their crimes.

1. International Criminal Tribunal for the Former Yugoslavia

As of 31 May 2016, the ICTY has not defined juridical military necessity. Nor has it discussed the requirements of military necessity as an element of crimes at any length. Yet the tribunal's various

[1] See Chapter 8 above.
[2] And, albeit to a significantly lesser extent, property misappropriation including pillage. This chapter will make occasional references to these offences where appropriate.
[3] See, in particular, the various post-World War II criminal trials referred to in Chapter 9 and elsewhere in this thesis.

chambers have not shied away from making factual determinations about the existence or absence of military necessity in the context of specific incidents.

These factual determinations have been made in connection with two crime categories. The first is large-scale property destruction, of which the absence of military necessity appears as an element. Forcible displacement of persons is the other. Since temporary evacuation is not unlawful if, *inter alia*, "imperative military reasons" so demand, it must be shown that the victim's displacement was either permanent or, though temporary, not demanded by imperative military reasons.

1.1 Absence of Military Necessity as an Element of Large-Scale Property Destruction

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

(a) Article 2(d), a grave breach of the 1949 Geneva Conventions[4];
(b) Article 3(b), a violation of the laws or customs of war[5]; and
(c) Article 5(h), a crime against humanity.[6]

1.1.1 Article 2(d), ICTY Statute

Causing "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly" constitutes a grave breach of Geneva Conventions I, II and IV.[7] This grave breach is incorporated into Article 2(d) of the ICTY Statute.[8] The tribunal has considered Article 2(d) charges in six cases.[9]

Several tribunal decisions have distinguished between two types of property under Article 2(d).[10] The first type includes civilian hospitals, medical aircraft and ambulances that are "generally protected" by the Geneva Conventions.[11] Property of this type is "generally protected" from destruction or appropriation because it is protected irrespective of its location. It appears that the intended

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[4] Statute of the International Criminal Tribunal for the Former Yugoslavia (25 May 1993).
[5] *Ibid.,* Article 3(b).
[6] *Ibid.,* Article 5(h).
[7] Article 50, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (12 August 1949); Article 51, Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (12 August 1949); Article 147, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (12 August 1949).
[8] Article 2(d), ICTY Statute.
[9] See *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, *Sixth Amended Indictment*, 9 December 2003, count 10 ("[u]nlawful and wanton extensive destruction and appropriation of property, not justified by military necessity"); *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14, *Second Amended Indictment*, 25 April 1997, count 11 ("extensive destruction of property"); *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2, *Amended Indictment*, 30 September 1998, counts 37, 40 ("extensive destruction of property"); *Prosecutor v. Mladen Naletilić (a/k/a "Tuta") and Vinko Martinović (a/k/a "Štela")*, Case No. IT-98-34-PT, *Second Amended Indictment*, 28 September 2001, count 19 ("extensive destruction of property"); *Prosecutor v. Ivica Rajić a/k/a Viktor Andrić*, Case No. IT-95-12-PT, *Amended Indictment*, 13 January 2004, count 9 ("extensive destruction not justified by military necessity and carried out unlawfully and wantonly"); *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, *Second Amended Indictment*, 11 June 2008, counts 19 ("extensive destruction of property, not justified by military necessity and carried out unlawfully and wantonly"), 22 ("appropriation of property, not justified by military necessity and carried out unlawfully and wantonly").
[10] See *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-T, *Judgement*, 26 February 2001, para. 341; *Prosecutor v. Mladen Naletilić (a/k/a "Tuta") and Vinko Martinović (a/k/a "Štela"*), Case No. IT-98-34-T, *Judgement*, 31 March 2003, para. 575; *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, *Judgement*, 1 September 2004, para. 586. See also, e.g., Guénaël Mettraux, *International Crimes and the Ad Hoc Tribunals* (2005), at 78; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, 1 *Judgement*, 29 May 2013, para. 122.
[11] See *Kordić and Čerkez* Trial Judgement, para. 336; *Tuta and Štela* Trial Judgement, para. 575; *Brđanin* Trial Judgement, para. 586 n.1490; *Prlić et al.* Trial Judgement, para. 125.

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

Be that as it may, some ICTY trial chambers apparently concluded that military necessity exceptions do not apply to the prohibition against the destruction of property under "general protection". Thus, according to the *Tuta and Štela* Trial Chamber,

> two types of property are protected under the grave breach regime: i) property, regardless of whether or not it is in occupied territory, that carries general protection under the Geneva Conventions of 1949, such as civilian hospitals, medical aircraft and ambulances [irrespective of any military need to destroy them]; and ii) property protected under Article 53 of the Geneva Convention IV, which is real or personal property situated in occupied territory *when the destruction was not absolutely necessary by military operations* ... The Chamber considers that a crime under Article 2(d) of the Statute has been committed when: ... iii) the extensive destruction regards property carrying general protection under the Geneva Conventions of 1949, or; the extensive destruction *not absolutely necessary by military operations* regards property situated in occupied territory ...[12]

It is debatable, however, whether this conclusion finds support in the plain language of either Article 2(d) of the ICTY Statute, or in Article 50/51/147 of Geneva Convention I/II/IV that underpins it. To be sure, those IHL provisions cited by these chambers[13] protect the property in question from *attacks* regardless of military necessity. This does not necessarily mean, however, that these provisions also protect the property – and, in particular, immobile property such as buildings – from *destruction* regardless of military necessity. The Red Cross commentary on Geneva Convention I observes:

> The provision [prohibiting intentional destruction of material and stores defined in Article 33, Geneva Convention I] covers the material of both mobile units and fixed establishments. It also refers to stores of material, but only to those belonging to fixed establishments, as the nature of mobile units excludes their having stores in the real sense. *The stipulation does not, however, cover the actual buildings, which may in certain extreme cases have to be destroyed for tactical reasons*.[14]

As will be shown, the destruction of property may, but need not, constitute an attack against that property or *vice versa*.

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[12] *Tuta and Štela* Trial Judgement, paras. 575, 577. Footnotes omitted; emphasis added. See also *Brđanin* Trial Judgement, paras. 586, 588.

[13] See *Tuta and Štela* Trial Judgement, para. 575 n.1436 ("Several kinds of property are generally protected by the Conventions, irrespective of any military need to destroy them. See Chapters III, V and VI of Geneva Convention I (Protecting medical units, vehicles, aircraft, equipment and material) and Articles 22-35 (protecting hospital ships) and Articles 38-40 (protecting medical transports) of Geneva Convention II. See also Article 18 of Geneva Convention IV which provides that a civilian hospital 'may in no circumstances be the object of an attack, but shall at all times be respected and protected by the parties to the conflict'"); *Brđanin* Trial Judgement, para. 586 n.1490 ("Several provisions of the Geneva Conventions identify particular types of property accorded general protection. For example, Article 18 (protection of civilian hospitals), Articles 21 and 22 (protection of land, sea and air medical transports), of Geneva Convention IV; Articles 38-39 (protecting ships and aircraft employed for medical transport) of Geneva Convention II, A [*sic*.]; Articles 19-23 (protection of medical units and establishments), Articles 33-34 (protection of buildings and materials of medical units or of aid societies), Articles 35-37 (protection of medical transports), of Geneva Convention I").

[14] Jean S. Pictet (ed.), *Commentary I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (1952), at 276. Emphasis added. See also Jean S. Pictet (ed.), *Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (1958), at 601 ("[T]he destruction and appropriation mentioned here are dependent on the necessities of war").

Real and personal property in occupied territory forms the second type of property falling within the scope of Article 2(d) of the ICTY Statute.[15] All Article 2(d) charges have involved the destruction and/or appropriation of real and personal property located in what the prosecution alleged was occupied territory. Yet it has become increasingly difficult for the prosecution to prove the existence of belligerent occupation.[16] This difficulty – together with considerations of judicial economy and a perceived lack of difference between the culpability of an accused convicted under Article 2(d) and the culpability of an accused convicted under Article 3(b) – appears to have led to a decrease in the number of charges brought under Article 2(d).

1.1.2 Article 3(b), ICTY Statute

Article 3(b) of the ICTY Statute provides for the prosecution of "wanton destruction of cities, towns or villages, or devastation not justified by military necessity", a violation of the laws or customs of war.[17] Several cases have been brought under this article.[18]

It is sometimes suggested that "wanton destruction of cities, towns or villages" on the one hand, and "devastation not justified by military necessity" on the other, are two distinct offences.[19] On this view, the former offence would not admit military necessity exceptions. The drafting history of Article 6(b) of the Nuremberg Charter – from which Article 3(b) of the ICTY Statute is drawn verbatim – appears to indicate that the two notions could indeed be considered distinct. The charter's 11 July

[15] See *Prosecutor v. Ivica Rajić a/k/a Viktor Andrić*, Case No. IT-95-12-R61, *Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence*, 13 September 1996, para. 42; *Blaškić* Trial Judgement, paras. 148-50; *Kordić and Čerkez* Trial Judgement, paras. 337-41; *Tuta and Štela* Trial Judgement, para. 575; *Brđanin* Trial Judgement, paras. 586, 588.

[16] See *Kordić and Čerkez* Trial Judgement, para. 808; *Tuta and Štela* Trial Judgement, paras. 586-88; *Brđanin* Trial Judgement, paras. 637-639. But see 1 *Prlić et al.* Trial Judgement, paras. 577-589.

[17] Article 3(b), ICTY Statute.

[18] See, e.g., *Prosecutor v. Naser Orić*, Case No. IT-03-68-PT, *Third Amended Indictment*, 30 June 2005, counts 3, 5 ("wanton destruction of cities, towns or villages, not justified by military necessity"); *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-PT, *Third Amended Indictment*, 10 December 2003, count 4 ("devastation not justified by military necessity"); *Brđanin* Sixth Amended Indictment, count 11 ("[w]anton destruction of cities, towns or villages, or devastation not justified by military necessity"); *Prosecutor v. Milan Babić*, Case No. IT-03-72, *Indictment*, 6 November 2003, count 4 ("wanton destruction of villages, or devastation not justified by military necessity"); *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-PT, *Third Amended Indictment*, 26 September 2003, count 5 ("wanton destruction of cities, towns or villages, not justified by military necessity"); *Prosecutor v. Miodrag Jokić*, Case No. IT-01-42, *Second Amended Indictment*, 26 August 2003, count 4 ("devastation not justified by military necessity"); *Prosecutor v. Milan Martić*, Case No. IT-95-11-PT, *Second Amended Indictment*, 14 July 2003, count 12 ("wanton destruction of villages, or devastation not justified by military necessity"); *Tuta and Štela* Second Amended Indictment, count 20 ("wanton destruction not justified by military necessity"); *Rajić* Amended Indictment, count 10 ("wanton destruction of a city or devastation not justified by military necessity"); *Kordić and Čerkez* Amended Indictment, count 41 ("wanton destruction not justified by military necessity"); *Blaškić* Second Amended Indictment, counts 2, 12 ("devastation not justified by military necessity"); *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-PT, *Amended Indictment*, 2 November 2005, count 2 ("wanton destruction of cities, towns or villages"); *Prosecutor v. Vojislav Šešelj*, Case no. IT-03-67, *Third Amended Indictment*, 7 December 2007, count 12 (wanton destruction of villages, or devastation not justified by military necessity"); *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, *Amended Joinder Indictment*, 12 March 2008, count 5 ("wanton destruction of cities, towns or villages, or devastation not justified by military necessity"); *Prlić et al.* Second Amended Indictment, count 20 ("wanton destruction of cities, towns or villages, or devastation not justified by military necessity").

[19] See, e.g., *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-AR73.3, *Joint Defence Interlocutory Appeal of Trial Chamber Decision on Enver Hadžihasanović and Amir Kubura's Rule 98bis Motions for Acquittal*, 2 November 2004, para. 26; *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, *Judgement*, 12 June 2007, para. 89; *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-T, *Judgement*, 10 July 2008, para. 350; Mettraux, *supra* note 10, at 92-93.

1945 draft contained the expression "the wanton destruction of towns and villages".[20] This formulation remained essentially unchanged throughout the negotiations.[21] It is in the U.S. revision submitted on 31 July that the expression "wanton destruction of cities, towns or villages; devastation not justified by military necessity", separated by a semicolon, first appeared.[22] The record of the 2 August discussion does not reveal any information about this last-minute addition.[23] Nor is it clear how, after 2 August, the semicolon was replaced by the combination of a comma and the word "or". The charter was adopted six days later, on 8 August 1945.

It is submitted here however that, even if the two offences were to be considered distinct, they would share a common aspect in the sense that they only criminalise property destruction that is not justified by military necessity. Acts constituting "wanton destruction of cities, towns or villages" have consistently been interpreted to be those not justified by military necessity. For example, the International Military Tribunal found that "[c]ities and towns and villages were wantonly destroyed without military justification or necessity".[24] Article II(1)(b) of Control Council Law No. 10 lists "wanton destruction of cities, towns or villages, or devastation not justified by military necessity" as a war crime. Neither the indictments nor the judgements in *High Command* and *Hostage* divided Article II(1)(b) into subgroups.

There are only a small number of decisions within the ICTY jurisprudence in which Article 3(b) was held to contain two distinct offences. In *Hadžihasanović and Kubura*, the appeals chamber discussed "the wanton destruction of cities, towns or villages" as one offence articulated in Article 3(b) of the statute, and "devastation not justified by military necessity" as another.[25] Even there, however, the chamber did not cite any authority in support of this distinction; in any event, it noted that "wanton destruction of cities, towns or villages not justified by military necessity" was a customary prohibition.[26] The other decision is the *Strugar* Trial Judgement, according to which "Article 3(b) codifies two crimes: 'wanton destruction of cities, towns or villages, or devastation not justified by military necessity'".[27] Late in the same judgement, however, the trial chamber defined the elements of the crime of "wanton destruction not justified by military necessity".[28] It may be that the expressions "wanton"[29] and "not justified by military necessity" are functionally synonymous. At any rate, it appears uncontroversial in contemporary international humanitarian law and international criminal law that large-scale, militarily unnecessary property destruction is generally prohibited, and that violation of this general prohibition is treated as a war crime.[30]

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[20] See Robert H. Jackson, *Report of Robert H. Jackson United States Representative to the International Conference on Military Trials* (1949), at 197.
[21] See *ibid.,* at 205, 293, 327, 351, 359, 373-374, 390, 392-393.
[22] See *ibid.,* at 395.
[23] See *ibid.,* at 399-419.
[24] *United States of America et al. v. Hermann Wilhelm Göring et al*, 22 *Trial of the Major War Criminals Before the International Military Tribunal* (1948) 411, at 470.
[25] See *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-AR73.3, *Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98bis Motions for Acquittal*, 11 March 2005, para. 29.
[26] *Ibid.,* para. 30.
[27] *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, *Judgement*, 31 January 2005, para. 291.
[28] *Ibid.,* para. 292.
[29] The French term used is "sans motif" – i.e., "without good reason". See also United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (1948), at 34, 37-38 (American observations on charges of inhuman or atrocious conduct); Roger O'Keefe, *The Protection of Cultural Property in Armed Conflict* (2006), at 26, 32.
[30] See, e.g., Article 23(g), Regulations Respecting the Laws and Customs of War on Land, annexed to Convention (IV) Respecting the Laws and Customs of War on Land (18 October 1907); Article 6(b), Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (8 August 1945); Article II(1)(b), Control Council Law No. 10, Punishment of Persons Guilty of war Crimes, Crimes against Peace and against Humanity (20 December 1945); Article 50, Geneva Convention I; Article 51, Geneva Convention II; Articles 53, 147, Geneva Convention IV; Articles 8(2)(b)(xiii), 8(2)(e)(xii), Rome Statute of the International Criminal Court (17 July 1998). See also *Martić* Trial Judgement, para. 91; *Boškoski and Tarčulovski* Trial Judgement, para. 350; 1 *Prlić et al.* Trial Judgement, paras. 165-166 *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T, *Judgement*, 12 December 2012, para. 858; *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, *Judgement*, 10 June 2010, para. 985.

