

NECESSITY IN INTERNATIONAL LAW



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ABSTRACT

This thesis examines the role of necessity, as a defence to State responsibility, in international law. Necessity provides a State with a defence to the responsibility that would otherwise arise from its breach of an international obligation where the only way that State can safeguard an essential interest from a grave and imminent peril is to breach an obligation owed to a less imperilled State. It is a defence that has generated a considerable body of jurisprudence in recent years and yet it continues to be plagued by a perception that States have abused it in the past and by fears that States will abuse it in the future – ‘necessity’, declared the German Chancellor on the eve of World War I, ‘knows no law’.

This thesis contends that this perception is flawed and these fears are unfounded. The main claim of this thesis is that necessity operates as a safety valve within the law of State responsibility that mediates between the binding quality of international obligations and the harsh consequences that may follow from requiring compliance with those obligations at all costs. This safety valve promotes the reasonable application of international law and it recognises that international law must sometimes bend so that it does not break. The thesis bears out this claim by contending that necessity has a stronger pedigree than is commonly appreciated and that it is solidly grounded in, and its contours are constrained by, customary international law. It charts those contours by first examining the scope of the obligations to which necessity may provide a defence, which includes examining how necessity relates to fields of law that contain their own safety valves regulating emergency situations. It then proceeds to examine the conditions that a State must satisfy in order to establish necessity and it finally examines the consequences of necessity, including for the stability of international law. The thesis concludes that any suggestion that ‘necessity knows no law’ has no place in international law today.

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INTRODUCTION

... in every law there are some things which when they happen a man may break the words of the law, and yet not break the law itself.¹

The Subject of the Thesis

This thesis examines the role of necessity, as a defence to State responsibility, in international law. Necessity provides a State with a defence to the responsibility that would otherwise arise from its breach of an international obligation where the only way that State can safeguard an essential interest from a grave and imminent peril is to breach an obligation owed to a less imperilled State.² A vivid illustration of the dilemma that necessity seeks to confront was provided by South Africa's submission to the 1930 League of Nations Conference for the Codification of International Law. 'No State', South Africa submitted, can 'be expected to close its schools and universities and its courts, to disband its police force and to neglect its public services to such an extent as to expose its community to chaos and anarchy merely to [meet its obligations].'³ 'There are', as it went on to submit, 'limits to what may be

¹ *Reniger v Fogossa* (1551) 1 Plowden 1, 18; 75 ER 1, 29 (Serjeant Pollard).

² See Article 25 of 'Articles on Responsibility of States for Internationally Wrongful Acts' in 'Report of the International Law Commission on the Work of its 53rd Session' (23 April – 1 June and 2 July – 10 August 2001) UN Doc A/56/10. Necessity is referred to therein as a 'circumstances precluding wrongfulness'. This thesis prefers to characterise necessity more simply as a 'defence' rather than as a 'circumstance precluding wrongfulness'. This thesis also questions the accuracy of the term 'circumstance precluding wrongfulness', at least in the case of necessity (see Chapter 5, text to nn 47 – 52). 'Necessity' was referred to by the ILC in its earlier work as 'state of necessity', but the former was preferred to avoid confusion with the other sense of 'State' (James Crawford, 'Second Report on State Responsibility' (19 July 1999) UN Doc A/CN.4/498 in *Ybk ILC* (1999) II(1) 3, 73).

³ League of Nations, 'Conference for the Codification of International Law, Bases of Discussion for the Conference drawn up by the Preparatory Committee, vol III (Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners)' (1929) LN Doc C.75.M.69.1929.V, 37.

reasonably expected of a State in the same manner as with an individual.⁴ The concerns that were raised by South Africa then are even more pertinent today. In a world where the responsibility of States for breaches of international law is being invoked ever more frequently before international tribunals, including not just by States but also by individuals and corporations, and often with a view to obtaining substantial awards of damages, defences to State responsibility, and necessity in particular, have never been as relevant to States as they are now.

Nowhere has that been more evident than in the context of the wave of arbitrations brought by foreign investors against Argentina in the wake of its 2001/02 financial crisis. This was a crisis that brought a stark reality to the situation hypothesised by South Africa over 70 years earlier. It involved what was then the largest sovereign default ever and at its depth the urban unemployment rate stood at 25%, more than half of Argentines were living below the poverty line, rioting had become commonplace and the country witnessed five presidents in ten days.⁵ It was against that backdrop that a number of tribunals had to determine whether Argentina could establish necessity as a defence⁶ to the various breaches of bilateral investment treaties (BITs) that Argentina had committed in the course of responding to this crisis and for which foreign investors were claiming substantial awards of damages.⁷

⁴ *ibid.*

⁵ 'A Decline Without Parallel', *The Economist* (London, 2 March 2002) 26.

⁶ An added complication in some of those cases was that Argentina also invoked a treaty-based exception with some superficial similarities to necessity (see Chapter 3, beginning with text to n 74).

⁷ For an overview of those cases, see José Alvarez & Gustavo Topalian, 'The Paradoxical Argentina Cases' (2012) 6 *World Arb & Med Rev* 491.

But necessity's prominence has placed in sharp relief the controversy over its role in international law. Necessity was the 'most controversial' of the defences that the International Law Commission (ILC) included in its Articles on the Responsibility of States for Internationally Wrongful Acts (ASR)⁸ and the Argentine crisis cases have produced a body of inconsistent and unconvincingly reasoned jurisprudence that has done little to dispel that controversy.⁹ Necessity remains plagued by a perception that States have abused it in the past and by fears that States will abuse it in the future, and the spectre of the words of the German Chancellor on the eve of World War I – 'necessity knows no law' – still hangs heavily over contemporary discussions of the defence.¹⁰

This thesis contends that this perception is flawed and these fears are unfounded. The main claim of this thesis is that necessity operates as a safety valve within the law of State responsibility that mediates between the binding quality of international obligations and the harsh consequences that may follow from requiring compliance with those obligations at all costs. This claim builds on the approach outlined by Roberto Ago who, as the ILC's second

⁸ James Crawford, *State Responsibility: The General Part* (CUP 2013) 274. For the ASR, see n 2.

⁹ These cases have become a primary exhibit in the arguments of those who criticise the legitimacy and sustainability of international investment law: see, for example, Gus Van Harten, *Investment Treaty Arbitration and Public Law* (OUP 2007) 152–53; William Burke-White, 'The Argentine Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID System', in Michael Waibel, Asha Kaushal et al (eds), *The Backlash Against Investment Arbitration* (Kluwer 2010) 407.

¹⁰ Cited and translated in ILC, 'The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries' (CUP 2002) n 373. See, discussing the controversy surrounding its perceived past abuse, Sarah Heathcote, 'Necessity' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) 491, 492 – 493, and see, discussing its future susceptibility to abuse, Robert Sloane, 'On the Use and Abuse of Necessity in the Law of State Responsibility' (2012) 106 *AJIL* 447. For a particularly harsh critique, viewing necessity as 'the most persistent and formidable enemy of a truly human society', see Philip Allott, 'State Responsibility and the Unmaking of International Law' (1988) 29 *Harvard Intl L J* 1, 17.

Special Rapporteur on State Responsibility, used the metaphor of a safety valve when outlining the role that necessity could play in international law:¹¹

The application of the concept must, of course, be ruled out wherever it is actually dangerous, but not where it has been and continues to be useful as a "safety-valve", to relieve the inevitably untoward consequences of a concern for adhering at all costs to the letter of the law. We must ensure that the fundamental requirement of respect for the law does not ultimately lead to the kind of situation that is perfectly described by the adage *summum jus, summa injuria*.^[12] Moreover, the concept of "state of necessity" is far too deeply rooted in the consciousness of the members of the international community and of individuals within States. If driven out of the door it would return through the window, if need be in other forms; in that case, the only result would be the unhappy one of distorting and obscuring other concepts, the precise delimitation of which is no less essential.

The seeds of two key ideas emerge from this passage. First, necessity is not about permitting a State to act *beyond* international law, but it is rather about promoting the reasonable application *of* international law. Yet necessity is about more than that. Necessity can play a systemic role too. Necessity recognises that international law must sometimes *bend* so that it does not *break*. Necessity accepts the political realities of international life, but it brings those realities within the constraints of international law rather than leaving them to destabilise international law from without. This is what is meant by necessity's role as a safety valve and this thesis bears out the claim that necessity can provide this safety valve by contending that necessity has a stronger pedigree than is commonly appreciated and that it is solidly grounded in, and its contours are constrained by, customary international law. Any suggestion that 'necessity knows no law' has no place in international law today.

¹¹ Roberto Ago, 'Addendum – Eighth Report on State Responsibility' (29 February, 10 and 19 June 1980) UN Doc A/CN.4/318/Add.5-7 in *Ybk of the ILC* (1980) II(1) 13, 51.

¹² This translates as 'supreme justice, supreme injustice', or as 'the greatest right is the greatest injury' (Aaron Fellmeth and Maurice Horwitz, *Guide to Latin in International Law* (OUP 2009) 273).

The Scope of the Thesis

This thesis aims to be broad in its scope in one sense and narrow in another. It aims to be broad in its scope by examining necessity from the perspective of the law of State responsibility. This thesis examines closely the jurisprudence on necessity that has emerged in the context of investor-State arbitration, with a particular focus on the Argentine crisis cases.¹³ But investor-State arbitration is itself a means of implementing State responsibility¹⁴ and, in any event, necessity arises in many other contexts. To take just a few examples of the range of contexts in which necessity has emerged over the last two decades: Hungary invoked necessity as a defence to breaches of a treaty governing a vast construction project on the Danube River;¹⁵ the International Court of Justice (ICJ) raised necessity to consider whether it could provide a defence to Israel's breaches of the laws of armed conflict and international human rights law arising out of its construction of a security wall on occupied Palestinian territory;¹⁶ Belgium invoked necessity as a defence to its role in NATO's use of force in Yugoslavia;¹⁷ and, most recently, it has been speculated whether necessity may provide a

¹³ It is on these cases that much of the recent literature on necessity has focused: see, for example, William Burke-White & Andreas von Staden, 'Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties' (2008) 48 *Virginia J Intl L* 307; José Alvarez & Kathryn Khamsi, 'The Argentine Crisis and Foreign Investors: A Glimpse Into the Heart of the Investment Regime' in Karl Sauvant (ed), *Yearbook of International Investment Law & Policy 2008-2009* (OUP 2009) 379; Jürgen Kurtz, 'Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis' (2010) 59 *ICLQ* 325.

¹⁴ See, for example, though discussing how the application of the law of State responsibility to the investor-State context may not always be straightforward, Martins Paparinskis, 'Investment Treaty Arbitration and the (New) Law on State Responsibility' (2013) 24 *EJIL* 617.

¹⁵ *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (Judgment) [1997] ICJ Rep 7.

¹⁶ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136.

¹⁷ *Legality of Use of Force (Serbia and Montenegro v Belgium)* Oral Proceedings CR1999/15.

defence for States breaching Syria's territorial integrity in order to provide humanitarian assistance to Syrian civilians.¹⁸ Necessity is a product not of any specific field of law but of the law of State responsibility generally, and that is why, with a view to providing a coherent account of necessity, this thesis examines necessity from that broad perspective.¹⁹

This thesis aims to be narrow in its scope by focusing on necessity as a defence to State responsibility. Glanville Williams once observed that 'In a manner of speaking the whole law is based upon social necessity; it is a body of rules devised by the judges and the legislature to provide for what are felt to be reasonable needs'.²⁰ It is therefore unsurprising that the term 'necessity' is used in a range of rules in international law,²¹ including, for example, the law of self-defence.²² But as Ian Brownlie once noted, 'necessity' is a term of considerable relativity'.²³ It should not be presumed that 'necessity' carries the same meaning wherever it is found in international law,²⁴ and this thesis is not about 'necessity' wherever

¹⁸ Emanuela-Chiara Gillard, 'The Law Regulating Cross-Border Relief Operations' (2013) 95 Intl Rev Red Cross 351, 372 – 373.

¹⁹ The leading treatment of necessity within the law of State responsibility is probably that by Sloane (n 10) but, as will become clear, this thesis takes some very different views than those expressed in that article. Sarah Heathcote has also written an unpublished doctoral thesis on the subject ('State of Necessity in International Law' (PhD Thesis, University of Geneva 2005), and which this thesis has consulted, although that thesis was concluded before most of the Argentine crisis cases became available for consideration.

²⁰ Glanville Williams, 'The Defence of Necessity' (1953) 6 Current Legal Problems 216.

²¹ See, for example, Burleigh Cushing Rodick, *The Doctrine of Necessity in International Law* (Columbia 1928), where the focus is on a concept of 'necessity' understood very broadly and not just as a defence to State responsibility but also as a concept extending to what would today be considered primary rules, for example, military necessity. See also Diane Desierto, *Necessity and National Emergency Clauses: Sovereignty in Modern Treaty Interpretation* (Martinus Nijhoff 2012), where the focus is only partly on necessity as a defence to State responsibility and, as its title suggests, is focused also, and in fact more so, on 'national emergency clauses' in international treaties.

²² Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (CUP 2004).

²³ *International Law and the Use of Force* (OUP 1963) 48.

²⁴ See, with respect to the multiple meanings that 'necessity' may possess in international law, the World Trade Organisation's Appellate Body (*Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, AB-2000-8, Report of the Appellate Body, WT/DS169/AB/R, 11 December 2000, [159] – [160]), which cited the following 'definition' of necessity (from *Black's Law Dictionary* (West 1995) 1029): 'This word must be considered in the connection in which it is used, as it is a word susceptible of various meanings. It may import

that term may arise. There are times where the defence of necessity overlaps with, or may appear to overlap with, obligations that contain their own safety valves that regulate emergency situations and that may also involve an element of ‘necessity’. This thesis does examine the relationship between the defence of necessity and some of the most relevant of these instances,²⁵ but it does so with the overriding focus of examining the scope of necessity as a defence to State responsibility.

The Structure of the Thesis

The thesis is advanced across five chapters. Chapter 1 contends that necessity has a stronger pedigree than is commonly appreciated. This chapter first identifies the origins of necessity in the writings of Grotius, who derived a specific ‘right of necessity’ from the broader right of self-preservation and yet emphasised that this was a right that operated within and was constrained by international law. This legal doctrine of necessity was then developed by subsequent writers and it also directly influenced State practice and the decisions of international tribunals. That carefully constrained legal doctrine of necessity is then distinguished from the vague and unreviewable assertions of necessity that some States also derived from the right of self-preservation and which they made in an attempt to confer political legitimacy upon their forcible interventions in other States. These assertions of necessity did give rise to abuse, but they had nothing to do with international law, became widely discredited and were in any event superseded by the development of international law

absolute physical necessity or inevitability, or it may import that which is only convenient, useful, appropriate, suitable, proper, or conducive to the end sought. It is an adjective expressing degrees, and may express mere convenience or that which is indispensable or an absolute physical necessity.’

²⁵ See Chapter 3.

and in particular the development of the prohibition on the use of force. Chapter 1 then examines how the ILC built on and developed the legal doctrine of necessity during its work on the law of State responsibility. The ILC developed necessity as a defence to State responsibility rather than as a right deriving from the right of self-preservation. Yet the ILC built on Grotius' emphasis that necessity operated within and was constrained by international law, and the ILC expressly distinguished its approach to necessity from the vague and unreviewable assertions of necessity that some States had formerly made in an attempt to confer political legitimacy upon their forcible interventions in other States. The ILC accordingly developed necessity as a safety valve within the law of State responsibility that could mediate between the binding quality of international obligations and the harsh consequences that may follow from requiring compliance with those obligations at all costs. Chapter 1 clears the ground for the remainder of the thesis. Once the perception of necessity's past abuse is seen to have nothing to do with necessity as a legal doctrine, the analysis of necessity's place within international law today can proceed without that shadow.

Chapter 2 takes up that analysis by contending that necessity is solidly grounded in customary international law. International tribunals have tended to assume rather than establish that necessity is a rule of customary international law and this has caused some of the writers who have analysed necessity most closely either to doubt or reject that necessity is a rule of customary international law. This chapter fills the gap left by international tribunals and responds to those writers. The chapter first outlines the proper place of the ASR generally within the sources of law, which is as a subsidiary means for the determination of rules of customary international law, albeit a very persuasive subsidiary means. It then turns to consider more specifically the status of necessity within customary international law. To that end, this chapter sets out the framework for identifying a rule of customary international law,

evaluates the relevant evidence against that framework and concludes that necessity is solidly grounded in customary international law.

Chapter 2 is concerned with necessity's *existence* as a rule of customary international law, while Chapters 3, 4 and 5 chart the *contours* of necessity as a rule of customary international law with the purpose of demonstrating that necessity not only operates within, but is also constrained by, customary international law. Chapter 3 begins this examination of the contours of necessity by focusing on the scope of its application. The secondary rules of State responsibility apply generally to all primary rules. Necessity, as a secondary rule of State responsibility, may thus provide a defence to the breach of a wide and potentially limitless number of primary rules. But there are exceptions to this. This chapter considers two exceptions to the general scope of necessity. It first considers how necessity cannot be invoked as a defence to the breach of a peremptory rule of international law. This chapter focuses on the peremptory prohibition on the use of force, which is where the most interesting and practically relevant issues concerning necessity have arisen, and contends that it is clear that necessity cannot provide a defence to a breach of this rule nor an exception within this rule. This puts to bed the fears that necessity could today provide a legal basis for the kind of forcible interventions with which necessity is perceived to have been associated in the past. Chapter 3 then examines how primary rules may contain their own safety valves that regulate situations of emergency. This has two consequences for the scope of necessity. The first consequence is that these primary rules that regulate situations of emergency must be applied prior to and independently of necessity as a defence and secondary rule of State responsibility. The second consequence is that these primary rules may regulate situations of emergency to the exclusion of necessity. This may be either as a practical consequence because the primary rule sets down a more lenient test than necessity, or as a matter of law because the primary rule by its object and purpose excludes the possibility of invoking

necessity. This chapter illustrates these consequences by examining three situations where primary rules regulate situations of emergency, namely non-precluded measures clauses in trade and investment treaties, emergency derogations in human rights treaties, and military necessity and the laws of armed conflict. The key conclusion this chapter seeks to draw is that in every case it is essential first to determine the scope within which necessity can apply before determining under what conditions it can apply.

Chapter 4 turns to flesh out the conditions that a State must satisfy in order to establish necessity. This chapter is central to establishing the main claim of the thesis: that necessity operates as a safety valve within the law of State responsibility that mediates between the binding quality of international obligations and the harsh consequences that may follow from requiring compliance with those obligations at all costs. If the conditions under which necessity applies are too lenient, then the binding quality of international obligations may be unduly weakened. On the other hand, if the conditions under which necessity applies are too strict, then the defence may become practically useless. Either way, necessity's role as a safety valve would be undermined. Necessity would no longer promote the reasonable application of international law and it would no longer provide a means by which international law can bend so that it does not break. In fact, despite the widespread fears of necessity's vulnerability to abuse, or perhaps because of those fears, some tribunals, especially in the context of the Argentine crisis cases, have taken unrealistically strict approaches to the conditions that a State needs to satisfy in order to establish necessity. This has been particularly so with respect to the 'only way' and non-contribution conditions. These unrealistically strict approaches threaten to render necessity practically useless. This chapter critiques these unrealistically strict approaches and instead seeks to elaborate these conditions, as well as necessity's conditions more generally, in a way that should guard

against abuse without rendering necessity practically useless. The conditions for necessity's application remain strict, but they are not unrealistically strict.

Chapter 5 finally examines the consequences of necessity. Chapter 5 begins by examining how a State that has established necessity still bears two important obligations that constrain the way in which necessity operates. First, necessity is a temporary defence, which means that a State that has established necessity must resume compliance with the underlying primary obligation once the situation of necessity has expired. Second, a State that has established necessity must compensate the party to whom it owes the primary obligation for any material loss that it has suffered during the time of necessity, although the conduct of the injured party and the situation of necessity may have a bearing on the extent of that compensation. Chapter 5 ends with some broader observations about the systemic consequences of necessity. It rebuts the arguments of those who still see necessity as a threat to the stability of international law and instead reasons that necessity, by virtue of its role as a safety valve within the law of State responsibility, has the greater potential to strengthen rather than destabilise international law.

1. THE ORIGINS AND DEVELOPMENT OF NECESSITY

Introduction

Necessity is plagued by a perception that it has been abused in the past, which has produced fears that it will be abused in the future. James Crawford alludes to this link when, after citing some common examples of its past abuse, he observes that ‘Such abuses have led many to doubt that necessity has any place in international law’.¹ Other writers have drawn the same link in the course of doubting whether necessity does or should have a place in international law.² Even the ASR Commentaries, which do support a place for necessity in international law, refer to the ‘classic case’ of necessity’s past abuse – Germany’s invasion of Belgium in 1914, which the German Chancellor prefaced with his much-quoted claim that ‘necessity knows no law’ – and explain that necessity is ‘subject to strict limitations to safeguard against possible abuse.’³

This chapter contends that necessity has a stronger pedigree than is commonly appreciated. This chapter first identifies the origins of necessity in the writings of Grotius, who derived a specific ‘right of necessity’ from the broader right of self-preservation and yet emphasised that this was a right that operated within and was constrained by international law. This legal doctrine of necessity was then developed by subsequent writers and it also

¹ James Crawford, *State Responsibility: The General Part* (CUP 2013) 306.

² Sarah Heathcote explains that necessity ‘is controversial firstly because of the abuses that have been committed in its name’ (‘Necessity’ in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) 491, 492), while Robert Sloane has stated, as if it were but a cliché, that ‘Necessity, after all, is notoriously subject to abuse’ (‘On the Use and Abuse of Necessity in the Law of State Responsibility’ (2012) 106 AJIL 447, 450).

³ ILC, ‘The International Law Commission’s Articles on State Responsibility: Introduction, Text, and Commentaries’ (CUP 2002) (‘ASR Commentaries’) 178 and n 398.

directly influenced State practice and the decisions of international tribunals. This chapter then distinguishes that carefully constrained legal doctrine of necessity from the vague and unreviewable assertions of necessity that some States also derived from the right of self-preservation and which they made in an attempt to confer political legitimacy upon their forcible interventions in other States. These assertions of necessity did give rise to abuse, but they had nothing to do with international law, became widely discredited and were in any event superseded by the development of international law and in particular the development of the prohibition on the use of force.

This chapter then examines how the ILC built on and developed the legal doctrine of necessity during its work on the law of State responsibility. The ILC developed necessity as a defence to State responsibility rather than as a right deriving from the right of self-preservation. Yet the ILC built on Grotius' emphasis that necessity operated within and was constrained by international law, and the ILC expressly distinguished its approach to necessity from the vague and unreviewable assertions of necessity that some States had formerly made in an attempt to confer political legitimacy upon their forcible interventions in other States. The ILC accordingly developed necessity as a safety valve within the law of State responsibility that could mediate between the binding quality of international obligations and the harsh consequences that may follow from requiring compliance with those obligations at all costs.

This chapter clears the ground for the remainder of the thesis. Once the perception of necessity's past abuse is seen to have nothing to do with necessity as a legal doctrine, the analysis of necessity's place within international law today can proceed without that shadow.

Necessity and the Right of Self-Preservation

The following discussion examines how necessity originated in and first developed as a part of the right of self-preservation. It has been said that ‘The idea of ... self-preservation is as old as the science of international law itself’⁴ and there have indeed been numerous attempts to translate that idea into a legal right. Grotius,⁵ Pufendorf⁶ and Vattel⁷ all wrote about the right of self-preservation and it later became the most fundamental of the ‘fundamental rights of States’ recognised by many writers during the nineteenth and early twentieth centuries.⁸ But translating the abstract idea of self-preservation into a more specific legal right has proved to be difficult and the right of self-preservation has lent itself to a number of uses and abuses.⁹ It is therefore unsurprising that the right of self-preservation has produced more than one approach to necessity.

