
Excessive collateral civilian casualties and military necessity

Awkward crossroads in international humanitarian law
between State responsibility and individual
criminal liability

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Introduction

When an attack is launched by an army against a military objective of the adverse party to an international armed conflict (IAC), causing incidental civilian casualties, the legal question that immediately arises is whether such ‘collateral damage’ is ‘excessive’ in relation to ‘the concrete and direct military advantage anticipated’ within the meaning of Articles 51(5)(b) and 57(2) of the 1977 Geneva Additional Protocol I (API).¹ These provisions embody the principle of proportionality, which is recognised as part of customary international law.² Assuming that the test of attribution is met, the responsibility of the attacking State can be engaged. Further, if such an attack has been carried out in the knowledge that the incidental loss ‘would be clearly excessive in relation to the concrete and direct overall military advantage anticipated’, then the question of individual criminal

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¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protocol of Victims of International Armed Conflicts (Protocol I), 8 June 1977. The same language of proportionality appears also in the original 1980 Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-traps and Other Devices annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Art. 3(3)(c); and the amended Protocol of 3 May 1996, Art. 3(8)(c).

² *Prosecutor v. Galić*, Case No. IT-98–29–T, ICTY Trial Chamber, Judgment, 5 December 2003, para. 58. See also Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge University Press, 2005), 46–62.

responsibility of the soldier involved in the attack may concurrently arise under Article 8(2)(b)(iv) of the Rome Statute of the International Criminal Court (ICC Statute). With respect to incidental casualties of civilians (and damage of civilian objects, and combination thereof), it is clear that Article 8(2)(b)(iv) ICC derives from the rules embodied under Articles 51(5)(b) and 57(2) API.

As Bianchi notes,³ such duality of responsibility, and this without any hierarchy between them,⁴ has been ‘a constant feature of international law’.⁵ That said, fundamental differences must be borne in mind. The law on State responsibility is an ‘objective’ regime,⁶ which is not predicated on a ‘fault’ (*culpa*) or subjective element of the pertinent State’s organ or agent, save for the primary rules that inherently incorporate a subjective element, such as those on genocide.⁷ The responsibility of a State for the excessive collateral damage arises, even though perpetrators are judged as not having entertained the requisite degree of *mens rea*, as required under Article 30 ICC Statute, with respect to their conduct.

This chapter examines some salient issues that may arise with respect to the identification of State responsibility and individual criminal responsibility with respect to disproportionate collateral civilian casualties in the context of IAC. It is limited to examining incidental loss of civilian lives, excluding analyses of other protected legal interests contained in Article 8(2)(b)(iv) ICC Statute, namely, civilian objects, or a combination of civilians and civilian objects, and the environment. This chapter is nonetheless compelled to emphasise that while the literature tends to discuss these protected interests under the generic notion of ‘collateral civilian damage’ in ascertaining the proportionality equation, a clear

³ Andrea Bianchi, ‘State Responsibility and Criminal Liability of Individuals’ in Antonio Cassese (ed.), *Oxford Companion of International Criminal Justice* (Oxford University Press, 2009), 23.

⁴ *Prosecutor v. Delalić and others*, Case No. IT-96–21, ICTY Appeals Chamber, Judgment, 20 February 2001, para. 24.

⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, para. 173. See also *Prosecutor v. Krstić*, Case No. IT-98–33, ICTY Appeals Chamber, Judgment, 19 April 2004.

⁶ James Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002), 81–2, para. 3, commentary to Art. 2.

⁷ Brigitte Stern, ‘The Elements of an Internationally Wrongful Act’ in James Crawford, Alain Pellet and Simon Olleson (eds.), *The Law of International Responsibility* (Oxford University Press, 2010), 210.

line must be drawn between the incidental loss of civilian *lives* and the incidental loss of civilian *objects*. It should be obvious that a more stringent appraisal is required with respect to the balance between two ‘incommensurable values’ (lives of civilians and the military advantage) than in the case of weighing two less comparable elements (civilian objects and the military advantage).⁸

Implications of qualifying words in the material elements of the offence of collateral civilian casualties

On a closer inspection, there are some differences in relation to the material element of the two associated rules. The drafters of Article 8(2)(b)(iv) ICC Statute have appended the adverb ‘clearly’ before the adjective ‘excessive’,⁹ whilst the word ‘overall’ has been added so as to create an expression that may appear an oxymoron, ‘concrete and direct overall military advantage anticipated’.¹⁰ In view of these, it may be argued that the drafters of the ICC Statute deliberately set a higher threshold for ascertaining the war crime of excessive collateral damage of attacks under Article 8(2)(b)(iv) ICC Statute. Such a move conforms to the declaration of interpretation made by many Western States with respect to the associated rules under API (Articles 51(5)(b) and 57(2)). According to their interpretation, the military advantage anticipated from the attack should be comprehended as the advantage considered as a whole and not from isolated or specific parts of the attack.¹¹

⁸ This does not, however, mean that long-term deleterious impacts of damage to civilian infrastructure on the health and lives of civilians should be discounted. See Paolo Benvenuti, ‘The ICTY Prosecutor and the Review of the NATO Bombing Campaign against the Federal Republic of Yugoslavia’, *European Journal of International Law*, 12 (2001), 508.