1.1.3 Article 5(h), ICTY Statute

Article 5(h) of the ICTY Statute specifies "persecutions on religious, political and racial grounds" as a crime against humanity.[31] According to the tribunal's jurisprudence, property destruction may amount to persecutions under certain circumstances.[32] The tribunal has charged property destruction as an underlying act of persecutions in relation to numerous cases.[33]

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[31] Article 5(h), ICTY Statute.

[32] See, e.g., *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-T, *Judgement*, 27 September 2006, paras. 773-779, 782-783; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T, *Judgement*, 17 January 2005, para. 594; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, *Judgement*, 17 December 2004, para. 108; *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, *Judgement*, 31 July 2003, para. 764, 768; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, *Judgement*, 27 July 2004, para. 149; *Tuta and Štela* Trial Judgement, para. 704; *Prosecutor v. Biljana Plavšić*, Case No. IT-00-39&40/1-S, *Sentencing Judgement*, 27 February 2003, para. 15; *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-T, *Judgement*, 2 November 2002, para. 186; *Kordić and Čerkez* Trial Judgement, paras. 202, 205, 207; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, *Judgement*, 3 March 2000, paras. 227-228, 234; *Brđanin* Trial Judgement, paras. 1021-1024; *Prosecutor v. Miroslav Deronjić*, Case No. IT-02-61-S, *Sentencing Judgement*, 30 March 2004, para. 123; *Prosecutor v. Milan Babić*, Case No. IT-03-72-S, *Sentencing Judgement*, 29 June 2004, paras. 14-17, 30-31; *Martić* Trial Judgement, para. 119; *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, *Judgement*, 10 June 2010, paras. 982-987; *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-T, *Judgement*, 23 February 2011, paras. 1770-1773; *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, *Judgement*, 15 April 2011, paras. 1825-1830; *Tolimir* Trial Judgement, para. 859; *Prosecutor v. Mićo Stanišić and Stojan Župljanin*, Case No. IT-08-91-T, 1 *Judgement*, 27 March 2013, para. 86; *Popović* Trial Judgement, para. 987; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, *Judgement*, 24 March 2016, paras. 530-534.

[33] *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T, *Fourth Amended Joinder Indictment*, 14 May 2004, count 5 ("persecutions on political, racial and religious grounds [by way of] destruction of personal property and effects"); *Brđanin* Sixth Amended Indictment, count 3 ("persecutions [by way of] destruction [of property]"); *Babić* Indictment, count 1 ("persecutions on political, racial and religious grounds [by way of] deliberate destruction of homes, other public and private property"); *Prosecutor v. Miroslav Deronjić*, Case No. IT-02-61-PT, *Second Amended Indictment*, 29 September 2003, paras. 36-37 ("persecutions [by way of] destruction of property"); *Martić* Second Amended Indictment, count 1 ("persecutions on political, racial and religious grounds [by way of] deliberate destruction of homes, other public and private property"); *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-PT, *Amended Joinder Indictment*, 26 May 2003, count 5 ("persecutions on political, racial and religious grounds [by way of] destruction of personal property"); *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-PT, *Fourth Amended Indictment*, 10 April 2002, count 6 ("persecutions [by way of] destruction [of residential and commercial properties]"); *Prosecutor v. Momčilo Krajišnik and Biljana Plavšić*, Case No. IT-00-39 & 40-PT, *Amended Consolidated Indictment*, 7 May 2002, count 3 ("persecutions on political, racial and religious grounds [by way of] intentional and wanton destruction of private property including houses and business premises and public property"); *Tuta and Štela* Second Amended Indictment, count 1; *Prosecutor v. Radislav Krstić*, Case No. IT-98-33, *Amended Indictment*, 27 October, 1999, count 6 ("persecutions on political, racial and religious grounds [by way of] destruction of personal property"); *Prosecutor v. Blagoje Simić et al.*, Case No. IT-95-9, *Fifth Amended Indictment*, 30 May 2002, count 1 ("persecutions on political, racial and religious grounds [by way of] wanton and extensive destruction [of property]"); *Kordić and Čerkez* Amended Indictment, counts 1, 2 ("persecutions on political, racial or religious grounds [by way of] wanton and extensive destruction [of property]"); *Blaškić* Second Amended Indictment, count 1 ("persecutions on political, racial or religious grounds [by way of] destruction [of property]"); *Gotovina et al.* Amended Joinder Indictment, count 1 ("persecutions on political, racial and religious grounds [by way of] destruction and burning"); *Šešelj* Third Amended Indictment, count 1 ("persecutions … committed on political, racial and religious grounds [by way of] deliberate destruction of homes, other public and private property, cultural institutions, historic monuments and sacred sites"); *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-PT, *Forth Amended Indictment*, 2 June 2008, count 5 ("persecutions on political, racial and religious grounds [by way of] wanton destruction"); *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, *Third Amended Indictment*, 27 February 2009, count 3 ("persecutions [by way of] wanton destruction"); *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-PT, *Third Amended Indictment*, 4 November 2009, count 6 ("persecutions on political, racial and religious grounds [by way of] the destruction of personal property and effects"); *Prosecutor v. Mićo Stanišić and Stojan Župljanin*, Case No. IT-08-91-PT, *Second Amended Consolidated Indictment*, 10 September 2009, count 1 ("persecutions on political, racial and religious grounds [by way of] wanton destruction"); *Prosecutor v. Vujadin Popović et al.*, count 6 ("persecutions on political, racial and religious grounds [by way of] destruction of personal property"); *Tolimir* Trial Judgement, paras. 870-878; 1 *Stanišić and Župljanin* Trial Judgement, paras. 86-90; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, 3 *Judgement*, 29 May 2013, paras. 1694-1713, 1725-1729, 1737-1741.

While some ICTY judgements clearly indicate the absence of military necessity as an element of persecutions by way of property destruction,[34] others do not.[35] This discrepancy is unfortunate, because the destruction of property justified by military necessity constitutes neither a grave breach of the Geneva Conventions nor a violation of the laws and customs of war. Yet this discrepancy might be taken to leave open the possibility that even militarily necessary – and, therefore, IHL-compliant – property destruction could constitute persecutions.[36]

1.2 Instances of Militarily Unnecessary Property Destruction

In *Kordić and Čerkez*, several trial-level findings of militarily unnecessary property destruction were overturned on appeal.[37] The appeals chamber found that no evidence had been adduced on the scale and manner of the destruction or on the absence of military necessity therefor.[38] With respect to Nadioci, the chamber held:

> It is not sufficient for the Prosecution to prove that destruction occurred. It also has to prove when and how the destruction occurred. It has to establish that the destruction was not justified by military necessity, which cannot be presumed and especially in the context of the Indictment in which the Prosecution pleaded that fighting continued until May 1994. The Appeals Chamber considers that in the absence of further evidence as to how the destruction occurred, no reasonable trier of fact could find that wanton destruction not justified by military necessity ... is established.[39]

That the timing of the property destruction in Nadioci had not been proven meant that the destruction might have occurred *during* the fighting. It is arguable that this, together with the lack of evidence on the manner in which the property was destroyed, gave rise to a reasonable doubt that Nadioci's property destruction was *caused by* the fighting.[40]

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

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[34] See, e.g., *Blaškić* Trial Judgement, para. 234; *Blaškić* Appeal Judgement, paras. 146, 149; *Blagojević and Jokić* Trial Judgement, para. 593; *Krajišnik* Trial Judgement, para. 776; *Gotovina et al.* Trial Judgement, para. 1827; *Popović et al.* Trial Judgement, paras. 984-986; *Karadžić* Trial Judgement, para. 532.

[35] See, e.g., *Kordić and Čerkez* Trial Judgement, para. 205; *Kordić and Čerkez* Appeal Judgement, paras. 108-09; *Tuta and Štela* Trial Judgement, paras. 238, 704, 706; *Plavšić* Sentencing Judgement, para. 15; *Stakić* Trial Judgement, para. 763.

[36] On the danger of recharacterising IHL-compliant conduct as a crime against humanity, see, e.g., Payam Akhavan, "Reconciling Crimes Against Humanity with the Laws of War: Human Rights, Armed Conflict, and the Limits of Progressive Jurisprudence", 6 *Journal of International Criminal Justice* 6 (2008); Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law* 3d ed. (2014), at 259; Nobuo Hayashi, "Is the Yugoslav Tribunal Guilty of Hyper-Humanising International Humanitarian Law?", in Nobuo Hayashi and Cecilia M. Bailliet (eds.), *The Legitimacy of International Criminal Tribunals* (2016). But see, e.g., José Doria, "Whether Crimes Against Humanity Are Backdoor 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) 645, at 656-660.

[37] See, e.g., *Kordić and Čerkez* Trial Judgement, paras. 572, 625-649, 665, 806-807 (regarding Merdani, Nadioci, Pirići, Rotilj, Stari Vitez, and Vitez); *Kordić and Čerkez* Appeal Judgement, paras. 429, 465-466, 495, 503, 547 (regarding Merdani, Nadioci, Pirići, Rotilj, and Stari Vitez).

[38] See *Kordić and Čerkez* Appeal Judgement, para. 495.

[39] *Ibid.* See also *Martić* Trial Judgement, para. 93; 1 *Prlić et al.* Trial Judgement, para. 170. Since the absence of military necessity for property destruction cannot be presumed, the onus rests with the prosecution to show this absence. See *Prosecutor v. Naser Orić*, Case No. IT-03-68-T, *Judgement*, 30 June 2006, para. 586 (quoting *Kordić and Čerkez* Appeal Judgement, para. 495). Showing the absence of military necessity entails, in turn, proving that at least one of its requirements was unfulfilled.

[40] See also *Štanišić and Župljanin* Trial Judgement, para. 334.

1.3 Property Destruction in the Context of Combat

There are four major factors to take into consideration when assessing the military necessity of property destruction in combat. First, as a threshold matter, one may look to the lawfulness or otherwise of the military activities that underlie the destruction in issue. Should property be destroyed as part of an assault on a locality that contains no military objective to begin with, then it would *ipso facto* be militarily unnecessary.

Second, we need to unpack the subtle way in which the act of attacking and that of destroying interact with each other. As will be seen below, a failure to appreciate this interplay is responsible for some of the confusions in the ICTY's case law that exist on military necessity. Third, these confusions are exacerbated by the fact that the tribunal has sought to describe military necessity by reference to military objectives. It is true that one's assessment as to whether the destruction of an object is militarily necessary often turns out to be the same, whether he or she adheres to these considerations or not. Failing to adhere to them nevertheless means offering unsound legal reasons and, occasionally, arriving at erroneous conclusions.

Fourth, the most intricate area of military necessity assessment involves the destruction of civilian objects during hostilities that does not take the form of an attack. Establishing an object's civilian status does not *per se* warrant the conclusion that its destruction is militarily unnecessary. The assessor must additionally consider the four requirements of juridical military necessity.[41] This stands in contrast to the fact that an object's civilian status does mean that a deliberate attack on it is *ipso facto* unlawful.

1.3.1 Lawfulness of the Underlying Military Activities

The *Blaškić* Trial Chamber held that the property destruction in Ahmići, Šantići, Pirići and Nadioci, as well as in Vitez and Stari Vitez, was militarily unnecessary because the underlying offensives on these localities were without military justification.[42] In so holding, the chamber effectively set forth two propositions: (1) as a matter of fact, there was nothing in these localities that justified the offensives; and (2) as a matter of law, where an offensive is launched on a locality without military justification, military necessity is inadmissible in respect of property destruction that occurs during the course of that offensive.

The *Blaškić* Appeals Chamber rejected the first proposition. It found that there was, in fact, some military justification for the offensives on the localities concerned, and consequently, that they were not *per se* unlawful.[43] This finding left the second proposition of the trial chamber unaddressed by the appeals chamber. It is submitted here that the second proposition is correct as a matter of law, to the extent that the property destruction forms part of the underlying military activities.[44] As noted earlier, military necessity does not except measures based on purposes that are contrary to international humanitarian law.[45] It would seem logical – indeed, truistic – to say that if an offensive is unlawfully launched on a locality, and if the offensive involves the destruction of property therein, then this destruction is devoid of military necessity. It does not follow *a contrario*, however, that the

[41] See Chapter 9 above.
[42] *Blaškić* Trial Judgement, paras. 402-410, 507-512.
[43] See *Blaškić* Appeal Judgement, paras. 235, 331-335, 437-438, 444 (regarding Ahmići, Nadioci, Pirići, Šantići, Stari Vitez, and Vitez).
[44] Examples of unjustified offensives include attacks launched on localities that are in fact undefended or non-defended, and those launched on special zones such as demilitarised zones.
[45] See Chapter 9 above.

lawfulness of an offensive on a locality renders all property destruction that accompanies that offensive militarily necessary. Plainly, the underlying offensive's lawfulness is *not* determinative of the destruction's military necessity.[46]

What, then, *is* determinative? Articulating informed responses to this question involves:

i. Distinguishing between attacking and destroying a piece of property;
ii. Distinguishing between military necessity and military objective, two similar-sounding yet very dissimilar concepts in positive international humanitarian law; and
iii. Distinguishing between the destruction of property that also constitutes an attack against that property, on the one hand, and the destruction of property that does not, on the other hand.

1.3.2 Attack v. Destruction

Article 49(1) of Additional Protocol I defines "attacks" as "acts of violence against the adversary, whether in offence or in defence".[47] There is no formal definition of "destruction" under international humanitarian law. Nevertheless, "attacks" and "destruction" are clearly interrelated notions. In active combat, the destruction of property typically takes the form of an attack against that property, or an attack against some other objective in its vicinity. Similarly, when particular property becomes the object of an attack, this attack often results in the property being totally or partially destroyed.

Not every successful attack necessarily entails the destruction of its objective, however. During the 1999 Kosovo crisis, NATO attacked some of Serbia's electrical power switch stations. According to news reports, NATO released small filaments of graphite over these facilities.[48] This material caused large-scale short circuits; nevertheless, other than burnt fuses, it left no material damage to the power switch stations.[49] Likewise, in 2003, the U.S. Air Force reportedly deployed an electromagnetic pulse (EMP) as a weapon in its attack against Iraq's satellite television network.[50] Its programmes were disrupted for several hours after the EMP temporarily disabled the broadcaster's equipment.[51]

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

Nor, even if the belligerent launches an attack with a view to destroying an objective, does the attack necessarily cause the objective's destruction or damage. Thus, for instance, the ordnance may simply fail to detonate; the target may move sufficiently away from the area of impact to escape or withstand the blast; an undersupplied mortar battery may exhaust its limited rounds without hitting

[46] The *Blaškić* Appeals Chamber stated that it "does not therefore consider that the attack of 16 April 1993 on Vitez and Stari Vitez was unlawful *per se*, but agrees with the Trial Chamber only to the extent that crimes were committed in the course of the attack". *Blaškić* Appeal Judgement, paras. 438, 444.
[47] Article 49(1), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (8 June 1977). See Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War* 2d ed. (2001), at 97 (noting that "'acts of violence' means acts of warfare involving the use of violent means: the term covers the rifle shot and the exploding bombs, not the act of taking someone prisoner (even though the latter may also involve the use of force)"). See also A.P.V. Rogers, *Law on the Battlefield* 2d ed. (2004), at 27-29.
[48] See, e.g., "'Soft Bombs' Hit Hard", *BBC News*, 3 May 1999. See also Rogers, *supra* note 47, at 27-29.
[49] *Ibid*.
[50] See, e.g., Joel Roberts, "U.S. Drops 'E-Bomb' On Iraqi TV", *CBS*, 25 March 2003.
[51] *Ibid*.

the target.[52] Plainly, if an attack is launched against an objective, and if the objective survives the attack, this does not mean that no attack has taken place at all.[53]

Conversely, under certain circumstances, property may be destroyed without being attacked.[54] During World War II, Japan demolished houses in order to create firebreaks in parts of its large cities (e.g., Nagoya) in anticipation of Allied aerial bombardments.[55] Even if Article 49(1) of Additional Protocol I had applied to these demolitions, they clearly would not have constituted "acts of violence against" the United States.