⁴ Marcelo Kohen, ‘The Notion of ‘State Survival’ in International Law’ in Laurence Boisson de Chazournes and Philippe Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons* (CUP 1999), 294.

⁵ Hugo Grotius, *De Jure Belli ac Pacis Libri Tres* vol II (Francis Kelsey tr, first published 1625, Clarendon 1925) Bk 2, ch 1, cl 3.

⁶ Samuel Pufendorf, *De Jure Naturae et Gentium Libri Octo* (W A Oldfather tr, first published 1672, Clarendon 1934) Bk 2, ch 6, cl 2.

⁷ Emerich de Vattel, *Law of Nations* (Joseph Chitty tr, first published 1758, Sweet 1834) Bk 1, ch 2, cl 18.

⁸ For just a few examples, see: Travers Twiss, *The Law of Nations Considered as Independent Political Communities* (2nd ed, Clarendon 1884) 179; Charles Fenwick, *International Law* (Allen & Unwin 1924) 142; Amos Hershey, *The Essentials of International Public Law and Organization* (Macmillan 1927) 231. See also Lassa Oppenheim, *International Law* vol I (Peace) (Longmans 1905) 177, describing that ‘most writers maintain that every State has a fundamental right of self-preservation’, but himself offering a more critical view.

⁹ James Green, ‘Self-Preservation’ in *MPEPIL* (OUP online) [1].

(i) Necessity as a Legal Doctrine

It is with Hugo Grotius that a legal doctrine of necessity first began to take shape.¹⁰ '[N]ature', Grotius declared, 'commits to each his own protection',¹¹ but Grotius moved beyond this broad right of self-preservation to a more specific 'right of necessity' when discussing one of his just causes of war. Grotius set down three just causes of war – defence, recovery of property and punishment¹² – and it was in connection with the second of those causes – recovery of property – that Grotius focused his discussion of the bounds of this right of necessity.¹³ Grotius explained that in cases of 'necessity' the laws governing private property give way by virtue of an implied exception within those laws to an original and primitive state whereby all goods are held in common and can be used according to the necessity of self-preservation.¹⁴ Grotius referred to domestic law examples including the sharing of provisions when on a long voyage they begin to fail and the destruction of a neighbour's building to stop a fire spreading.¹⁵ He considered that the principle also applied at the international level¹⁶ and he gave some examples of this including occupying neutral territory and using its resources in times of war.¹⁷

¹⁰ Burleigh Cushing Rodick, *The Doctrine of Necessity in International Law* (Columbia 1928) 2: 'Hugo Grotius ... deserves, more than anyone else, to be considered the early founder of the doctrine of necessity.'

¹¹ See n 5.

¹² *ibid* Bk 2, ch 1, cl 2.

¹³ *ibid* Bk 2, ch 2, cl 6 – 24.

¹⁴ *ibid* Bk 2, ch 2, cl 6.

¹⁵ *ibid*.

¹⁶ *ibid* Bk 2, ch 2, cl 10-24.

¹⁷ *ibid* Bk 2, ch 2, cl 10.

But what is most relevant for the present discussion is not why Grotius considered a right of necessity existed in that particular context, but how he considered that right operated. It is the latter aspect that would carry weight for how subsequent writers, States and international tribunals would build on Grotius' platform when developing necessity and applying it more generally in international law. Grotius conceived of necessity as a right based on the broader right of self-preservation, but, and this is the critical point, Grotius emphasised that the right of necessity was a constrained right.¹⁸ Grotius clarified that when a man invoked the right of necessity, 'strictly speaking, it was not a full and perfect right, which he exercised; but a kind of permission, arising out of a case of necessity.'¹⁹ He further explained that 'this indulgence must be granted with precautions and restrictions, to prevent it from degenerating into licentiousness.'²⁰ The first of these 'precautions and restrictions' was that the 'distressed party [must first] try every mode of obtaining relief, by an appeal to a magistrate, or by trying the effect of entreaty to prevail upon the owner to grant what is necessary for his pressing occasions.'²¹ Even if the distressed party had tried 'every mode of obtaining relief', the plea of necessity would still not succeed 'where the possessor is in an equal state of necessity himself.'²² The distressed party is finally 'bound to make restitution, or give an equivalent to the owner, whenever that is possible.'²³ From the beginning, then, it

¹⁸ Hersch Lauterpacht, 'The Grotian Tradition in International Law' (1946) 23 BYIL 1, 19 – 20: 'Neither did [Grotius] concede to states the absolute faculty of action in self-preservation ... The emphasis with which Grotius denies the absoluteness of the right to act in self-preservation is deeply impressive.'

¹⁹ See n 5 Bk 2, ch 2, cl 9.

²⁰ *ibid* Bk 2, ch 2, cl 7.

²¹ *ibid*.

²² *ibid* Bk 2, ch 2, cl 8.

²³ *ibid* Bk 2, ch 2, cl 9.

was clear that necessity was conceived of not as a concept that operated beyond international law, but rather as one that operated within and was constrained by international law.

Subsequent writers also recognised a constrained right of necessity that operated within international law. Samuel Pufendorf devoted a full chapter to the ‘Right and Privilege of Necessity’ within his sweeping account of natural law. He introduced this chapter by observing that ‘The power of necessity is a phrase upon the lips of all men, because it lacks the restraint of law, and is understood to form an exception in all the rules of men, while it carries the right to do many things which, apart from it, were held to be forbidden’.²⁴ Yet Pufendorf devoted his chapter to showing precisely how this ‘power of necessity’ could be brought within the ‘restraint of law’. Pufendorf, like Grotius, was heavily influenced by the analogy of the individual and he based the right of self-preservation on what he saw as the realities of human nature. He characterised necessity as arising from a presumption that those who pass laws ‘had before their eyes the weakness of human nature, and how man cannot help avoiding and repelling whatever tends to his destruction.’²⁵ This echoed the implied exception approach on which Grotius had relied, although without adopting his common use of property approach.²⁶ Pufendorf wrote in general terms about the right of necessity without specifically applying his discussion to the international context, but it is still worth looking at how, given the careful way in which he approached the matter, Pufendorf delineated the constrained way in which he considered the right of necessity operated:²⁷

²⁴ See n 6 Bk 2, ch 6, cl 1.

²⁵ *ibid* Bk 2, ch 6, cl 2.

²⁶ For a more extensive comparison of the approaches of Grotius and Pufendorf to the right of necessity, see James Salter, ‘Grotius and Pufendorf on the Right of Necessity’ (2005) 26 *History of Political Thought* 284.

²⁷ See n 6 Bk 2, ch 6, cl 8.

... a necessity that touches our own property apparently allows one the permission to destroy or appropriate the property of another, but with the following restrictions: that the threatened loss to our property came through no fault of ours; that it cannot be averted in any more convenient way; that we do not destroy another's article of greater value for our own of less value; that we make good the value of the article, if it would not have been lost anyway; and, finally, that we bear a part of the loss, if the other's property, which now is sacrificed to preserve ours, would otherwise have been lost along with ours.

Thus Pufendorf recognised, similar to Grotius, that necessity required a consideration of alternatives, a balancing of interests and a potential compensation requirement. To these requirements Pufendorf added an absence of fault condition that Grotius had not included.

Emerich de Vattel's approach to necessity followed similar contours albeit he focused more closely and directly on the law of nations rather than on the analogy of the individual. He wrote, in the context of his discussion on the 'Rights which Belong to all Nations', of 'the right which necessity alone gives to the performance of certain actions that are otherwise unlawful, when, without these actions, it is impossible to fulfil an indispensable obligation'.²⁸ The examples Vattel gave where this right might be invoked included a State's procurement of provisions from another State in a time of dire need and the appropriation of foreign vessels in its ports.²⁹ As with Grotius, but unlike Pufendorf, Vattel also relied on the idea of a reversion to a primitive state of common use to justify this use of property. But more importantly, and as with both Grotius and Pufendorf, Vattel's right of necessity was brought within and constrained by the law. Vattel required that 'the act in question [be] the only

²⁸ See n 7 Bk 2, ch 9, cl 119. Vattel also spoke more specifically of an implicit exception of necessity within every treaty a State signed ('If the assistance and offices that are due by virtue of such a treaty should on any occasion prove incompatible with the duties a nation owes to herself, or with what the sovereign owes to his own nation, the case is tacitly and necessarily excepted in the treaty ... Necessity here forms an exception, and he does not violate the treaty, because he cannot fulfil it.' (Bk 2, Ch 12, cl 170) (and see below n 43 for an application of this)).

²⁹ *ibid* Bk 2, ch 9, cl 120 – 121.

means of fulfilling that obligation',³⁰ while he also recognised that the other State in question must not be 'under the same necessity',³¹ and finally that the State 'ought to pay for the use she makes of [the provisions], if she has the means of paying.'³²

The approach that Grotius, Pufendorf and Vattel adopted of recognising necessity as a legal doctrine that operated within and was constrained by the law directly influenced the practice of States and international tribunals. An early example is provided by the *Neptune* arbitration of 1797.³³ This arbitration, which was before a mixed commission constituted under the Jay Treaty, arose following the British seizure of the cargo of a US vessel loaded with foodstuffs bound for France, then at war with the British. The British claimed that its actions were justified by the necessity caused by food shortages in Great Britain and the British paid the invoice of the cargo plus ten per cent, but the American owners claimed that this was well below the market price it would receive in France and pursued the claim. The commission rejected Great Britain's necessity plea and upheld the claim. The most extensive discussions of necessity were provided by Commissioners Pinkney and Trumbull.

Commissioner Pinkney drew expressly on Grotius:³⁴

I shall not deny that *extreme necessity* may justify such a measure. It is only important to ascertain whether that *extreme necessity* existed on this occasion and upon what terms the right it communicated might be carried into exercise.

We are told by Grotius that the necessity must not be imaginary, that it must be real and pressing, and that even then it does not give a right of appropriating the goods of

³⁰ *ibid* Bk 2, ch 9, cl 119.

³¹ *ibid* Bk 2, ch 9, cl 121.

³² *ibid* Bk 2, ch 9, cl 121.

³³ *The Neptune, Jeffries, Master: Provision Case* in John Bassett Moore, *International Adjudications* vol IV (OUP 1931) 372.

³⁴ *ibid* 398 – 399.

others until all other means of relief consistent with the necessity have been tried and found inadequate.

Commissioner Pinkney rejected the plea on the facts because he considered there to be other ways by which the British could have relieved its food scarcity, such as by providing bounties to traders.³⁵ Even if there were not, he considered that the British would be required to pay the market price of the foodstuffs.³⁶ Commissioner Trumbull did not expressly refer to any of the classical writers, but he similarly recognised and constrained necessity, in particular by emphasising that the plea cannot be admitted ‘until all other means of self-preservation shall have been exhausted.’³⁷ Like Commissioner Pinkney, Commissioner Trumbull held those other means had not been exhausted.³⁸

Necessity also arose during the *Chichester* affair of 1829.³⁹ Mexico had imposed an embargo on ships leaving Mexico in an attempt to prevent any information from reaching the Spanish whose fleet was fitting out in Havana and from whom the Mexicans were anticipating an attack. It was pursuant to this embargo that Mexico detained a British vessel – the *Chichester*. The British Advocate General, Herbert Jenner, advised his Government that Mexico’s acts were justified by necessity. Jenner explained that ‘The first and paramount duty of every Nation is that of self-preservation, and the Law of Nations will sanction the adoption of any measure, which may be necessary to secure this great object, although it may in some degree infringe upon the rights of others.’⁴⁰ Although Jenner spoke of ‘any measure’,

³⁵ *ibid* 399.

³⁶ *ibid* 400.

³⁷ *ibid* 433.

³⁸ *ibid*.

³⁹ Arnold McNair, *International Law Opinions* vol 2 (CUP 1956) 231.

⁴⁰ *ibid*.

it is clear that this was constrained by the requirement that the relevant measure be objectively ‘necessary’. Thus Jenner proceeded to emphasise the importance of the threat faced by Mexico and his view that the embargo ‘was the only measure, which could be resorted to for the purpose of preventing a disclosure to the Enemy which might be productive of infinite danger to the State.’⁴¹

Necessity also arose in the context of a dispute between Great Britain and Portugal in 1832. Portugal, in what was potentially a breach of a treaty with Great Britain under which Portugal was obliged to protect British property in Portugal, appropriated British properties in Portugal in order to provide for troops who were engaged in putting down a local rebellion. The British Consul General at Lisbon reported that the Portuguese had invoked ‘the plea of necessity’ in its defence.⁴² Jenner, this time citing Vattel, advised his Government that the Portuguese plea was consistent with international law:⁴³

Cases may be easily imagined in which the strict observance of the Treaty would be altogether incompatible with the paramount duty which a Nation owes to itself. When such a case occurs Vattel, Book 2, C. 12, Sect. 170 observes that it is ‘tacitly and necessarily excepted in the Treaty’.

In a case, therefore, of pressing necessity, I think that it would be competent to the Portuguese Government to appropriate to the use of the Army such Articles of Provisions etc., etc., as may be requisite for its subsistence, even against the will of the Owners, whether British or Portuguese; for I do not apprehend, that the Treaties between this Country and Portugal are of so stubborn and unbending a nature, as to be incapable of modification under any circumstances whatever, or that their stipulations ought to be so strictly adhered to, as to deprive the Government of Portugal of the right of using those means, which may be absolutely and indispensably necessary to the safety, and even to the very existence of the State.

⁴¹ *ibid.*

⁴² *ibid* 231 – 232.

⁴³ *ibid* 232.

The extent of the necessity, which will justify such an appropriation of the Property of British Subjects, must depend upon the circumstances of the particular case, but it must be imminent and urgent.

Thus was recognised a constrained right of necessity where the conduct in question had to be ‘absolutely and indispensably necessary to the safety, and even to the very existence of the State’, and the necessity had to be ‘imminent and urgent.’

To the *Neptune* arbitration, the *Chichester* affair and the Anglo-Portuguese dispute may be added two arbitrations brought by France against Venezuela before the French-Venezuelan Mixed Commission established in 1902 in the wake of the upheaval produced by Venezuela’s 1898-1902 civil war. In the *Venezuelan Railroads* arbitration,⁴⁴ France claimed that Venezuela had not paid the debts it owed to a French company that had been granted a concession to build railways in Venezuela before the revolution. Umpire Plumley rejected France’s claim on the basis that Venezuela’s ‘first duty was to itself. Its own preservation was paramount. Its revenues were properly devoted to that end. The appeal of the company for funds came to an empty treasury, or to one only adequate to the demands of the war budget.’⁴⁵ That is essentially the extent of Umpire Plumley’s discussion, but his reasoning does suggest that the plea did not succeed simply because the right of self-preservation was an absolute right. The terms of the passage suggest that Venezuela’s plea succeeded because on the facts of the case Venezuela was caught between the two evils of breaching its obligation to pay a foreign debtor and failing to use its limited resources to protect the State during war, and there was no other way Venezuela could come by those resources if it were

⁴⁴ *French Company of Venezuela Railroads (France v Venezuela)* (1905) X RIAA 285.

⁴⁵ *ibid* 353.

to pay its debts to those such as the claimant. In other words, Venezuela's measures were necessary, and the necessity was objectively reviewable.

That the plea remained a constrained one is further illustrated by another arbitration that Umpire Plumley decided that same year before the French-Venezuelan Mixed Commission. In the *Orinoco* arbitration,⁴⁶ a French company had been granted a concession to exploit minerals and develop a transport network in Venezuela. But Colombia claimed that the land on which the concession was granted was Colombian territory. The result, in Umpire Plumley's words, was that the concession 'had become a source of serious national danger'.⁴⁷ Umpire Plumley held that 'As the Government of Venezuela, whose duty of self-preservation rose superior to any question of contract, it had the power to abrogate the contract in whole or in part. It considered the peril superior to the obligation and substituted therefor the duty of compensation.'⁴⁸ This requirement still to pay compensation – notwithstanding the necessity of self-preservation – was a significant constraint on the plea and one which reflects the view taken by the Grotius, Pufendorf and Vattel, as well as by Commissioner Pinkney in the *Neptune* arbitration.

The early practice of States and decisions of international tribunals, combined with the contributions of Grotius, Pufendorf and Vattel, demonstrates that necessity, even when understood as deriving from the right of self-preservation, was originally developed not as operating beyond international law, but as operating within and constrained by international law.

⁴⁶ *Company General of the Orinoco Case (France v Venezuela)* (1905) X RIAA 184.

⁴⁷ *ibid* 281.

⁴⁸ *ibid* 280.

(ii) Necessity as a Political Assertion

That legal doctrine of necessity must be distinguished from the vague and unreviewable assertions of necessity that some States derived from the right of self-preservation and that they made in an attempt to confer political legitimacy upon their forcible interventions in other States. The States that relied on necessity as a political assertion ignored the legal constraints that had been placed on necessity in the writings of Grotius, Pufendorf and Vattel, and that had been accepted by the States and international tribunals that had built on those writings. These States moved directly from their right to preserve their existence to their right to do anything they saw fit to preserve that existence. Their intellectual forebears cannot be found among legal writers, but are more obviously found among political philosophers and purveyors of *Realpolitik* like Niccolò Machiavelli and Thomas Hobbes. Machiavelli's views on necessity and self-preservation are infamous. '[A] prince', Machiavelli advised, 'should know how to enter evil when forced by necessity',⁴⁹ and he had no doubt that such 'evil' was not constrained by law:⁵⁰

.... for when the entire safety of our country is at stake no consideration of what is just or unjust, merciful or cruel, praiseworthy or shameful, must intervene. On the contrary, every other consideration being set aside, that course alone must be taken which preserves the existence of the country and maintains its liberty.

⁴⁹ Niccolò Machiavelli, *The Prince* (Peter Bondanella tr, first published 1532, OUP 2005) 61.

⁵⁰ Niccolò Machiavelli, *Discourses on the First Decade of Titus Livius* (Ninian Thomson tr, first published 1531, Kegan Paul 1883) 473.

Hobbes thought similarly:⁵¹

The right of nature, which writers commonly call *jus naturale*, is the liberty each man hath to use his own power as he will himself for the preservation of his own nature; that is to say, of his own life; and consequently, of doing anything which, in his own judgment and reason, he shall conceive to be the aptest means thereunto.

There are a number of recorded instances of States using their ‘own judgment and reason’ to decide, purportedly for the purpose of self-preservation, that it was necessary to forcibly intervene in other States.

An early example was provided by the British actions against Denmark in 1807.⁵² The British, fearing Napoleon would invade Denmark, seize its powerful fleet and set that fleet against Great Britain, requested that Denmark deliver up its fleet to the British for safekeeping. The Danes refused. The British, claiming that it was ‘necessary for the nation’s self-preservation’, shelled Copenhagen, killing hundreds and burning to destruction large swathes of the city.⁵³ The British eventually seized the fleet, but writers were divided over how necessary the British actions were.⁵⁴

Roberto Ago, in the Addendum to his Eighth Report on State Responsibility, provided an extensive list of the occasions on which ‘necessity’ was invoked as a ‘justification’ (Ago’s

⁵¹ Thomas Hobbes, *Leviathan* (first published 1651, OUP 2008) 86.

⁵² Carl Kusrud, ‘The Seizure of the Danish Fleet, 1807’ (1938) 32 AJIL 280.

⁵³ Kenneth Stevens, *Border Diplomacy: The Caroline and McLeod Affairs in Anglo-American-Canadian Relations, 1837-1842* (University of Alabama Press 1989) 25.

⁵⁴ See, for example, A Pearce Higgins, *Hall’s International Law* (8th ed, Clarendon 1924) 326 – 327 (and citations therein).

inverted commas) for forcible interventions in other States.⁵⁵ Those occasions comprised: Austria's annexation of the Free City of Krakow in 1846; Italy's annexation of Rome in 1870; Japan's occupation of Korea in 1904; Austria-Hungary's annexation of Bosnia-Herzegovina in 1908; the occupation by Entente Powers of certain Greek territories or islands during World War I; Italy's annexation of Ethiopia in 1936; Germany's occupation of Denmark, Norway, Belgium and Luxembourg during World War II; Germany's and Italy's occupation of Yugoslavia and Greece during World War II; the United Kingdom's occupation of Iceland during World War II; the United Kingdom's and the Soviet Union's occupation of Iran during World War II; and the Netherlands' and Australia's occupation of Portuguese Timor during World War II. Ago concluded that the States invoking necessity on these occasions did so 'with varying degrees of candour'.⁵⁶

But the most infamous example, and the 'classic case' of necessity's abuse,⁵⁷ was provided by Germany in 1914 in connection with its invasion of Belgium. Germany was bound by treaty to respect Belgium's neutrality.⁵⁸ The German Chancellor conceded in a speech before the Reichstag that the invasion of Belgium 'contradicts international law', but he explained that Germany was under threat⁵⁹ and 'necessity knows no law'.⁶⁰ The

⁵⁵ Roberto Ago, 'Addendum – Eighth Report on State Responsibility' (29 February, 10 and 19 June 1980) UN Doc A/CN.4/318/Add.5-7 in *Ybk of the ILC* (1980) II(1) 13, nn 109 and 111 ('Ago's Addendum').

⁵⁶ *ibid* n 111.

⁵⁷ ASR Commentaries (n 3) n 373.

⁵⁸ For a thorough study of the legal issues surrounding Germany's invasion of Belgium, see Charles de Visscher, *Belgium's Case: A Judicial Inquiry* (EF Jourdain tr, Hodder 1916).

⁵⁹ A claim that has been doubted (*ibid*).

⁶⁰ Cited and translated in ASR Commentaries (n 3) n 398.

Chancellor later dismissed the treaty of neutrality as a ‘scrap of paper’⁶¹ and what happened over the next four years cast a deep shadow over the role of necessity in international law.

But these forcible interventions, though they may have been defended by the States taking them on the basis of the ‘necessity’ of protecting their ‘right’ of self-preservation’,⁶² had nothing to do with international law. This was for two reasons. First, and when viewed in the context of the state of international law at the time, most of these claims could not be legal claims in the first place. Ian Brownlie described the period 1815-1914 as ‘still dominated by an unrestricted right of war and the recognition of conquests,’⁶³ and in the *Russian Indemnity* case the tribunal characterised war as an ‘international fact in the first degree’.⁶⁴ As late as 1924, *Hall’s International Law* conceded that ‘International law has ... no alternative but to accept war, independently of the justice of its origin, as relations which the parties to it may choose, and to busy itself only in regulating the effects of the relation.’⁶⁵ This did not mean that States were always comfortable about waging war without communicating to other States some reasons, compelling or otherwise, for doing so.⁶⁶ But it

⁶¹ Cited in Isabel Hull, *A Scrap of Paper: Breaking and Making International Law During the Great War* (Cornell 2014) 42.

⁶² Ian Brownlie noted that during the period 1815-1914 the ‘exercise of the right of self-preservation [was] identical with the operation of the Doctrine of Necessity’, with the qualification that some writers treated necessity as a sub-division of self-preservation, though Brownlie himself noted that necessity could also be viewed as being broader than self-preservation if it was understood to encompass contexts beyond the use of force (*International Law and the Use of Force by States* (OUP 1963) 46 – 47).

⁶³ *ibid* 19.