⁹ Amichai Cohen and Yuval Shany, ‘A Development of Modest Proportions: The Application of the Principle of Proportionality in the Targeted Killings Case’, *Journal of International Criminal Justice*, 5 (2007), 319.

¹⁰ Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge University Press, 2003), 166 and 169.

¹¹ See the UK reservation (i) concerning Arts. 51 and 57 (2 July 2002). See also Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, 49, n. 27 (referring to the practice of Australia, Belgium, Canada, France, Germany, Italy, the Netherlands, New Zealand, Spain, United Kingdom, United States, as well as the non-Western State of Nigeria). The reservations and declarations are available at www.icrc.org/applic/ihl/ihl.nsf/States.

Some commentators voice a concern over modifying the existing proportionate equation embodied under the relevant provisions of API.¹² Under international humanitarian law (IHL), there have been debates over whether the ‘extensive’¹³ or ‘severe’¹⁴ nature of incidental casualties can be read in the expression ‘excessiveness’.¹⁵ Now there is a fear that the standard of ‘clear excessiveness’ introduced at the Rome Conference (1998) may remove the normative constraint further away from the reality of side effects of aerial bombardment on the ground, whose fall-out disproportionately affects children, women and the aged. Indeed, one expert comments that the insertion of those words ‘does not fulfil its ostensible purpose, which was to clarify the crime, but simply raises the threshold and introduces greater uncertainty into the law in this area’.¹⁶

As is known, at Rome the Representative of the International Committee of the Red Cross and Crescent (ICRC) underscored that the introduction of the words ‘clearly’ and ‘overall’ under Article 8(2)(b)(iv) ICC Statute does not alter the existing rule under API and the customary law equivalent:

The word ‘overall’ could give the impression that an extra unspecified element has been added to a formulation that was carefully negotiated during the 1974–1977 Diplomatic Conference that led to Additional Protocol I to the 1949 Geneva Conventions and this formulation is generally recognized as reflecting customary law. The intention of this additional word appears to be to indicate that a particular target can have an important military

¹² Louise Doswald-Beck and Sylvain Vité, ‘International Humanitarian Law and Human Rights Law’, *International Review of the Red Cross*, 293 (1993), 109; and Anthony E. Cassimatis, ‘International Humanitarian Law, International Human Rights Law, and Fragmentation of International Law’, *International and Comparative Law Quarterly*, 56 (2007), 629.

¹³ 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. Commentary – Protection of the civilian population, 625–6, para. 1980, www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?viewComments=LookUpCOMART&articleUNID=4BEBD9920AE0AEEAC12563CD0051DC9E.

¹⁴ W. J. Fenrick, ‘The Rule of Proportionality and Protocol I in Conventional Warfare’, *Military Law Review*, 98 (1982), 111.

¹⁵ A. P. V. Rogers, *Law on the Battlefield*, 3rd edn (Manchester University Press, 2012), 25–6; Sandesh Sivakumaran, *The Law of Non-international Armed Conflict* (Oxford University Press, 2012), 350–1.

¹⁶ Robert Cryer, ‘Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study’, *Journal of Conflict and Security Law*, 11 (2006), 259–60.

advantage that can be felt over a lengthy period of time and affect military action in areas other than the vicinity of the target itself. As this meaning is included in the existing wording of Additional Protocol I, the inclusion of the word 'overall' is redundant.¹⁷

The outcomes revealed by the ICRC's Customary IHL Study¹⁸ suggest that the insertion of the words 'clearly' and 'overall' under Article 8(2)(b)(iv) ICC Statute has not (yet) modified the standard of the affiliated rule under customary IHL. According to the *Study*, the material elements of the latter are found to remain consistent with those embodied in Articles 51(5)(b) and 57(2) API.¹⁹

Further, one might contend that the standard of ascertaining the war crime of disproportionate attack in the ICC Statute does not reflect customary law. According to this argument, such a higher threshold that appears to be introduced by the ICC Statute should be understood as delimiting the jurisdictional scope of the ICC rather than as providing the definitional elements of this war crime under customary law.²⁰

Different thresholds for establishing State responsibility and individual criminal liability concerning collateral damage

This chapter duly heeds the *bona fide* concern expressed by the ICRC and publicists with respect to the possible elevation of the threshold for identifying a violation of the rule of proportionality under Article 8(2)(b)(iv) ICC Statute. It nevertheless argues that such a change in the construction, if any, relates solely to the question of individual criminal responsibility. Such a modification in the interpretation is recognisable,²¹ without the law relating to war crimes entailing negative effects in shaping the corresponding IHL rule.