In September 1944, the port city of Brest in Bretagne, France, experienced fierce urban combat between German and Allied forces.[56] According to one account,

> [t]he battle for Brest entered its final but most painful stage. The 2d and 8th Division [of the U.S. Army] became involved in street fighting against [German] troops who seemed to contest every street, every building, every square. Machine gun and antitank fire from well-concealed positions made advances along the thoroughfares suicidal, and attackers had to move from house to house by blasting holes in the building walls, clearing the adjacent houses, and repeating the process to the end of the street.[57]

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

> [d]uring the bitter house-to-house street fighting that followed, the 2d Engineer Combat Battalion made its most valuable contribution. The engineers became adept at blowing holes in the walls of houses at points where the entering infantrymen would not have to expose themselves to enemy fire in the streets. On the eastern side, away from the enemy, the engineers blew holes through inner walls to enable the troops to pass safely from building to building and in ceilings to allow the infantry to pass from floor to floor when the Germans defended stairways. The engineers also developed several methods of quickly overcoming obstacles in the way of the advancing troops. The engineers ... learned to fill craters and ditches quickly by blowing debris into them from the walls of adjacent buildings.[58]

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[52] See also Terry D. Gill, "International Humanitarian Law Applied to Cyberwarfare: Precautions, Proportionality and the Notion of 'Attack' under the Humanitarian Law of Armed Conflict", in Nicholas Tsagourias and Russell Buchan (eds.), *Research Handbook on International Law and Cyberspace* (2015) 366, at 374-375.

[53] See Article 8(2)(b)(ii), ICC Statute (designating as a war crime the act of "[i]ntentionally directing attacks against civilian objects, that is, objects which are not military objectives"). This war crime does not require that the attacks result in the objects being destroyed or damaged. The same can arguably be said of the elements of launching attacks in the knowledge that it will cause disproportionate collateral damage, a war crime stipulated under Article 8(2)(b)(iv) of the ICC Statute. See also Judith Gardam, "Crimes Involving Disproportionate Means and Methods of Warfare under the Statute of the International Criminal Court", in Doria, Gasser and Bassiouni (eds.), *supra* note 36, 537, at 546. As a matter of evidence, however, the prosecution may find it difficult to prove that an attack was deliberately directed against a particular objective except by showing that the objective was in fact destroyed or damaged as a result. At the ICTY, the *Galić* Trial Chamber ruled that the war crime of unlawful attacks on civilian persons requires the showing that the attacks *caused* death or serious injury. See *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, *Judgement and Opinion*, 5 December 2003, paras. 42-44, 56, 62. See also *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, *Judgement*, 12 December 2007, para. 942.

[54] See, e.g., Roger O'Keefe, "Protection of Cultural Property", in Andrew Clapham and Paola Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict* (2014) 492, at 501: "As for the qualified prohibition on wilful destruction of or damage to cultural property other than by way of attacks, imperative military necessity may justify demolitions in order to impede the progress of enemy columns, to clear a line of fire or to deny cover to enemy fighters, although the extent of the destruction or damage in the event of will need to be calibrated to the degree of military necessity".

[55] See, e.g., Civil Defense Office, National Security Resources Board, Executive Office of the President, *Fire Effects of Bombing Attacks* (1950), at 18-19. See also John Antal, *City Fights: Selected Histories of Urban Combat from World War II to Vietnam* (2003), at 394 (regarding American army units during World War II using demolition charges to create a firebreak between Manila's north port area and residential districts).

[56] Martin Blumenson, *The European Theater of Operations: Breakout and Pursuit* (2005), at 646.

[57] *Ibid*.

[58] Alfred M. Beck et al., *The Technical Services: The Corps of Engineers: The War Against Germany* (1985), at 384-385.

Here, too, it would have been odd to characterise the actions of Allied engineers as "attacks" against local French property. After all, the violence in question was not directed against the "adversary". Also, according to the British manual, "[i]t may be permissible to destroy a house in order to clear a field of fire"[59] in non-international armed conflicts. Calling the destruction of such a house an "attack" would appear counterintuitive, as the act of violence is not truly directed "against the adversary".

For the same reason, genuinely unintended destructions of civilian objects commonly known as "collateral damage" would not constitute "attacks" against such objects. Where an attack results in collateral damage, it means, by definition, that the act of violence is properly directed against some military objective, i.e., "the adversary",[60] and *not* against the civilian objects that the act incidentally destroys or damages.[61]

1.3.3 Military Necessity v. Military Objective

The idea that destroying property and attacking property are two conceptually distinct acts also finds support in the dissimilar grounds on which their propriety depends. Property destruction is militarily necessary within the meaning of express military necessity clauses only if it is required for the attainment of a military purpose and otherwise in conformity with international humanitarian law.[62] Formulated thus, juridical military necessity pertains to the *measure* taken; that is, the very act of destruction. Compare this with the notion of a military objective that pertains to the *property* itself. The lawfulness of an attack against property depends primarily on whether the property constitutes a military objective. Under Article 52(2) of Additional Protocol I, property constitutes military objectives, only if (i) "by their nature, location, purpose or use [they] make an effective contribution to military action"[63] and if (ii) their "total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage".[64] If property constitutes a military objective, it is liable to attacks; if it does not, it constitutes a civilian object and is therefore immune from attacks.[65]

In other words, military necessity justifies the property's destruction, whereas the property's status as a military objective justifies attacks being directed against it. The acts of destroying property

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[59] U.K. Ministry of Defence, *The Joint Service Manual of the Law of Armed Conflict* (2004), at 393.

[60] Article 49(1), Additional Protocol I.

[61] This, of course, raises a separate problem as to whether one can really speak of a deliberate "attack" against civilians or civilian objects. After all, attacking a civilian person or object does not necessarily mean committing an act of violence against the adversary. Yet, Article 51(2) of Additional Protocol I clearly protects civilian persons from being made "the object of attack". Similarly, the protocol's Article 52(1) prohibits the belligerents from making civilian objects "the object of attack". Whether an attack *qua* IHL notion may encompass acts other than those stipulated in Article 49(1) of Additional Protocol I is a matter that goes beyond the scope of this thesis. Suffice it to note here that the International Committee of the Red Cross has taken this issue into account when formulating the requisite threshold of harm as part of its interpretive guidance on the notion of direct participation in hostilities. See International Committee of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009), at 47: "In order to reach the required threshold of harm, a specific act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack". See also *ibid.*, at 49 (footnotes omitted): "In IHL, attacks are defined as 'acts of violence against the adversary, whether in offence or in defence'. The phrase 'against the adversary' does not specify the target, but the belligerent nexus of an attack, so that even acts of violence directed specifically against civilians or civilian objects may amount to direct participation in hostilities".

[62] See Chapter 9 above.

[63] Article 52(2), Additional Protocol I.

[64] *Ibid*.

[65] *See ibid.,* Article 52(1).

and attacking property are conceptually distinct from each other, because the notions of military necessity and military objectives are conceptually distinct from each other.[66] The *Strugar* Trial Chamber therefore arguably erred when it stated that "military necessity may be usefully defined for present purposes with reference to the widely acknowledged definition of military objectives in Article 52 of Additional Protocol I".[67] The same may be said of the *Strugar* Appeals Chamber:

> The Appeals Chamber also agrees that military necessity is not an element of the crime of destruction of, or damage to cultural property ... While the latter's requirement that the cultural property must not have been used for military purposes may be an element indicating that *an object does not make an effective contribution to military action in the sense of Article 52(2) of Additional Protocol I*, it does not cover the other aspect of military necessity, *namely the definite military advantage that must be offered by the destruction of a military objective*.[68]

The chamber is clearly of the view that military necessity is to be understood by reference to the two-prong definition of military objectives found in Article 52(2) of Additional Protocol I.[69]

This is an error, notwithstanding two familiar perceptions to the contrary. First, it is true that most instances of property destruction in combat would also be instances of property attack, and *vice versa*. It is also true that today's international humanitarian law limits lawful attacks to those directed at military objectives. This merely amounts to upholding the somewhat obvious truth that destroying a military objective by way of an attack is *ipso facto* militarily necessary.[70] It does not follow *a contrario* that destroying a civilian object by means other than an attack is perforce militarily unnecessary.[71]

Second, the 1999 Second Protocol to the 1954 Hague Cultural Property Convention effectively restricts the loss of cultural property's protection not just against destruction, but also against military use and acts of hostility, to situations where it constitutes a military objective "by its function"[72] – or, in the case of enhanced protection – "by its use".[73] As Roger O'Keefe observes:

> In addition, parties to a conflict to which the Second Protocol applies owe certain special obligations towards cultural property placed under Chapter 2's select regime of "enhanced" protection. They are prohibited from attacking such property unless by its use, and use alone, it becomes a military objective and the attack is the only feasible means of terminating such use. *All acts of*

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[66] See, e.g., Roger O'Keefe, "Protection of Cultural Property", in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law* 3d ed. (2013) 423, at 440.

[67] *Strugar* Trial Judgement, para. 295. See also *Kordić and Čerkez* Appeal Judgement, paras. 465-466, 503; *Boškoski and Tarčulovski* Trial Judgement, para. 353; *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, *Judgement*, 3 April 2007, para. 337; 1 *Prlić et al.* Trial Judgement, para. 123; *Karadžić* Trial Judgement, para. 533; William Fenrick, "Specific Methods of Warfare", in Elizabeth Wilmshurst and Susan Breau (eds.), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (2007) 238, at 244.

[68] *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, *Judgement*, 17 July 2008, para. 330. Emphasis added.

[69] See Article 52(2), Additional Protocol I. See also Kriangsak Kittichaisaree, *International Criminal Law* (2001), at 274 n.68: "This was the subject of the decision of the Anglo-American Arbitral Tribunal in the *Hardman Claim* in 1913. It was held that the act constituted 'military necessity'. (McCoubrey, *International Humanitarian Law*, 201). It is submitted, however, that the defence accepted in that case would better be characterised as 'necessity'. It was not 'military necessity' as the act did not target military objectives in order to secure military victory over the enemy". Here, the confusion appears to be three-fold. First, as noted in Chapter 9, the matter at issue in *Hardman* was exceptional military necessity, not justificatory necessity. Second, it is not a requirement of military necessity that the measure in question "target military objectives". Third, military necessity does not require military victory over the enemy to be the purpose of the measure taken.

[70] See below. See also O'Keefe, *Protection of Cultural Property*, *supra* note 29, at 128.

[71] See below.

[72] Article 6(a)(i), Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (26 March 1999).

[73] *Ibid.*, Article 13(1)(b).

hostility against cultural property under enhanced protection other than attacks, such as its demolition even for military ends, are absolutely forbidden.[74]

This, while undoubtedly significant for cultural property, is simply an extra layer of protection instituted under the 1999 Second Protocol by which its states parties are bound. It does not change the fact that, as concepts, military necessity and military objectives are distinct from each other.

In *Kordić and Čerkez*, the appeals chamber held that no evidence allowed "conclusions as to whether the shelling of Merdani was or was not justified by military necessity".[75] In so holding, the chamber appears to have concluded that the relevant question for determining the military necessity or otherwise of the property destruction in Merdani was whether the *shelling of that locality* was or was not justified by military necessity. The chamber's approach here is problematic in two respects.

To begin with, the shelling of a locality is not amenable to being "militarily necessary" or "unnecessary" within the context of positive international humanitarian law. Rather, it is amenable to being lawful or unlawful, depending on whether, *inter alia*, the locality does or does not contain any military objective or objectives, and whether the shelling targets such an objective or objectives.[76]

Moreover, as noted earlier, whereas combat-related property destruction is *ipso facto* militarily unnecessary where the underlying offensive is unlawful, the latter's lawfulness is not determinative of the former's military necessity. In other words, the shelling of military objectives in Medani may have been lawful, but not all property destruction that took place during this offensive may have been militarily necessary. Nor, despite the position taken by the *Blaškić* and *Kordić and Čerkez* Trial Chambers to the contrary, does military necessity justify targeting civilian objects.[77]

1.3.4 Destruction of Property Constituting a Military Objective

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

Some ICTY trial chambers declined to find the destruction of houses to be lacking in military necessity on the ground that they may have constituted military objectives at the time of their destruction.[78] The *Prlić et al.* Trial Chamber's majority found that the Old Bridge of Mostar constituted a military objective at the relevant time.[79] Nevertheless, according to the majority, the bridge's destruction was unlawful because the "damage to the civilian population" in the form of the humanitarian supplies cut as a result and very significant psychological impacts on Mostar's Muslim population

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[74] Roger O'Keefe, "Protection of Cultural Property", in Andrew Clapham and Paola Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict* (2014) 492, at 504. Emphasis added. See also O'Keefe, *Protection of Cultural Property*, *supra* note 29, at 255, 331-332.

[75] *See Kordić and Čerkez* Appeal Judgement, para. 429.

[76] Should the attacker indiscriminately treat the locality itself as his or her target, however, it would be unlawful to launch an attack on it even if it did contain military objectives. See, e.g., Article 51(5)(a), Additional Protocol I; *Gotovina et al.* Trial Judgement, paras. 1893, 1911, 1923, 1935, 1943; Hayashi, *supra* note 36.

[77] See *Kordić and Čerkez* Trial Judgement, para. 328; *Blaškić* Trial Judgement, para. 180. This error was acknowledged in *Galić* and other subsequent decisions. See, e.g., *Galić* Trial Judgement and Opinion, para. 44; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, *Judgement*, 29 July 2004, para. 109; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, *Corrigendum to Judgement of 17 December 2004*, 24 January 2005, para. 54; *Strugar* Trial Judgement, para. 278; *Milošević* Trial Judgement, para. 944; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, *Judgement*, 30 November 2006, paras. 130, 190. See also Shane Darcy, *Judges, Law and War: The Judicial Development of International Humanitarian Law* (2014), at 143-144.

[78] See, e.g., 3 *Prlić et al.* Trial Judgement, paras. 1525, 1558, 1563.