⁶⁴ *Russian Indemnity (Russia v Turkey)* (1912) XI RIAA 421, translated in (1913) 7 AJIL 178. 181.

⁶⁵ See n 54, 82.

⁶⁶ See Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (CUP 2006) 329 – 330, describing ‘states’ historic hesitation to claim openly the right of war and their desire to coat themselves with a mantle of justification for their use of force’, and giving as examples of this the preference of States to resort to ‘hostile measures short of war’ rather than openly declaring war, even though it was lawful to do so, as well as the ‘invocation of the rhetoric of self-preservation, self-defence, and necessity’.

does mean that those reasons put forward were not legal reasons. The asserted ‘necessity of self-preservation was’, in this context, nothing more than an attempt to confer political legitimacy upon a State’s forcible intervention.⁶⁷

Second, even if there were in the first place a breach of international law, such as a breach of a treaty of neutrality as in the case of Germany in 1914, the idea that an unreviewable plea of necessity could somehow justify or excuse that breach still had nothing to do with international law. The argument that ‘necessity knows no law’ was, and is, a negation of the idea of international law *as law*. Hersch Lauterpacht put this point most clearly when he explained that the claim that a ‘right’ could be beyond the evaluation of the law ‘is self-contradictory, inasmuch as it purports to be based on legal right, and as, at the same time, it dissociates itself from regulation and evaluation by the law.’⁶⁸ Many writers from the late nineteenth and early twentieth centuries had argued that even the so-called ‘fundamental rights of States’, and the right of self-preservation was the most fundamental of these, had to be constrained within legal limits for otherwise there would be no way for international law to resolve the conflicting rights of States.⁶⁹ Georg Schwarzenberger put the implications of an unconstrained ‘superright’ of self-preservation in these terms:⁷⁰

If self-preservation were an absolute and overriding right, the rest of international law would become optional, and its observance would depend on a self-denying ordinance, revocable at will by each state, not to invoke this formidable superright.

⁶⁷ Brownlie, *International Law and the Use of Force by States* (n 62) 19 – 50; Ago’s Addendum (n 55) n 112; Gross and Ní Aoláin (ibid) 328 – 339.

⁶⁸ Hersch Lauterpacht, *The Function of Law in the International Community* (OUP 1933) 188. See also Oscar Schachter, *International Law in Theory and Practice* (Martinus Nijhoff 1991) 135 – 138.

⁶⁹ See, for example, Twiss (n 8) 179; Fenwick (n 8) 142 – 143; Hershey (n 8) 231 – 232.

⁷⁰ Georg Schwarzenberger ‘The Fundamental Principles of International Law’ (1955) 87 *Recueil des Cours* 344. See also JL Brierly, *Law of Nations* (5th ed, Clarendon 1955) 317 and DW Bowett, *Self-Defence in International Law* (Manchester University Press 1958) 10.

No evidence exists that state practice, as distinct from naturalist writers and authors with a flair for the ideological uses of international law, subscribes to such a doctrine of a *droit de convenance*.

This scholarly backlash against a vague and unreviewable right of self-preservation was complemented by the development of international law and in particular the entry into force of the UN Charter in 1945, by which time it was clear that international law prohibited the use of force.⁷¹ There are exceptions to that prohibition, including the use of force in self-defence, but such exceptions are constrained by strict legal conditions.⁷² That the use of force was now an issue that had been brought within and constrained by international law, and that there was no longer room for vague and unreviewable assertions of the necessity of self-preservation, is illustrated by the approach of the International Military Tribunal at Nuremberg (IMT).⁷³ The IMT gave short shrift to the defendants' argument that Germany's invasion of Denmark and Norway 'was a necessity, and that in making her decision her judgment was conclusive.' The IMT explained that 'whether action taken under the claim of self-defence was in fact aggressive or defensive must ultimately be subject to investigation and adjudication if international law is ever to be enforced.'⁷⁴

⁷¹ Article 2(4) of the Charter of the United Nations ((adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI) provides: 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.' On the early development of the prohibition on the use of force, see Brownlie, *International Law and the Use of Force by States* (n 62) ch I – VI.

⁷² Article 51 of the UN Charter provides: 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.' On the strict conditions of self-defence, see Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Christopher Sutcliffe tr, Hart 2010) ch 7.

⁷³ *Judgment of the Nuremberg International Military Tribunal* (1947) 41 AJIL 172, 207.

⁷⁴ *ibid.* See also on the prohibition on intervention the forceful statement of the ICJ in *Corfu Channel* ((*United Kingdom v Albania*) (Merits) [1949] ICJ Rep 4, 35: 'The Court can only regard the alleged right of intervention

The idea of self-preservation today creates no rule of international law on its own.⁷⁵ Its only relevance lies to the extent that it has been incorporated into rules of international law like self-defence and necessity. It is on the content of those rules that one must therefore focus. The ICJ's advisory opinion in the *Nuclear Weapons* case illustrates this with respect to the relationship between self-preservation and self-defence. The Court first observed that it could not 'lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defence, in accordance with Article 51 of the Charter, when its survival is at stake.'⁷⁶ It then (in)famously concluded that:⁷⁷

in view of the present state of international law viewed as a whole, as examined above by the Court, and of the elements of fact at its disposal, the Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake.

The Court's words are best viewed as an application of the rules of self-defence in the particular and exceptional circumstances of the case before it rather than the recognition – or resurrection – of a free-standing right of self-preservation. That is suggested not just by the way in which the Court on both occasions that it mentions State survival links it to self-defence, but also the pleadings of the UK, which was the only State to raise this idea of State

as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law'. See further the Dissenting Opinion of Judge Krylov: 'Since 1945, i.e., after the coming into force of the Charter, the so-called right of self-help, also known as the law of necessity (*Notrecht*), which used to be upheld by a number of German authors, can no longer be invoked. It must be regarded as obsolete. The employment of force in this way, or of the threat of force, is forbidden by the Charter (para. 4 of Art. 2)' (77).

⁷⁵ Kohen (n 4) 293; Green (n 9) [2].

⁷⁶ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 263, [96].

⁷⁷ At [97].

survival before the Court.⁷⁸ The UK did so not to contend for a free-standing right of self-preservation, but rather to illustrate how the extreme circumstances of a threat to a State's survival could bear upon the proportionality calculus when assessing self-defence:⁷⁹

... it is argued that to use nuclear weapons must fall outside the right of self-defence, since it could never constitute a "proportionate" response. Here again, this is assertion, not argument. If one is to speak of "disproportionality", the question arises: disproportionate to what? The answer must be "to the threat posed to the victim State". It is by reference to that threat that proportionality must be measured. So one has to look at all the circumstances, in particular the scale, kind and location of the threat. To assume that any defensive use of nuclear weapons must be disproportionate, no matter how serious the threat to the safety and the *very survival of the State* resorting to such use, is wholly unfounded.

(Emphasis added.)

This appears to be precisely the line of argument that the Court would go on to accept.

It is in this vein too that Robert Jennings and Arthur Watts, in the most recent edition of *Oppenheim's International Law*, dismissed the right of self-preservation as having been 'a barely colourable excuse for violations of another state's sovereignty'⁸⁰ and explained that:⁸¹

The inviolability of a state's territory is now so firmly and peremptorily established by Article 2(4) of the Charter of the United Nations, and the prohibition of aggression and other unlawful uses of armed force is so fundamental a rule of international law, that self-preservation can no longer be invoked to justify such violations.

⁷⁸ Kohen (n 4) 298.

⁷⁹ Oral Statement of Sir Nicholas Lyell of 15 November 1995, CR 95/34, 34.

⁸⁰ Robert Jennings and Arthur Watts, *Oppenheim's International Law*, vol 1 (Peace) (9th ed, Longman 1996) 416.

⁸¹ *ibid.*

But as Jennings and Watts proceeded immediately to note, citing Draft Article 33 of the ASR (which would become Article 25):⁸²

More generally, however, and not only in connection with violations of territory, the necessity of safeguarding the integrity and inviolability of the territory of the state may in strictly limited circumstances justify acts which would otherwise be internationally wrongful.

The following section turns to consider how the ILC moved beyond the right of self-preservation and developed this legal doctrine of necessity.

Necessity as a Defence to State Responsibility

Necessity operates today as a defence to State responsibility rather than as a part of the right of self-preservation. Yet the ILC very much built on the way in which Grotius, Pufendorf and Vattel, as well as the early State practice and decisions of international tribunals, had developed necessity as a rule that operated within and was constrained by international law. It also expressly distinguished its approach to necessity from the vague and unreviewable assertions of necessity that some States had formerly made in an attempt to confer political legitimacy upon their forcible interventions in other States. The ILC accordingly developed necessity as a safety valve within the law of State responsibility that could mediate between the binding quality of international obligations and the harsh consequences that may follow from requiring compliance with those obligations at all costs.

⁸² *ibid* 416 – 417.

The following discussion first sets out the basic framework of State responsibility, including the category of defences to State responsibility, and then turns more specifically to consider how the ILC developed necessity within that framework. This chapter then ends by distinguishing necessity from other defences to State responsibility with a view to clarifying the distinct function that necessity performs today.

(i) The Framework of State Responsibility

The law of State responsibility provides the basic framework within which necessity, as a defence to State responsibility, operates. This section first introduces the law of State responsibility and then turns more specifically to the category of defences to State responsibility.

The Law of State Responsibility

The law of State responsibility is concerned with ensuring that there are legal consequences when a State fails to comply with its international obligations.⁸³ Ian Brownlie captured the key purpose of State responsibility when he said that ‘A major role of state responsibility ... [is] that of putting a harder edge on legal rights and duties.’⁸⁴ This critical subject has been put on a sound conceptual footing by the extensive work of the ILC, which culminated in its

⁸³ The importance of consequences comes through clearly in the PCIJ’s classic dictum in *Factory of Chorzów*, Merits, 1928, PCIJ Series A, No 17, 4, 29: ‘it is a principle of international law, *and even a general conception of law*, that any breach of an engagement involves an obligation to make reparation.’ (Emphasis added.)

⁸⁴ Ian Brownlie, *State Responsibility* (OUP 1983) 87.

adoption of the ASR in 2001. The ILC's work on State responsibility began as far back as 1956, but it did not start auspiciously. The ILC's first Special Rapporteur on State Responsibility, FV García Amador, had focused on the substantive rules of State responsibility for injuries to aliens and their property. The content of those rules, including rules surrounding expropriation and compensation, was highly controversial and sharp divisions between States stymied progress.⁸⁵ The ILC's work may have foundered at this point were it not for a significant reconceptualisation of State responsibility by the next Special Rapporteur, Roberto Ago. Ago, prior to becoming Special Rapporteur, had recommended that the ILC focus on 'the definition of the general rules governing the international responsibility of the state'.⁸⁶ Ago, then as Special Rapporteur, further elaborated the approach, which the ILC had accepted, in these terms:⁸⁷

The Commission agreed on the need to concentrate its study on the determination of the principles which govern the responsibility of States for internationally wrongful acts, maintaining a strict distinction between this task and the task of defining the rules that place obligations on States, the violation of which may generate responsibility. ... the essential fact [is] that it is one thing to define a rule and the content of the obligation it imposes, and another to determine whether that obligation has been violated and what should be the consequence of the violation. Only the second aspect of the matter comes within the sphere of responsibility proper ...

Put another way, Ago's key contribution was to articulate State responsibility as 'the framework within which the obligations of states operate' and 'not itself a set of rules telling

⁸⁵ Daniel Müller, 'The Work of García Amador on State Responsibility for Injury Caused to Aliens' in Crawford, Pellet and Olleson (n 2) 69.

⁸⁶ Roberto Ago, 'Report by Mr Roberto Ago, Chairman of the Sub-Committee on State Responsibility' (16 January 1963) UN Doc A/CN.4/152 in *Ybk ILC* (1963) II 227, 228.

⁸⁷ ILC, 'Report of the International Law Commission on the Work of its 22nd Session (4 May – 10 July 1970) UN Doc A/8010/Rev.1 in *Ybk ILC* (1970) II 271, 306.

states what to do'.⁸⁸ The latter would come to be known as primary rules, and the former as secondary rules. This conceptual approach was maintained by the next three Special Rapporteurs (Willem Riphagen, Gaetano Arangio-Ruiz and James Crawford) and it forms the foundational distinction of the final ASR.

Following that foundational distinction, the ASR put 'a harder edge' on States' rights and duties in three key steps. First, the ASR provide for the establishment of an 'internationally wrongful act', including the rules of attribution, breach and defences.⁸⁹ Second, the ASR provide for the legal consequences of an internationally wrongful act, including the obligations of cessation and reparation.⁹⁰ Third, the ASR provide for the implementation of the international responsibility of a State by way of the invocation of responsibility or the adoption of countermeasures.⁹¹

These secondary rules of State responsibility are general rules. They apply to all international obligations, whether they originate in treaty, custom, general principle or unilateral act.⁹² There are no comparable distinctions in the law of State responsibility to distinctions drawn in domestic law such as between contract, tort and criminal law. The law

⁸⁸ James Crawford, 'The International Court of Justice and the Law of State Responsibility' in Christian Tams and James Sloan (eds), *The Development of International Law by the International Court of Justice* (OUP 2013) 71, 75.

⁸⁹ 'Articles on Responsibility of States for Internationally Wrongful Acts' in 'Report of the International Law Commission on the Work of its 53rd Session' (23 April – 1 June and 2 July – 10 August 2001) UN Doc A/56/10, Part 1.

⁹⁰ Part 2.

⁹¹ Part 3. There is also a Part 4, which contains certain general provisions applicable to the ASR as a whole, including the *lex specialis* principle (Article 55).

⁹² ASR, Article 12: 'There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.' See also *Rainbow Warrior (New Zealand v France)* (1990) 82 ILR 500, [75].

of State responsibility, because it comprises general rules, is, however, subject to and may be displaced by special rules.⁹³

Defences in the Law of State Responsibility

If the key purpose of State responsibility is to put a harder edge on States' rights and duties, then the key purpose of defences to State responsibility is to soften that edge. Without defences to State responsibility, States could be more reluctant to enter international obligations in the first place and less reluctant to ignore their international obligations when difficulties arise.⁹⁴

Defences to State responsibility correspond most obviously to how defences operate in domestic systems of tort and criminal law, although the ILC has developed defences to State responsibility independently of domestic defences.⁹⁵ The ASR Commentaries trace the concept of defences to State responsibility back to the work of the Preparatory Committee of the 1930 Hague Conference for the Codification of International Law.⁹⁶ The Committee's Bases of Discussion included a category titled 'Circumstances in which a State is entitled to

⁹³ ASR, Article 55: 'These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.'

⁹⁴ See generally on the need for flexibility mechanisms in international law: Laurence Helfer, 'Flexibility in International Agreements' in Jeffrey Dunoff and Mark Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations* (CUP 2012) 175; Sotirios-Ioannis Lekkas and Antonios Tzanakopoulos, 'Pacta Sunt Servanda and Flexibility in the Suspension and Termination of Treaties' in Christian Tams, Antonios Tzanakopoulos and Andreas Zimmermann (eds), *Research Handbook on the Law of Treaties* (Elgar 2014) 312.

⁹⁵ ASR Commentaries (n 3) 162.

⁹⁶ *ibid* 161.

disclaim Responsibility’, although this category only included self-defence and reprisals.⁹⁷

García Amador, as the first Special Rapporteur on State responsibility, produced a draft article that included a category titled ‘Exoneration from Responsibility; Extenuating and Aggravating Circumstances.’⁹⁸ Within that category, García Amador included *force majeure*, state of necessity, and fault on the part of the alien. An act that was the consequence of *force majeure*, state of necessity, or fault on the part of the alien would, on the terms of García Amador’s draft article, ‘not be imputable to the State’.

It was Ago who introduced the category of ‘circumstances precluding wrongfulness’.⁹⁹ Ago set down six of these¹⁰⁰ (consent, legitimate countermeasures, *force majeure* and fortuitous event, distress, state of necessity and self-defence), which, with some modifications, would also be found in the final ASR. Ago explained that he preferred the concept of circumstances precluding the *wrongfulness* of the act rather than merely *responsibility* for the act because he considered unattractive the idea that an act could be ‘internationally wrongful without attaching to it disadvantageous consequences for its author.’¹⁰¹ He further explained that ‘Imposing an obligation while at the same time attaching

⁹⁷ See Bases of Discussion No 24 and No 25, in League of Nations, ‘Conference for the Codification of International Law, Bases of Discussion for the Conference drawn up by the Preparatory Committee, vol III (Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners)’ (1929) LN Doc C.75.M.69.1929.V, 125 – 130.

⁹⁸ Draft Article 13 in García Amador, ‘Third Report on State Responsibility’ (2 January 1958) UN Doc A/CN.4/111 in *Ybk ILC* (1958) II, 47, 50 and Draft Article 17 in García Amador, ‘Sixth Report on State Responsibility’ (26 January 1961) UN Doc A/CN.4/134 in *Ybk ILC* (1961) II, 1, 48.

⁹⁹ The inspiration for the language of ‘circumstances precluding wrongfulness’ may have been provided by his compatriot, Dionisio Anzilotti. García Amador, in this Third Report (ibid) 50, quoted (and translated) Anzilotti (*Corso di diritto internazionale* vol I (4th ed, Societa Poligrafica Editoriale 1955) 413) to the effect that ‘there are cases in which an act, wrongful in itself, does not produce the effects of a wrongful act, or completely loses its wrongful character.’

¹⁰⁰ See Draft Articles 29 – 34, discussed by Ago in his ‘Eighth Report on State Responsibility’ (24 January, 5 February and 15 June 1979) UN Doc A/CN.4/318 in *Ybk of the ILC* (1979) II, 3, 27 and Ago’s Addendum (n 55) 14).

¹⁰¹ ‘Eighth Report’, ibid 28.

no consequences to breaches of it would in fact amount to not imposing an obligation at all'¹⁰² and that this would undermine the effectiveness of international law.¹⁰³

The concept of defences to State responsibility, first touched on by García Amador and then formulated by Ago and in turn the ILC under the title of 'circumstances precluding wrongfulness', has thus been a consistent feature of the development of the law of State responsibility and their inclusion within the ASR was not questioned by States.¹⁰⁴ Yet their inclusion within the ASR has not been without academic criticism. There are two main criticisms. The first is that they fall conceptually outside the scope of the law of State responsibility as a body of secondary rules. Eric David has critiqued their place within the ASR on the basis that insofar as these rules:¹⁰⁵

aim at excluding the wrongfulness of conduct and not the responsibility of the State for that conduct, as explained by Ago, then these rules are more appropriately regarded as being situated 'upstream', that is, they should be seen as forming an element of the primary rule in question.

This critique is overstated. It makes less sense to view a defence such as necessity as an implicit element of every primary rule than as a secondary rule that applies generally to all primary rules. A distinction can still be drawn in most cases between the underlying substantive obligation, which is the primary rule, and the defence, which remains the

¹⁰² *ibid* 29.

¹⁰³ *ibid*.

¹⁰⁴ Crawford, *State Responsibility* (n 1) 280.

¹⁰⁵ Eric David, 'Primary and Secondary Rules', in Crawford, Pellet and Olleson (n 2) 27, 29.

secondary rule.¹⁰⁶ The distinction can be brought out in two ways. First, it is clear that a defence in most cases operates independently of the constituent elements of the underlying obligation.¹⁰⁷ Defences to State responsibility provide ‘a shield against an otherwise well-founded claim for the breach of an international obligation.’¹⁰⁸ In other words, one need not consider whether a defence to State responsibility applies unless the State has first breached the underlying international obligation in question.¹⁰⁹

Second, the distinction can be illustrated by focusing on the precise effect of a defence’s application. Article 27(a) of the ASR provides that ‘The invocation of a circumstance precluding wrongfulness ... is without prejudice to: (a) compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness does not exist.’ The underlying obligation – the primary rule – thus remains in force unless it is otherwise terminated and the State’s conduct therefore remains in breach of that underlying obligation, but the State, for so long as it establishes a circumstance precluding wrongfulness (that is, a defence), is not responsible for that breach. The point is illustrated by the ICJ’s approach in the *Gabčíkovo* case, where the Court was concerned with the potential

¹⁰⁶ Consent and self-defence, however, are problematic. Consent more naturally operates upstream at the level of the primary obligation given that the consent needs to be given in advance and so at the time of the act in question it is difficult to say there is any wrongfulness to be precluded or any breach for which there would need to be a defence (Crawford, *State Responsibility* (n 1) 288; David (ibid) 29 – 30). Self-defence may also be viewed as an exception that is part of the primary rule providing for the prohibition on the use of force (Crawford, *State Responsibility* (n 1) 289 – 290; David (ibid) 30 – 31) although as Federica Paddeu has observed, self-defence may have a second function as a circumstance precluding wrongfulness (or defence) with respect to breaches of obligations other than the prohibition on the use of force (‘Self-Defence as a Circumstance Precluding Wrongfulness: Understanding Article 21 of the Articles on State Responsibility’ (2015) BYIL (forthcoming)).

¹⁰⁷ ASR Commentaries (n 3) 162.

¹⁰⁸ *ibid* 160.

¹⁰⁹ Hugh Thirlway, ‘The Law and Procedure of the International Court of Justice 1960-1989: Part Seven’ (1995) 65 BYIL 1, 70 – 72; Lekkas and Tzanakopoulos (n 94) 327: ‘circumstances precluding wrongfulness are defences *par excellence*, that is, they apply only after all the constituent requirements of the obligation have been found to exist.’

application of necessity in a context where the underlying obligation was a treaty obligation:¹¹⁰

The state of necessity claimed by Hungary—supposing it to have been established—thus could not permit of the conclusion that ... it had acted in accordance with its obligations under the 1977 Treaty or that those obligations had ceased to be binding upon it. It would only permit the affirmation that, under the circumstances, Hungary would not incur international responsibility by acting as it did.

What this means is that defences to State responsibility ‘act less as a sword than as a shield: they cut down neither the obligation nor the primary rule underlying it; they merely defend against them.’¹¹¹ This is in contrast to certain treaty rules such fundamental change of circumstances,¹¹² which can cut down the underlying obligation.

The second criticism of the inclusion of defences to State responsibility concerns the way in which they have been included. This criticism challenges the coherence or otherwise of the six defences set down in Chapter V. Vaughan Lowe has critiqued the ILC’s approach to defences to State responsibility on the basis of their failure to allow for the possibility that different defences may work in different ways.¹¹³ Lowe draws what he considers a key distinction between *exculpation* and *excuse*, which corresponds broadly to the distinction

¹¹⁰ *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (Judgment) [1997] ICJ Rep 7, [48].

¹¹¹ Crawford, *State Responsibility* (n 1) 281.

¹¹² Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Article 62.