¹⁷ UN Doc. A/CONF.183/INF/10 of 13 July 1998, available at ICC preparatory works; as cited in Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, 169–70.

¹⁸ ICRC, *Customary International Humanitarian Law*, ed. Jean-Marie Henkaerts and Louise Doswald-Beck (Cambridge University Press, 2005).

¹⁹ Henkaerts and Doswald-Beck, *Customary International Humanitarian Law*, 46–55.

²⁰ Sivakumaran, *The Law of Non-International Armed Conflict*, 80–1.

²¹ Hermann von Hebel and Darryl Robinson, 'Crimes within the Jurisdiction of the Court' in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results* (The Hague: Kluwer, 1999), 111; Roberta Arnold, 'War Crimes – para. 2(b)(IV)' in Otto Triffterer (ed.), *Commentary to the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2nd edn (Munich: C. H. Beck, 2008), 339; Sivakumaran, *The Law of Non-international Armed Conflict*, 79–80.

Banal as it may sound, it is essential that the war crime rules be construed more narrowly and strictly to conform to the principle *nulla poena sine lege* than the equivalent rules of IHL.²² It is precisely for this reason that some circumspection is needed for transposing the elements of international criminal law to the congenial rules of IHL.²³ With specific regard to the war crime of excessive collateral damage under Article 8(2)(b)(iv) ICC Statute, given the insertion of the qualifying words ‘clearly’ and ‘overall’, this is drafted in a narrower manner than the equivalent IHL rule.²⁴

The different thresholds for establishing the two systems of responsibility should not be surprising, not least because war crimes relate only to a ‘serious’ violation of IHL.²⁵ ‘Non-serious’ breaches of IHL generate issues only of State responsibility. Conversely, for ‘ordinary’ breaches of IHL, even if the threshold of individual criminal responsibility is unattained, the requisite level for establishing State responsibility for violating the equivalent IHL rules may be reached.²⁶

Trying perpetrators in the dock for war crimes cannot be determined solely by the ‘objective’ ascertainment of breaches of international obligations. Rather, identifying war crimes is contingent upon complex evaluations of many other factors such as the *mens rea*, grounds precluding individual criminal responsibility, mistakes of fact or mistake of law, superior order, the *nullum crimen sine lege* principle and the rights of fair trial of the accused.²⁷

²² Michael Bothe, ‘War Crimes’ in Antonio Cassese, Paola Gaeta and John R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 2 vols. (Oxford University Press, 2002), I, 381.

²³ Sivakumaran, *The Law of Non-international Armed Conflict*, 79.

²⁴ See also the introduction of the proportionate equation under Art. 8(2)(b)(iv) ICC Statute, the element that does not feature under the associated rules on the protection of environment under Arts. 35(3) and 55(1) API, and Art. 1 of the Convention on the Prohibition of Military or any Hostile Use of Environmental Modification Technique (New York, adopted 10 December 1976, entered into force 5 October 1978), 1108 UNTS 151.

²⁵ Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 2nd edn (Cambridge University Press, 2010), 266. See also *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, ICTY Trial Chamber, Judgment, 16 November 1998, para. 1154.

²⁶ However, the converse is true, so that the identification of state responsibility for violations of IHL constitutes a ‘precondition’ for affirming individual criminal responsibility: Benvenuti, ‘The ICTY Prosecutor and the Review of the NATO Bombing Campaign against the Federal Republic of Yugoslavia’, 527.

²⁷ See also Sivakumaran, *The Law of Non-international Armed Conflict*, 80.