[79] See *ibid.*, para. 1582.

was "disproportionate to the concrete and direct military advantage expected by the destruction of the Old Bridge".[80]

1.3.5 Destruction of Property Constituting a Civilian Object

A civilian object is *per se* immune from attacks. An attack against such an object is unlawful, be it deliberate or indiscriminate. If an attack is deliberately launched against a civilian object, and if the attack destroys that object and/or another civilian object or objects, then juridical military necessity does not exempt their destruction.[81] This is so, because the destruction in question does not satisfy the requirement that the measure be in conformity with international humanitarian law.[82] Similarly, if an attack is launched indiscriminately, and if the attack destroys a civilian object, then this destruction remains without military necessity.[83]

The *Strugar* Trial Chamber found that there was no military objective in the Old Town of Dubrovnik when it came under attack by the Yugoslav People's Army (JNA).[84] The JNA's shelling of the Old Town resulted in its partial destruction. The chamber rightly concluded that the shelling was deliberate or indiscriminate[85] and that the destruction of the Old Town was not justified by military necessity.[86] As noted earlier, however, it did so by equating the notion of military necessity with the notion of military objectives.[87] The correct reasoning would have been as follows:

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

It may happen that civilian objects are destroyed as part of collateral damage. For example, suppose Property A is a civilian object that is destroyed as a result of an attack specifically directed against Combatant B, an able-bodied, non-surrendering enemy combatant and a military objective. Property A's destruction forms part of incidental civilian casualties and damage. Suppose further that such casualties and damage are proportionate to the concrete and direct military advantage anticipated by Combatant B's disablement. Property A's destruction will then be militarily necessary, because the measure taken is required for the attainment of a military purpose and otherwise in conformity with international humanitarian law.[88] In this scenario, the attack against Combatant B constitutes the

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[80] *Ibid*., paras. 1583-1584, 1587. But see *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, 6 *Separate and Partially Dissenting Opinion of Presiding Judge Jean-Claude Antonetti*, 29 May 2013, at 318-325, esp. 325 ("to my mind, the Old Bridge was a legitimate military objective whose destruction gave the HVO a definite military advantage by cutting off communications and the supply of food. I fail to see how the principle of proportionality could be applicable in this case. If the Old Bridge was a military objective, it quite simply had to be destroyed. In any event, there is no such thing as proportionate destruction").
[81] See *Kordić and Čerkez* Appeal Judgement, paras. 419, 426, 477, 485, 526.
[82] See Chapter 9 above.
[83] *Brđanin* Trial Judgement, para. 626 ("In some villages, attacks were preceded by an ultimatum: for example in the Hambarine area in late May 1992, an ultimatum was given for the surrender of a particular individual [Aziz Ališković, a checkpoint commander]. Following the expiration of the ultimatum, the Bosnian Muslim village of Hambarine was shelled by Bosnian Serb forces for the entire day. Houses were targeted indiscriminately. Tanks passed through the village and shelled the houses causing civilian casualties. Houses were looted and set on fire") (footnotes omitted).
[84] See *Strugar* Trial Judgement, paras. 193-194, 214, 284.
[85] See *ibid.,* paras. 214, 285-288, 329.
[86] See *ibid.,* paras. 328, 330.
[87] See *ibid.,* para. 295.
[88] See *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-T, *Judgement*, 15 March 2006, para. 45 ("The protection offered by Article 3(b) of the Statute is, however, limited by the exception of military necessity. The Chamber finds that collateral damage to civilian property may be justified by military necessity and may be an exception to the principles of protection of civilian property").

measure taken, while his disablement constitutes the military purpose. The measure's conformity with international humanitarian law emanates from two facts. First, Combatant B is a military objective. Second, *ex hypothesi*, the attack against him does not cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which are excessive in relation to the concrete and direct military advantage anticipated.[89]

If, however, Property A's destruction is incidental yet *dis*proportionate to the concrete and direct military advantage anticipated, it becomes unlawful and, accordingly, without military necessity. The measure taken runs counter to international humanitarian law, since disproportionate attacks are prohibited under Article 51(5)(b) of Additional Protocol I.[90] Nor, within the meaning of juridical military necessity, is the attack against Combatant B "required" for the concrete and direct military advantage anticipated insofar as the measure's injurious effect is disproportionate in relation to its stated purpose.

The *Martić* Trial Chamber observed:

> The Trial Chamber recalls the evidence that there was intensive shelling in Škabrnja on the morning of the attack. Moreover, there is evidence that fire was opened on private houses by JNA tanks and using hand-held rocket launchers. The Trial Chamber recalls the evidence that members of Croatian forces were in some of the houses in Škabrnja. In the Trial Chamber's opinion, this gives rise to reasonable doubt as to whether the destruction resulting from these actions was carried out for the purposes of military necessity. The elements of wanton destruction of villages or devastation not justified by military necessity (Count 12) have therefore not been met.[91]

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

Accordingly, where the destruction of a civilian object takes the form of an unlawful attack, the attack's unlawfulness conclusively indicates the absence of military necessity for the object's destruction. Arguably, this is what the *Hadžihasanović and Kubura* Appeals Chamber meant when it held that "the conventional prohibition on attacks on civilian objects ... has attained the status of customary international law and that this covers 'wanton destruction of cities, towns or villages not justified by military necessity'". [92] The attack is unlawful if:

(i) It is deliberately directed against the civilian object concerned, or against another civilian object or objects;
(ii) It is indiscriminate[93]; or
(iii) It is directed against a military objective but causes disproportionate collateral damage.

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[89] See Article 51(5)(b), Additional Protocol I.

[90] See, e.g., *Blaškić* Trial Judgement, para. 510 ("Consequently, it was impossible to ascertain any strategic or military reasons for the 16 April 1993 attack on Vitez and Stari Vitez. In the event that there had been, the devastation visited upon the town was of out of all proportion with military necessity"). See also *Kordić and Čerkez* Trial Judgement, para. 734 ("On 8 September 1993 the HVO launched a successful attack on the village of Grbavica, a hillside feature to the west of Vitez and close to the Britbat camp at Bila. This feature had been used by the ABiH as a position for the purposes of sniping and, according to the evidence of Britbat officers who saw the attack, it was a legitimate military target. However, according to the same witnesses, the attack was accompanied by unnecessary destruction. For instance, Brigadier Duncan said that the objective was secured by an excessive use of force against the local population, causing massive destruction of property beyond any military necessity ...") (footnotes omitted).

[91] *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, *Judgement*, 12 June 2007, para. 394.

[92] *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-AR73.3, *Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98bis Motions for Acquittal*, 11 March 2005, para. 30.

[93] See, e.g., 3 *Prlić et al.* Trial Judgement, paras. 1568-1570.

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

As noted earlier, however, there are situations during active combat in which a belligerent destroys a civilian object without attacking that object or any other object. Where this occurs, the object's destruction is militarily necessary if it satisfies all the requirements of juridical military necessity.[94] If the destruction fails to satisfy one or more of the requirements, then it is without military necessity.

The *Orić* Trial Chamber held that property was destroyed without military necessity in Brađevina.[95] The chamber held that, "at the time of the attack, the property destroyed in Brađevina was neither of a military nature, nor was it used in a manner such as to make an effective contribution to the military actions of the Bosnian Serbs"[96] and that, "[c]onsequently, the destruction of property in Brađevina was not required for the attainment of a military objective".[97]

With the first ruling, the trial chamber determined in effect that the haystacks, sheds, houses, stables and livestock destroyed in Brađevina constituted civilian objects. If, as civilian objects, they were destroyed by deliberate, indiscriminate or disproportionate attacks, then this would *ipso facto* mean that their destruction was militarily unnecessary. The chamber described the circumstances of property destruction in Brađevina thus:

> The attack on Brađevina was launched from the direction of Kaludra. The attackers entered Brađevina from its lower part, and surrounded it. They met with no resistance. The attack came in two waves, the first by fighters approaching the houses of Brađevina firing upon the prone position, and the second by fighters following behind. Witnesses heard detonations and saw burning of haystacks and sheds. In the course of the attack, Bosnian Muslim fighters torched houses after taking out goods. Bosnian Muslim civilians joined fighters in torching stables and burning livestock in the meadows between Brađevina and Magudovići. Eventually, all the buildings of Brađevina, except those used for storing grain and food, were set on fire. Bosnian Muslim civilians remained in the area after the attack, searching for food and other goods.[98]

In view of these circumstances, it would not have been unreasonable for the trial chamber to conclude that the objects destroyed not only constituted civilian objects but were, in fact, attacked *as such* – i.e., deliberately.

The trial chamber did not do so. In fact, nowhere in the judgement is there any specific finding that, as civilian objects, the property destroyed in Brađevina was destroyed by attacks, let alone by unlawful ones.[99] Rather, it appears that, having determined the objects' civilian status, the trial chamber simply concluded – "consequently" is the expression used – that their destruction is incapable of satisfying any military purpose. The way in which the chamber discussed the events in Brađevina leaves open the possibility that some civilian property was destroyed by acts not constituting attacks. Where such a possibility exists, whether the destruction of the property in question was or was not required for the attainment of a military purpose is a matter that must be considered on a case-by-case basis.

Similarly, the *Boškoski and Tarćulovski* Trial Chamber considered most of the houses set alight in the village of Ljuboten civilian objects, and yet it declined to treat them as having been destroyed in deliberate attacks.[100] Rather, the chamber found itself asking whether these houses were used for

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[94] See Chapter 9 above. That is, unless the object in question constitutes cultural property and enjoys enhanced protection under Hague Cultural Property Protocol II.

[95] See *Orić* Trial Judgement, para. 618.

[96] *Ibid*. See also *ibid.,* paras. 607, 618, 632, 675 (holding, *inter alia,* that the property destroyed in Ježestica and Ratkovići was "neither of a military nature, nor ... used in a manner such as to make an effective contribution to the military actions of the Bosnian Serbs").

[97] *Ibid.,* para. 618.

[98] *Ibid.,* para. 613. Footnotes omitted.

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

[100] See *Boškoski and Tarčulovski* Trial Judgement, paras. 359-380.

any military purposes. Then, as regards those houses without such purpose, the chamber proceeded to find that their destruction was all without military necessity.

This somewhat roundabout way in which the *Orić* and *Boškoski and Tarćulovski* Trial Chambers approached the matter may very well have to do with the fact that the prosecution specifically charged the accused under Article 3(b) of the ICTY Statute, effectively tying the chambers' hands.

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

> [A]part from the buildings destroyed or damaged due to the fighting along the separation line between the two forces, a number of buildings with no military interest belonging to civilian Muslims were destroyed in the part of the old town called Bare (the lower part, Ratanjska, at the entry of Novi Travnik). The nearest military objective was approximately 200-300 metres from there and other destroyed Muslim buildings were 700-800 metres from the front line … The Appeals Chamber is of the view that, although part of the HVO attack on Novi Travnik might have pursued a legitimate military purpose, a reasonable trier of fact could have, on the basis of the evidence in question, come to the conclusion beyond reasonable doubt that wilful and large scale destruction of Muslim properties not justified by military necessity also occurred in its course.[101]

It was found that there was a considerable distance between the properties destroyed, on the one hand, and the nearest military objective ("approximately 200-300 metres") and the front line ("700-800 metres"), on the other hand.[102] This distance would effectively eliminate the possibility that the destruction of Muslim buildings was incidental to attacks directed against military objectives nearby. The distance would also make it unlikely that stray shells and the like launched across the front line accidentally destroyed the properties. It would follow that they were destroyed either by deliberate or indiscriminate attacks, or by acts not constituting attacks.

The appeals chamber also found that the Muslim buildings had "no military interest".[103] This might mean that the properties destroyed constituted civilian objects. If they constituted civilian objects, and if their destruction was the result of deliberate or indiscriminate attacks, then the attacks would be unlawful and the destruction would be without military necessity. If, however, the proprieties were destroyed by acts other than attacks, then the mere fact that they constituted civilian objects would not conclusively demonstrate the absence of military necessity for their destruction.

Alternatively, "no military interest" might mean not only the properties' status as civilian objects but also the lack of military purpose served by their destruction. Provided this is the meaning that the appeals chamber had in mind, the destruction in question would fail to satisfy the requirement of juridical military necessity that the measure be taken for some specific military purpose[104] and would, accordingly, remain militarily unnecessary.

1.3.6 Property Destruction in the Context of Combat – A Summary

When assessing the juridical military necessity of combat-related property destruction, the trier of fact would consider the following questions.

- Was there any military justification for the combat activities of which the property destruction formed part? Absent any military justification, the trier of fact would find that the

[101] The acronym "HVO" refers to *Hrvasko Vijeće Obrane*, or "Croatian Defence Council". The HVO was the army of the Bosnian Croats. See *Kordić and Čerkez* Appeal Judgement, para. 391.
[102] *Ibid*.
[103] *Ibid*.
[104] See Chapter 9 above.

property destruction was militarily unnecessary. If at least some military justification existed,[105] then the trier would turn his or her attention to the property itself.

- Where there was some military justification for the underlying combat activities, did the individual property destroyed constitute a military objective? If it did, its destruction, whether caused by an attack or not, was militarily necessary.[106] If it constituted a civilian object, then the trier of fact would examine the particular circumstances of its destruction.
- Was the property at issue, a civilian object, made the object of a deliberate attack, destroyed as a result of a deliberate attack against another civilian object, or destroyed by an indiscriminate attack? An affirmative answer would yield the finding that the destruction was without military necessity; a negative answer would bring the trier of fact to the next question.
- Was the civilian object destroyed as a result of an attack directed against a military objective? If so, were the incidental civilian casualties and damage – of which the object's destruction formed part – in proportion to the concrete and direct military advantage anticipated? The lack of proportion between the injury and advantage would mean that the destruction at issue was militarily unnecessary, whereas the existence of proportion would indicate the destruction's military necessity.
- Lastly, where the civilian object was destroyed by an act not constituting an attack, did the destruction satisfy the requirements of military necessity?

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

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

[106] But see Articles 6(a)(i), 13(1)(b), Hague Cultural Property Protocol II.

<table>
<tr><td colspan="2" rowspan="2"></td><td colspan="2">The property destroyed was …</td></tr>
<tr><td>… a military objective.</td><td>… a civilian object.</td></tr>
<tr><td rowspan="6">The property was destroyed …</td><td>… as a result of a deliberate attack against it.</td><td>Lawful per se and therefore militarily necessary.</td><td>Unlawful per se and therefore militarily unnecessary.</td></tr>
<tr><td>… as a result of a deliberate attack against a(nother) civilian object.</td><td>Lawful per se and therefore militarily necessary.</td><td>Unlawful per se and therefore militarily unnecessary.</td></tr>
<tr><td>… as a result of an indiscriminate attack.</td><td>Lawful per se and therefore militarily necessary.</td><td>Unlawful per se and therefore militarily unnecessary.</td></tr>
<tr><td rowspan="2">… as a result of an attack against a(nother) military objective.</td><td rowspan="2">Lawful per se and therefore militarily necessary.</td><td>If not part of proportionate civilian casualties and/or damage, then unlawful and therefore militarily unnecessary.</td></tr>
<tr><td>If part of proportionate civilian casualties and/or damage, then lawful and therefore militarily necessary.</td></tr>
<tr><td>… not as a result of an attack.</td><td>Lawful per se and therefore militarily necessary.</td><td>Depends on whether the act of destruction was:
(a) required for the attainment of
(b) a military purpose, and
(c) otherwise in conformity with international humanitarian law.</td></tr>
</table>

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

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

The extent to which the prosecution can discharge its onus successfully depends on the quantity and quality of the evidence adduced. The prosecution's ability in this regard may be limited by the realities of active combat that make it difficult, if not impossible, to obtain the relevant evidence.

The April 1993 destruction of Muslim houses in Vitez/Stari Vitez is a case in point. The *Kordić and Čerkez* Trial Chamber found that the destruction was without military necessity.[107] This finding was, however, overturned on appeal:

> The Appeals Chamber takes into account the testimony of Col. Watters according to which most of the destruction during the April attacks was in the Muslim area of the town of Vitez, but has already held that the scale of such destruction is unknown. Exh. Z2715 does not specify when eighty houses were destroyed in the town of Vitez; part of these houses were obviously destroyed as a result of the 18 April truck bomb, which the Trial Chamber did not link with either of the Accused. Moreover, there were military objectives in Vitez/Stari Vitez, including the headquarters of the Muslim TO and the private houses from where combatants, (including members of the ABiH, the TO and every person taking a direct part in hostilities), were resisting. In the absence of evidence as to the scale of the destruction and as to the lack of military justification, the Appeals Chamber finds that no reasonable Trial Chamber could have concluded that destruction not justified by military necessity occurred in Vitez/Stari Vitez in April 1993.[108]

It appears that the insufficiency of evidence with respect to Vitez/Stari Vitez left, *inter alia*, the following three reasonable doubts unresolved. First, the presence of military objectives in Vitez/Stari Vitez could have militarily justified the underlying combat activities taking place in these localities. Second, at the time of their destruction, some Muslim houses might have constituted military objectives themselves. Third, even if the houses destroyed in Vitez/Stari Vitez were all civilian objects, it was not shown that they were destroyed by deliberate, indiscriminate, or disproportionate attacks, or by acts such that their destruction failed to satisfy one or more requirements of military necessity.[109]

1.4 Property Destruction Outside the Context of Combat

[107] See *Kordić and Čerkez* Trial Judgement, para. 808.
[108] The acronym "TO" refers to *teritoriajalna odbrana*, or "territorial defence", a militia organization originating from the defence structure of the former Social Federal Republic of Yugoslavia. The acronym "ABiH" refers to *Armija Bosne i Hercegovine*, or "Army of Bosnia and Herzegovina". See *Kordić and Čerkez* Appeal Judgement, paras. 465-466.
[109] *Ibid.* See also *Hadžihasanović and Kubura* Trial Judgement, paras. 1794, 1797, 1799, 1806-1807, 1830, 1832 (regarding Guča Gora, Maline, Šušanj, Ovnak, Brajkovići and Grahovčići).