¹¹³ Vaughan Lowe, ‘Precluding Wrongfulness or Responsibility: A Plea for Excuses’ (1999) 10 EJIL 405. Note also the comments of the United Kingdom on this issue during the drafting of the ASR (ILC, ‘State Responsibility – Comments and Observations Received by Governments’ (25 March, 30 April, 4 May and 20 July 1998) UN Doc A/CN.4/488 in *Ybk ILC* (1998) II(1) 81, 130). See also the comments of Japan and France in ILC, ‘State Responsibility – Comments and Observations Received by Governments’ (10 February 1999) UN Doc A.CN.4/492 in *Ybk ILC* (1999) II(1) 101, 107 and 130.

between *justification* and *excuse* that is sometimes adopted by legal theorists with respect to domestic criminal and tort law.¹¹⁴ The distinction between exculpation and excuse is, for Lowe, the distinction between ‘behaviour that is right; and ... behaviour that, though wrong, is understandable and excusable’.¹¹⁵ He understands the defences to State responsibility as taking an exculpation approach because their effect is that, as circumstances that *preclude wrongfulness*, the conduct in question amounts to ‘behaviour that is right’.¹¹⁶ But Lowe observes that another approach would have been that ‘rather than releasing the state from the obligation, we might maintain the obligation in force but excuse the breach of it by the State in the various special circumstances’.¹¹⁷ Lowe considers that this shift in characterisation could carry important practical consequences. These potential consequences include that an act that is excused rather than exculpated may still attract a requirement to pay compensation to the State that suffered loss¹¹⁸ and that excusing an act may increase the normative pull of an obligation compared to exculpation, which could in practice encourage wider disregard of the obligation.¹¹⁹ Lowe concludes with a plea ‘to restore the flexibility of response to states, allowing them to decide on a case-by-case basis whether to follow the exculpation or excuse approach, rather than imposing one blanket solution.’¹²⁰

¹¹⁴ See, for example, Kent Greenawalt, ‘The Perplexing Borders of Justification and Excuse’ (1984) 84 Col LR 1897; George Fletcher, *Rethinking Criminal Law* (OUP 2000) 759 – 875.

¹¹⁵ Lowe (n 113) 406.

¹¹⁶ *ibid.*

¹¹⁷ *ibid.*

¹¹⁸ *ibid.* 410.

¹¹⁹ *ibid.* 409 – 410.

¹²⁰ *ibid.* 411.

This critique is understandable given the language of circumstances *precluding wrongfulness*. It may well have made more sense for the ILC to use the language of circumstances *precluding responsibility*, at least for some defences.¹²¹ Contrary to Ago's concerns that failing to attach consequences to an internationally wrongful act would undermine the effectiveness of international law,¹²² the very point is that for some defences, and necessity may be one of these, there could still be consequences such as an obligation to pay some form of compensation for damage caused. Yet notwithstanding the language of circumstances *precluding wrongfulness*, the ASR actually do provide more flexibility for variation in effect between different defences than Lowe's critique gives credit. It was already noted above how the underlying obligation is not cut down and remains in force. In addition to this, Article 27(b) of the ASR provides that 'The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to: ... (b) the question of compensation for any material loss caused by the act in question.' Despite the unfortunate use of the language of circumstances *precluding wrongfulness*, it is therefore not clear that the ASR do adopt the 'exculpation approach' as 'one blank solution'.¹²³ Some defences to State responsibility may still, in effect, *excuse* rather than *exculpate* or *justify*, or in reality preclude *responsibility* rather than *wrongfulness*. Each defence needs to be considered closely on its own terms.

¹²¹ Brigitte Stern, 'The Elements of an Internationally Wrongful Act' in Crawford, Pellet and Olleson (n 2) 193, 218. James Crawford at one stage proposed that 'there is a case for a more explicit distinction between justifications (such as self-defence) and excuses (such as necessity)' (in 'Revising the Draft Articles on State Responsibility' (1999) 10 EJIL 435, 444) but he soon thereafter recommended not drawing any 'categorical distinction' between justifications and excuses ('Second Report on State Responsibility' (19 July 1999) UN Doc A/CN.4/498 in *Ybk ILC* (1999) II(1) 3, 86). See also, accepting that there may nonetheless be such distinctions latent within the ASR: Crawford, *State Responsibility* (n 1) 278 – 280.

¹²² See above text to nn 101 – 103.

¹²³ Crawford, 'Revising the Draft Articles' (n 121) 443.

(ii) The Development of Necessity by the International Law Commission

García Amador, the ILC's first Special Rapporteur on State Responsibility, included 'state of necessity' under the category 'Exoneration from Responsibility; Extenuating and Aggravating Circumstances.' García Amador was sensitive to the controversy surrounding necessity, but he considered, based on a short review of the doctrine, that necessity did have a place in positive international law and therefore it needed to be defined 'to forestall as far as possible a recurrence of past controversies concerning the circumstances in which it is admissible as a defence.'¹²⁴ The result was Article 13(1) of the draft articles that García Amador produced in his Third Report:¹²⁵

Notwithstanding the provisions of the article last preceding, the State shall not be responsible for injuries caused to an alien if the measures taken are the consequence of *force majeure* or of a state of necessity due to a grave and imminent peril threatening some vital interest of the State, provided that the State did not provoke the peril and was unable to counteract it by other means.

This was the embryo of the defence that would be developed by the ILC over the next four decades.

But it was the work of the next Special Rapporteur, Roberto Ago, which contributed most significantly to necessity as it would be set down in the ASR. Necessity remained controversial when Ago turned to consider it. There remained, in particular, a significant split

¹²⁴ García Amador, 'Third Report' (n 98) 52 – 53.

¹²⁵ *ibid* 50. Draft Article 13 became Draft Article 17 in García Amador's Sixth Report (n 98) 48.

between those writers who did and did not recognise necessity's existence as a rule of international law.¹²⁶ It was in this context that Ago, in an Addendum to his Eighth Report, produced a lengthy and thoroughly researched discussion of necessity that would play a central role in the development – and acceptability to the international community – of necessity.¹²⁷

Ago's greatest concern was to purge any traces of necessity's relationship to the 'right of self-preservation'. Ago accepted that some natural lawyers, such as Grotius, Pufendorf and Vattel, had, even though they wrote from the perspective of self-preservation, developed a doctrine of necessity that operated within and was constrained by international law, much like he sought to do.¹²⁸ But what he was at pains to do by purging any traces of necessity's relationship to the right of self-preservation was to distinguish his approach to necessity not so much from those writers, whose restrictive approach to necessity he cites with approval,¹²⁹ but rather from the forcible interventions that had been carried out in necessity's name and under the guise of this right of self-preservation.¹³⁰

¹²⁶ To take just a few examples, see in favour: Schwarzenberger (n 70) 344; Bin Cheng *General Principles of Law as Applied by International Courts and Tribunals* (CUP 1994) 69 – 77. Compare in opposition: Eduardo Jiménez de Aréchaga, 'International Responsibility' in Max Sørensen (ed), *Manual of Public International Law* (Macmillan 1968) 531, 543. Brownlie was less clear. In his *Principles of Public International Law* (3rd ed, OUP 1979) 465, he stated that 'necessity as an omnibus category probably does not exist, and its availability as a defence depends on specialized rules.' For a comprehensive review of the doctrine, see Ago's Addendum (n 55) 47 – 50.

¹²⁷ Ago's Addendum (n 55).

¹²⁸ *ibid* 46.

¹²⁹ *ibid*.

¹³⁰ *ibid* 16: '...we must first clear away any vestiges of the natural law concepts that predominated longer in this area than in others and have distorted the outline of the question with which we are concerned. In particular, we must eliminate the idea, still unconsciously present in some learned circles, that the problem inherent in state of necessity is that of an opposition, a conflict between two "subjective rights".'

Ago was not the first to criticise the concept of a *right* of self-preservation. Lassa Oppenheim had clarified in the first edition of his treatise that when the State violates the territory of another State, it is the first (violating) State that has breached an international obligation.¹³¹ Thus, as Oppenheim continued, ‘Self-preservation is consequently an excuse, because violations of other States are in certain exceptional circumstances not prohibited when they are committed for the purpose and in the interest of self-preservation’.¹³² Ago himself explained that States could not be invoking a right of necessity because, ‘When someone invokes as an excuse a situation of “necessity”, what he is trying to do is to justify his attitude in denying a legitimate legal claim by another and not in putting forward some claim of his own against another.’¹³³ In short, when a State invokes necessity, it is invoking a defence rather than exercising a right.

Nor, Ago observed, and this time moving beyond Oppenheim, were States in reality invoking a right of *self-preservation*. Ago explained that when States invoked necessity they were doing so to protect an ‘essential interest’ of the State.¹³⁴ Robert Sloane has contended that this shift from focusing on the preservation of the existence of the State to focusing on an essential interest of a State is a significant conceptual shift.¹³⁵ But it is not. The reality is that States’ invocations of ‘self-preservation’ should not be taken too literally. Ellery Stowell

¹³¹ Oppenheim (n 8) 177 – 178.

¹³² *ibid.*

¹³³ Ago’s Addendum (n 55) 18.

¹³⁴ *ibid* 17.

¹³⁵ See n 2, 454. Sloane draws a sharp distinction between what he calls the ‘classical’ or ‘existential’ conception of necessity, which was based on self-preservation, and the conception of necessity relied on by Ago and the ILC, which is based on a State’s ‘essential interest’ and has been used to plead what Sloane calls ‘economic necessity’ and ‘ecological necessity’. He draws this distinction as the platform for contending that it is doubtful whether Ago and the ILC’s conception of necessity, as opposed to the ‘classical’ or ‘existential’ conception of necessity, exists as a rule of customary international law (at 455 – 471).

made the realistic observation in 1921 that, ‘When we speak of the existence of the state, we are always making a mere supposition, for no one really knows what will endanger the existence of the state. We should always read “interests of prime importance” when the preservation of the state is discussed.’¹³⁶ Thus it could not, without a significant degree of ‘supposition’, be contended that when the British seized the *Neptune*’s cargo in 1797 or when the Portuguese appropriated British property in Portugal in 1832 that the British or the Portuguese were doing so to protect the State’s very existence. The loose language of self-preservation is probably the result of the way in which Grotius and his successors founded a State’s right of self-preservation on the basis of the imperfect analogy of an individual’s right of self-preservation. States simply do not die quite as easily as individuals do. Ago was therefore not seeking to make any major change in the law when he insisted that necessity was invoked to protect an ‘essential interest’ of the State. He was simply reflecting reality and dispensing with a term used more with supposition (and exaggeration) than accuracy.

Ago sought not only to clarify how necessity worked in a narrow sense, but he also sought to explain the broader role necessity performed in international law. It was in connection with this broader issue that necessity was, and still is, most controversial among international lawyers. Ago summarised that there were two broad schools of thought when it came to what role necessity could play in international law. There were those who opposed a role for necessity and, as Ago put it, ‘the main reason for their opposition is still the old fear of abuses’.¹³⁷ There were, on the other hand, those writers who supported a role for necessity given ‘the function which this concept performs in legal relations between States, as in all

¹³⁶ Ellery Stowell, *Intervention in International Law* (John Byrne 1921) 392 n 2.

¹³⁷ Ago’s Addendum (n 55) 50.

other legal systems'.¹³⁸ But Ago was right to point out that the gap between these two schools of thought was actually a narrow one. The fears of abuse were based on the invocation of necessity in the context of the kind of forcible interventions that were once unregulated by international law but are now regulated by the UN Charter, while even those who supported necessity were at pains to emphasise that it must be subjected to strict conditions in order to prevent abuse.¹³⁹ Ago accordingly reconciled the different views of necessity by proffering the following role for necessity, which has been set out in the introduction to this thesis, but is worth setting out again:¹⁴⁰

The application of the concept must, of course, be ruled out wherever it is actually dangerous, but not where it has been and continues to be useful as a "safety-valve", to relieve the inevitably untoward consequences of a concern for adhering at all costs to the letter of the law. We must ensure that the fundamental requirement of respect for the law does not ultimately lead to the kind of situation that is perfectly described by the adage *summum jus, summa injuria*.^[141] Moreover, the concept of "state of necessity" is far too deeply rooted in the consciousness of the members of the international community and of individuals within States. If driven out of the door it would return through the window, if need be in other forms; in that case, the only result would be the unhappy one of distorting and obscuring other concepts, the precise delimitation of which is no less essential.

What emerges clearly from this passage is that necessity is not about permitting a State to act beyond international law, but it is rather about promoting the reasonable application of international law. Yet it is also about more than that. Necessity has a systemic role too. Necessity recognises that the law must sometimes bend so that it does not break. Necessity

¹³⁸ *ibid.*

¹³⁹ *ibid.*

¹⁴⁰ *ibid.* 51.

¹⁴¹ This translates literally as 'supreme justice, supreme injustice', or less literally as 'the greatest right is the greatest injury' (Aaron Fellmeth and Maurice Horwitz, *Guide to Latin in International Law* (OUP 2009) 273).

accepts the political realities of international life, but it brings those realities within the constraints of international law rather than leaving them to destabilise international law from without. This motivation for recognising necessity turns on their head the arguments of those who would reject necessity based on fears of its abuse. Rather than refusing to recognise necessity because that could pave the way for abuse, this view, which has been called the ‘domestication of necessity’,¹⁴² holds that it is precisely because necessity has sometimes been used less rigorously (and extra-legally) in the past that it should be clearly brought within and constrained by international law.

It followed for Ago that necessity should be recognised in the ASR, but within strictly defined conditions. These strictly defined conditions Ago derived in part from the views of writers but more substantially from an extensive survey of State practice and, in particular, the decisions of international tribunals.¹⁴³ The product of Ago’s extensive work would be Draft Article 33, which was adopted on first reading by the ILC in 1980:¹⁴⁴

Article 33 State of necessity

1. A State of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that State not in conformity with an international obligation of the State unless:
 - (a) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and
 - (b) the act did not seriously impair an essential interest of the State towards which the obligation existed.
2. In any case, a state of necessity may not be invoked by a State as a ground for precluding wrongfulness:

¹⁴² Heathcote, ‘Necessity’ (n 2) 494.

¹⁴³ Ago’s addendum (n 55) 21 – 37.

¹⁴⁴ ILC, ‘Report of the International Law Commission on the Work of its 32nd Session’ (5 May – 25 July 1980) UN Doc A/35/10, in *Ybk ILC* (1980) II(2) 34.

- (a) if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law; or
- (b) if the international obligation with which the act of the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation; or
- (c) if the State in question has contributed to the occurrence of the state of necessity.

James Crawford was the next and final Special Rapporteur to consider necessity as the ILC began its second reading of the ASR and, with a couple of exceptions, Crawford sought to maintain continuity with Ago's work on necessity. Crawford noted that there were still doubts among writers, tribunals and within the ILC about the existence and desirability of necessity, but he also observed that a consensus within the ILC had developed that necessity should be included within the ASR provided it was subjected to strict constraints.¹⁴⁵ The ILC's final word on necessity is Article 25 of the ASR:¹⁴⁶

Article 25 Necessity

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
 - (a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
 - (b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
 - (a) The international obligation in question excludes the possibility of invoking necessity; or

¹⁴⁵ ILC, 'Summary Record of the 2592nd Meeting' (23 June 1999) UN Doc A/CN.4/SR.2592, in *Ybk ILC* (1999) I 176, 180.

¹⁴⁶ See n 89.

(b) The State has contributed to the situation of necessity.

Article 25 includes several changes from Draft Article 33. The prohibition on invoking necessity where the State has breached a peremptory norm of international law, and which was provided for in Draft Article 33(2)(a), still exists, but it has been placed in a separate article (Article 26) that applies to defences to State responsibility generally. Draft Article 33(2)(b), which had prohibited the invocation of necessity where a treaty obligation excluded necessity's application, was amended to extend this condition beyond treaty obligations to international obligations generally (Article 25(2)(a)). But the most notable changes made during Crawford's term as Special Rapporteur relate to the nature of the interests that, at least in his (and the ILC's) view, necessity balances. Two changes are relevant here. First, whereas Article 33(1)(a) referred to 'an essential interest of the State', Article 25(1)(a) refers simply to 'an essential interest'. The ASR Commentaries explain that Article 25(1)(a) 'extends to particular interests of the State and its people, as well as of the international community as a whole'.¹⁴⁷ Second, whereas Article 33(1)(b) provided that necessity was not available unless 'the act did not seriously impair an essential interest of the State towards which the obligation existed', Article 25(1)(b) provides that necessity is only available if the act 'Does not seriously impair an essential interest of the State or States towards which the obligation exists, *or of the international community as a whole*' (emphasis added). This change ensured that Article 25(1)(b) took into account the nature of *erga omnes* obligations, which, in the

¹⁴⁷ ASR Commentaries (n 3) 183.

words of the ICJ in the *Barcelona Traction* case¹⁴⁸ and now in the words of Article 25(1)(b) as well, are obligations owed by a State to the ‘international community as a whole’.¹⁴⁹

(iii) Necessity Distinguished

This chapter now finally distinguishes necessity from the other defences to State responsibility with a view to clarifying the distinct function that necessity performs today.

The ASR Commentaries distinguish necessity in these terms:¹⁵⁰

The plea of necessity is exceptional in a number of respects. Unlike consent (art. 20), self-defence (art. 21) or countermeasures (art. 22), it is not dependent on the prior conduct of the injured State. Unlike *force majeure* (art. 23), it does not involve conduct which is involuntary or coerced. Unlike distress (art. 24), necessity consists not in danger to the lives of individuals in the charge of a State official but in a grave danger either to the essential interests of the State or of the international community as a whole.

This following discussion fleshes out these distinctions.

¹⁴⁸ *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Second Phase) [1970] ICJ Rep 3, [33].

¹⁴⁹ Crawford, ‘Second Report on State Responsibility’ (n 121) 32.

¹⁵⁰ See n 3, 178.

Necessity and Consent, Countermeasures and Self-Defence

The distinction between necessity on the one hand, and consent, self-defence and countermeasures on the other hand, is relatively easy to draw. Consent, self-defence and countermeasures are all ‘dependent on the prior conduct of the injured State’.¹⁵¹ With respect to consent, necessity is usually invoked precisely because the consent of the injured State has been withheld. With respect to self-defence and countermeasures, they are dependent on the prior *wrongful* conduct of the State against which they are being invoked.¹⁵² By contrast, necessity can be invoked against a State that has not engaged in any wrongful conduct and, in that sense, is innocent.

Necessity and Force Majeure

Necessity is similar to, but is distinguishable from, *force majeure*. *Force majeure* is widely recognised as existing as a defence to State responsibility under customary international law.¹⁵³ Its codification in Article 23 of the ASR has been less controversial than the

¹⁵¹ *ibid.*

¹⁵² At least typically. Self-defence may not be dependent on the prior wrongful conduct of the State against which it is invoked if it could be invoked in response to an armed attack by a non-State actor, although that question goes far beyond the scope of this thesis.

¹⁵³ *Rainbow Warrior* (n 92) [76] – [77]; *LAFICO v Burundi* [1991] 96 ILR 279, 318; Federica Paddeu, ‘The Genealogy of *Force Majeure* in International Law’ (2012) 82 BYIL 381, 480-493; Simon Hentrei and Ximena Soley, ‘Force Majeure’ in *MPEPIL* (OUP online) [3].

codification of necessity in Article 25.¹⁵⁴ Article 23 provides for *force majeure* in the following terms:

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to *force majeure*, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.
2. Paragraph 1 does not apply if:
 - (a) the situation of force majeure is due, either alone or in combination with other factors, to the conduct of the State invoking it; or
 - (b) the State has assumed the risk of that situation occurring.

Both necessity and *force majeure* are concerned with ‘cases where, at least in some sense, a state is compelled to commit an act that does not conform to an international obligation’ (as is distress).¹⁵⁵ But there is a key conceptual distinction between *force majeure* and necessity, which lies in the element of voluntariness.

Thomas Hobbes captured the key distinction between *force majeure* and necessity when he explained that with respect to situations of necessity, ‘There is nothing there involuntary, but the hardness of the choice.’¹⁵⁶ The State’s choice to comply or not with international law may be a hard one, but, unlike with *force majeure*, there is still a choice.

Ago drew this distinction more recently when he explained that the conduct of a State in the

¹⁵⁴ Thus in both the *Rainbow Warrior* ((n 92) [77], [78]) and *LAFICO* ((ibid) 318, 319) cases the tribunals cited then Draft Article 31 (*force majeure*) with no adverse comment but cited Draft Article 33 (necessity) with reservations.

¹⁵⁵ Crawford, *State Responsibility* (n 1) 295.

¹⁵⁶ Thomas Hobbes, *Elements of Law* (first published 1650, CUP 1928) 48. Hobbes said this with respect to the example of a person throwing goods off a ship in order to save life.

case of *force majeure* involved an ‘absolutely *involuntary* action’ (emphasis original).¹⁵⁷ In the case of necessity, on the other hand, Ago emphasised that ‘the "voluntary" nature of the action or omission and the "intentional" aspect of the failure to conform with the international obligation are not only undeniable, but also a logical and inherent part of the excuse given.’¹⁵⁸ Federica Paddeu brings this distinction out clearly through the use of the following illustration:¹⁵⁹

For instance, a tsunami could damage a nuclear plant, rendering it impossible for the state to comply with an international obligation to, say, provide energy to a neighbouring state. Failure to comply with its obligation, given the requisite circumstances, would be justified or excused by *force majeure*. The same tsunami may, for example, damage cultivated land, creating a food emergency for the population of the state. In this situation, the state, its population at risk of famine, would fail to perform international obligations for the delivery of crops grown in a different area of the state, rather choosing to use those crops to feed its own population. In this second example, given the requisite circumstances, failure to comply with the obligation to deliver the crops would be justified or excused by the defence of state of necessity.

Thus it was not impossible for the State to perform its obligation to deliver the crops to another State because those crops still exist (unlike the nuclear plant), but the State chooses not to perform that obligation in order to prioritise an essential interest over its international obligation.

At the expense of sacrificing some of the sharpness of the distinction between *force majeure* and necessity, it should be acknowledged that *force majeure* is not always viewed so strictly. Article 23 of the ASR requires that the performance of the obligation must be

¹⁵⁷ Ago’s Addendum (n 55) 14.

¹⁵⁸ *ibid.*

¹⁵⁹ Paddeu, ‘Genealogy’ (n 153) 463.

‘*materially impossible*’ (emphasis added), which suggests that the impossibility may not have to be absolute.¹⁶⁰ Crawford, for one, distinguishes material and absolute impossibility on the basis that the former is less stringent than the latter.¹⁶¹ But either way it is clear that the threshold for *force majeure* is a high one and difficulty of performance will not suffice.¹⁶²

Necessity and Distress

Necessity is most similar to, but is still distinguishable from, distress. Distress is widely recognised as a defence under customary international law,¹⁶³ and its codification in Article 24 of the ASR has, like the codification of *force majeure*, been less controversial than the codification of necessity in Article 25.¹⁶⁴ Article 24 provides for distress in the following terms:

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author’s life or the lives of other persons entrusted to the author’s care.

2. Paragraph 1 does not apply if:

¹⁶⁰ Although compare the *Rainbow Warrior* tribunal, which appeared to consider that material and absolute impossibility meant the same thing when it stated that ‘the test of [*force majeure*’s] applicability is of material and absolute impossibility’ ((n 92) [77]).

¹⁶¹ *State Responsibility* (n 1) 299. In *Aucoven v Venezuela*, the tribunal rejected a test of ‘absolute impossibility’ and instead moderated it by asking whether the *force majeure* event prevented a State that exercised ‘reasonable judgment’ from acting ((Award), ICSID Case No ARB/00/5, 23 September 2003 [120] – [124]).

¹⁶² *Rainbow Warrior* (n 92) [77]; *Sempra v Argentina* (Award) ICSID Case No ARB/02/16, 28 September 2007, [246]; *Enron v Argentina* (Award) ICSID Case no ARB/01/3, 22 May 2007, [217].

¹⁶³ *Rainbow Warrior* (n 92) [78]; Sandra Szurek, ‘Distress’ in Crawford, Pellet and Olleson (n 2) 480; Elena Fasoli, ‘Distress’, in *MPEPIL* (OUP online) [18].

¹⁶⁴ Thus the *Rainbow Warrior* tribunal cited then Draft Article 32 (distress) without adverse comment but cited Draft Article 33 (necessity) with reservations ((n 92) [78]).