Overcoming the 'binary analytical mindset'

This chapter's underlying premise is that our analysis must not be confined to the binary thinking that a conduct in armed conflict is either lawful or tantamount to a war crime.²⁸ There is a concern that the interpretive development of the latter body of law may depend too closely on the work of war crimes tribunals, such as the ICC.²⁹ Such a 'dichotomised mindset' may make us oblivious to breaches of IHL rules that stop short of amounting to war crimes, but for which State responsibility may remain. We should not ascertain elements of IHL rules exclusively through the lens of their 'secondary rules' (war crimes rules),³⁰ as if the latter 'freeze' or 'push' the development of corresponding rules of IHL.³¹ In 2000, on the basis of the Report submitted by the Review Committee, the then ICTY Prosecutor decided not to open a criminal investigation into the aerial bombings undertaken by the North Atlantic Treaty Organization (NATO) on Serbia. The Review Committee's controversial report, albeit unintentionally, seems to have given the public impression that by finding no evidence of war crimes there was accordingly no State responsibility for this damage.³² This has been the case even though it was outside the Review Committee's mandate to analyse issues of State responsibility. As discussed above, the absence of war crimes does not necessarily translate into the non-existence of State responsibility for the contested conduct.

²⁸ Marco Sassòli, 'The Implementation of International Humanitarian Law: Current and Inherent Challenges', *Yearbook of International Humanitarian Law*, 10 (2007), 54.

²⁹ Sivakumaran, *The Law of Non-international Armed Conflict*, 81. Such an unintended result is surely contemplated by Art. 10 ICC.

³⁰ The suggestion that international criminal law on war crimes constitutes the secondary rules in relation to the primary rules of IHL is accepted in the literature: Bothe, 'War Crimes', 381; and Sivakumaran, *The Law of Non-international Armed Conflict*, 77 and 478.

³¹ W. J. Fenrick, 'The Law Applicable to Targeting and Proportionality after Operation Allied Force: A View from the Outside', *Yearbook of International Humanitarian Law*, 3 (2000), 79–80; David Turns, 'At the "Vanishing Point" of International Humanitarian Law: Methods and Means of Warfare in Non-International Armed Conflicts', *German Yearbook of International Law*, 45 (2002), 146–7.

³² Benvenuti, 'The ICTY Prosecutor and the Review of the NATO Bombing Campaign against the Federal Republic of Yugoslavia', 527 (criticising that 'the [Review] Committee has done its best to deny the international responsibility of the state as such, in order to achieve an *a priori* exclusion of the role of the ICTY in evaluating the positions of individuals').

The concept of military necessity

Overview

One salient aspect that should be borne in mind when examining the relationship between the two systems of responsibility for collateral civilian casualties is the ramifications of the concept of military necessity. The following appraisals aim to address some of the confusion that may arise when the concept of military necessity is invoked as an attempt to deny responsibility for collateral civilian casualties on two levels (exculpation of criminal responsibility of a defendant; and/or exoneration of State responsibility).

The analysis starts with the thesis that the operational scope of this concept is confined to those specific IHL provisions that expressly or implicitly set it forth, so that any endeavour to plead for a further ambit of derogability to escape responsibility under the *general* context of IHL is futile. Next, the analysis turns to defending the argument that with the concept of military necessity already ingrained in the normative parameters of *all* IHL rules, reliance on it is excluded at the level of the secondary rules on State responsibility. The underlying assumption is that the principle of proportionality, which necessitates ascertaining the elements of military objective and military advantage, as well as the relative degree of 'excessiveness', is a specific form of the notion of military necessity.³³

No room for the concept of military necessity save under the specific rules that incorporate it

The concept of military necessity in the present-day context of IHL is completely differentiated from its historical counterpart that was affiliated

³³ Myres S. McDougal and Florentino P. Feliciano, *The International Law of War: Transnational Coercion and World Public Order* (Dordrecht: Martinus Nijhoff, 1994), originally published as *Law and Minimum World Public Order: The Legal Regulation of International Coercion* (New Haven: Yale University Press, 1961), 72; William V. O'Brien, 'The Meaning of "Military Necessity" in International Law', *World Polity*, 1 (1957), 138, 148–9; Robert Kolb, 'La Nécessité militaire dans le droit des conflits armés: essai de clarification conceptuelle', *Colloque de Grenoble, La nécessité en droit international*, Société française pour le droit international (Paris: Pedone, 2007), 164–5 and 167–8; Robert D. Sloane, 'The Cost of Conflation: Preserving the Dualism of *Jus ad Bellum* and *Jus in Bello* in the Contemporary Law of War', *Yale Journal of International Law*, 34 (2009), 74; Gabriella Venturini, 'Necessity in the Law of Armed Conflict and in International Criminal Law', *Netherlands Yearbook of International Law*, 41 (2010), 73. See, however, Stefan Oeter, 'Methods and Means of Combat' in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 2nd edn (Oxford University Press, 2008), 135.