In *Tuta and Štela*, the prosecution restricted the scope of its property destruction charges to events that occurred after the attacks.[110] The post-World War II United Nations War Crimes Commission took a similar approach.[111]

The absence of combat activities is relevant when determining the juridical military necessity of property destruction. The absence of combat, however, does not *per se* indicate the absence of military necessity. As noted earlier, in the *Hardman* claim, an occupation force's destruction of a house and its contents for the maintenance of sanitary conditions among its members was held to constitute military necessity. The destruction in question did not occur in the context of active combat.[112] Indeed, where an ICTY chamber made a finding of militarily unnecessary property destruction on the basis of little or no fighting, it typically did so on the ground that the destruction was ethnically driven.[113] In many cases, property destruction occurred in localities inhabited predominantly by members of a targeted ethnicity.[114] In other localities, only the property belonging to members of a targeted ethnicity or ethnicities was destroyed.[115]

It is submitted here that ethnically driven property destruction is *ipso facto* devoid of military necessity both within and without the context of combat.[116] Any decision to destroy property based

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[110] See *Tuta and Štela* Second Amended Indictment, paras. 55-56, 58 ("[f]ollowing the capture" of villages).

[111] See United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and Development of the Laws of War* (1948), at 488: "Committee I [of the Commission] often had to decide whether a given set of facts arising from the destruction of personal property, public property, or local monuments was a war crime, or whether such destruction was justified on the basis of military necessity in time of war. For example, the Committee refused to list for war crimes those Germans responsible for the demolition of a French lighthouse at Pas-de-Calais in September, 1944 (Commission No. 3603). Generally, the test applied was whether military operations were in progress, or were imminent".

[112] See *William Hardman (United Kingdom) v. United States*, 18 June 1913, 6 *Reports of International Arbitral Awards* (2006) 25, at 26; 7 *American Journal of International Law* 879 (1913), at 881; 2 *British Yearbook of International Law* 197 (1921-1922), at 199.

[113] See, e.g., *Kordić and Čerkez* Appeal Judgement, paras. 484-485, 583-586 (holding that damage done in Šantići and Ahmići was restricted to Muslim houses; that a reasonable trier of fact could have found that it was "of such a nature that it could not have been caused by the fighting" and "thus not justified by military necessity"; and that a reasonable trier of fact could have found that property destruction in Han Ploča Grahovci in Kiseljak was not justified by military necessity "[s]ince only Muslim houses were destroyed, and the destruction occurred when there was not much fighting"); *Blaškić* Trial Judgement, paras. 543-544, 549-550, 556-557, 559 (regarding Donja Večeriska, Gačice, and Grbavica); *Tuta and Štela* Trial Judgement, paras. 583, 585 (regarding Sovići and Doljani). The *Blagojević and Jokić* Trial Chamber found that the destruction of personal property taken from Bosnian Muslim detainees was not justified by military necessity. See *Blagojević and Jokić* Trial Judgement, para. 615.

[114] See, e.g., *Blaškić* Trial Judgement, paras. 565, 569, 579, 595-596 (regarding Lončari and Očehnići in Busovača, and Behrići and Gomionica in Kiseljak); *Brđanin* Trial Judgement, paras. 600, 608-634 (regarding Bosanska Krupa; Bosanski Novi; Blagaj Rijeka in Bosanski Novi; Donji Agići in Bosanski Novi; Bosanski Petrovac; Čelinac; Bašići in Čelinac; Ključ; Kotor Varoš; Stari Grad in Prijedo; Bišćani, Kozaruša, Kamičani, Kevljani, Rakovčani, Čarakovo and Rizvanovići in Prijedor; Hambarine in Prijedor; Kozarac in Prijedor; Briševo in Prijedor; Mahala in Sanski Most; Begići in Sanski Most; and Šipovo); *Kordić and Čerkez* Trial Judgement, paras. 740, 807 (regarding Stupni Do); *Štanišić and Župljanin* Trial Judgement, para. 264 (regarding Doganovci).

[115] See, e.g., *Blaškić* Trial Judgement, paras. 418, 510, 544, 598, 600, 605, 608, 613-614, 616, 619, 620, 622 (regarding Ahmići, Šantići, Pirići, Nadioci, Vitez, Stari Vitez, Donja Večeriska, Gromiljak in Kiseljak, Polje Višnjica, Višnjica in Kiseljak, Svinjarevo in Kiseljak, Grahovci, Han Ploča, and Tulica); *Blaškić* Appeal Judgement, para. 444 (regarding Vitez and Stari Vitez); *Kordić and Čerkez* Trial Judgement, paras. 635, 643, 807(i), 645, 659-660, 677, 805, 807(iv) (regarding Ahmići, Vitez, Donja Večeriska, Očehnići in Busovača, and Gačice); *Kordić and Čerkez* Appeal Judgement, paras. 484-485, 534, 558, 562, 563-564, 583-586 (regarding Šantići in Ahmići, Očehnići, Gomionica, Višnjica, Polje Višnjica, and Han Ploča-Grahovci in Kiseljak); *Tuta and Štela* Trial Judgement, paras. 582-585 (regarding Sovići and Doljani); *Brđanin* Trial Judgement, para. 1022 ("Unlike non-Serb property, Bosnian Serb property was systematically left intact and only sporadically damaged"); *Martić* Trial Judgement, paras. 258, 381, 383 (regarding Saborsko); 3 *Prlić et al.* Trial judgement, paras. 1523-1524, 1535-1543, 1546-1549, 1551-1552, 1554-1557, 1559-1562, 1564-1566, 1571-1574-1578, 1588-1591, 1593-1594, 1596-1599 (regarding Prozor; Duša, Hrasnica, Ždrimci, and Uzričje; Sovići and Doljani; Borojevići and Stolac; Bivolje Brdo; Stupni Do; Parcani; Skrobućani, Lug and Podaniš); *Štanišić and Župljanin* Trial Judgement, paras. 264, 282, 347, 491, 700, 812, 880, 982, 1041, 1119, 1190, 1248, 1286, 1356, 1498, 1688 (regarding Donji Vakuf, Prusac, Šeherdžik, Sokolina, Ključ, Kotor Varoš, Prijedor, Sanski Most, Taslić, Bileća, Bosanski Šamac, Brčko, Doboj, Gacko, Ilijaš, Pale, Vlasenica, Zvornik).

[116] See *Brđanin* Appeal Judgement, paras. 339-341; 3 *Prlić et al.* Trial Judgement, para. 1579-1580.

on its owner's ethnicity would fail to satisfy the requirement of juridical military necessity that the measure's purpose be in conformity with international humanitarian law.[117] There are two reasons for this failure. First, ethnicity-based selectiveness in the treatment of property would amount to adverse distinction. International humanitarian law prohibits adverse distinction in its application based on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria.[118] Whatever disagreement there might be about the definition of ethnicity, it would undoubtedly fall within one or more of these criteria. Second, where property is selectively destroyed with a view to adversely distinguishing its owners on the basis of their ethnicity,[119] and where other relevant facts are present,[120] the conduct may also constitute persecutions, a crime against humanity.

The *Hadžihasanović and Kubura*, *Orić* and *Prlić et al.* Trial Judgements are exceptional in the treatment of property destruction outside the context of combat. Regarding Vareš, the *Hadžihasanović and Kubura* Trial Chamber noted that the indictment had alleged militarily unnecessary destruction of dwellings, buildings and civilian personal property belonging to Bosnian Croats and Bosnian Serbs.[121] The chamber found that such destruction did indeed occur following the cessation of armed hostilities in Vareš.[122] In so doing, however, the chamber made no determination as to the ethnicity of the owners of the property destroyed. Rather, according to the judgement, the Bosnian Muslim perpetrators destroyed the doors and windows of the houses in Vareš for the "sole purpose" of committing plunder.[123] To the extent that this was in fact what the perpetrators intended, it was indeed militarily unnecessary because the purpose pursued was neither primarily military in nature nor in conformity with international humanitarian law.

The *Orić* Trial Chamber noted that the villages in which post-combat property destruction occurred were inhabited exclusively or almost exclusively by Bosnian Serbs.[124] This ethnic component of the destruction, however, does not appear to have had any impact on the chamber's ruling that the destruction was militarily unnecessary. The judgement indicates that the chamber viewed the absence of combat to mean the absence of military necessity:

> after the fighting has ceased, destruction can in principle no longer be justified by claiming 'military necessity'. A different situation arises if a military attack is launched against a settlement from which previously, due to its location and its armed inhabitants, a serious danger emanated for the inhabitants of a neighbouring village who are now seeking to remove this danger through military action. It may be that, after such a settlement has been taken, destruction of houses occurs in order to prevent the inhabitants, including combatants, [from returning and resuming attacks] ... [E]xcept for the rare occasions in which such preventive destruction could arguably fall within the scope of 'military necessity', the principle must be upheld that the destruction of civil settlements, as a rule, is punishable as a war crime.[125]

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

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[117] See Chapter 9 above.
[118] See Jean-Marie Henckaerts and Louise Doswald-Beck, 1 *Customary International Humanitarian law* (2005), at 308.
[119] The prohibition against adverse distinction under international humanitarian law is equivalent to the principle of non-discrimination under international human rights law. See *ibid.,* at 309.
[120] Such as, for example, where the property was destroyed within the context of a widespread or systematic attack against a civilian population.
[121] See *Hadžihasanović and Kubura* Trial Judgement, para. 1833.
[122] *Ibid.,* para. 1846.
[123] See *ibid.,* paras. 1844-1846.
[124] See *Orić* Trial Judgement, paras. 593-594, 621, 660 (regarding Gornji Ratkovići and Ježestica).
[125] *Ibid.,* para. 588 (footnotes omitted). See also *ibid.,* paras. 607, 632-633, 674-675 (regarding Gornji Ratkovići and Ježestica). See also *Martić* Trial Judgement, para. 93.

The judgement refers to *Peleus* in support of the proposition that "after the fighting has ceased, destruction can in principle no longer be justified by claiming 'military necessity'".[345] At issue in *Peleus*, however, was *not* whether military necessity pleas should be admissible once the fighting had ceased. As noted earlier,[126] the judge advocate in that case had conceded that circumstances *could* arise in which a belligerent in Eck's position might be justified in killing an unarmed person for the purpose of saving his own life. At no point did the judge advocate limit the scope of his concession to situations where active combat was in progress. Rather, he questioned whether the measure taken by Eck had any material relevance to his stated purpose and, even if it did, whether it was the least injurious of those means that were materially relevant to the purpose and reasonably available to him.

The *Orić* Trial Judgement also relies on the ruling by the International Military Tribunal (IMT) against Alfred Jodl for the view that "the principle must be upheld that the destruction of civil settlements, as a rule, is punishable as a war crime".[127] In so doing, the judgement notes that "[a] policy of 'scorched earth', *i.e.*, the destruction of any facilities that might be useful to the enemy while withdrawing from an area, was not recognised at the Nuremberg Tribunal to be justified by military necessity ..."[128]

This reliance is unhelpful, because the IMT offered virtually no reason when it made the relevant ruling. One cannot hope to establish, for instance, whether the tribunal considered (i) that scorching earth *as such* could never be militarily necessary, or (ii) that the evidence rendered Jodl's specific order concerning northern Norway militarily unnecessary. The first interpretation, while possible, is unlikely. It appears to have been uncontroversial during World War II that scorching occupied territory was considered lawful if required by military necessity.[129] The second interpretation is more likely, although it suffers from the complete absence of any analysis in the IMT's ruling. Compare this with the U.S. Military Tribunal in *Hostage*. As noted earlier, this latter tribunal actually did offer legal and factual reasons for acquitting Rendulic of devastating the Finnmark area, a measure carried out on Jodl's orders.[130]

The *Prlić et al.* Trial Chamber found that the destruction of houses in Parcani by members of HVO special units in retaliation for the villagers hiding in the woods and refusing to surrender their weapons was not justified by military necessity.[131]

1.5 Absence of Military Necessity as an Element of Forcible Displacement

Article 49 of Geneva Convention IV prohibits deportation and transfer of protected persons from occupied territory, except in situations of temporary evacuation where "the security of the population or imperative military reasons so demand".[132] According to the ICRC, "imperative military reasons" exist "when the presence of protected persons in an area hampers military operations".[133]

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[126] See Chapter 9 above.

[127] *Orić* Trial Judgement, para. 588.

[128] *Ibid.,* at 207 n.1581. The relevant passage of the International Military Tribunal ruling reads as follows (*Nuremberg* Judgement, at 571): "By teletype of 28 October 1944, Jodl ordered the evacuation of all persons in northern Norway and the burning of their houses so they could not help the Russians. Jodl says he was against this, but Hitler ordered it and it was not fully carried out. A document of the Norwegian Government says such an evacuation did take place in northern Norway and 30,000 houses were damaged".

[129] See Chapter 9 above. By virtue of Article 54 of Additional Protocol I, scorching earth no longer admits military necessity exceptions where it involves a party to the conflict destroying "objects indispensable to the survival of the civilian population" not located in its own territory.

[130] This is not to say that the *Hostage* ruling on this matter is without criticism. See, e.g., Geoffrey Best, *War and Law Since 1945* (1994), at 328-330.

[131] See 3 *Prlić et al.* Trial Judgement, paras. 1526-1528.

[132] Article 49, Geneva Convention IV.

[133] Pictet (ed.), *Commentary IV Geneva Convention*, *supra* note 14, at 280. The commentary continues (*ibid.*): "[e]vacuation is only permitted in such cases, however, when overriding military considerations make it imperative; if it is not imperative, evacuation ceases to be legitimate". See also David Kretzmer, "The Advisory Opinion: The Light Treatment

Permanent transfer of protected persons for any reason, as well as their temporary evacuation not demanded by their security or for imperative military reasons, constitutes a grave breach of the convention.[134] This grave breach is incorporated into Article 2(g) of the ICTY Statute.[135] The ICTY has considered Article 2(g) charges against several defendants.[136]

Deportation is also a crime against humanity eligible for prosecution under Article 5(d) of the ICTY Statute. Whether deportation requires the victim to have crossed at least one international border remains a matter of dispute.[137] Owing in part to this unsettledness, the prosecution has developed a practice whereby one charge under Article 5(d) would frequently be accompanied by another, "back-up" charge of inhumane acts under Article 5(i) – also a crime against humanity – perpetrated through forcible transfer within the territory of one state. Charges of deportation and/or forcible transfer have been ruled upon in multiple trials.[138]

Lastly, under Article 5(h) of the ICTY Statute, persecutions may be committed by way of deportation and/or forcible transfer.[139] This form of persecutions has been adjudicated in many trials.[140]

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of International Humanitarian Law", 99 *American Journal of International Law* 88 (2005), at 93-94 n.43; Chapter 9 above.

[134] See Article 147, Geneva Convention IV.

[135] Article 2(g), ICTY Statute.

[136] See *Prosecutor v. Blagoje Simić et al.*, Case No. IT-95-9-T, *Judgement*, 17 October 2003, paras. 120, 1117, 1121, 1125; *Tuta and Štela* Trial Judgement, paras. 569-571, 763, 767; *Prosecutor v. Stevan Todorović*, Case No. IT-95-9/1-S, *Sentencing Judgement*, 31 July 2001, para. 8; 1 *Prlić et al*. Trial Judgement, para. 132.