- (a) the situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it; or
- (b) the act in question is likely to create a comparable or greater peril.

Distress is conceptually distinct from *force majeure* and is more closely related to necessity because the act in question is clearly a voluntary act.¹⁶⁵ Thus if an aircraft is blown off course by severe weather into a State's airspace, then that is *force majeure* because it was impossible for the pilot to avoid flying into the other State's airspace and there is no voluntariness. By contrast, if the pilot decides to direct the aircraft into another State's airspace in order to avoid severe weather, then that may be distress because it was not impossible for the pilot to avoid flying into the other State's airspace, but the pilot chose to do so in order to save lives.

The key difference between distress and necessity is that in the case of distress the element of choice is constrained within a narrower field of application than necessity. Rather than a choice between complying with an international obligation and protecting an 'essential interest' of the State, the actor in question is choosing between complying with an international obligation and 'saving the author's life or the lives of other persons entrusted to the author's care'.¹⁶⁶

¹⁶⁵ Crawford, *State Responsibility* (n 1) 301; Szurek (n 163) 482, 483.

¹⁶⁶ The *Rainbow Warrior* tribunal spoke in terms of 'medical or other considerations of an elementary nature' ((n 92) [79]), but this lower threshold 'extending to less than life-threatening situations' has been criticised as introducing a blurred boundary to distress and one that is not needed given that necessity covers emergencies more generally (Crawford, *State Responsibility* (n 1) 303).

Conclusion

This chapter has contended that necessity has a stronger pedigree than is commonly appreciated. To that end this chapter has examined the origins of necessity and charted its development from the right of necessity that was derived from the right of self-preservation through to the defence to State responsibility that has been enshrined in Article 25 of the ASR.

This chapter first identified the origins of necessity in the writings of Grotius, who derived a specific ‘right of necessity’ from the broader right of self-preservation and yet emphasised that this was a right that operated within and was constrained by international law. This legal doctrine of necessity was then developed by subsequent writers and it also directly influenced State practice and the decisions of international tribunals. This chapter then distinguished that carefully constrained legal doctrine of necessity from the vague and unreviewable assertions of necessity that some States also derived from the right of self-preservation and that they made in an attempt to confer political legitimacy upon their forcible interventions in other States. These assertions of necessity did give rise to abuse, but they had nothing to do with international law, became widely discredited and were in any event superseded by the development of international law and in particular the development of the prohibition on the use of force.

This chapter then examined how the ILC built on and developed the legal doctrine of necessity during its work on the law of State responsibility. The ILC developed necessity as a defence to State responsibility rather than as a right deriving from the right of self-preservation. Yet the ILC built on Grotius’ emphasis that necessity operated within and was constrained by international law and it expressly distinguished its approach to necessity from the vague and unreviewable assertions of necessity that some States had formerly made in an

attempt to confer political legitimacy upon their forcible interventions in other States. The ILC accordingly developed necessity as a safety valve within the law of State responsibility that could mediate between the binding quality of international obligations and the harsh consequences that may follow from requiring compliance with those obligations at all costs.

2. NECESSITY AND CUSTOMARY INTERNATIONAL LAW

Introduction

That necessity is a rule of customary international law is a proposition that has often been assumed rather than proven.¹ This is problematic from the perspective of the sources of international law because the ASR are not themselves a source of law, and although the ICJ,² the International Tribunal for the Law of the Sea (ITLOS)³ and a number of arbitral tribunals⁴ have all accepted that Article 25 of the ASR (or its draft predecessor, Article 33) authoritatively recognises necessity's existence as a matter of customary international law, none of those tribunals adequately explained necessity's basis in State practice. The

¹ See, for example, Antonio Cassese, *International Law* (2nd ed, OUP 2008) 255; Andrea Bjorklund, 'Emergency Exceptions' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *Oxford Handbook of International Investment Law* (OUP 2008) 459, 474; Maria Agius, 'The Invocation of Necessity in International Law' (2009) 56 *Netherlands Intl L Rev* 95, 99; Tarcisio Gazzini, Wouter Werner and Ige Dekker, 'Necessity Across International Law: An Introduction' (2010) 41 *Netherlands Ybk Intl L* 3, 4; Attila Tanzi, 'State of Necessity', in *MPEPIL* (OUP online) [20] – [21].

² *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (Judgment) [1997] ICJ Rep 7, [51]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, [140].

³ *MV Saiga (No 2) (St Vincent and the Grenadines v Guinea)* (Merits) Judgment of 1 July 1999, [133] – [134].

⁴ *CMS v Argentina* (Award) ICSID Case No ARB/01/08, 12 May 2005, [315]; *CMS v Argentina* (Decision on Annulment) ICSID Case No ARB/01/08, 25 September 2007, [130] *LG & E v Argentina* (Decision on Liability) ICSID Case No ARB/02/1, 3 October 2006, [245]; *Enron v Argentina* (Award) ICSID Case No ARB/01/3, 22 May 2007, [303]; *Enron v Argentina* (Decision on Annulment) ICSID Case No ARB/01/3, 30 July 2010, [405]; *Sempra v Argentina* (Award) ICSID Case No ARB/02/16, 28 September 2007, [375]; *Sempra v Argentina* (Decision on Annulment) ICSID Case No ARB/02/16, 29 June 2010, [197]; *BG v Argentina* (Final Award) UNCITRAL Case, 24 December 2007, [407] – [412] (though reserving its position as to whether necessity could apply in the context of investor-State arbitration); *Continental Casualty v Argentina* (Award) ICSID Case No ARB/03/9, 5 September 2008, [165]; *National Grid v Argentina* (Award) UNCITRAL Case, 3 November 2008, [255]; *Funnekotter v Zimbabwe* (Award) ICSID Case No ARB/05/06, 22 April 2009, [105]; *Suez v Argentina* (Decision on Liability) ICSID Case no ARB/03/17, 30 July 2010, [249]; *Total v Argentina* (Decision on Liability) ICSID Case No ARB/04/1, 21 December 2010, [220]; *Impregilo v Argentina* (Award) ICSID Case no ARB/07/17, 21 June 2011, [344]; *El Paso v Argentina* (Award) ICSID Case No ARB/03/15, 31 October 2011, [552] – [553]; *Von Pezold v Zimbabwe* (Award) ICSID Case No ARB/10/15, 28 July 2015, [624].

‘institutional circularity’ that has taken place between the ICJ and the ILC has in particular produced concerns.⁵ In the *Gabčíkovo* case, the ICJ cited no State practice to support its single-sentence conclusion that necessity is a rule of customary international law and it went on to rely on Draft Article 33 of the ASR alone as an authoritative statement of customary international law.⁶ The ICJ’s acceptance of necessity’s customary status in turn played a significant role in shoring up support among ILC members for the inclusion of necessity in the final ASR.⁷ Then, following the adoption of the ASR, the ICJ again accepted the customary status of necessity in its *Wall* opinion, citing in support only Article 25 of the ASR and its previous decision in the *Gabčíkovo* case.⁸ This ‘institutional circularity’, and the repeated failure of tribunals to adequately explain necessity’s basis in State practice, has caused several of the writers who have considered necessity most closely either to doubt⁹ or reject¹⁰ that necessity is a rule of customary international law.

This chapter responds to those writers, fills the gap left by the ICJ and other tribunals, and contends that necessity is solidly grounded in customary international law. This chapter first outlines the proper place of the ASR generally within the sources of law, which is as a

⁵ Robert Sloane, ‘On the Use and Abuse of Necessity in the Law of State Responsibility’ (2012) 106 AJIL 447, 453. See also Daniel Bodansky and John Crook, ‘Symposium: The ILC’s State Responsibility Articles: Introduction and Overview’ (2002) 96 AJIL 773, 788, describing Article 25 of the ASR as having ‘a bootstrapping quality, helping to shape the law to match the draft’.

⁶ See n 2, [51].

⁷ See Crawford at the 2592nd meeting of the ILC (‘Summary Record of the 2592nd Meeting’, 180): ‘Article 33 had survived the debate materially unscathed, no doubt because the ICJ had approved it almost word for word in its judgment in the *Gabčíkovo-Nagymaros Project* case’.

⁸ See n 2, [140].

⁹ Diane Desierto, *Necessity and National Emergency Clauses: Sovereignty in Modern Treaty Interpretation* (Martinus Nijhoff 2012) 111 – 114.

¹⁰ Sarah Heathcote, ‘State of Necessity in International Law’ (PhD Thesis, University of Geneva 2005) and ‘Necessity’ in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) 492, 493 – 494; Sloane (n 5) 451 – 469.

subsidiary means for the determination of rules of customary international law, albeit a very persuasive subsidiary means. This chapter then turns to consider more specifically the status of necessity within customary international law. To that end, this chapter sets out the framework for identifying a rule of customary international law, evaluates the relevant evidence against that framework and concludes that necessity is solidly grounded in customary international law.¹¹ The summary approach that many tribunals have taken when recognising necessity's customary status may be wanting from a law-making perspective, but the shared conclusion they all reached as to necessity's customary status is nonetheless correct. This is not to say that the content of each element of Article 25 of the ASR is cut and dried as a matter of customary international law. They are not. But that is not the focus of this chapter. This chapter, which is concerned with the *existence* of necessity under customary international law, simply lays the platform for the remaining three chapters of this thesis, which are concerned with the *contours* of necessity under customary international law.

The Articles on State Responsibility and Customary International Law

The deference with which international tribunals have approached the ILC's work on necessity has borne out the concerns that David Caron expressed in a prescient 2002 article.¹²

¹¹ Some writers have suggested that necessity may also be a general principle of law, though often without setting out any, let alone sufficient, evidence for that proposition. (See, for example, Julio Barboza, 'Necessity (Revisited) in International Law' in Jerzy Makarczyk (ed), *Essays in International Law in Honour of Judge Manfred Lachs* (Martinus Nijhoff 1984) 27. Bin Cheng, in his study of general principles, relied on decisions of international tribunals as evidence for the existence of a general principle of necessity under the rubric of self-preservation (*General Principles of Law as Applied by International Courts and Tribunals* (CUP 1994) 69 – 77), although looking simply to international tribunals is itself an indirect means of establishing whether a general principle exists). In view of this chapter's conclusion that necessity is solidly grounded in customary international law, there is no need to go down this path of considering whether it is also a general principle of law.

¹² David Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship Between Authority and Form' (2002) 96 AJIL 857.

In that article, Caron identified what he called the ‘paradox between authority and form’, by which he meant the paradox that the ASR may have more authority in their current treaty-like form than they would if they were submitted to a treaty-making conference. There is a ‘seductive clarity’¹³ to the spare, treaty-like articles that an esteemed international body has produced over an extended period of time. This, Caron argued, could mean that tribunals find that accepting those articles at face value is preferable to a time-consuming and difficult examination of the complexities and divisions in practice, or absence of practice, that may in truth underlie particular articles. In this connection it must be recalled that the ILC’s own mandate is a dual one of both codifying and progressively developing the law, two tasks which, while distinct in theory, are difficult to separate in practice.¹⁴ Caron contended that the ASR may be especially seductive for *arbitral* tribunals.¹⁵ He based this contention on a previous study he had undertaken of the Iran-US Claims Tribunal and how it had approached certain draft articles regarding attribution.¹⁶ In that study, Caron had concluded that the dynamics of arbitral decision-making, where the panel involved party-appointed arbitrators, were such that the arbitrators tended to defer to ‘neutral’ external sources, such as the ASR.¹⁷

¹³ To use the phrase of Daniel Bodansky and John Crook when introducing Caron’s article: ‘Symposium: The ILC’s State Responsibility Articles: Introduction and Overview’ (2002) 96 AJIL 773, 775.

¹⁴ For the ILC’s dual mandate, see Statute of the International Law Commission, UNGA Res 174(II) (21 November 1947) UN Doc A/RES/174(II), Article 15. See generally Arthur Watts, ‘Codification and Progressive Development of International Law’, in *MPEPIL* (OUP online).

¹⁵ See n 12, 867 – 868.

¹⁶ David Caron, ‘The Basis of Responsibility: Attribution and Other Trans-substantive Rules’ in Richard Lillich, Daniel Magraw and David Bederman (eds), *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (Transnational 1998) 109.

¹⁷ *ibid* 181 – 182: ‘In a situation where the chairs of Chambers in the Tribunal often found themselves criticized, particularly by the Iranian arbitrators, for acting without regard for the law, it is understandable that such arbitrators would choose carefully when to develop the law progressively, *i.e.*, be innovative and meet the challenge presented. Rather, one finds awards seeking to rest the legitimacy of the decision on the authority of the views of institutions other than the Tribunal. Thus it should not be surprising that, far from criticizing the Draft Articles of the Commission, the Tribunal cited and accepted those articles as authoritative.’

Caron's article has anticipated precisely what has happened in the context of the Argentine crisis cases where almost all of the arbitral tribunals have deferred to the ASR's recognition of necessity as conclusive evidence of its customary status,¹⁸ although it may be added that the ICJ and ITLOS have not shown any less deference when accepting necessity's customary status.¹⁹ Stefan Talmon, in a recent article criticising the ICJ's methodology (or lack thereof) for identifying rules of customary international law, described that 'Reference to the International Law Commission ... is a favourite shortcut in establishing rules of customary international law', and he gave the ICJ's approach to necessity as the foremost example of that.²⁰

That deference may be problematic from a law-making perspective because the ASR are not themselves a source of international law. Article 38(1) of the Statute of the ICJ sets out the widely accepted list of the sources of international law:²¹

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- (b) international custom, as evidence of a general practice accepted as law;
- (c) the general principles of law recognized by civilized nations;
- (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

¹⁸ See above n 4.

¹⁹ See above nn 2 – 3.

²⁰ Stefan Talmon, 'Determining Customary International Law: The ICJ's Methodology Between Induction, Deduction and Assertion' (2015) 26 EJIL 417, 437.

²¹ Although Article 38(1) technically only applies to the ICJ, it is often accepted as a starting point for examining the sources of international law more generally (James Crawford, *Brownlie's Principles of Public International Law* (8th ed, OUP 2012) 22).

The ASR are, at least formally, among ‘the teachings of the most highly qualified publicists of the various nations’.²² ILC members are only eligible to be ILC members if, in the words of the ILC Statute, they are ‘persons of recognized competence in international law’,²³ and they exercise their role as ILC members in their individual capacity and not as representatives of States.²⁴ Characterised in that way, the ASR are, in the words of Article 38(1)(d) of the ICJ Statute, a ‘subsidiary means for the determination of rules of law’, and not a source of law themselves. It would be unrealistic to say that the ASR simply possess the same (limited) place within the sources of law as academic writings. The ILC developed the ASR over a substantial period of time and with the benefit of States’ comments and further input by States via the Sixth Committee of the General Assembly.²⁵ The result is that the ASR have the potential to be a very persuasive ‘subsidiary means for the determination of rules of law’. But that is a question of degree. However the ASR are viewed, the degree of persuasiveness that the ASR carry derives not from what they say but from the basis on which they say it. The ASR remain a ‘storehouse from which the rules of [custom] can be extracted’,²⁶ which means that what matters is the light the ILC sheds on the sources of international law, in this case customary international law.

²² Caron, ‘The Paradoxical Relationship Between Authority and Form’ (n 12) 867. The same must apply by extension to the ASR Commentaries. For a discussion regarding the interpretation of the ASR and the Commentaries, see Giorgio Gaja, ‘Interpreting Articles Adopted by the International Law Commission’ (2015) BYIL (forthcoming).

²³ Statute of the ILC (n 14) Article 2(1).

²⁴ Watts (n 14) [12].

²⁵ On the direct relevance of the positions taken by States within the Sixth Committee to customary international law, see below text to nn 30, 122 – 126.

²⁶ Shabtai Rosenne, *Law and Practice of the International Court, 1920-2005* vol III (Brill 2006) 1551.

Necessity as a Rule of Customary International Law

This section sets out the basic framework for identifying a rule of customary international law and then applies that framework to the relevant evidence in order to demonstrate that necessity is solidly grounded in customary international law.

(i) The framework for identifying a rule of customary international law

Article 38(1)(b) of the ICJ Statute refers to ‘international custom, as evidence of a general practice accepted as law’. That sub-paragraph is not as clear as it might be. It is the ‘general practice accepted as law’ that evidences ‘international custom’, and not the other way around as a literal reading of the paragraph would have it. But the two basic elements that emerge from Article 38(1)(b) are tolerably clear. ‘It is axiomatic’, as the ICJ has confirmed, ‘that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States.’²⁷

State practice can be found in a number of places. These places include the physical acts of States, diplomatic correspondence, press releases, the opinions of government legal advisers, executive decisions and practices, and decisions of national courts.²⁸ Two further sources of State practice that are particularly important to the following discussion must also

²⁷ *Continental Shelf (Libya v Malta)* (Judgment) [1985] ICJ Rep 13, [27]. See also *Jurisdictional Immunities (Germany v Italy)* (Judgment) [2012] ICJ Rep 99, [55]. Michael Wood, as ILC Special Rapporteur on the Identification of Customary Law (‘Second Report on Identification of Customary International Law’ (22 May 2014) UN Doc A/CN.4/672, [23]) described that ‘the two-element approach is indeed generally adopted in the practice of States and the decisions of international courts and tribunals, including the International Court of Justice. It is widely endorsed in the literature.’

²⁸ Wood, *ibid* [39] – [41].

be emphasised here. The comments of governments on the ILC's work, including within the General Assembly's Sixth Committee, where, unlike within the ILC itself, the members are the representatives of governments,²⁹ can provide a valuable source of State practice.³⁰ So too can the pleadings of States before international tribunals. The ICJ has recognised that the pleadings of States before *national* courts can amount to State practice,³¹ and there is no obvious reason why the same cannot apply to the pleadings of States before *international* tribunals.³²

It is clear, and indeed emerges from the use of the word 'general' in Article 38(1)(b), that not every State in the world is required to engage in the relevant practice.³³ But the practice must be 'extensive' and 'representative'.³⁴ The extent of conflicting practice will be relevant here. The ICJ recognised this in the *Jurisdictional Immunities* case, where it specifically mentioned the lack of practice conflicting with the work of the ILC on which it

²⁹ Huw Llewellyn, 'United Nations, Sixth Committee' *MPEPIL* (OUP online), [2], [10].

³⁰ Mark Villiger, *Customary International Law and Treaties* (2nd ed, Kluwer 1997) 23; Wood, (n 28) [40].

³¹ *Jurisdictional Immunities* (n 27) [55].

³² Maurice Mendelson, 'The Formation of Customary International Law' (1998) 272 *Recueil des Cours* 155, 204; Ian Brownlie, 'Some Problems in the Evaluation of the Practice of States as an Element of Custom', in *Studi di diritto internazionale in onore di Gaetano Arangio Ruiz* vol I (2004) 313, 315: 'it seems obvious that statements made by Agents and Counsel before international tribunals constitute State practice'; Stephen Schwebel, *Justice in International Law: Further Selected Writings* (CUP 2011) 70 – 71; Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (OUP 2014) Introduction to the Paperback Edition li; Wood, (n 28) [41]; Michael Wood and Omri Sender, 'State Practice' in *MPEPIL* (OUP online) [12]. See also the ILC's reliance on pleadings in the course of its work on the law of treaties with respect to *rebus sic stantibus*: 'The most significant indications as to the attitude of States regarding the principle are perhaps to be found in the statements submitted to the Court in cases where the doctrine has been invoked' ('Report of the International Law Commission Covering the Work of its Fifteenth Session', UN Doc A/5509, in *Ybk ILC* (1963) II 187, 208).

³³ Wood (n 28) [52].

³⁴ *North Sea Continental Shelf (Federal Republic of Germany/Netherlands; Federal Republic of Germany/Denmark)* [1969] ICJ Rep 3, [73]; Wood, (n 28) [52].

was relying as the basis for a particular customary rule concerning State immunity.³⁵ The upshot is that if there is no, or very little, conflicting practice, the easier it is to conclude that there is sufficiently extensive and representative State practice.³⁶

It is also clear that State practice must be consistent, or ‘virtually uniform’ in the words of the ICJ,³⁷ but not perfectly consistent.³⁸ The ICJ has acknowledged that the practice does not have to be ‘in absolutely rigorous conformity’, provided that ‘instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of recognition of a new rule’.³⁹

The ‘general practice’ must be ‘accepted as law’.⁴⁰ This second element, often associated with the Latin tag *opinio iuris sive necessitatis*, refers to either a will or belief⁴¹ that a piece of practice is governed by law rather than something less such as convenience,

³⁵ *Jurisdictional Immunities* (n 27) [77]. See also [69]: ‘The almost complete absence of contrary jurisprudence is also significant, as is the absence of any statements by States in connection with the work of the International Law Commission regarding State immunity and the adoption of the United Nations Convention or, so far as the Court has been able to discover, in any other context asserting that customary international law does not require immunity in such cases.’

³⁶ Michael Akehurst, ‘Custom as a Source of International Law’ (1977) 47 BYIL 1, 18: ‘The number of States needed to create a rule of customary international law varies according to the amount of practice which conflicts with the rule. A practice followed by a very small number of States can create a rule of customary law if there is no practice which conflicts with the rule’; Wood (n 28) [42]. Consistent with this, Anthea Roberts has found on the basis of ICJ judgments that ‘most customs are found to exist on the basis of practice by fewer than a dozen States’ (‘Traditional and Modern Approaches to Customary International Law: A Reconciliation’ (2001) 95 AJIL 757, 767). It would be reasonable to assume that the practice of other tribunals does not differ markedly.

³⁷ *North Sea Continental Shelf* (n 34) [74]

³⁸ Wood (n 28) [55] – [57].

³⁹ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, [186].

⁴⁰ Statute of the ICJ, Article 38(1)(b).

⁴¹ For a discussion of the different ways in which this element has been understood, and ultimately concluding that it actually plays in practice a very minor role, see Maurice Mendelson, ‘The Subjective Element in Customary International Law’ (1995) 66 BYIL 177.

compromise, comity or policy.⁴² So, and this has already emerged in Chapter 1 of this thesis, just because a State uses the word ‘necessity’ in a particular context, this does not automatically mean it has the particular legal doctrine of necessity with which this thesis is concerned in mind. There are a number of difficulties with this second element. One is the difficulty of identifying a subjective element like will or belief in an abstract body like a State, not to mention among almost 200 abstract bodies. The practical way out of this difficulty is that a significant amount of inference is often required. If a State makes, for example, a statement framed in legal terms in diplomatic correspondence, or pleads a legal proposition before an international tribunal, then this may be State practice from which, given the context, the required will or belief will also be quite naturally inferred.⁴³

What is clear from the preceding discussion is that it is States that are the primary makers of customary international law. The ILC, which, as was discussed above, plays a subsidiary role in the determination of customary international law, is not a primary maker of international law. Nor are international tribunals, notwithstanding the summary method by which some tribunals, especially in the context of necessity, have been willing to declare that a rule exists as a matter of customary international law. Judicial and arbitral decisions⁴⁴ are, just like the ‘teachings of the most highly qualified publicists’, ‘subsidiary means for the determination of law’.⁴⁵ The ICJ has at least formally subscribed to this view.⁴⁶ It has stated

⁴² *North Sea Continental Shelf* (n 34) [77]; *Jurisdictional Immunities* (n 27) [55]; *Wood* (n 28) [61].

⁴³ *Wood*, (n 28) [70]; Hugh Thirlway, *The Sources of International Law* (OUP 2014) 70: ‘Since the *opinio juris* is a state of mind, there is an evident difficulty in attributing it to an entity such as a State; and it is thus to be deduced from the State’s pronouncements and actions, particularly the actions alleged to constitute the ‘practice’ element of the custom’.