to the Prussian doctrine of *Kriegsraison geht vor Kriegsmanier*,³⁴ which was premised on the very wide interpretation of the right of self-preservation.³⁵ This concept does not have any place outside specific exceptional clauses that provide for it.³⁶ Conversely, the treaty provisions that do not contain such saving clauses must never allow any plea of military necessity.³⁷ Otherwise, the very express clauses or provisions that integrate this concept would be deemed superfluous.³⁸ Once there is a finding that specific IHL rules have been flouted, there is no room for the concept of military necessity to operate again to exonerate the recalcitrant State's responsibility,³⁹ as if this were an implied and overarching principle of IHL. Indeed, this chapter argues that in view of the close parallel development of customary law and conventional rules, there is no residual customary law that would allow the broader scope of application *ratione materiae* of the concept of military necessity beyond the clauses that incorporate it.⁴⁰

This understanding has been fully established in the case law.⁴¹ In the *Krupp* case, the United States Military Tribunal III-A at Nuremberg held that if the laws of war did not contain any escape valve of military necessity, then derogation was not permissible from those

³⁴ See Julius Stone, *Legal Controls of International Conflict: A Treatise on the Dynamics of Disputes – and War-Law* (Sydney: Maitland, 1954), 352–3. See also Holland, The Hague, Special Criminal Court, 4 May 1948; and Special Court of Cassation, 12 January 1949, *In re Rauter*, International Law Reports, 16 (1949), 543 (rejecting this doctrine).

³⁵ Kolb, 'La Nécessité militaire dans le droit des conflits armés', 168 and 170; Venturini, 'Necessity in the Law of Armed Conflict and in International Criminal Law', 51.

³⁶ See, *inter alia*, Erik Castrén, *The Present Law of War and Neutrality* (Helsinki: Suomalaisen Tiedeakatemia Toimituksia, 1954), 66; Frits Kalshoven, *Belligerent Reprisals* (The Hague: Martinus Nijhoff, 1971), 366, (repr. Leiden: Martinus Nijhoff, 2005); ICRC Commentary to APs (1987), paras. 1389 and 1405; Henri Meyrowitz, 'The Principle of Superfluous Injury or Unnecessary Suffering: From the Declaration of St. Petersburg of 1868 to Additional Protocol I of 1977', *International Review of the Red Cross*, 299 (1994), 108; Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 6–7; Robert Kolb, *Ius in Bello: le droit international des conflits armés*, 2nd edn (Basel: Helbing Lichtenhahn, 2009), 119. See also Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, II: *The Law of Armed Conflict* (London: Stevens and Sons, 1968), 135–6.

³⁷ Venturini, 'Necessity in the Law of Armed Conflict and in International Criminal Law', 52; Marco Sassòli, 'State Responsibility for Violations of International Humanitarian Law', *International Review of the Red Cross*, 84 (2002), 416.

³⁸ Kolb, 'La Nécessité militaire dans le droit des conflits armés', 168.

³⁹ *Ibid.*, 158 and 168. ⁴⁰ *Ibid.*, 170.

⁴¹ Apart from the *Krupp* case discussed here, see also *The Hostage Trial (Trial of Wilhelm List and others)*, Law Reports of Trials of War Criminals, 8 (1949), 35–6, 63–4 and 66–9.

rules.⁴² Admittedly, despite the *Krupp* ruling, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in some instances erred in reverting to the argument put forward by the defendants in the *Krupp* case, holding that '[t]argeting civilians is an offence when not justified by military necessity'.⁴³ This interpretation overlooks the non-derogable nature of the outlawing of a deliberate attack on civilians.⁴⁴ Such a construction has been duly rectified by the ICTY Appeals Chamber, which has reaffirmed that 'there is an absolute ban on targeting civilians in customary international law'.⁴⁵ Allowing States to plead a *general* and implicit concept of military necessity outside the expressly recognised rules to justify deviations from otherwise unqualified IHL rules 'would risk making the law . . . subservient to the exigencies of war'.⁴⁶

No room for military necessity under Article 25(2)(a) Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA)

If we reach a conclusion under IHL (namely, on the level of the primary law) that the notion of military necessity does not justify a certain conduct or omission, on the level of the secondary law of State responsibility, this notion can no longer serve as a ground for precluding an internationally wrongful act within the meaning of Article 25(2)(a) ARSIWA. At first glance, the contention that the state of necessity under the law of peace cannot be invoked in the context of IHL that deals with much greater

⁴² *Trial of Alfred Felix Alwyn Krupp and eleven others (The Krupp Trial)*, Law Reports of Trials of War Criminals, 10 (1949), 138–9. See also Holland, The Hague, Special Criminal Court, 4 May 1948; and Special Court of Cassation, *In re Rauter*, 533 and 543.