[137] This particular issue need not detain us here. Suffice it to note the contrast between the growing majority of ICTY decisions upholding the existence of a cross-border element, on the one hand, and a minority of decisions rejecting its existence, on the other. Those decisions upholding the requirement include: *Tuta and Štela* Trial Judgement, para. 670; *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-T, *Judgement*, 15 March 2002, para. 474; *Krstić* Trial Judgement, para. 521; *Brđanin* Trial Judgement, para. 542; *Simić* Trial Judgement, paras. 123, 129; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, *Decision on Motion for Judgement of Acquittal*, 16 June 2004, para. 68. Those decisions rejecting the requirement include: *Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-R61, *Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence*, 20 October 1995, para. 23; *Stakić* Trial Judgement, paras. 671-684. The *Stakić* Appeal Judgement held that deportation must involve expulsion across a *de jure* border to another country or across a *de facto* border of occupied territory. See *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-A, *Judgement*, 22 March 2006, paras. 278, 289-303, 308 (but see partly dissenting opinion of Judge Shahabuddeen, paras. 19-76). As far as the ICTY jurisprudence is concerned, the *Stakić* Appeal Judgement has put the matter to rest. See *Prosecutor v. Blagoje Simić*, Case No. IT-95-9-A, *Judgement*, 28 November 2006, paras. 172-175; *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, 1 *Judgement*, 26 February 2009, paras. 165, 169; *Krajišnik* Trial Judgement, para. 723; *Prosecutor v. Mladen Naletilić (a/k/a "Tuta") and Vinko Martinović (a/k/a "Štela")*, Case No. IT-98-34-A, *Judgement*, 3 May 2006, para. 152, 212-213 (separate and partly dissenting opinion of Judge Schomburg); *Martić* Trial Judgement, paras. 107, 110; *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-A, *Judgement*, 27 January 2014, paras. 532-542; 1 *Prlić et al.* Trial Judgement, paras. 47, 55-56.

[138] See, e.g., *Brđanin* Trial Judgement, paras. 539-570; *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, 1 *Judgement*, 26 February 2009, paras. 163-172; *Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, *Judgement*, 23 January 2014, paras. 286-527; *Blagojević and Jokić* Trial Judgement, paras. 629-630; *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-T, *Judgement*, 6 September 2011, paras. 113-116; *Martić* Trial Judgement, paras. 105-111; *Đorđević* Trial Judgement, paras. 1603-1614; *Gotovina et al.* Trial Judgement, paras. 1737-1741; *Tolimir* Trial Judgement, paras. 793-803; 1 *Stanišić and Župljanin* Trial Judgement, paras. 60-65; *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-T, 1 *Judgement*, 30 May 2013, paras. 991-995; 1 *Prlić et al.* Trial Judgement, para. 47; *Karadžić* Trial Judgement, paras. 487-495.

[139] See, e.g., *Krnojelac* Trial Judgement, para. 433-434; *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-A, *Judgement*, 17 September 2003, para. 222; *Tuta and Štela* Trial Judgement, paras. 671-672; *Simić* Trial Judgement, para. 48; *Blagojević and Jokić* Trial Judgement paras. 629-631; *Martić* Trial Judgement, para. 119; *Popović* Trial Judgement, para. 989; *Đorđević* Trial Judgement, paras. 1763-1764; *Gotovina et al.* Trial Judgement, paras. 1738, 1740; Trial Judgement, para. 120; *Tolimir* Trial Judgement, paras. 851, 860; 1 *Stanišić and Župljanin* Trial Judgement, paras. 81-82.

[140] See, e.g., 3 *Milutinović et al.* Trial Judgement, paras. 1207-1212; *Martić* Trial Judgement, para. 432; *Krajišnik* Trial Judgement, paras. 748-749, 807-809, 1182; *Blagojević and Jokić* Trial Judgement, paras. 616-618, 621; *Brđanin* Trial Judgement, paras. 556, 1025-1028, 1082, 1088, 1152; *Babić* Sentencing Judgement, paras. 11, 15; *Deronjić* Sentencing Judgement, paras. 29, 99-101, 120; *Prosecutor v. Momir Nikolić*, Case No. IT-02-60/1-S, *Sentencing Judgement*, 2 December 2003, paras. 12, 40-42; *Prosecutor v. Ivica Rajić a/k/a Viktor Andrić*, Case No. IT-95-12-S, *Sentencing Judgement*, 8 May 2006; *Simić et al.* Trial Judgement, paras. 1034-1050, 1115, 1119, 1123; *Stakić* Trial Judgement, paras. 881-882; *Tuta and Štela* Trial Judgement, paras. 669-672, 711, 763, 767; *Plavšić* Sentencing Judgement, paras. 5, 15; *Krno-*

The crimes against humanity of deportation, inhumane acts by way of forcible transfer, and persecutions by way of deportation/forcible transfer all contain the element that the victim was forcibly displaced "without grounds permitted under international law".[141] Such grounds include "imperative military reasons" within the meaning of Article 49 of Geneva Convention IV and Article 17(1) of Additional Protocol II.[142]

The tribunal has not dealt extensively with "grounds permitted under international law" or "imperative military reasons" in this context.[143] Only in some cases, such as *Tuta and Štela*, *Brđanin* and *Đorđević*, was the description of victims leaving or being transferred followed by some general finding that their departure was "unlawful"[144] or that it was not demanded by imperative military reasons.[145] No further insight was offered. In *Martić*, the trial chamber acknowledged that the absence of "grounds permitted under international law" and "imperative military reasons" was an element of deportation,[146] yet it did not engage in any factual discussion on this matter.[147] In a somewhat more elaborate manner, the *Krstić* Trial Chamber found that

> [i]n this case no military threat was present following the taking of Srebrenica. The atmosphere of terror in which the evacuation was conducted proves, conversely, that the transfer was carried out in furtherance of a well organised policy whose purpose was to expel the Bosnian Muslim population from the enclave. The evacuation was itself the goal and neither the protection of the civilians nor imperative military necessity justified the action.[148]

This relative brevity[149] stands in contrast to the considerable factual detail in which the tribunal has examined the military necessity of property destruction.

2. Military Necessity and the International Criminal Court

Within the context of positive international humanitarian law, military necessity has no role

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jelac Trial Judgement, paras. 472-485, 534; *Krstić* Trial Judgement, paras. 537, 676, 727; *Todorović* Sentencing Judgement, para. 45; *Kordić and Čerkez* Trial Judgement, 305; *Blaškić* Trial Judgement, at 267 (disposition); *Popović* Trial Judgement, para. 901; *Đorđević* Trial Judgement, paras. 1774-1778; *Gotovina et al.* Trial Judgement, paras. 1804, 1812-1813; *Perišić* Trial Judgement, paras. 743-746; *Tolimir* Trial Judgement, paras. 879-881; 1 *Stanišić and Simatović* Trial Judgement, paras. 1242-1243; *Karadžić* Trial Judgement, paras. 515-516. But see *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, *Judgement*, 31 March 2016, para. 17.

[141] See, e.g., *Stakić* Trial Judgement, para. 672; *Stakić* Appeal Judgement, para. 278; *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, *Judgement*, 17 March 2009, paras. 304, 307-308; *Simić et al*. Trial Judgement, para. 125; *Tuta and Štela* Trial Judgement, para. 521; *Krnojelac* Trial Judgement, para. 475; *Krnojelac* Appeal Judgement, para. 222; *Blagojević and Jokić* Trial Judgement, paras. 595, 597; *Blaškić* Trial Judgement, para. 234; *Blaškić* Appeal Judgement, paras. 150-153; *Martić* Trial Judgement, paras. 107, 109; 1 *Milutinović et al*. Trial Judgement, para. 166; *Đorđević* Trial Judgement, para. 1607; *Tolimir* Trial Judgement, paras. 798-799; 1 *Prlić et al.* Trial Judgement, para. 52; *Štanišić and Župljanin* Trial Judgement, para. 61; 1 *Stanišić and Simatović* Trial Judgement, para. 994.

[142] See, e.g., *Brđanin* Trial Judgement, para. 556; 1 *Milutinović et al.* Trial Judgement, para. 166; Article 49, Geneva Convention IV; Article 17(1), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (8 June 1977).

[143] See *Blagojević and Jokić* Trial Judgement, para. 618; *Đorđević* Trial Judgement, paras. 1618-1679; *Štanišić and Župljanin* Trial Judgement, paras. 221, 281, 346, 490, 699, 810, 879, 934, 981, 1040, 1189, 1247, 1285, 1355, 1413, 1497, 1552, 1686; *Krajišnik* Appeal Judgement, paras. 308, 314.

[144] See, e.g., *Tuta and Štela* Trial Judgement, para. 542, 544, 551, 563 (regarding Mostar generally, and Mostar on 9 May 1993, 12-14 June 1993, and 29 September 1993).

[145] See, e.g., *ibid.,* para. 526 (regarding Sovići and Doljani); *Brđanin* Trial Judgement, para. 556 (1 September 2004) (in general, except Čelinac); *Đorđević* Trial Judgement, paras. 1691-1692; *Tolimir* Trial Judgement, paras. 812, 828.

[146] See *Martić* Trial Judgement, para. 107; *Karadžić* Trial Judgement, paras. 488, 492.

[147] See *Martić* Trial Judgement*,* paras. 426-432. See also *Krajišnik* Trial Judgement, paras. 727-732.

[148] *Krstić* Trial Judgement, para. 527.

[149] See *Krajišnik* Appeal Judgement, paras. 308 (emphasis added): "While the Trial Chamber did not explicitly find that the forcible displacements in the case at hand are 'without grounds permitted under international law', the Appeals Chamber is not satisfied that *this defect* of the Trial Chamber invalidates the verdict". See also *ibid.*, para. 314.

outside express exceptional clauses. It exempts deviations from the prescription of a rule only if the rule itself provides for military necessity exceptions. In this respect, the ICC's Rome Statute raises some awkward questions concerning the potential use before ICC proceedings of military necessity not only as an exception but also as one of the "grounds for excluding criminal responsibility".[150]

2.1 Article 8 and Elements of Crimes – Military Necessity as an Exception

The ICC has jurisdiction over crimes specified in Articles 5-8 of its statute.[151] They are defined in the Elements of Crimes document, an instrument by which the court is to guide itself when considering cases before it.[152] Four war crimes under Article 8 expressly admit exceptions on account of military necessity.[153] The absence of military necessity is an element of each of these crimes. They are:

(a) Extensive destruction and appropriation of property, a grave breach of the Geneva Conventions[154];
(b) Destruction or seizure of the enemy's property, a serious violation of the laws and customs of war in international armed conflict[155];
(c) Ordering the displacement of the civilian population for reasons related to the conflict, a serious violation of the laws and customs of war in non-international armed conflict[156]; and
(d) Destruction or seizure of the property of an adversary, a serious violation of the laws and customs of war in non-international armed conflict.[157]

The absence of military necessity also appears as part of an element of pillage,[158] a serious violation of the laws and customs of war in international and non-international armed conflict.[159]

For the most part, the corresponding IHL rules expressly provide for military necessity exceptions.[160] When a substantive rule envisages an exception, and when the rule's violation constitutes a

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[150] Article 31(1), ICC Statute. See also Héctor Olásolo, *Unlawful Attacks in Combat Situations: From the ICTY's Case Law to the Rome Statute* (2008), at 238.
[151] See Articles 5-8, ICC Statute.
[152] *See ibid.,* Articles 9(1), 21(1)(a).
[153] There are also offenses which implicitly admit exceptions on account of military necessity. See below. These offenses typically involve deportation or transfer of persons.
[154] See *ibid.,* Article 8(2)(a)(iv) ("Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly"). One of the elements of this war crime is "[t]he destruction or appropriation was not justified by military necessity". See Elements of Crimes (7 April 2000), at 20-21.
[155] See Article 8(2)(b)(xiii), ICC Statute ("Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war"). One of the elements of this crime is that "[t]he destruction or seizure was not justified by military necessity". ICC Elements of Crimes, *supra* note 154, at 30-31.
[156] See Article 8(2)(e)(viii), ICC Statute ("Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand"). One of the elements of this crime is that "[s]uch order was not justified by the security of the civilians involved or by military necessity". ICC Elements of Crimes, *supra* note 154, at 46.
[157] See Article 8(2)(e)(xii), ICC Statute ("Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict"). One of the elements of this crime is that "the destruction or seizure was not justified by military necessity". ICC Elements of Crimes, *supra* note 154, at 48.
[158] The second element of the crime of pillage is that "the perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use". ICC Elements of Crimes, *supra* note 154, at 31-32. An explanatory footnote is appended to this element (*ibid.*; emphasis added): "As indicated by the use of the term 'private or personal use', *appropriations justified by military necessity cannot constitute the crime of pillaging*". In earlier drafts of the elements of this war crime, the absence of military necessity appeared as an independent element. See Knut Dörmann, *Elements of War Crimes Under the Rome Statute of the International Criminal Court: Sources and Commentary* (2002), at 272-273.
[159] See Articles 8(2)(b)(xvi), 8(2)(e)(v), ICC Statute.
[160] As regards extensive destruction and appropriation of property, a grave breach of the Geneva Conventions, see Article 50, Geneva Convention I; Article 51, Geneva Convention II; Article 147, Geneva Convention IV. As regards destruction or seizure of the property of the enemy or adversary, see Article 23(g), 1907 Hague Regulations. As regards ordering the

crime, it is only logical that the absence of circumstances satisfying the exception's requirements is itself an element of that crime.[161]

Where the absence of military necessity is an element of a war crime, the onus rests with the prosecution to show this absence.[162] Showing the absence of military necessity entails, in turn, proving that at least one of its requirements was unfulfilled.[163] The prosecution's failure to do so means that it has not proved that the crime was committed. When an accused is charged with a war crime of which the absence of military necessity is an element, and when he pleads military necessity, he challenges the notion that the crime was committed at all. Therefore, strictly speaking, pleading military necessity in this context does not constitute a "defence".[164] Conversely, in no other crimes enumerated under the ICC Statute does military necessity expressly appear as an exception. Nor does the absence of military necessity appear implicitly as one of their elements or part thereof. This is in line with the fact that the underlying positive IHL rules contain no military necessity exceptions.

There are, however, several offences in the ICC Statute which would admit, albeit implicitly, exceptions on account of military necessity. One is the crime of unlawful deportation or transfer, a grave breach of the Geneva Conventions listed under Article 8(2)(a)(vii) of the ICC Statute.[165] This grave breach emanates from Article 147 of Geneva Convention IV, which in turn is based on the convention's Articles 45 and 49. Article 49 exceptionally permits temporary evacuation of an area in occupied territory if, *inter alia*, "imperative military reasons so demand".[166] Temporary evacuations demanded by such reasons are not "unlawful" within the meaning of Article 8(2)(a)(vii) of the ICC Statute.[167] Similarly, the offence of deportation or transfer, a crime against humanity under Article 7(1)(d), contains as one of its elements the requirement that the victim was forcibly displaced "without grounds permitted under international law".[168] As noted earlier, the ICTY has interpreted that these grounds include "imperative military reasons" demanding temporary evacuation of an area in occupied territory. Lastly, offences within the jurisdiction of the ICC – including those of which the absence of military necessity is an explicit or implicit element – may amount to persecutions under Article 7(1)(h) of the statute.[169]

As of 31 May 2016, the ICC Prosecutor has issued arrest warrants or laid charges against the following individuals for some of the crimes in question:

(a) Germain Katanga,[170] Mathieu Ngudjolo Chui,[171] Callixte Mbarushimana,[172] Sylvestre

displacement of the civilian population, see Article 17(1), Additional Protocol II. The sole exception in this regard is pillage. See Dörmann, *supra* note 158, at 272-273.

[161] See, e.g., Robert Cryer et al., *An Introduction to International Criminal Law and Procedure* 2d ed. (2010), at 423.

[162] See, e.g., *Brđanin* Appeal Judgement, para. 337; *Kordić and Čerkez* Appeal Judgement, para. 495; 1 *Milutinović et al.* Trial Judgement, para. 208; *Karadžić* Trial Judgement, para. 533.