⁴⁴ Article 38(1)(d) of the ICJ Statute refers only to ‘judicial decisions’, but arbitral decisions can have the same precedential value (or lack thereof) in principle: Crawford, *Brownlie’s Principles* (n 21) 39 – 40.

⁴⁵ Statute of the ICJ, Article 38(1)(d).

⁴⁶ Gleider Hernández, *The International Court of Justice and the Judicial Function* (OUP 2014) 86.

that it must not ‘anticipate the law before the legislator has laid it down’⁴⁷ and that the ‘Court ... states the existing law and does not legislate. This is so even if, in stating and applying the law, the Court necessarily has to specify its scope and note its general trend.’⁴⁸

The second quote shows how it would be disingenuous to deny that international tribunals, and especially the ICJ, can play no law-making role at all. They can.⁴⁹ The vague and unstated nature of customary international law bestows an unavoidable constitutive role upon an international tribunal, and especially the ICJ, when it recognises a customary rule and thereby crystallises what is typically an otherwise nebulous body of State practice and *opinio iuris*.⁵⁰ But, and this is the critical point with which to end this section, the role of international tribunals is in this respect still subsidiary to that of States. Even where an international tribunal is crystallising a nebulous body of State practice into a customary rule, that role cannot be performed without a sufficient body of State practice in the first place.

(ii) Evidence of the Customary Status of Necessity

With this framework in mind, the following analysis critically evaluates the evidence relevant to ascertaining whether necessity is a rule of customary international law. The following

⁴⁷ *Fisheries Jurisdiction (United Kingdom v Iceland)* (Merits) [1974] ICJ Rep 3, [53].

⁴⁸ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 263, [18].

⁴⁹ See, classically, Hersch Lauterpacht, *The Development of International Law by the International Court* (CUP 2010).

⁵⁰ Roberts, ‘Traditional and Modern Approaches to Custom’ (n 36) 772, calls the ICJ the ‘ultimate arbiter in some cases’ of the existence and content of custom.

analysis draws on the evidence on which the ASR Commentaries rely to support the customary status of necessity,⁵¹ but it does not limit itself to that evidence and seeks to give as full a picture as reasonably possible of the relevant evidence.

Some of the earliest evidence, such as that which arose in the context of the *Neptune* arbitration, the *Chichester* affair, the Anglo-Portuguese, and the *Venezuelan Railroads* and *Orinoco* cases, has already been considered in the first chapter of this thesis.⁵² To recall briefly, the tribunal in the *Neptune* arbitration rejected the British plea of necessity, but recognised its existence in principle,⁵³ while in the context of both the *Chichester* affair⁵⁴ and the Anglo-Portuguese dispute,⁵⁵ the British Advocate General, Herbert Jenner, recognised that Mexico and Portugal respectively could rely on a plea of necessity. Finally, in the *Venezuelan Railroads*⁵⁶ and *Orinoco*⁵⁷ cases, Venezuela, in the context of its revolution and civil war, appear to have pleaded what was essentially necessity as the basis for its failure to comply with the obligations it owed to certain French companies, and the French-Venezuelan Mixed Commission accepted the plea. Although in all of these instances the pleas of

⁵¹ The ASR Commentaries conclude that, ‘On balance, State practice and judicial decisions support the view that necessity may constitute a circumstance precluding wrongfulness under certain very limited conditions, and this view is embodied in Article 25’ (ILC, ‘The International Law Commission’s Articles on State Responsibility: Introduction, Text, and Commentaries’ (CUP 2002) 183).

⁵² See Chapter 1. Of this practice, the ASR Commentaries refer only to the Anglo-Portuguese dispute (ibid 179).

⁵³ *The Neptune, Jeffries, Master: Provision Case*, in John Bassett Moore, *International Adjudications* vol IV (OUP 1931) 372, discussed in Chapter 1, text to nn 33 – 38.

⁵⁴ Arnold McNair, *International Law Opinions* vol 2 (CUP 1956) 231, discussed in Chapter 1, text to nn 39 – 41.

⁵⁵ *ibid*, discussed in Chapter 1, text to nn 42 – 43.

⁵⁶ *French Company of Venezuela Railroads (France v Venezuela)* (1905) X RIAA 285, discussed in Chapter 1, text to nn 44 – 45.

⁵⁷ *Company General of the Orinoco Case (France v Venezuela)* (1905) X RIAA 184, discussed in Chapter 1, text to nn 46 – 48.

necessity were derived from the right of self-preservation, they were all pleas that were based on necessity as a legal doctrine that operated not only within international law but was constrained by international law according to conditions that are striking similar to those still applicable today. This early practice therefore does provide some support for necessity's customary status under contemporary international law.⁵⁸

Moving beyond the evidence that has already been discussed, the Russian Fur Seals controversy of 1893 provides some tentative support for necessity's customary status. Russia, motivated by a decline in the population of fur seals in the Bering Sea, captured three British sealing ships in the Bering Sea despite those ships being beyond Russia's maritime jurisdiction. Russia also issued a decree prohibiting sealing in an area beyond its maritime jurisdiction. The Russian Minister of Foreign Affairs explained Russia's actions on the basis of 'the absolute necessity of immediate provisional measures' given the imminence of the next hunting season,⁵⁹ although it was not entirely clear what the Minister was contending because he also explained that Russia's seizure of the British vessels 'may be regarded as a

⁵⁸ By contrast, 'necessity' is discussed alongside 'self-preservation' in the context of the well-known correspondence between the US and Great Britain that followed the 1837 *Caroline* incident (for the correspondence, see William Manning, *Diplomatic Correspondence of the United States: Canadian Relations 1784-1860* vol III (Carnegie Endowment for International Peace 1943) 422; Great Britain Foreign and Commonwealth Office, *British and Foreign State Papers, 1840-1841* vol 29 (Ridgway 1857) 1129), but this incident is not relevant to necessity's customary status. The Commentaries explain that the incident, 'though frequently referred to as an instance of self-defence, really involved the plea of necessity at a time when the law concerning the use of force had a quite different basis than it has at present' (n 51, 179). The observation that the law concerning the use of force rested on a very different basis in the nineteenth century is accurate. As discussed in Chapter 1, the period 1815-1914 was, as Ian Brownlie explained, 'still dominated by an unrestricted right of war and the recognition of conquests' (Ian Brownlie, *International Law and the Use of Force by States* (OUP 1963) 19). In these circumstances, there was no need to carve out an exception of self-defence because there was no prohibition on the use of force in the first place. But for that very reason there would be no need to carve out a defence of necessity either. This episode is rather an example of what this thesis discussed in Chapter 1 regarding how the terms 'necessity' and 'self-preservation' were often used during this period as political assertions rather than as anything to do with a legal doctrine. That those terms were used in the context of this incident in a stricter sense than was usual for the time probably had more to do with the fact that the British had to explain their actions to another powerful State and therefore with more care than they otherwise might have.

⁵⁹ Great Britain Foreign and Commonwealth Office, *British and Foreign State Papers, 1893-1894* vol 86 (HM Stationery Office 1899) 220 (and discussed in the ASR Commentaries (n 51) 180).

case of *force majeure* and assimilated to cases of self-defence'.⁶⁰ Great Britain does not appear to have expressly accepted the existence of necessity in this instance, although it did not expressly reject it either, and Russia and Great Britain ultimately reached a political settlement of the issue.⁶¹

The *Russian Indemnity* arbitration,⁶² and the cases that follow it, provide more substantial support for necessity's customary status. The *Russian Indemnity* arbitration is the first of several cases that arose during the first half of the twentieth century concerning financial necessity. Turkey, which had delayed paying a debt it owed to Russia incurred as an indemnity in a peace treaty following the Russo-Turkish War of 1877 – 1878, pleaded before an arbitral tribunal that it was not obliged to pay interest for that delay because of, among other reasons, what it referred to as a situation of *force majeure* brought about by the expenses it had incurred putting down rebellions and fighting wars.⁶³ The tribunal, drawing on Russia's acknowledgement that this could in principle provide a defence, rejected its application on the facts, while agreeing with the parties that the defence did exist in principle:⁶⁴

The exception of *force majeure*, cited as of the first importance, may be pleaded in opposition in public as well as in private international law. International law must adapt itself to political necessities. The Imperial Russian Government expressly admits ... that the obligation of a State to carry out treaties may give way "if the very

⁶⁰ Although see immediately below, with respect to the *Russian Indemnity* arbitration, how it was not unusual for States to conflate necessity and *force majeure* in the early twentieth century.

⁶¹ ASR Commentaries (n 51) 181.

⁶² *Russian Indemnity (Russia v Turkey)* (1912) XI UNRIAA 421, translated in (1913) 7 AJIL 178 (and discussed in the ASR Commentaries (n 51) 180).

⁶³ *ibid* 195. As the tribunal explained: 'Turkey was, from 1881 to 1902, in the midst of financial difficulties of the utmost seriousness ... it was placed in a position where it could meet its engagements only with delay and postponements, and even then at great sacrifice'.

⁶⁴ *ibid*.

existence of the State should be in danger, if observance of the international duty is ... self-destructive”.

The tribunal used the terminology of *force majeure*, but, and as the Commentaries correctly describe, the case was ‘more like a case of necessity’.⁶⁵ The focus of the tribunal’s analysis was not on any impossibility in making the interest payments. Turkey had the choice as to whether to make the payments or not. The question was rather if Turkey did pay whether that would be ‘self-destructive’. If it would have been, then Turkey may have had a defence.

Several States accepted necessity as a rule of international law, and this time by name, in their pleadings in the *Wimbledon* case before the Permanent Court of International Justice (PCIJ).⁶⁶ This case arose out of Germany’s refusal to allow a British ship carrying munitions pass through the Kiel Canal on its way to Danzig in Poland while Poland was at war with Russia. Germany acted out of what it claimed to be a desire to maintain its neutrality, but the UK, France, Italy and Japan challenged the legality of Germany’s actions under the Treaty of Versailles. The French agent (Jules Basdevant) implicitly accepted the existence of necessity when he emphasised that Germany had not made a plea of necessity.⁶⁷ Interestingly, given the confusion in terminology that was on display in both the *Fur Seals* controversy and the *Russian Indemnity* arbitration, Basdevant was quite clear in distinguishing necessity from *force majeure*:⁶⁸

... no arguments against the application of the rule of free passage have been advanced on the ground *either* of impossibility of compliance *or* of the danger which

⁶⁵ See n 51, 180.

⁶⁶ *S.S. Wimbledon* [1923] PCIJ Rep A No 1 16.

⁶⁷ PCIJ, Series C, No. 3, vol I, 178 – 179.

⁶⁸ *ibid.*

compliance with the provision might have created for Germany; *the plea of necessity was not made at all.*

(Emphasis added.)

The Italian agent (Massimo Pilotti) also recognised the existence of necessity (or what he termed ‘*status necessitatis*’), but rejected its application on the facts.⁶⁹ The German agent (Eugen Schiffer) confirmed that Germany was contending that there was no breach in the first place and therefore no need for it to plead a ‘*jus necessitatis*’, and this may also be read as an implicit acceptance of necessity in principle.⁷⁰ It was with some justification, then, that Roberto Ago concluded in the Addendum to his Eighth Report that ‘The “*Wimbledon*” case ... shows a significant concurrence of views as to the admissibility in general international law of “state of necessity” as a circumstance precluding ... wrongfulness’.⁷¹ Given Germany had not actually invoked necessity, the PCIJ did not itself consider necessity.

But of the cases from the first half of the twentieth century, necessity was most clearly recognised, and most extensively discussed, in the pleadings in the *Société de commerciale Belgique*⁷² case (*SCB case*) before the PCIJ. This case involved a claim by Belgium that Greece had breached international law by failing to comply with two arbitral awards under which it owed money to a Belgian company (*Société de commerciale Belgique*). The Greek counsel (Jean Youpis) explained Greece’s defence most carefully during oral proceedings:⁷³

⁶⁹ *ibid* 284 – 288.

⁷⁰ *ibid* 314.

⁷¹ Roberto Ago, ‘Addendum – Eighth Report on State Responsibility’ (29 February, 10 and 19 June 1980) UN Doc A/CN.4/318/Add.5-7 in *Ybk of the ILC* (1980) II(1) 13, 33.

⁷² *Société Commerciale de Belgique (Belgium v Greece)* [1939] PCIJ ser A/B No 78, 160 (and discussed in the Commentaries (n 51) 180 – 181).

⁷³ *Société Commerciale de Belgique (Belgium v Greece)* [1939] PCIJ Series C, No 87, 204 – 205.

... there occur from time to time external circumstances beyond all human control which make it impossible for Governments to discharge their duty to creditors and their duty to the people; the country's resources are insufficient to perform both duties at once. It is impossible to pay the debt in full and at the same time to provide the people with a fitting administration and to guarantee the conditions essential for its moral, social and economic development. The painful problem arises of making a choice between the two duties; one must give way to the other in some measure: which?

...

Doctrine recognizes in this matter that the duty of a Government to ensure the proper functioning of its essential public services outweighs that of paying its debts. No State is required to execute, or to execute in full, its pecuniary obligation if this jeopardizes the functioning of its public services and has the effect of disorganizing the administration of the country. In the case in which payment of its debt endangers economic life or jeopardizes the administration, the Government is, in the opinion of authors, authorized to suspend or even to reduce the service of debt.

Youpis went on to explain this as ‘the theory of *force majeure* expressed in another formulation,’ and added that ‘various schools and writers express the same idea in the term ‘state of [necessity]’’.⁷⁴ He further added that, ‘Although the terminology differs, everyone agrees on the significance and scope of the theory: everyone considers that the debtor State does not incur responsibility if it is in such a situation.’⁷⁵

Belgium accepted the existence of necessity in principle. Counsel for Belgium (Sand) remarked during oral proceedings that:⁷⁶

In a learned survey . . . Mr. Youpis stated yesterday that a State is not obliged to pay its debt if in order to pay it[,] it would have to jeopardize its essential public services. So far as the principle is concerned, the Belgian Government would no doubt be in agreement.

⁷⁴ *ibid* 209.

⁷⁵ *ibid*.

⁷⁶ *ibid* 236.

The Court itself did not consider necessity because it found this issue to be outside the scope of the proceedings.⁷⁷ But the clarity of Greece's pleadings on necessity in this case, combined with Belgium's acceptance of necessity in principle as well as the recognition of necessity by a range of States in the context of the *Russian Indemnity* and *Wimbledon* cases, and not to mention the earlier practice arising out of the *Neptune* arbitration, the *Chichester* affair, the Anglo-Portuguese dispute, the *Venezuelan Railroad and Orinoco* cases, and the Russian Fur Seals controversy, all demonstrate that necessity's existence as a rule of customary international law was well established in the first half of the twentieth century.⁷⁸

France made what was essentially a plea of necessity, though this time not by name, soon after World War II in the context of the *Rights of US Nationals in Morocco* case.⁷⁹ In that case, the United States was challenging certain import restrictions that France imposed in

⁷⁷ See n 72, 178.

⁷⁸ This is further borne out by Judge Anzilotti's recognition that 'necessity may excuse the non-observance of international obligations' in his Separate Opinion in *Oscar Chinn (United Kingdom v Belgium)* [1934] PCIJ Ser A/B No 63, 107, 113. It is also borne out by the Bases of Discussion promulgated by the Preparatory Committee for the 1930 League of Nations Codification Conference wherein it was provided that: 'A State incurs responsibility if, without repudiating a debt, it suspends or modifies the service, in whole or in part, by a legislative act, *unless it is driven to this course by financial necessity*' (emphasis added) (League of Nations, 'Conference for the Codification of International Law, Bases of Discussion for the Conference drawn up by the Preparatory Committee, vol III (Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners)' (1929) LN Doc C.75.M.69.1929.V, 37, Bases of Discussion No 4 and No 9). On the other hand, the Commentaries ((n 51) at 180 and 181 respectively) rely on the *Forests of Central Rhodopia* dispute between Greece and Bulgaria ((1934) 15 League of Nations Official Journal 1432) and the *Serbian Loans* case ((*France v Serbia, Croatia and Slovenia*) [1929] PCIJ Series A No 20) as further evidence of necessity's customary status, but in both instances their relevance is doubtful. The *Forests of Central Rhodopia* dispute was settled not on the basis of legal principle, but by way of what Bulgaria called a 'friendly settlement' (at 1432) and the *Serbian Loans* case was argued on the basis of domestic law rather than public international law (PCIJ Series C, No. 16-111, 470). Perhaps more relevant, though not mentioned in the Commentaries, is *Dickson Car Wheel Co (United States v Mexico)* (1931) 4 RIAA 669, where in the context of a claim before the US-Mexican General Claims Commission by a US national for loss occasioned by emergency measures taken by the Mexican government, the commission stated that 'the Government of Mexico had to take over the management of the lines in order to face an emergency that put in serious danger the social order and even the independence of that Nation. Considering the matter even from this viewpoint, there would be no international responsibility on the part of the Government of Mexico for this act. States have always resorted to extraordinary measures to save themselves from imminent dangers, and the injuries to foreigners resulting from these measures do not generally afford a basis for claims.' It is not clear, however, if the Commission had in mind a defence or a denial of a breach of international law in the first place.

⁷⁹ *Rights of US Nationals in Morocco (France v United States of America)* [1952] ICJ Rep 176.

the French Zone in Morocco as being inconsistent with the rights of US nationals. The French agent (Paul Reuter) relied on the *Russian Indemnity* award to support an argument that he called *force majeure* but which, as in the *Russian Indemnity* case, was more akin to necessity given that the restrictions had been imposed, not because of involuntary compulsion, but rather voluntarily in order to protect the ‘fundamental economic equilibrium’ of France at a time where it considered the import restrictions necessary to prevent the outflow of foreign currency that it desperately needed.⁸⁰ The US agent (Adrian Fisher) rejected that the defence could apply on the facts without rejecting it in principle.⁸¹ The Court itself was not required to consider the defence.

Necessity thereafter arose less frequently in practice. It is in this context that the Commentaries seek to extract legal significance from the *Torrey Canyon* incident of 1967.⁸² A Liberian oil tanker – the *Torrey Canyon* – had struck rocks off the coast of the UK but outside its territorial waters, posing a threat to the British coastline. The UK bombed the ship in order to burn off the oil on the basis that there was no other way to prevent the potential environmental disaster.⁸³ But as the Commentaries themselves acknowledge, the UK did not frame its actions within any legal argument, and while other States, including Liberia, did not

⁸⁰ *ibid*, ‘Pleadings, Oral Arguments, Documents’ vol II, 182-184 (translated in ILC, “Force Majeure” and “Fortuitous Event” as Circumstances Precluding Wrongfulness: Survey of State Practice, International Judicial Decisions and Doctrine – Study Prepared by the Secretariat’ (27 June 1977) UN Doc A/CN.4/315, in *Ybk ILC* (1978) II(1) 65, 145).

⁸¹ *ibid* 241, 248 – 249.

⁸² For an account of the facts and some of the legal issues, see Albert Utton, ‘Protective Measures and the “Torrey Canyon”’ (1968) 9 *Boston College L Rev* 613. For the Commentaries’ reliance on this incident, see n 51, 181.

⁸³ See n 51, 181.

protest, nor did they.⁸⁴ This incident therefore lacks the *opinio iuris* required for it to provide support for the customary status of necessity.

The lack of State practice concerning necessity following World War II no doubt contributed to the doubtful reception it received from the tribunal in the *Rainbow Warrior* arbitration.⁸⁵ This arbitration arose following France's removal, contrary to an agreement with New Zealand, of two of its agents from the Pacific atoll of Hao, where those two agents were serving terms as prisoners for their role in the 1985 bombing of the *Rainbow Warrior* in an Auckland harbour. France did not invoke necessity, but it did invoke *force majeure* and distress in order to defend its removal of the agents on medical grounds, and in the course of the tribunal's discussion of distress, and in particular its distinguishing of distress from necessity, the tribunal went out of its way to express its doubts as to whether necessity was a rule of customary international law. The tribunal twice described Draft Article 33 (which, with some changes, would become Article 25) as 'controversial.'⁸⁶ The tribunal further described that necessity '*allegedly* authorizes a State to take unlawful action invoking a state of necessity' (emphasis added).⁸⁷ The tribunal buttressed its doubts with an extended citation of a passage from a chapter authored by the president of the tribunal, Eduardo Jiménez de Aréchaga, where he wrote that there is:⁸⁸

⁸⁴ *ibid.* Sarah Heathcote, 'Necessity' (n 10) 494 – 495 suggests that *Nachfolger Navigation Co Ltd* 89 ILR 1, where France destroyed an explosives-laden vessel outside its territorial waters, and where this was held to be consistent with international law by the *Conseil d'État*, presents a better example, but it is not clear that necessity was in issue. The *Conseil d'État* did not mention necessity but rather spoke (in the ILR's translation) of a decision taken by the French authorities that 'did not constitute fault capable of engaging the responsibility of the State' (5).

⁸⁵ *Rainbow Warrior (New Zealand v France)* (1990) 82 ILR 500 (noted in the ASR Commentaries (n 51) 181).

⁸⁶ *ibid* [78].

⁸⁷ *ibid.*

⁸⁸ *ibid*, citing Jiménez de Aréchaga, 'International Responsibility' in Max Sørensen (ed), *Manual of Public International Law* (Macmillan 1968) 531, 543. A similar view was taken by Ian Brownlie in the last edition of

no general principle allowing a defence of necessity. There are particular rules of international law making allowance for varying degrees of necessity, but these cases have a meaning and a scope entirely outside the traditional doctrine of state of necessity. Thus, for instance, vessels in distress are allowed to seek refuge in a foreign port, even if it is closed ...; in the case of famine in a country, a foreign ship proceeding to another port may be detained and its cargo expropriated ... In these cases – in which adequate compensation must be paid – it is not the doctrine of the state of necessity which provides the foundation of the particular rules, but humanitarian considerations, which do not apply to the State as a body politic but are designed to protect essential rights of human beings in a situation of distress.

Jiménez de Aréchaga is right to draw a distinction between necessity and distress. The ASR draw this distinction too. But Jiménez de Aréchaga fails to deal with the substantial body of practice wherein States have accepted the existence of necessity in situations involving the protection of the interests of ‘the State as a body politic’, which is what necessity protects, and not specifically ‘the essential rights of human beings’, which is what distress protects (although protecting the former may be one way of protecting the latter).

Yet further scepticism about the customary status of necessity was also expressed just four years later by the tribunal in the *LAFICO v Burundi* arbitration.⁸⁹ The *LAFICO* arbitration of 1994 involved a claim by the Libyan government-owned company, Libyan Arab Foreign Investment Company (LAFICO), which had entered into a joint venture with Burundi for the purpose of making various investments in Burundi. Burundi, citing its national security, subsequently broke off diplomatic relations with Libya and expelled all Libyan nationals from Burundi. LAFICO and Burundi agreed to arbitration in order to settle how this would affect the joint venture. Among other issues, the tribunal considered whether

Brownlie's Principles that he edited (7th ed, OUP 2008), and in which he cited Jiménez de Aréchaga, although he was more equivocal than Jiménez de Aréchaga: ‘...necessity as an omnibus category probably does not exist, and its availability as a defence is circumscribed by strict conditions’ (466).