⁴³ *Prosecutor v. Tihomir Blaskić*, Case No. IT-95–14–T, ICTY Trial Chamber, Judgment, 3 March 2000, para. 180. See also *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95–14/2–T, ICTY Trial Chamber, Judgment, 26 February 2001, para. 328.

⁴⁴ Christine Byron, 'International Humanitarian Law and Bombing Campaigns: Legitimate Military Objectives and Excessive Collateral Damage', *Yearbook of International Humanitarian Law*, 13 (2010), 188–9.

⁴⁵ *Prosecutor v. Tihomir Blaskić*, Case No. IT-95–14–A, ICTY Appeals Chamber, Judgment, 29 July 2004, para. 109. See also *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95–14/2–A, ICTY Appeals Chamber, Judgment, 17 December 2004, para. 54; and *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports (1996), para. 78.

⁴⁶ Nobuo Hayashi, 'Requirements of Military Necessity in International Humanitarian Law and International Criminal Law', *Boston University International Law Journal*, 28 (2010), 55. See also Venturini, 'Necessity in the Law of Armed Conflict and in International Criminal Law', 65.

exigencies than other fields of international law seems paradoxical. Yet, when we grasp that IHL already takes into account such exigencies, and above all that '[i]l n'y a pas une seule norme du droit des conflits armés qui ne réponde à une mise en balance entre les intérêts humanitaires et les intérêts issus des nécessités de la situation de belligérance',⁴⁷ such a paradox should soon dissolve. Put succinctly, 'a balance between military necessity and humanitarian concerns has been made in advance'⁴⁸ on the level of primary rules. As a consequence, once violations of the IHL rules on proportionality are found, the State concerned is precluded from invoking the concept of military necessity under Article 25(2)(a) of the International Law Commission's (ILC) ARSIWA.⁴⁹

Article 25(2)(a) ARSIWA assumes this line of thought. It stipulates the non-availability of the plea of necessity in case 'the international obligation [in the primary rule] in question excludes the possibility of invoking necessity'. The ILC commentary explains that:

Paragraph (2)(a) [of Article 25] concerns cases where the international obligation in question explicitly or implicitly excludes reliance on necessity. Thus certain humanitarian conventions applicable to armed conflict expressly exclude reliance on military necessity. Others while not explicitly excluding necessity are intended to apply in abnormal situations of peril for the responsible State and plainly engage its essential interests. In such a case the non-availability of the plea of necessity emerges clearly from the object and the purpose of the rule.⁵⁰

The third sentence of the above passage contemplates the specific IHL rules that contain the concept of military necessity expressly, such as Articles 23(1)(g) the Hague Regulations; Articles 33(2), 34 and 54 First Geneva Convention 1949 (GCI); Article 126(2) GCIII; and Articles 49(2)

⁴⁷ Kolb, 'La Nécessité militaire dans le droit des conflits armés', 158: 'there is not any single norm of the law of armed conflict that does not respond to the balancing between the humanitarian interests and the interests stemming from the necessity of the situation of belligerence' (English translation by the present author).

⁴⁸ Elies van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (The Hague: T. M. C. Asser Press, 2003), 296.

⁴⁹ That said, the concept of military necessity can be invoked as 'a ground for excluding [individual] criminal responsibility other than those referred to in paragraph 1' under Art. 31(3) ICC Statute: Kolb, 'La Nécessité militaire dans le droit des conflits armés', 153–4; and William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, 2010), 493.

⁵⁰ Crawford, *The International Law Commission's Articles on State Responsibility*, 185, commentary to Art. 25, para. 19.

and 53 GCIV.⁵¹ It also suggests that IHL rules deal essentially with emergency situations, and that such exigencies are already taken into account within the normative substance of the rules.⁵²

Most crucially, the ILC commentary highlights what should be obvious: the concept of military necessity is relevant only in respect of the obligations under IHL, and this concept is not given another part to play in the sphere of the law on State responsibility.⁵³ In other words, the concept of military necessity works exclusively in relation to the primary rules (that is, the rules of IHL), which is separate from the ‘*general* (secondary) rule of necessity’⁵⁴ under the law on State responsibility. The ILC commentary observes that:

As embodied in article 25, the plea of necessity is not intended to cover conduct which is in principle regulated by the primary obligations. This has a particular importance in relation to the rules relating . . . to the question

⁵¹ See also the provisions with qualifying words: Art. 51 of the 1909 London Declaration Concerning the Laws of Naval War (London, adopted 26 February 1909; did not enter into force), 208 CTS 338; Arts. 8(3) and 34(2) GCI (Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field) (Geneva, adopted 12 August 1949, entered into force 21 October 1950), 75 UNTS 31; Art. 53 GCIV (Convention Relative to the Protection of Civilian Persons in Time of War) (Geneva, adopted 12 August 1949, entered into force 21 October 1950), 75 UNTS 287; Art. 11(2) of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, adopted 14 May 1954, entered into force 7 August 1956), 249 UNTS 240. See also provisions suggesting this concept by way of ‘soft’ language (‘as far as possible’, ‘if circumstances allow’, ‘to the fullest extent practicable’, ‘feasible’): Venturini, ‘Necessity in the Law of Armed Conflict and in International Criminal Law’, 53.