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

[164] This is so, even though, in an adversarial setting, the accused would most likely plead military necessity during his "defence" case and his pleas would be colloquially referred to as a "defence". See, e.g., George P. Fletcher, *Basic Concepts of Criminal Law* (1998), at 93-110.

[165] See Article 8(2)(a)(vii), ICC Statute.

[166] Article 49, Geneva Convention IV.

[167] See Dörmann, *supra* note 158, at 106 ("Arts. 45 and 49 [of Geneva Convention IV] set forth the conditions for unlawfulness").

[168] ICC Elements of Crimes, *supra* note 154, at 10.

[169] See *ibid.*, at 14.

[170] See *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, *Amended Document Containing the Charges Pursuant to Article 61(3)(a) of the Statute*, 26 June 2008, count 13.

[171] See *ibid.*, count 13.

[172] See *Prosecutor v. Callixte Mbarushimana*, Case No. ICC-01/04-01/10, *Document de notification des charges présenté par l'Accusation en application de l'article 61-3 du Statut de Rome*, 15 July 2011, count 11.

Mudacumura,[173] Abdel Raheem Muhammad Hussein,[174] and Bosco Ntaganda,[175] for property destruction (Article 8(2)(b)(xiii) or Article 8(2)(e)(xii));

(b) Ali Muhammad Al Abd-Al-Rahman ("Ali Kushayb"),[176] Jean-Pierre Bemba Gombo,[177] Ahmad Muhammad Harun ("Ahmad Harun"),[178] Katanga,[179] Joseph Kony,[180] Raska Lukwiya,[181] Chui,[182] Okot Odhiambo,[183] Dominic Ongwen,[184] Vincent Otti[185] and Omar Hassan Ahmad Al Bashir ("Omar Al Bashir"),[186] Bahar Idriss Abu Garda,[187] Abdallah Banda Abakaer Nourain,[188] Saleh Mohammed Jerbo Jamus,[189] Mbarushimana,[190] Mudacumura,[191] Hussein,[192] and Ntaganda,[193] for pillaging (Article 8(2)(e)(v)) or Article 8(2)(e)(v);

(c) Hussein,[194] and Ntaganda,[195] for forcible transfer (Article 8(2)(e)(viii));

(d) Harun[196] and Kushayb,[197] for property destruction (Article 8(2)(v)(xii));

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[173] See *Prosecutor v. Sylvestre Mudacumura*, Case No. ICC-01/04-01/12, *Decision on the Prosecutor's Application under Article 58*, 13 July 2012, count 11.

[174] See *Prosecutor v. Abdel Raheem Muhammad Huseein*, Case No. ICC-02/05-01/12, *Warrant of Arrest for Abdel Raheem Muhammad Hussein*, 1 March 2012, at 8.

[175] See *Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, *Document Containing the Charges*, 10 January 2014, count 18.

[176] See *Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Al Abd-Ali-Rahman* ("Ali Kushayb"), Case No. ICC-02/05-01/07, *Warrant of Arrest for Ali Kushayb*, 27 April 2007, counts 18, 36, 49.

[177] See *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, *Amended Document Containing the Charges Filed on 30 March 2009*, 30 March 2009, count 8.

[178] See *Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Al Abd-Ali-Rahman ("Ali Kushayb")*, Case No. ICC-02/05-01/07, *Warrant of Arrest for Ahmad Harun*, 27 April 2007, counts 18, 36, 37, 49.

[179] See *Katanga and Chui* Amended Charges Document, count 12.

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

[181] See *Prosecutor v. Raska Lukwiya*, Case No. ICC-02/04, *Warrant of Arrest for Raska Lukwiya*, 8 July 2005, count 9. On July 11, 2007, the pre-trial chamber terminated the proceedings against Lukwiya. See *Prosecutor v. Joseph Kony et al.*, Case No. ICC-02/04-01/05, *Decision to Terminate the Proceedings Against Raska Lukwiya*, 11 July 2007.

[182] See *Katanga and Chui* Amended Charges Document, count 12.

[183] See *Prosecutor v. Okot Odhiambo*, Case No. ICC-02/04, *Warrant of Arrest for Okot Odhiambo*, 8 July 2005, counts 15, 19. On 10 September 2015, the pre-trial chamber terminated the proceedings against Odhiambo. See *Prosecutor v. Jospeh Kony et al.*, Case No. ICC-02/04-01/05, *Decision Terminating Proceedings Against Okot Odhiambo*, 10 September 2015.

[184] See *Prosecutor v. Dominic Ongwen*, Case No. ICC-02/04, *Warrant of Arrest for Dominic Ongwen*, 8 July 2005, count 33.

[185] See *Prosecutor v. Vincent Otti*, Case No. ICC-02/04, *Warrant of Arrest for Vincent Otti*, 8 July 2005, counts 9, 15, 19, 26, 33.

[186] See *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, *Warrant of Arrest for Omar Hassan Ahmad Al Bashir*, 4 March 2009, at 7.

[187] See *Prosecutor v. Bahar Idriss Abu Garda*, Case No ICC-02/05-02/09, *Document Containing the Charges Submitted Pursuant to Article 61(3) of the Statute*, 24 September 2009, count 3.

[188] See *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Mamus*, Case No. ICC-02/05-03/09, *Summons to Appear for Abdallah Banda Abakaer Nourain*, 27 August 2009, paras. 15, 19.

[189] See *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Case No. ICC-02/05-03/09, *Summons to Appear for Saleh Mohammed Jerbo Jamus*, 27 August 2009, paras. 15, 19. On 4 October 2013, the trial chamber terminated the proceedings against Jerbo. See *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Case No. ICC-02/05-03/09, *Public Redacted Decision Terminating Proceedings Against Mr. Jerbo*, 4 October 2013.

[190] See *Mbarushimana* Charges Document, count 12.

[191] See *Mudacumura* Decision, count 12.

[192] See *Hussein* Arrest Warrant, at 8.

[193] See *Ntaganda* Charges Document, count 11.

[194] See *Hussein* Arrest Warrant, at 8-9.

[195] See *Ntaganda* Charges Document, count 13.

[196] See *Harun* Arrest Warrant, counts 8, 19, 38, 50.

[197] See *Kushayb* Arrest Warrant, counts 8, 19, 38, 50.

(e) Harun,[198] Kushayb,[199] Omar Al Bashir,[200] Ntaganda,[201] William Samoei Ruto,[202] Henry Kiprono Kosgey,[203] Joshua Arap Sang,[204] Francis Kirimi Muthaura,[205] Uhuru Muigai Kenyatta,[206] and Mohammed Hussein Ali,[207] for deportation or forcible transfer (Article 7(1)(d));

(f) Harun,[208] Kushayb,[209] Hussein,[210] and Ntaganda,[211] for persecution by way of pillaging (Article 7(1)(h));

(g) Harun,[212] Kushayb,[213] Hussein,[214] Ntaganda,[215] Ruto,[216] Kosgey,[217] and Sang,[218] for persecution by way of property destruction (Article 7(1)(h)); and

(h) Harun, [219] Kushayb, [220] Hussein, [221] Ntaganda, [222] Ruto, [223] Kosgey, [224] Sang, [225] Muthaura,[226] Kenyatta,[227] and Ali,[228] for persecution by way of deportation or forcible transfer (Article 7(1)(h)).

2.2 Rulings to Date

Of these cases, a number have reached the pre-trial stage of confirming charges,[229] and one has

[198] See *Harun* Arrest Warrant, counts 9, 20, 51.
[199] See *Kushayb* Arrest Warrant, counts 9, 20, 51.
[200] See *Al Bashir* Arrest Warrant, at 7.
[201] See *Ntaganda* Charges Document, count 12.
[202] See *Prosecutor v. William Samoei Ruto et al.*, Case No. ICC-01/09-01/11, *Document Containing Charges*, 15 August 2011, count 3.
[203] See *ibid*.
[204] See *ibid.*, count 4.
[205] See *Prosecutor v. Francis Kirimi Muthaura et al.*, Case No. ICC-01/09-02/11, *Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, 8 March 2011, count 2.
[206] See *ibid.* On 13 March 2015, the trial chamber terminated the proceedings against Kenyatta. See *Prosecutor v. Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11, *Decision on the Withdrawal of Charges Against Mr Kenyatta*, 13 March 2015.
[207] See *Muthaura et al.* Summonses Decision, count 2.
[208] See *Harun* Arrest Warrant, counts 10, 21, 39.
[209] See *Kushayb* Arrest Warrant, counts 10, 21, 39.
[210] See *Hussein* Arrest Warrant, at 6-7.
[211] See *Ntaganda* Charges Document, count 10.
[212] See *Harun* Arrest Warrant, counts 1, 10, 21, 39.
[213] See *Kushayb* Arrest Warrant, counts 1, 10, 21, 39.
[214] See *Hussein* Arrest Warrant, at 6-7.
[215] See *Ntaganda* Charges Document, count 10.
[216] See *Ruto et al.* Charges Document, count 5.
[217] See *ibid*.
[218] See *ibid.*, count 6.
[219] See *Harun* Arrest Warrant, counts 1, 10, 39.
[220] See *Kushayb* Arrest Warrant, counts 1, 10, 39.
[221] See *Hussein* Arrest Warrant, at 6-7.
[222] See *Ntaganda* Charges Document, count 10.
[223] See *Ruto et al.* Charges Document, count 5.
[224] See *ibid*.
[225] See *ibid.*, count 6.
[226] See *Muthaura et al.* Summonses Decision, count 5.
[227] See *ibid*.
[228] See *ibid*.
[229] See, e.g., *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, *Decision Pursuant to Article 61(7)(a) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo*, 15 June 2009; *Prosecutor v. Bahar Idriss Abu Garda*, Case No. ICC-02/05-02/09, *Decision on the Confirmation of Charges*, 8 February 2010; *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Case No. ICC-02/05-03/09, *Corrigendum of the "Decision on the Confirmation of Charges"*, 7 March 2011; *Prosecutor v. Callixte Mbarushimana*, Case No. ICC-01/04-01/10, *Decision on the Confirmation of Charges*, 16 December 2011; *Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, *Decision Pursuant to Article 61(7)(a) of the Rome Statute on the Charges of the Prosecutor Against*

reached its trial judgement.[230] Confirmation decisions are often quite superficial in their legal and factual discussions. For example, the *Bemba* Confirmation Decision states, without further elaboration, that the property "deprivation was not justified by military necessity".[231] The *Ntaganda* Confirmation Decision finds that the forcible transfer charged was without military necessity because "there is no indication of … any reason linked to the conduct of military operations".[232] The same decision also notes that the property destructions were militarily unnecessary because there is no evidence that the party involved "made a distinction between military objectives and civilian objects while shelling the densely populated villages"[233] and that the perpetrators "destroyed and burned the villages after the departure of the adverse party".[234]

One element of property destruction as a war crime under the Rome Statute is that the property enjoyed IHL protection at the time.[235] In its *Katanga and Chui* Confirmation Decision, the pre-trial chamber noted that this excludes (a) military objectives destroyed during an attack[236] and (b) civilian objects destroyed as part of a proportional attack against a military objective.[237] The chamber also held that this offence does not cover military objectives that are destroyed before or after falling into the hands of the attacking party and to the extent militarily necessary.[238] When finding specific destructions to be devoid of military necessity, however, the decision merely states that the property destroyed did not constitute military objectives.[239]

Much the same was reiterated in the *Katanga* Trial Judgement.[240] Three novel features may nevertheless be noted. First, the trial chamber looked to Article 14 of the 1863 Lieber Code for the definition of military necessity.[241] The definition given in that article[242] is not itself problematic, though somewhat antiquated and perhaps not entirely up to date if read together with the code's Article 15 that goes on to discuss the notion in greater detail.[243] When adjusted for modern IHL rules,

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Bosco Ntaganda, 9 June 2014; *Prosecutor v. Dominic Ongwen*, Case No. ICC-02/04-01/05, *Decision on the Confirmation of Charges against Dominic Ongwen*, 23 March 2016.

[230] That is, the *Katanga* case. See *Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, *Judgment Pursuant to Article 74 of the Statute*, 7 March 2014; *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, *Judgment Pursuant to Article 74 of the Statute*, 21 March 2016.

[231] *Bemba* Confirmation Decision, para. 322.

[232] *Ntaganda* Confirmation Decision, para. 68. See also *Prosecutor v. William Samoei Ruto et al.*, Case No. ICC-01/09-01/11, *Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute*, 23 January 2012, para. 268 ("the PNU supporters were forcibly displaced without grounds permitted under international law from the areas where they were lawfully present"); *Prosecutor v. Francis Kirimi Muthaura et al.*, Case No. ICC-01/09-02/11, *Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute*, 23 January 2012, para. 253 ("the established facts do not reveal any grounds permitting the displacement under international law").

[233] *Ntaganda* Confirmation Decision, para. 72.

[234] *Ibid.*, para. 73.

[235] See ICC Elements of Crimes, *supra* note 154, at 26, 44.

[236] See *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-04-01/07, *Decision on the Confirmation of Charges*, 30 September 2008, para. 312. See also *Mbarushimana* Confirmation Decision, para. 172.

[237] See *Katanga and Chui* Confirmation Decision, para. 313. See also *Mbarushimana* Confirmation Decision, para. 172.

[238] See *Katanga and Chui* Confirmation Decision, para. 318 (quoting 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) at 171). See also *Mbarushimana* Confirmation Decision, para. 172.

[239] See *Katanga and Chui* Confirmation Decision, para. 324. See also *Mbarushimana* Confirmation Decision, paras. 175, 196, 208, 225.

[240] See *Katanga* Trial Judgment, paras. 889-895.

[241] See *ibid.*, para. 894 (citing *Kordić and Čerkez* Appeal Judgement, para. 686).

[242] See Article 14, Instructions for the Government of Armies of the United States in the Field (1863): "Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war".

[243] See *ibid.*, Article 15: "Military necessity admits of all direct destruction of life or limb of *armed* enemies, and of other persons whose destruction is incidentally *unavoidable* in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the army, and of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements

Article 14 largely corresponds to the definition of juridical military necessity proposed in Chapter 9. Second, the trial chamber interpreted the expression "imperatively demanded" found in Article 8(2)(e)(xii) to mean that the perpetrator ought to have "no other option" but to destroy the property in order to be eligible for military necessity.[244] Here, too, although a *sine qua non* causation is not a requirement of juridical military necessity,[245] a more stringent construction of its degrees is arguably consistent with the addition of qualifying adjectives and adverbs such as "imperative" and "imperatively."[246]

Third, according to the *Katanga* Trial Judgement, whether the destruction of property fell within military necessity is a case-by-case assessment to be carried out "by considering, for example, whether the destroyed property was defended or whether specific property was destroyed".[247] For this proposition, the judgement cites paragraphs 534[248] and 586[249] of the *Kordić and Čerkez* Appeal Judgement. That the *Katanga* Trial Chamber apparently understood these paragraphs to mean that there is no military necessity where "the destroyed property was defended" and where "specific property was destroyed" is deeply problematic. Plainly, neither factor is relevant when determining the existence or absence of juridical military necessity. As discussed earlier, it may become militarily necessary to destroy civilian objects, whether defended or not, in some circumstances. Nor is the fact that specific property was destroyed while the remainder was not, *per se* indicative of military necessity's absence. What the *Kordić and Čerkez* Appeal Judgement's passages quoted reveal is rather that all the property destroyed was civilian in character at the time and that it was destroyed based solely on the ethnic identity of its owner.

The *Katanga* Trial Chamber considered the following pieces of property destroyed in Bogoro on 24 February 2003:

- Houses, especially thatched houses and those with roofing sheets owned and occupied by Bogoro's predominantly Hema population[250];
- The *manyata* (small houses occupied by adversaries)[251]; and
- Buildings in Diguna Mission, including the CECA 20 church.[252]

Of these objects, the chamber apparently found all but the *manyata* to have been destroyed

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entered into during the war, or supposed by the modern law of war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God".