⁸⁹ (1994) 96 ILR 279 (and noted by the ASR Commentaries (n 51) n 413).

any breaches by Burundi of the joint venture agreement could be excused or justified by *force majeure* or necessity. The tribunal accepted that Draft Article 31 (*force majeure*) represented customary international law, but it rejected that its conditions were fulfilled on the facts of the case. The tribunal viewed Draft Article 33 differently. Whereas it had been willing to accept that Draft Article 31 represented customary international law, the tribunal explained that ‘It is not desired here to express a view on the appropriateness of seeking to codify rules on “state of necessity” and the adequacy of the concrete proposals made by the International Law Commission, which has been a matter of debate in the doctrine.’⁹⁰ The tribunal held that even if necessity were a rule of customary international law, its conditions would not have been fulfilled.⁹¹

None of that scepticism was evident in the *Gabčíkovo* case.⁹² In this case, the ICJ approved the ILC’s work on necessity and produced a decisive turn back in favour of necessity’s customary status. The *Gabčíkovo* case arose out of a vast project entered into under a 1977 treaty between Hungary and Czechoslovakia, and which involved the construction of a series of locks on the Danube River. The project’s goals were to produce hydroelectricity, improve navigation and control flooding in the area. Hungary later suspended and then abandoned its role in the project while Czechoslovakia itself proceeded with a variant of the original project. After various failed attempts to settle the resulting dispute, Hungary and Slovakia (which succeeded Czechoslovakia so far as this project was concerned) submitted the dispute to the ICJ. Hungary contended, among other things, that it was entitled to suspend and then abandon the project because of a ‘state of ecological

⁹⁰ *ibid* 319.

⁹¹ *ibid*.

⁹² See n 2.

necessity'.⁹³ Hungary explained that it faced this 'state of ecological necessity' because continuing the project would have caused severe damage to water supply and quality as well as the aquatic habitats in the area.⁹⁴ The Court recorded that both Hungary and Slovakia agreed that whether necessity could be established needed to be evaluated against Draft Article 33 (and thus both States accepted necessity's customary status in principle).⁹⁵

The Court, as James Crawford (who was counsel for Hungary) has since observed, 'could have decided the case hypothetically on the basis of the arguments of the parties' given that it rejected necessity's application on the facts.⁹⁶ But it did not. The Court, turning the approaches of the *Rainbow Warrior* and *LAFICO* tribunals on their heads, went out of its way to unanimously hold that necessity did exist as a matter of customary international law.⁹⁷

The Court considers, first of all, that the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation. It observes moreover that such ground for precluding wrongfulness can only be accepted on an exceptional basis. The International Law Commission was of the same opinion when it explained that it had opted for a negative form of words in Article 33 of its Draft "in order to show, by this formal means also, that the case of invocation of a state of necessity as a justification must be considered as really constituting an exception - and one even more rarely admissible than is the case with the other circumstances precluding wrongfulness . . ." (ibid, p. 51, para. 40). Thus, according to the Commission, the state of necessity can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met.

⁹³ ibid [40].

⁹⁴ ibid.

⁹⁵ ibid [50].

⁹⁶ James Crawford, 'The International Court of Justice and the Law of State Responsibility' in Christian Tams and James Sloan (eds), *The Development of International Law by the International Court of Justice* (OUP 2013) 71, 81.

⁹⁷ At [51].

The Court relied on Draft Article 33 as an authoritative statement of those ‘strictly defined conditions’⁹⁸ and it held that Hungary had not satisfied all of those conditions.⁹⁹

The ICJ’s acceptance of necessity’s customary status is clear but, as the introduction to this chapter acknowledged, it is not without problems from a law-making perspective. To recap: the ICJ cited no State practice to support its single-sentence conclusion that necessity exists as a matter of customary international law and went on to rely simply on Draft Article 33 of the ASR as an authoritative statement of customary international law;¹⁰⁰ The ICJ’s acceptance of necessity’s customary status in turn played a significant role in shoring up support among ILC members for the inclusion of necessity in the final ASR;¹⁰¹ then, following the adoption of the ASR, the ICJ again accepted the customary status of necessity in its *Wall* opinion, citing in support only Article 25 of the ASR and its previous decision in the *Gabčíkovo* case.

But the Court’s failure to cite any State practice in support of its recognition of necessity’s customary status, either in the *Gabčíkovo* case or the *Wall* opinion, does not mean that there is not any. There is, as this chapter has already outlined, a considerable body of State practice in favour of necessity’s customary status, especially from the first half of the twentieth century and earlier. In the context of the *Gabčíkovo* case itself, both Hungary and

⁹⁸ *ibid* [52].

⁹⁹ *ibid* [52] – [57].

¹⁰⁰ *ibid* [51].

¹⁰¹ See Crawford at the 2592nd meeting of the ILC (‘Summary Record of the 2592nd Meeting’, 180): ‘Article 33 had survived the debate materially unscathed, no doubt because the ICJ had approved it almost word for word in its judgment in the *Gabčíkovo-Nagymaros Project* case’.

Slovakia accepted necessity's customary status.¹⁰² So have a number of States since, as the following discussion demonstrates.¹⁰³

Belgium invoked necessity (among other arguments) before the ICJ in an attempt to defend NATO's bombing of Yugoslavia in 1999 after Yugoslavia (later Serbia and Montenegro) had instituted proceedings seeking provisional measures against Belgium and several other States.¹⁰⁴ Belgium's counsel (Rusen Ergec) pleaded that 'The notion of a state of necessity, which is enshrined in all branches of the law, is unquestionably acknowledged in international law; and the draft Article 33 proposed by the International Law Commission reflects this.'¹⁰⁵ Yugoslavia's counsel (Ian Brownlie and Paul de Waart), on the other hand, pleaded that Belgium and the other States against which it was seeking provisional measures could not rely on necessity to defend its 'humanitarian intervention' because it had not satisfied the conditions of necessity's application.¹⁰⁶ In other words, Yugoslavia appeared to implicitly accept the customary status of necessity in principle, while denying its application

¹⁰² As recorded by the Court, at [50].

¹⁰³ But the *Fisheries Jurisdiction* case (*Spain v Canada*) (Jurisdiction) [1998] ICJ Rep 432) on which the Commentaries rely in this context is not relevant here. The Commentaries themselves introduce the discussion of this case by stating that necessity was 'apparently in issue' ((n 51) 182). Canada had seized a Spanish vessel – the *Estai* – in international waters and explained that the seizure was 'necessary in order to put a stop to the overfishing of Greenland halibut by Spanish fishermen' ([1998] ICJ Rep 432, 443). But the mere fact that Canada mentioned the word 'necessary' does not mean that it believed it was acting pursuant to necessity as a defence to State responsibility and there was nothing else in Canada's pleadings to suggest that it was. The case did not proceed beyond the jurisdictional stage.

¹⁰⁴ *Legality of Use of Force (Serbia and Montenegro v Belgium)* [2004] ICJ Rep 279.

¹⁰⁵ CR1999/15. Ago also notes in his Addendum (n 71) (43) an earlier example where Belgium invoked 'necessity' to defend its deployment of paramilitaries in the Congo in 1960 to rescue Belgian and other European nationals whom Belgium claimed were being held hostage, although the precise basis on which Belgium used force was equivocal and appears to be based more clearly on the argument that Belgium's use of force was not directed against the territorial integrity or political independence of the Congo and thus not an unlawful use of force in the first place (see Chapter 3, text to nn 40 - 46).

¹⁰⁶ CR99/14 at 39 (Brownlie) and at 46 – 47 (de Waart).

on the facts. The Court declined to indicate provisional measures and the cases would not proceed to the merits.

In the *MV Saiga* case,¹⁰⁷ before ITLOS, Guinea invoked necessity in an attempt to justify the arrest and seizure of a St Vincent and Grenadines-flagged ship it claimed was involved in unlawful bunkering activities within the Guinean Exclusive Economic Zone.¹⁰⁸ St Vincent and the Grenadines appeared to accept the customary status of necessity but, citing Draft Article 33, pleaded that its conditions were not met in this case.¹⁰⁹ ITLOS itself recognised necessity's customary status before rejecting its application on the facts.¹¹⁰

Necessity has most recently taken on particular importance in the context of investor-State arbitration. It has been at the heart of the wave of arbitrations brought by investors against Argentina following the measures Argentina took during its 2001/02 financial crisis.¹¹¹ These measures included a bank freeze, the de-pegging of the peso from the US dollar and its devaluation, the pesification¹¹² of contracts that had been calculated in US dollars, and widespread defaults on public debt. These measures had significant effects on the value of investments held by foreign investors and have since been challenged in the numerous claims that have been made by investors against Argentina under various BITs. In all of the cases arising out of the crisis, the investors alleged numerous breaches of the

¹⁰⁷ See n 3.

¹⁰⁸ Counter-Memorial Submitted by Guinea, 16 October 1998, [112] – [114].

¹⁰⁹ Reply Submitted by St Vincent and the Grenadines, 19 November 1998, [138].

¹¹⁰ See n 5, [133] – [135].

¹¹¹ For a more detailed discussion of the economic background, see IMF Independent Valuation Office, *The IMF and Argentina 1991-2001* (2004).

¹¹² That is, contracts where prices had been calculated in US dollars were, by decree, amended so that they were now calculated in devalued pesos.

standards of treatment contained in relevant BITs and many were successful in establishing various breaches.¹¹³ This placed in sharp relief Argentina's arguments that those breaches should be justified or excused by necessity. In all of the Argentine crisis arbitrations, Argentina invoked necessity on the basis of its existence as a rule of customary international law and, with the exception of one tribunal that left the question open, in all of these arbitrations the tribunals accepted necessity's customary status.¹¹⁴

Necessity also arose in two arbitrations brought by foreign investors against Zimbabwe claiming treaty breaches in the wake of the invasions of white-owned farms by various settlers since 2000. In both the *Funnekotter*¹¹⁵ and *Von Pezold*¹¹⁶ cases, Zimbabwe invoked necessity as a defence to breaches caused by its failure to deal with the invasions and on each occasion Zimbabwe pleaded that necessity existed as a matter of customary international law.¹¹⁷ The tribunals in both cases accepted necessity's customary status¹¹⁸ before rejecting its application on the facts.¹¹⁹

Yet by far the largest body of State practice in favour of necessity's customary status comes from the reactions of States to the ILC's work on necessity. Some States expressly

¹¹³ See, for an overview, José Alvarez & Gustavo Topalian, 'The Paradoxical Argentina Cases' (2012) 6 World Arb & Med Rev 491.

¹¹⁴ See n 4. The *EDF* tribunal was more cautious. The tribunal stated that, because it rejected the application of the defence of necessity anyway, it 'need take no position on the theoretical question of how far the various aspects of ILC Article 25 codify customary defences [sic] related to necessity. Although addressed by the International Court of Justice, the matter has continued to be subject to scholarly and judicial debate' (*EDF v Argentina* (Award) ICSID Case No ARB/03/23, 11 June 2012, [1127]).

¹¹⁵ *Funnekotter v Zimbabwe* (Award) ICSID Case No ARB/05/06, 22 April 2009.

¹¹⁶ *Von Pezold v Zimbabwe* (Award) ICSID Case No ARB/10/15, 28 July 2015.

¹¹⁷ *Funnekotter* at [102]; *Von Pezold* at [613].

¹¹⁸ *Funnekotter* at [105]; *Von Pezold* at [624].

¹¹⁹ *Funnekotter* at [106]; *Von Pezold* at [668].

approved of necessity's existence in the comments they submitted to the ILC.¹²⁰ But it is the views expressed by States within the General Assembly's Sixth Committee, which is a source of State practice that appears to have been ignored by those that have argued against the customary status of necessity, that were overwhelmingly in favour of necessity's existence as a rule of international law and the desirability of its inclusion within the ASR. A significant number of States offered their views on necessity during the Sixth Committee's meetings in 1980 following Ago's extensive work on necessity in the Addendum to his Eighth Report.¹²¹ The vast majority of these States emphasised the importance of constraining necessity within strict terms, and at times criticised particular aspects of the drafting, but in doing so they either expressly or at least implicitly accepted necessity's status as a rule of international law and the desirability of its inclusion in the ASR.¹²² Some of those States again, as well as some additional States, provided similar support for necessity during the Sixth Committee's

¹²⁰ Denmark on behalf of the Nordic States and France (ILC, 'State Responsibility – Comments and Observations Received by Governments' (25 March, 30 April, 4 May and 20 July 1998) UN Doc A/CN.4/488 in *Ybk ILC* (1998) II(1) 134 – 135).

¹²¹ See n 71.

¹²² Netherlands (UNGA Sixth Committee (35th Session) 'Summary Record of the 44th Meeting' (11 November 1980) UN Doc A/C.6/35/SR.44, [29]); Federal Republic of Germany (ibid 'Summary Record of the 45th Meeting' (11 November 1980) UN Doc A/C.6/35/SR.45, [8]); Chile (ibid 'Summary Record of the 47th Meeting' (12 November 1980) UN Doc A/C.6/35/SR.47, [7]); Brazil (ibid [20] – [23]); Canada (ibid 'Summary Record of the 48th Meeting' (13 November 1980) UN Doc A/C.6/35/SR.48, [7]; Mexico (ibid [13] - [21]); Japan (ibid [32]); Finland (ibid [50]); Sri Lanka (ibid 'Summary Record of the 49th Meeting' (14 November 1980) UN Doc A/C.6/35/SR.49, [8]); German Democratic Republic (ibid [18]); Kuwait (ibid [27]); Italy (ibid [32] – [35]); Israel (ibid 'Summary Record of the 50th Meeting' (17 November 1980) UN Doc A/C.6/35/SR.50, [14]); Argentina (ibid [25]); United States (ibid 'Summary Record of the 51st Meeting' (17 November 1980) UN Doc A/C.6/35/SR.51, [3]); Ethiopia (ibid [44] – [45]); Iraq (ibid, [56] – [61]); Greece (ibid 'Summary Record of the 52nd Meeting' (18 November 1980) UN Doc A/C.6/35/SR.52, [35]); Tunisia (ibid [45]); Egypt (ibid [53]); Philippines (ibid 'Summary Record of the 53rd Meeting' (19 November 1980) UN Doc A/C.6/35/SR.53, [15]); Mongolia (ibid [28]); Jamaica (ibid [50]); India (ibid 'Summary Record of the 54th Meeting' (19 November 1980) UN Doc A/C.6/35/SR.54 [28] – [31]); Zaire (ibid [63]); Spain (ibid 'Summary Record of the 55th Meeting' (20 November 1980) UN Doc A/C.6/35/SR.55, [10]; Algeria (ibid [30]); Hungary (ibid [44]); Trinidad & Tobago (ibid 'Summary Record of the 56th Meeting' (20 November 1980) UN Doc A/C.6/35/SR.56, [25]); Ukraine (ibid [32] – [34]); Thailand (ibid [48]); Kenya (ibid [60]); Pakistan (ibid 'Summary Record of the 58th Meeting' (21 November 1980) UN Doc A/C.6/35/SR.58, [7]); Poland (ibid [16]); Indonesia (ibid [23]); Cyprus (ibid 'Summary Record of the 59th Meeting' (24 November 1980) UN Doc A/C.6/35/SR.59, [4]); Bulgaria (ibid [11] – [13]); Yugoslavia (ibid [30]).

meetings in 1999,¹²³ 2000¹²⁴ and 2001¹²⁵ following James Crawford's Second Report on State Responsibility, in which he had discussed necessity at length.¹²⁶

By contrast, only a very small number of States rejected the existence of necessity as a rule of customary international law or took the view that necessity should not be included within the ASR. Following Ago's work on necessity, the USSR communicated to the ILC its opposition to Draft Article 33 on the basis that the defence of necessity 'totally undermines the basic principles of the international responsibility of States set forth in the draft'.¹²⁷ Within the General Assembly's Sixth Committee, Romania criticised necessity on the basis of its doubtful existence and the dangers of abuse,¹²⁸ as did Czechoslovakia¹²⁹ and Bangladesh.¹³⁰ Libya also appeared to oppose necessity because of fears that it could provide a defence to breaches of international law by colonial powers whose essential interests were

¹²³ Spain (UNGA Sixth Committee (54th Session) 'Summary Record of the 21st Meeting' (29 October 1999) UN Doc A/C.6/54/SR.21, [21]); Netherlands (ibid [51]); Austria (ibid 'Summary Record of the 22nd Meeting' (1 November 1999) UN Doc A/C.6/54/SR.22, [16]); Slovakia (ibid [55]); China (ibid [65] – [66]); Germany (ibid 'Summary Record of the 23rd Meeting' (2 November 1999) UN Doc A/C.6/54/SR.23, [7]); Mexico (ibid [20]); India (ibid [33]); Egypt (ibid 'Summary Record of the 27th Meeting' (4 November 1999) UN Doc A/C.6/54/SR.27, [32]); Cuba (ibid 'Summary Record of the 28th Meeting' (5 November 1999) UN Doc A/C.6/54/SR.28, [93]).

¹²⁴ Australia (UNGA Sixth Committee (55th Session) 'Summary Record of the 16th Meeting' (25 October 2000) UN Doc A/C.6/55/SR.16, [43]).

¹²⁵ Poland (UNGA Sixth Committee (56th Session) 'Summary Record of the 13th Meeting' (31 October 2001) UN Doc A/C.6/56/SR.13, [32]); Mexico (ibid 'Summary Record of the 14th Meeting' (1 November 2001) UN Doc A/C.6/56/SR.14, [11]).

¹²⁶ 'Second Report on State Responsibility' (19 July 1999) UN Doc A/CN.4/498 in *Ybk ILC* (1999) II(1) 3, 69 – 74.

¹²⁷ ILC, 'Comments and Observations of Governments on Part 1 of the Draft Articles on State Responsibility for Internationally Wrongful Acts' (1 March – 6 May 1982) UN Doc A/CN.4/351 in *Ybk ILC* (1982) II(1), 15, 19.

¹²⁸ UNGA Sixth Committee (35th Session) 'Summary Record of the 50th Meeting' (17 November 1980) UN Doc A/C.6/35/SR.50, [1] – [3].

¹²⁹ ibid 'Summary Record of the 54th Meeting' (19 November 1980) UN Doc A/C.6/35/SR.54, [15] – [16].

¹³⁰ ibid 'Summary Record of the 59th Meeting' (24 November 1980) UN Doc A/C.6/35/SR.59, [39] – [40].

threatened by decolonisation.¹³¹ At the later stages of the ILC's work, however, the number of States opposing necessity had become even smaller. Russia maintained the critical position taken by the USSR,¹³² but otherwise only the United Kingdom joined Russia in rejecting a role for necessity within the law of State responsibility. The UK explained its view in these terms:¹³³

The United Kingdom views with extreme circumspection the introduction of a right to depart from international obligations in circumstances where the State has judged it necessary to do so in order to protect an interest that it deems "essential". A defence of necessity would be open to very serious abuse across the whole range of international relations. There is a grave risk that the provision would weaken the rule of law.

The UK took that view despite supporting a wide understanding of distress that would cover humanitarian intervention.¹³⁴

Finally, on those occasions on which the Sixth Committee has discussed the ASR following their adoption in 2001, no State, apart from Russia,¹³⁵ has doubted the propriety of necessity's inclusion within the ASR. This is in the context that, as this chapter has charted, international tribunals have on a number of occasions since the ASR's adoption relied on Article 25 of the ASR as representing customary international law. The vast majority of States appear to be content with this.

¹³¹ *ibid* 'Summary Record of the 57th Meeting' (21 November 1980) UN Doc A/C.6/35/SR.57, [33] – [34].

¹³² UNGA Sixth Committee (56th Session) 'Summary Record of the 14th Meeting' (1 November 2001) UN Doc A/C.6/56/SR.14, [50]: 'If States were given that right, it could be used to justify completely unlawful acts.'

¹³³ ILC, 'State Responsibility – Comments and Observations Received by Governments' (25 March, 30 April, 4 May and 20 July 1998) UN Doc A/CN.4/488 in *Ybk ILC* (1998) II(1), 81, 134 – 135.

¹³⁴ The UK supported an understanding of distress that went beyond saving the lives of 'persons entrusted to [the] care' of the actor in order to facilitate cross-border 'humanitarian action' (read: humanitarian intervention) (*ibid* 134).

¹³⁵ UNGA Sixth Committee (62nd Session) 'Summary Record of the 13th Meeting' (12 November 2007) UN Doc A/C.6/62/SR.13, [25].

Evaluation

There is a substantial body of State practice and *opinio iuris* that supports necessity's status as a rule of customary international law. Following on from the early practice arising out of the *Neptune* arbitration, the *Chichester* affair, the Anglo-Portuguese dispute and the *Venezuelan Railroads* and *Orinoco* arbitrations, the customary status of necessity was well established in the first half of the twentieth century, with a number of States recognising its existence in the context of the Fur Seals controversy, the *Russian Indemnity* arbitration, and the *Wimbledon* and *SCB* cases. Necessity, following the *Rights of US Nationals in Morocco* case in which what was essentially a plea of necessity was also recognised, was then less frequently invoked in the second half of the twentieth century and its customary status even came to be doubted by the tribunals in the *Rainbow Warrior* and *LAFICO* arbitrations. But the ILC's work on necessity, combined with the ICJ's approval of that work in the *Gabčíkovo* case, has produced a decisive turn back in favour of the customary status of necessity over the last two decades. Any issues arising from the 'institutional circularity' surrounding the relationship between the ICJ and ILC have been eclipsed by the fact that necessity has subsequently been relied on or implicitly accepted by a significant number of States before the ICJ, ITLOS and numerous arbitral tribunals, and its customary status has without exception been accepted by those tribunals. In addition, the significant number of States that commented on the ILC's work on necessity either in comments submitted to the ILC or within the meetings of the General Assembly's Sixth Committee were overwhelmingly in support of the existence of necessity and the desirability of its inclusion within the ASR. There is thus a solid basis to conclude that necessity exists as a rule of customary international law.

Conclusion

This chapter has sought to build on Chapter 1 by contending that not only does necessity have a stronger pedigree than is commonly appreciated, it is also today solidly grounded in customary international law. The writers who have doubted or rejected that necessity is a rule of customary international law have been right to criticise the lack of rigour frequently displayed by those tribunals that have been content to assume rather than establish the existence of such a controversial rule. But they have been wrong in their own conclusions when either doubting or rejecting the customary status of necessity. There is, as this chapter has detailed, a substantial body of State practice and *opinio iuris* that supports the customary status of necessity.

3. THE SCOPE OF NECESSITY

Introduction

The remaining three chapters of this thesis chart the contours of necessity and examine how necessity not only operates within, but is also constrained by, customary international law. This chapter focuses on the scope of necessity's application. The secondary rules of State responsibility apply generally to all primary rules.¹ Necessity, as a secondary rule of State responsibility, may thus provide a defence to the breach of a wide and potentially limitless number of primary rules. But there are limits to this general scope. This chapter considers two limits to the general scope of necessity.

This chapter first considers how necessity cannot be invoked as a defence to the breach of a peremptory rule of international law. This chapter focuses on the peremptory prohibition on the use of force, which is where the most relevant and controversial issues concerning necessity and its relationship to peremptory rules have arisen, and contends that it is clear that necessity cannot provide a defence to a breach of this rule. Nor does necessity operate as an exception within this rule. This puts to bed the fears that necessity could today provide a basis for the kind of forcible interventions with which necessity has been associated in the past.

This chapter then examines how primary rules may contain their own safety valves that regulate situations of emergency. This has two consequences for the scope of necessity. The first consequence is that these primary rules that regulate situations of emergency must

¹ On the distinction between primary and secondary rules, see Chapter 1, text to nn 86 – 88.

be applied prior to and independently of necessity as a defence and secondary rule of State responsibility. The second consequence is that these primary rules may regulate situations of emergency to the exclusion of necessity. This may be either as a practical consequence because the primary rule sets down a more lenient test than necessity, or as a matter of law because the primary rule by its object and purpose excludes the possibility of invoking necessity. This chapter illustrates these consequences by examining three situations where primary rules regulate situations of emergency, namely non-precluded measures clauses in trade and investment treaties, emergency derogations in human rights treaties, and military necessity and the laws of armed conflict.