⁵² David Kretzmer, ‘The Advisory Opinion: The Light Treatment of International Humanitarian Law’, *American Journal of International Law*, 99 (2005), 99; and Hayashi, ‘Requirements of Military Necessity in International Humanitarian Law and International Criminal Law’, 58.

⁵³ This understanding was already clarified in the ILC’s earlier work. The Report of the ILC on its work of 32nd session noted that:

The rules of humanitarian law relating to the conduct of military operations were adopted in full awareness of the fact that ‘military necessity’ was the very criterion of that conduct . . . States signing the Conventions undertook . . . not to try to find pretexts for evading it . . . It is true that some of these conventions on the humanitarian law of war contain clauses providing for an explicit exception to the duty to fulfill the obligations they impose . . . But these are provisions which apply only to the cases expressly provided for. Apart from these cases, it follows implicitly from the text of the conventions that they do not admit the possibility of invoking military necessity as a justification for State conduct not in conformity with the obligations they impose.

‘Report of the International Law Commission on the Work of its Thirty-second Session’, *ILC Yearbook*, 2(2) (1980), 46, para. 28.

⁵⁴ Robert D. Sloane, ‘On the Use and Abuse of Necessity in the Law of State Responsibility’, *American Journal of International Law*, 106 (2012), 497.

of 'military necessity' . . . The same thing [that the legality of unilateral forcible humanitarian intervention is not covered by article 25] is true of the doctrine of 'military necessity' which is, in the first place, the underlying criterion for a series of substantive rules of the law of war and neutrality, as well as being included in terms in a number of treaty provisions in the field of international humanitarian law . . . while considerations akin to those underlying article 25 may have a role, they are taken into account in the context of the formulation and interpretation of the primary obligations.⁵⁵

The ARSIWA furnish another clear indication that the notion of 'military necessity' under IHL is a normative species that should be distinguished from the concept of 'necessity' under Article 25. Subparagraph (1)(a) of that provision calls for the absence of any other alternative to invoke the concept of necessity, a stringent requirement that is unfamiliar to the intrinsically elusive notion of military necessity under IHL.⁵⁶

Confusion as to the primary and secondary rules of necessity

The foregoing discussions notwithstanding, even the ICJ was once trapped in a confusion that suggests the 'double counting' of necessity on two levels: first, military necessity operating on the level of primary rules (IHL) and, secondly, the general or secondary concept of necessity deployed under the law of State responsibility.⁵⁷ The ICJ in its *Wall* Advisory Opinion ruled that:

The Court has, however, considered whether Israel could rely on a state of necessity which would preclude the wrongfulness of the construction of the wall. In this regard the Court is bound to note that some of the conventions at issue in the present instance include qualifying clauses of the rights guaranteed or provisions for derogation [Article 53 GCIV, and derogations clause of HRL]. Since those treaties already address considerations of this kind ['military exigencies'] within their own provisions, it might be asked whether a state of necessity as recognized in customary international law could be invoked with regard to those treaties as a ground for precluding the wrongfulness of the measures or decisions being challenged.⁵⁸

⁵⁵ Crawford, *The International Law Commission's Articles on State Responsibility*, 185–6, para. 21, commentary to Art. 25, footnotes omitted.

⁵⁶ ARSIWA, Art. 25(1)(a) ('the only way for the State to safeguard an essential interest against a grave and imminent peril'); Crawford, *The International Law Commission's Articles on State Responsibility*, 184, para. 15, commentary to Art. 25.

⁵⁷ Cf. Kolb, 'La Nécessité militaire dans le droit des conflits armés', 158.

⁵⁸ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports (2004), para. 140.