[244] *Katanga* Trial Judgment, para. 894.

[245] See Chapter 9 above.

[246] See *ibid*.

[247] *Katanga* Trial Judgment, para. 894.

[248] The paragraph reads (footnote omitted): "Paragraph 659 [of the *Kordić and Čerkez* Trial Judgment] describing the events at Očehnići reads as follows:

> The village of Očehnići is to the south of Busovača. According to the Prosecution, it was subject to HVO attack in April 1993. The prosecution evidence was as follows. In the afternoon of 16 April 1993 masked HVO soldiers attacked the village by firing incendiary bullets into the houses. Within half an hour all the Muslim houses were burning. The villagers were unarmed and did not put up any resistance. One resident heard, at second-hand, that Paško Ljubičić was the leader of the unit that had attacked the village and that he had been ordered to do so by Brigadier Duško Grubešić, commander of the Zrinski Brigade, to "cleanse" Muslims from the area. The damage to Očehnići is clearly shown on the video recording taken during a helicopter flight over the area in May 1996 and played to the court during the trial. Around 20 men from Lončari were detained and taken to Kaonik on 16 April 1993. Upon arrival they were lined up and their valuables were stolen by HVO soldiers.

In the Appeals Chamber's view, a reasonable trier of fact could have concluded that the wilful destruction of all Muslim houses in Očehnići was of a large scale and not justified by military necessity since the villagers were unarmed and did not put up any resistance. Therefore, Kordić's argument that the Trial Chamber erred in finding that wanton destruction was committed in Očehnići in April 1993 fails. The Appeals Chamber upholds the Trial Chamber's finding that the crime was established".

[249] The paragraph reads: "The Appeals Chamber considers that a reasonable trier of fact could have found that the destruction was wilful and not justified by military necessity since only Muslim houses were destroyed, and the destruction occurred when there was not much fighting. The Appeals Chamber therefore upholds the Trial Chamber's finding that wanton destruction not justified by military necessity, Count 38 (Kordić), was established".

[250] See *Katanga* Trial Judgment, paras. 917-918.

[251] See *ibid.*, para. 921.

[252] See *ibid.*, para. 922.

without military necessity. Oddly, besides determining that the *manyata* arguably constituted military objectives[253] and implicitly that the others did not, the chamber did not apply the two bases of assessment that it had derived from the *Kordić and Čerkez* Appeal Judgement. This lack of reasoning is unilluminating. The facts as described in the judgement show that only the *manyata*, Hema property and religious buildings not used for military purposes were destroyed in Bogoro that day. It would not have been too difficult to find the latter two types of destructions lacking in military necessity.

As for the war crime of pillage, the *Katanga* Trial Chamber found that the property was stolen for personal gain and therefore devoid of military necessity.[254]

2.3 Article 31 – Military Necessity as a Justification/Excuse?

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

That military necessity should be admitted as a genuine defence, however, is a highly controversial proposition. As noted earlier, positive IHL rules already "account for" military necessity. Admitting military necessity as a genuine defence would impermissibly amount to admitting it *de novo* for deviations from these rules.[255] The entire *corpus juris* of international humanitarian law would risk being unduly volatile and subservient to the exigencies of war.

Article 31(1) of the ICC Statute envisages several "grounds for excluding criminal responsibility".[256] According to one ground,

> a person shall not be criminally responsible if, at the time of that person's conduct ... (c) [t]he person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph.[257]

Note here that a person shall not be criminally responsible for war crimes if he acts "reasonably to defend ... property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the ... property protected".[258]

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[253] See *ibid*., paras. 921, 924, 946.
[254] See *ibid.*, paras. 906, 951. See also *Bemba* Trial Judgement, paras. 122-125.
[255] See Chapter 9 above.
[256] It is not clear whether, within the meaning of Article 31, a "ground for excluding criminal responsibility" constitutes a justification or excuse, or both. See, e.g., Kittichaisaree, *supra* note 67, at 269; Antonio Cassese, "Justifications and Excuses in International Criminal Law", in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), 1 *The Rome Statute of the International Criminal Law: A Commentary* (2002) 951, at 954-955; E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003), at 258; Albin Eser, "Article 31", in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* 2d ed. (2008) 863, at 871-872; Geert-Jan Alexander Knoops, "The Diverging Position of Criminal Law Defences before the ICTY and the ICC: Contemporary Developments", in Doria, Gasser and Bassiouni (eds.), *supra* note 36, 779, at 779.
[257] Article 31(1)(c), ICC Statute.
[258] Ibid.

Could this clause be construed as introducing, in substance, a military necessity-like justification or excuse for war crimes? It appears from the drafting history that military necessity was treated at first as a potentially separate ground for excluding criminal responsibility.[259] During the final negotiations of the statute, the expression "in the case of war crimes, property which is essential for accomplishing a military mission" was added to what is now Article 31(1)(c).[260]

Several commentators have expressed their concern that this ground might be construed as though it were military necessity. E. van Sliedregt, for example, noted that the lack of clarity in the wording of Article 31(1)(c) "might be interpreted as allowing for a plea of military necessity. The clause 'property which is essential for accomplishing a military mission' might be taken to constitute a blank and open-ended allowance for a plea of military necessity, which would, however, be a violation of the laws of war".[261]

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

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

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

2.3.1 Narrower in Content Than Military Necessity as an Exception

The requirement that the act be taken with a view to defending certain property is foreign to the traditional understanding of military necessity. It was noted earlier that, in its legal function as an exception, military necessity encompasses a far wider range of purposes – from the maintenance of the belligerent's sanitary condition to the military defeat of his enemy.[262] Typically, the purposes concerned are abstract (e.g. the attainment of a degree of security for the occupation force), rather than material (e.g. the protection of an object), in nature. It is, among other things, this broad and abstract scope of permissible purposes that makes the potential introduction of military necessity as a genuine defence so contentious. If, as is the case with the exclusionary ground under Article 31(1)(c), the very notion of military necessity had been restricted to measures taken in defence of property, virtually none of the successful military necessity pleas in the history of international humanitarian law would have been successful.

Nor, for the exclusionary ground to be admissible under Article 31(1)(c), is it sufficient that the

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[259] See, e.g., Preparatory Committee, *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. II (Compilation of Proposals)* (1996), at 103, in M. Cherif Bassiouni (ed.), *The Statute of the International Criminal Court: A Documentary History* (1999) 441, at 495. See also Preparatory committee, *Addendum, Report of the Preparatory Committee on the Establishment of an International Criminal Court* (1998), at 59 n.39 ("It was questioned whether such grounds as military necessity could be dealt with in connection with the definition of war crimes").

[260] See, e.g., Eser, *supra* note 256, at 548; van Sliedregt, *supra* note 256, at 258.

[261] Van Sliedregt, *supra* note 256, at 259. See also, e.g., Geert-Jan G.J. Knoops, *Defenses in Contemporary International Criminal Law* (2001), at 89-91 (quoting N. Keijzer, "Réponse à la Question 2", 33 *Revue belge de droit international* 440 (2000), at 443); Keijzer, *supra* note 261, at 444-445; Catherine Denis and Miguel Romero, "Synthèse des débas de l'atelier du 12 juillet 2000", 33 *Revue belge de droit international* 463 (2000), at 480; Eric David, "Self-Defence and State of Necessity in the Statute of the ICC", in Doria, Gasser and Bassiouni, *supra* note 36, 757, at 769-770; Knoops, "Diverging Positions", *supra* note 256, at 786-788.

[262] See Chapter 9 above.

act be taken to defend *any* property. Rather, the property must be essential for accomplishing a military mission. Whatever it may mean for particular property to be "essential for accomplishing a military mission",[263] it seems highly likely that such property also constitutes a military objective. As a military objective, the property is liable to all lawful attacks and acts of destruction, and its destruction would *ipso facto* be militarily necessary. Conversely, only rarely would property "essential for accomplishing a military mission" retain its status as a civilian object. Where particular property does constitute a civilian object, it is immune from deliberate, indiscriminate or disproportionate attacks.

Unlike the ground under Article 31(1)(c), exceptional military necessity does not require that the measure be taken in response to force. A person is not eligible for the exclusionary ground under Article 31(1)(c), if the force against which he or she acts to defend the property is itself lawful. Since, as noted above, the type of property at issue here is almost always a military objective, the person in question will be eligible only (a) in a highly limited set of circumstances where the force in question involves prohibited means and methods of combat, and/or direct participation of civilians, or (b) in the unlikely event that the property defended is essential for a military mission and yet enjoys immunity as a civilian object.[264]

The remaining requirements of Article 31(1)(c) are substantively similar, if not identical, to those of military necessity as an exception. Thus, the clause requires that the act be "reasonable" for the property's defence.[265] This would resemble the requirement of juridical military necessity that the measure be "materially relevant" to and the "least injurious" for the attainment of a military purpose.[266] There is some authority for the view that the "reasonable act" test is an objective one.[267] If true, this test would arguably be more stringent than the belligerent's contemporaneous and *bona fide* knowledge, i.e., subjective awareness, of the various requirements of exceptional military necessity discussed earlier.[268]

The clause also requires that the act be taken against an "imminent" use of force.[269] This requirement would be akin to the notion of "urgency" implied in military necessity. Finally, the clause requires that the act be "proportionate" to the degree of danger to the property defended.[270] It would appear that the relevant ratio here is one between the danger to the property averted by the defensive act, on the one hand, and the harm caused by the same act, on the other.[271] Such a ratio would be analogous to the benefit-injury ratio used for the proportionality requirement of military necessity.

In view of the foregoing, the clause would not affect war crimes that already provide for military necessity exceptions. In other words, if all of the conditions in satisfaction of Article 31(1)(c) exist, then it is likely that they also satisfy all the requirements of juridical military necessity. Conversely, where the acts are not such as fulfil all of the latter, then they are unlikely to qualify for Article 31(1)(c).

2.3.2 Broader Availability to Offences Not Subject to Military Necessity Exceptions

To the extent that it would affect those crimes which envisage no military necessity exceptions, its scope is so restrictive that it would justify or excuse a far narrower range of measures than military necessity, if introduced as a genuine defence, would. The fact remains however that, no matter how

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[263] The looseness of this expression, as well as the difficulty that may arise in connection with its interpretation, has been noted elsewhere. See, e.g., Eser, *supra* note 256, at 549; Antonio Cassese, "The Statute of the International Criminal Court: Some Preliminary Reflections", 10 *European Journal of International Law* 144 (1999), at 155.
[264] See, e.g., Gabor Rona, "Réponses à la Question 2", 33 *Revue belge de droit international* 446 (2000), at 449-450.
[265] Article 31(1)(c), ICC Statute.
[266] See Chapter 9 above.
[267] See, e.g., van Sliedregt, *supra* note 256, at 260-61.
[268] See Chapter 9 above. The ICC Statute treats mistake of fact separately, under Article 32(1). See Article 32(1), ICC Statute.
[269] Article 31(1)(c), ICC Statute.
[270] Ibid.
[271] See, e.g., Rona, *supra* note 264, 450.

restrictive in scope, Article 31(1)(c) is a qualitatively new defence to war crimes hitherto unknown in international humanitarian law. In Antonio Cassese's words:

> [V]ia international criminal law a norm of international humanitarian law has been created whereby a serviceman many now lawfully commit an international crime for the purpose of defending any "property essential for accomplishing a military mission" against an imminent and unlawful use of force. So far such unlawful use of force against the "property" at issue has not entitled the military to commit war crimes. They could only react by using lawful means or methods of combat or, *ex post facto*, by resorting to lawful reprisals against enemy combatants.[272]

To be sure, international humanitarian law does appear as part of the law that the court is bound to apply by virtue of Article 21 of its statute.[273] But the statute contains no interpretational device whereby international humanitarian law mandatorily trumps its statutory provisions such as Article 31(1)(c).[274] It would be incumbent upon the court itself to keep this clause in check by using its Article 31(2) powers wisely.[275]

Lastly, Article 31(3) of the statute provides for exclusionary grounds not enumerated under Article 31(1) where such grounds are derived from applicable law as set forth in Article 21.[276] Whether military necessity could constitute such a ground would depend on how the court interprets the "applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict". Our discussion on the nature and scope of juridical military necessity exclusively as an exception makes it abundantly clear that no treaty, principle or rule of international law admits *de novo* military necessity pleas as a genuine defence.[277] Nor, in all likelihood, would the court recognise military necessity as an unenumerated exclusionary ground under Article 31(3).

3. Conclusion

This chapter reveals the intricacies of military necessity as a negative element of several war crimes and crimes against humanity. In particular, it shows where the trier of law and fact must tread carefully when adjudicating military necessity claims.

On the whole, the ICTY jurisprudence on exceptional military necessity offers an encouraging prospect for its effective interpretation even in highly complex circumstances such as those involving combat-related property destructions. ICTY chambers have by and large captured relevant aspects of exceptional military necessity, evaluated evidence in accordance with its requirements, and come to sensible factual conclusions. Inevitably, some decisions come across as more attuned to military necessity's nuances than others. Several potential pitfalls may be noted. The first two concern how the conceptual distinctions between attacks and destructions, and those between military necessity and military objective, may be overlooked. Despite their significant overlap and interplay, the two sets of notions do have their unique spheres of meanings and legal foundations. Occasional oversights in this regard have resulted in several instances of inadequate reasoning and questionable findings where combat-related destructions of civilian objects did not take the form of attacks against them.

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[272] Cassese, *supra* note 263, at 154-155. See also Antonio Cassese et al. (rev.), *Cassese's International Criminal Law* 3d ed. (2013), at 213.

[273] See Article 21, ICC Statute: "The Court shall apply ... (b) [i]n the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict".

[274] This problem would remain notwithstanding Article 21(3).

[275] See Article 31(2), ICC Statute: "The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it".

[276] See Article 31(3), ICC Statute.

[277] See, e.g., Denis and Romero, *supra* note 261, at 480. But see William A. Schabas, *An Introduction to the International Criminal Court* 4th ed. (2011), at 238-239; Gerhard Werle, "General Principles of International Criminal Law", in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice* (2009) 54, at 58.

Two other situations that also envisage military necessity exceptions – i.e., property destruction outside of combat and forcible population displacement – have received a somewhat less amount of the ICTY's judicial attention. There, too, most chambers have reached appropriate conclusions. With the notable exception of *Orić*, those judgements dealing with property destruction outside of combat base their findings on pertinent factors besides the absence of fighting at the time. As regards forcible population displacements, ICTY rulings on the absence of grounds permitted under international law are primarily made as a matter of form rather than substance.

The ICC's case law on military necessity exceptions is still at an early stage of development. Unsurprisingly, the various pre-trial chambers' military necessity findings in their confirmation decisions have so far been tentative and perfunctory. *Katanga*, the only ICC trial judgement of interest to us to date, has not added much material that is new in this respect. On the contrary, the *Katanga* Trial Judgement exhibits the same inadequacy that some of its ICTY counterparts do – namely, a failure to entertain the possibility that the destruction of civilian objects may in certain circumstances be militarily necessary. The fact that most of the ICC cases considered in this thesis involve non-international armed conflicts and omit charges of unlawful attacks on civilian objects as a result, may mean that militarily unnecessary destructions are in effect used as substitute offences. This remains a conjecture at present, however.

Whether the ICC's current and future trials will hear sustained claims of exceptional military necessity remains to be seen. The same uncertainty surrounds Article 31 of the Rome Statute. Although, on its own, this article's reference to the defence of property may have relatively modest practical ramifications on the applicable law, there is a real danger that it will undermine the clarity and precision with which the ICC builds its case law on exceptional military necessity proper. In addition, Article 31's residual clause can be seen – though erroneously – as inviting *de novo* military necessity pleas as a justification or excuse. The court has all the more reason to adjudicate its upcoming cases with care.