This reasoning would ‘immunise’ an act not justified by military necessity under a state of necessity codified under Article 25 ARSIWA. The Court’s reasoning is incongruous as it itself acknowledges that the considerations of military exigencies are already inherent in the primary rules of IHL.⁵⁹ Venturini criticises that ‘[t]his method, which firstly applies international humanitarian law as *lex specialis* and subsequently goes back to *lex generalis* for further evaluation, tends to blur the traditional separation between *jus in bello* and *jus ad bellum*’.⁶⁰ Needless to say, such an approach would dilute the IHL’s foundational idea that this body of law is ‘agnostic’ or ‘eclectic’ with respect to the moral or deontological rationales of the *casus belli*.⁶¹

The ICJ *Wall* opinion entails the effect of enabling Article 25 ARSIWA to ‘give states “two bites at the apple” of necessity’.⁶² The Court’s dictum is at odds with the idea that IHL was crafted as a ‘closed system’, immune to all justifications, including any ground of necessity under the law on State responsibility.⁶³ The grounds of necessity codified under Article 25 ARSIWA are prevented from playing a ‘role *de lege ferenda*’ in allowing the introduction of ‘new rules of exception over the normative threshold’ into the primary rules of IHL.⁶⁴

⁵⁹ *Ibid.*, para. 142 (‘the Court considers that Israel cannot rely . . . on a state of necessity in order to preclude the wrongfulness of the construction of the wall resulting from the considerations mentioned in paragraphs 122 [“severely” impeding the right to self-determination] and 137 above [“breaches by Israel of various of its obligations under the applicable international humanitarian law and human rights instruments”]).

⁶⁰ Venturini, ‘Necessity in the Law of Armed Conflict and in International Criminal Law’, 63. See also *ibid.*, p. 74; Marco Sassòli, ‘*Ius ad Bellum* and *Ius in Bello* – The Separation between the Legality of the Use of Force and Humanitarian Rules to Be Respected in Warfare: Crucial or Outdated’ in Michael N. Schmitt and Jelena Pejic (eds.), *International Law and Armed Conflict: Exploring the Faultlines – Essays in Honour of Yoram Dinstein* (Leiden: Martinus Nijhoff, 2007), 250–2.

⁶¹ See Sloane, ‘The Cost of Conflation’, 66, 69, 75 and 110. See also the Final Report of the Review Committee to the ICTY Prosecutor concerning the NATO bombardment, which interpreted the key concept of proportionality equation, ‘concrete and direct military advantage anticipated’, very broadly, as if this had coincided with the humanitarian objective of the NATO’s overall military operation: *ibid.*

⁶² Sloane, ‘On the Use and Abuse of Necessity in the Law of State Responsibility’, 497. See also Kolb, ‘La Nécessité militaire dans le droit des conflits armés’, 158.

⁶³ Gabriella Blum, ‘The Laws of War and the “Lesser Evil”’, *Yale Journal of International Law*, 35 (2010), 12. However, this observation must be qualified in that the relation between States cannot be governed exclusively by IHL, and that insofar as the laws of peace continue to operate in parallel, there is some scope of relying on a ground of necessity under Art. 25 ARSIWA: Kolb, ‘La Nécessité militaire dans le droit des conflits armés’, 159.

⁶⁴ Sarah Heathcote, ‘Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility: Necessity’ in James Crawford, *The International Law Commission’s Articles*

Conclusion

Despite the arguments presented earlier in this chapter, it is not excluded that the ICC, applying a *considerably more rigorous standard* of ascertaining the individual criminal responsibility for excessive collateral civilian casualties, may influence the interpretation of the corresponding IHL rules, making it more difficult to identify State responsibility for the violation of these rules. Because of a close liaison between violations of IHL and war crimes, or between the two systems of responsibility (individual and State), the strict interpretation of war crimes may bring about a 'spill-over effect' in circumscribing the normative substance and scope of the associated rules of IHL.⁶⁵ Such an effect, if any, is 'collateral' and inadvertent. The underlying tenet of this chapter is that the two systems of responsibility, albeit intimately connected and operative in parallel, are conceptually separate and not convergent.

The latter part of this chapter purports to dispel confusion surrounding the implications of the concept of military necessity on the interaction between primary rules (IHL) and secondary rules (the law on State responsibility). IHL rules on collateral civilian casualties, which are bound by the requirement of proportionality, are already reflective of the concept of military necessity. It should now be made clear that the finding that those rules have been transgressed on the level of IHL will obliterate the possibility of a State invoking a ground of necessity under the law of State responsibility to justify its impugned attack.

on State Responsibility: Introduction, Text and Commentaries (Cambridge University Press, 2002), 500–1 (discussing the ICSID cases that reveal the concept of 'financial necessity' in the primary rule, as influenced by the secondary rule of necessity).

⁶⁵ Marco Sassòli, 'Humanitarian Law and International Criminal Law' in Antonio Cassese (ed.), *Oxford Companion to International Criminal Justice* (Oxford University Press, 2009), 117.