The key point this chapter seeks to make is that it is essential first to determine the scope within which necessity can apply before determining under what conditions it applies.

Necessity, Peremptory Rules and the Use of Force

Necessity cannot provide a defence to the breach of a peremptory rule of international law. This is provided for by Article 26 of the ASR, which applies generally to all defences to State responsibility: ‘Nothing in this Chapter precludes the wrongfulness of any act of a State not in conformity with an obligation arising under a peremptory norm of general international law.’ This follows naturally from how peremptory rules work. Peremptory rules are rules from which no derogation is permitted.² Not only can a treaty not derogate from peremptory

² The Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331 in Article 53 defines a ‘peremptory norm of general international law (“jus cogens”)’ as ‘a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.’

rules,³ a rule of customary international law (such as necessity) cannot either, unless it also rises to the rank of a peremptory rule, which has never been suggested with respect to necessity.⁴ The most commonly cited peremptory rules include the prohibitions on genocide, crimes against humanity and the use of force.⁵ When it comes to necessity, the most relevant and controversial issues concern the question of whether necessity may nonetheless provide a defence to a breach of the prohibition on the use of force.

(i) Necessity and the Peremptory Prohibition on the Use of Force

Belgium considered that necessity could provide a defence to a breach of the prohibition on the use of force when it invoked necessity before the ICJ as a defence in connection with NATO's bombing of Yugoslavia in 1999.⁶ It has also been argued by some writers that necessity may provide a defence to the breach of the prohibition on the use of force in connection not just with humanitarian intervention,⁷ but also in connection with the use of

³ VCLT, Article 53 ('A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of international law') and Article 64 ('If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates').

⁴ *Prosecutor v Furundzija* (Judgment) (1999) 38 ILM 317, 349: 'The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force.'

⁵ James Crawford, *Brownlie's Principles of Public International Law* (8th ed, OUP 2012) 595.

⁶ See Chapter 2, text to nn 104 – 106.

⁷ Ian Johnstone, 'The Plea of Necessity in International Legal Discourse: Humanitarian Intervention and Counter-Terrorism' (2005) 43 *Columbia J Intl L* 337.

force against non-State terrorist actors⁸ and the protection of nationals abroad.⁹ The ILC observed that the possibility that necessity could provide a defence to the breach of the prohibition on the use of force could be problematic because ‘States have most often abusively invoked a state of necessity in the past as justification for breaches of precisely this ... obligation.’¹⁰ Chapter 1 of this thesis has already discussed how this abuse had nothing to do with necessity as a legal doctrine but rather took place at a time when international law was considerably less developed than it is now. But the possibility that necessity could provide a defence to a breach of the prohibition on the use of force remains problematic because it would still undermine the law applicable to the use of force as it operates today. There are three well-accepted bases for the lawful use of force: the use of force authorised by the UN Security Council;¹¹ the use of force in self-defence;¹² and the use of force with the consent of the State in which the force is being used.¹³ If necessity were to provide a defence to a breach of the prohibition on the use of force it would undermine all three of these bases: it would undermine the central role played by the UN Security Council under the UN Charter because necessity could be invoked without any Security Council authorisation; it would undermine the law of self-defence by undercutting the need for an (imminent) armed attack, which is

⁸ *ibid*; Oscar Schachter, ‘The Lawful Use of Force by a State Against Terrorists in Another Country’ in Henry Han (ed), *Terrorism and Political Violence: Limits and Possibilities of Legal Control* (Oceana 1993) 243, 256 – 260.

⁹ Jean Raby, ‘The State of Necessity and the Use of Force to Protect Nationals’ (1988) 26 *Canadian Ybk Intl L* 253.

¹⁰ ILC, ‘Report of the International Law Commission on the Work of its 32nd Session’ (5 May – 25 July 1980) UN Doc A/35/10, in *Ybk ILC* (1980) II(2) 50.

¹¹ UN Charter (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Article 42.

¹² *ibid* Article 51.

¹³ On consent, and the difficulties in establishing valid consent, see Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Christopher Sutcliffe tr, Hart 2010) ch 5.

central to self-defence, but would not be required by necessity; and it would undermine consent because that would not need to be obtained by a State invoking necessity.

But the peremptory status of the prohibition on the use of force, and which has been recognised by a large number of States,¹⁴ the ICJ,¹⁵ the ILC¹⁶ and by writers,¹⁷ must by its nature prevent necessity from providing a defence to the breach of the prohibition on the use of force. A peremptory rule such as the prohibition on the use of force cannot be derogated from by a customary rule that is not itself a peremptory rule, and necessity, which is not a peremptory rule, would, by providing a defence to a breach of that rule, derogate from it.¹⁸ The reason that this has not always been accepted may have something to do with the less than obvious way in which the peremptory status of the prohibition on the use of force operates. It has just been noted that the use of force is permitted in at least three instances. If the prohibition on the use of force makes way in these instances, it may naturally be

¹⁴ The practice is too extensive to set out here, but see Corten (ibid) 201 – 207, who does set it out comprehensively, referring to State practice in connection with the drafting of the VCLT, discussions leading up to General Assembly Resolutions including the ‘Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations’ (UNGA Res 2625 (XXV) (24 October 1970) UN Doc A/RES/25/2625) and the ‘Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations’ (UNGA Res 42/22 (18 November 1987) UN Doc A/RES/42/22) as well as States’ pleadings before the ICJ.

¹⁵ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, [190].

¹⁶ ILC, ‘Report of the International Law Commission on the Work of its 32nd Session’ (n 10) 50: ‘one obligation whose peremptory character is beyond doubt in all events is the obligation of a State to refrain from any forcible violation of the territorial integrity or political independence of another State.’

¹⁷ Christine Gray, *International Law and the Use of Force* (3rd ed, OUP 2008) 30; Corten (n 13) 200 – 213; Yoram Dinstein, *War, Aggression and Self-Defence* (5th ed, CUP 2011) 104 – 109. Compare James Green, ‘Questioning the Peremptory Status of the Prohibition of the Use of Force’ (2011) 32 Michigan J of Intl L 215, although he still accepts that ‘an overwhelming majority of scholars view the prohibition as having a peremptory character’ (216).

¹⁸ Thus, and as the ASR Commentaries put it with respect to countermeasures (ILC, ‘The International Law Commission’s Articles on State Responsibility: Introduction, Text, and Commentaries’ (CUP 2002) 188), ‘a genocide cannot justify a genocide’ (citing *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)* (Counterclaims) [1997] ICJ Rep 243, [35]).

wondered why it could not also make way for necessity. The best response to this, and the most convincing clarification of the nature of the peremptory prohibition on the use of force, is that the three well-accepted instances in which the use of force is nonetheless permitted do not actually derogate from the prohibition, but they rather act as exceptions within the prohibition and thereby delimit the scope of that prohibition in the first place.¹⁹ Thus a State that lawfully exercises self-defence ‘is not, even potentially, in breach of [the prohibition on the use of force].’²⁰ There is therefore no need to move to the level of secondary rules in order to determine whether there may be a defence to the breach of the prohibition on the use of force.²¹ In other words, it is only the use of force in cases where there is no Security Council authorisation, no lawful self-defence and no valid consent that the peremptoriness of the prohibition comes into play to prevent any derogation. The only way that necessity could therefore be relevant would be if it too had a role as an exception within the primary rule prohibiting the use of force.

This is borne out by the way in which the views of the ILC and its Special Rapporteurs on State Responsibility have developed, as well as how States have reacted to those views. Ago,²² and the ILC,²³ had at one point drawn a distinction between uses of force that amounted to aggression and uses of force that did not, with only the former being peremptorily prohibited. Ago and the ILC left open, on the basis of this distinction, whether

¹⁹ Corten (n 13) 199; James Crawford, *State Responsibility: The General Part* (CUP 2013) 317 – 318.

²⁰ ASR Commentaries (n 18) 166.

²¹ But self-defence may act as a defence to breaches of obligations other than the prohibition on the use of force (see Federica Paddeu, ‘Self-Defence as a Circumstance Precluding Wrongfulness: Understanding Article 21 of the Articles on State Responsibility’ (2015) BYIL (forthcoming)).

²² Roberto Ago, ‘Addendum – Eighth Report on State Responsibility’ (29 February, 10 and 19 June 1980) UN Doc A/CN.4/318/Add.5-7 in *Ybk of the ILC* (1980) II(1) 13, 39, 44.

²³ ‘Report of the ILC on the Work of its 32nd Session’ (n 10) 43 – 45.

necessity might provide a defence to uses of force that did not amount to aggression. But at another point Ago appeared to give up that position when observing in an ILC meeting that ‘it had been agreed that state of necessity could in no event justify recourse to armed force.’²⁴ In any event, those States that spoke up on the issue in the General Assembly’s Sixth Committee soon after this were firmly opposed to the possibility of necessity providing a defence to *any* breach of the prohibition on the use of force.²⁵ This opposition was complemented by the fact that ‘no State claimed the contrary, by asserting that the state of necessity could be justified by certain limited forms of armed intervention that were *a priori* contrary to the UN Charter’ (emphasis original).²⁶ Crawford, as Special Rapporteur, departed from Ago’s equivocation and echoed the views expressed in the Sixth Committee. Crawford categorically opposed any role for necessity in connection with the use of force. Speaking in terms of the lawfulness or otherwise of humanitarian intervention, but using reasoning that clearly applied to any contested basis for the use of force, Crawford explained that this was clearly a matter for the primary rules.²⁷

²⁴ ‘Summary Record of the 1618th Meeting’ (24 June 1980) UN Doc A/CN.4/SR.1618 in *Ybk ILC* (1980) I 177, 181.

²⁵ Chile (UNGA Sixth Committee (35th Session) ‘Summary Record of the 47th Meeting’ (12 November 1980) UN Doc A/C.6/35/SR.47, [7]); Sri Lanka (ibid ‘Summary Record of the 49th Meeting’ (14 November 1980) UN Doc A/C.6/35/SR.49, [8]); Ethiopia (ibid ‘Summary Record of the 51st Meeting’ (17 November 1980) UN Doc A/C.6/35/SR.51, [44]); Czechoslovakia (ibid ‘Summary Record of the 54th Meeting’ (19 November 1980) UN Doc A/C.6/35/SR.54, [16]) German Democratic Republic (ibid, [18]); India (ibid, [29]); Cyprus (ibid ‘Summary Record of the 59th Meeting’ (24 November 1980) UN Doc A/C.6/35/SR.59, [4]) Italy (ibid, [33]-[34]). Some States considered that necessity could never preclude the wrongfulness of a breach of the prohibition on the use of force because any use of force would seriously harm an essential interest of another State contrary to Draft Article 33(1)(b) (and later Article 25(1)(b)): Netherlands (ibid ‘Summary Record of the 44th Meeting’ (11 November 1980) UN Doc A/C.6/35/SR.44, [29]); Mexico (ibid ‘Summary Record of the 48th Meeting’ (13 November 1980) UN Doc A/C.6/35/SR.48, [17]). Some States considered that the UN Charter implicitly excluded necessity (Romania (ibid ‘Summary Record of the 50th Meeting’ (17 November 1980) UN Doc A/C.6/35/SR.50, [3]); Tunisia (ibid ‘Summary Record of the 52nd Meeting’ (18 November 1980) UN Doc A/C.6/35/SR.52, [45]); Egypt (ibid, [53]).

²⁶ Corten (n 13) 218.

²⁷ ‘Second Report on State Responsibility’ (19 July 1999) UN Doc A/CN.4/498 in *Ybk ILC* (1999) II(1) 3, 72.

For present purposes it seems enough to say that either modern State practice and *opinio juris* license humanitarian intervention abroad in certain limited circumstances, or they do not. If they do, then such action would appear to be lawful in those circumstances and cannot be considered as violating the peremptory norm reflected in Article 2(4) of the Charter. If they do not, there is no reason to treat them differently from any other aspect of the rules relating to the use of force. In either case, it seems that the question of humanitarian intervention abroad is not one which is regulated, primarily or at all, by [draft] article 33 [and thus also Article 25].

Crawford's conclusion was echoed by the ILC generally²⁸ and it was also expressly approved by several States in the General Assembly's Sixth Committee.²⁹

The development of the strict prohibition on the use of force also points against necessity playing a role as an exception within the prohibition on the use force.³⁰ Article 2(4) of the UN Charter was, subject to the well-accepted lawful bases for the use of force noted above, designed to provide a watertight prohibition on the use of force.³¹ The strictness with which international law would greet forcible interventions during the Charter era was illustrated soon after the Charter's entry into force by the ICJ in the seminal *Corfu Channel* case of 1949.³² This case arose following a minesweeping operation carried out by British

²⁸ 'Report of the International Law Commission on the Work of its 53rd Session' (23 April – 1 June and 2 July – 10 August 2001) UN Doc A/56/10, 84; ILC, 'The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries' (CUP 2002) 185 – 186.

²⁹ Austria (UNGA Sixth Committee (54th Session) 'Summary Record of the 22nd Meeting' (1 November 1999) UN Doc A/C.6/54/SR.22, [16]); Mexico (ibid 'Summary Record of the 23rd Meeting' (2 November 1999) UN Doc A/C.6/54/SR.23, [20]); Cuba (ibid 'Summary Record of the 28th Meeting' (5 November 1999) UN Doc A/C.6/54/SR.28, [93]). Mexico and Cuba both expressly referred to the peremptory status of the prohibition on the use of force in the UN Charter.

³⁰ This is distinct from necessity as a constituent element of self-defence, which of course does have to be satisfied for self-defence to be lawful (see, generally, Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (CUP 2004)).

³¹ Ian Brownlie, *International Law and the Use of Force by States* (OUP 1963) 267 – 268. See, specifically, the statement of the US delegate at the San Francisco Conference: 'The Delegate of the United States made it clear that the intention of the authors of the original text was to state in the broadest terms an absolute all-inclusive prohibition; the phrase 'or in any other manner' [in Article 2(4)] was designed to insure that there should be no loopholes' ('Summary Report of 11th Meeting of Committee I/1' (4 June 1945) 6 UNCIO 335).

³² *Corfu Channel (United Kingdom v Albania)* (Merits) [1949] ICJ Rep 6.

ships in Albanian territorial waters following the destruction by mines of two British ships in those waters causing 44 deaths and injuries to others. Albania claimed that this minesweeping operation constituted a violation of its sovereignty and the UK defended its actions before the ICJ in terms that, while not always clear, bore some resemblance to necessity. The UK pleaded that it possessed a ‘right of self-help or intervention [which] can only be exercised when there is an immediate necessity.’³³ In the oral proceedings, Eric Beckett, as agent and counsel for the UK, acknowledged the role of the Charter in restricting the use of force, but contended that ‘in a case of this kind, where there had been a violent attack on our ships ... and there was an urgent necessity to safeguard evidence necessary for the purposes of justice, that a properly limited right of self-help remains in modern international law.’³⁴

The Court gave short shrift to these arguments. The Court first dismissed the idea of a ‘right of intervention’.³⁵

The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself.

Nor could any concept of ‘self-help’ provide a lawful basis for the British actions because, ‘Between independent States, respect for territorial sovereignty is an essential foundation of international relations.’³⁶ The Court did not consider, despite labelling the ‘alleged right of

³³ *Corfu Channel (United Kingdom v Albania)* [1950] ICJ Pleadings, Oral Arguments, Documents vol II, 284.

³⁴ *ibid* vol III, 296.

³⁵ See n 32, 35.

³⁶ *ibid*.

intervention as the manifestation of a policy of force', whether the UK had breached the prohibition on the use of force in Article 2(4) of the UN Charter. But the tenor of the ICJ's judgment is clear. As Olivier Corten puts it:³⁷

In view of the arguments presented, it can be considered that the Court rules out the state of necessity for an action it otherwise refrains from characterising as a use of force. *A fortiori*, there is therefore every reason to think that it would have ruled out that justification if it had assimilated the action to a violation of article 2(4).

The days of the 'unrestricted right of war'³⁸ are well and truly over. It is clear that if necessity could not provide a lawful basis for interventions associated with a 'policy of force', then neither could necessity provide a lawful basis for the use of force.³⁹

State practice since then has not upset the conclusion that necessity cannot provide an exception within the prohibition on the use of force. Ago, writing in 1980, gave only one example of where a State had invoked necessity in connection with the use of force since World War II. The example involved what Ago considered to be Belgium's invocation of necessity in 1960 in connection with the protection of its and other European nationals in the Congo.⁴⁰ But it is far from clear that Belgium was actually invoking necessity. While the Belgian Prime Minister stated at one point that 'the Belgian troops intervened when there was imminent danger and the government found itself in a situation of absolute necessity',⁴¹

³⁷ See n 13, 240.

³⁸ Brownlie (n 31) 19.

³⁹ See the Dissenting Opinion of Judge Krylov ((n 32) [6]): 'after the coming into force of the Charter, the so-called right of self-help, also known as the law of necessity (Notrecht), which used to be upheld by a number of German authors, can no longer be invoked. It must be regarded as obsolete. The employment of force in this way is forbidden by the Charter (para 4 of Art. 2).'

⁴⁰ Ago's Addendum (n 22) 43.

⁴¹ Donald McNemar, 'The Postindependence War in the Congo' in Richard Falk (ed), *The International Law of Civil War* (Johns Hopkins 1971) 244, 273.

Belgian officials elsewhere, particularly before the UN Security Council, tended to couch their arguments in broad political or moral terms, and to the extent that they did approach legal terms, the Belgian arguments tended to focus more on a ‘right’ to protect nationals⁴² and ‘the complete absence of interference by the Belgian Government in the internal affairs of the Republic of the Congo.’⁴³ The Congo itself condemned Belgium’s acts as amounting to an ‘act of aggression’.⁴⁴ The response of States in the Security Council sheds little light given, as Ago himself noted, that States approached the matter in largely factual terms rather than on the basis of legal principle.⁴⁵ Ago thought it was important that no State denied the existence of necessity in principle,⁴⁶ but that lack of denial is unremarkable and irrelevant given Belgium itself had not clearly advanced necessity in legal terms. In sum, there is very little, if anything, in this incident that can be used to support an argument that necessity may provide a defence to a breach of the prohibition on the use of force.

There is another example where necessity may have been invoked as furnishing a lawful basis for the use of force but that was not mentioned by Ago. Nabil Elaraby, at an ILC meeting during which the relationship between necessity and the use of force was being discussed, mentioned that the UK and France had in 1956 informed the Egyptian government that, if its forces did not immediately withdraw from the Suez Canal, the UK and France

⁴² UNSC Verbatim Record (20 July 1960) UN Doc D/PV.877, [91], [106].

⁴³ UNSC Verbatim Record (13 July 1960) UN Doc S/PV.873, [193]. See also Raby’s summary (see n 9, 269): ‘the Belgian government’s statements were not precise, were confused and alluded more to a self-standing right approach than to the concept of necessity; the term ‘necessity’ was used more in its ordinary meaning than as a legal concept.’

⁴⁴ See Corten (n 13) 240 – 241, citing and translating a telegram of 12 July 1960 to this effect sent by the Congolese President and Prime Minister to the UN.

⁴⁵ Ago’s Addendum (n 22) 43. See also the summary in Corten (n 13) 242 – 243.

⁴⁶ *ibid.*

would (in Elaraby's words) 'occupy the canal because of the necessity to safeguard navigation.'⁴⁷ The UK and France, of course, did proceed to use force. Elaraby (an Egyptian national) does not cite the original British and French statements, but there are nonetheless some interesting insights to be gleaned from the advice tendered to the British government by Gerald Fitzmaurice, as Foreign Office Legal Adviser, and which has subsequently entered the public domain. Fitzmaurice had at an early stage considered the British to be on a 'very bad wicket legally as regards using force',⁴⁸ and he came to take the view, which he reiterated on numerous occasions to officials in Whitehall (and which was ignored), that there was no lawful basis for the use of force.⁴⁹ But he had at one stage advised that 'the doctrine of so-called necessity' could have been invoked. Fitzmaurice introduced necessity as 'rather a back-handed doctrine, since it is founded on the maxim that necessity knows no law.'⁵⁰ But he proceeded to state that necessity was a doctrine that 'international law does, nevertheless, within certain pretty stringent limits, afford recognition.'⁵¹ Although Fitzmaurice appeared to accept that necessity could in principle furnish a lawful basis for the use of force, Fitzmaurice clearly doubted whether the use of force in this case would come within necessity's stringent limits:⁵²

The result seems to be that the chances of establishing a legal case on this basis would be very slight. We might show the existence of a considerable danger arising out of the Canal situation, but it seems very doubtful whether we could show that this danger

⁴⁷ ILC, 'Summary Record of the 2591st Meeting' (22 June 1999) UN Doc A/CN.4/SR.2591 in *Ybk ILC* (1999) I 169, 172.

⁴⁸ FO 371/119728 (JT 1053/100G), cited in Geoffrey Marston, 'Armed Intervention in the 1956 Suez Canal Crisis: The Legal Advice Tendered to the British Government' (1988) 37 *ICLQ* 773, 783.

⁴⁹ See the discussion of Fitzmaurice's advice and correspondence in Marston, *ibid* 783 – 791.

⁵⁰ FO 800/747, cited in Marston, *ibid* 785.

⁵¹ *ibid*.

⁵² *ibid* 786.

was of such a nature that it really imperilled the existence of the United Kingdom, or that there were no effective means, short of the use of force, by which it could be dealt with.

Fitzmaurice's views on the role of necessity in international law are interesting, but there is ultimately little to derive from the Suez crisis in terms of authority to support necessity's potential for furnishing a lawful basis for the use of force. There is nothing from the debates before the Security Council and General Assembly to suggest that the UK and France were relying on necessity in a legal sense, and Fitzmaurice's sceptical advice may indeed have been one reason for that, while most other States condemned the Anglo-French actions as amounting to an unlawful use of force.⁵³

Finally, Belgium invoked necessity, among other arguments, in connection with the bombing of Yugoslavia by several NATO States in 1999.⁵⁴ But it was clear that it was invoking necessity not as an exception within the prohibition on the use of force but as a defence to State responsibility given that Belgium's counsel expressly stated that the argument was premised on the use of force in the first instance being unlawful (which he was prepared to assume *arguendo*).⁵⁵ Given the inability of necessity to derogate from the peremptory prohibition on the use of force as a matter of principle, this was not a strong argument. It is therefore unsurprising that Belgium cut an isolated figure with this argument.

⁵³ Ago's Addendum (n 22) n 132. Ago notes that, even if necessity had been invoked, it probably would not have satisfied the requisite conditions because, as many States pointed out, 'the safeguarding of the vital interest of some parties could not be achieved at the sacrifice of a no less vital interest of others' (as summarised in Ago's words).

⁵⁴ See Chapter 2, text to nn 104 – 106.

⁵⁵ *Legality of Use of Force (Serbia and Montenegro v Belgium)* [2004] ICJ Rep 279, CR1999/15: 'We do not accept that any rule has been breached. However, for the sake of argument, let us say that it is the rule prohibiting the use of force.'

Its NATO allies did not rely on this argument,⁵⁶ while outside of NATO the use of force was widely condemned as a breach of the prohibition on the use of force.⁵⁷

Two straightforward conclusions can therefore be drawn from this section. Necessity cannot provide a defence to a breach of the peremptory prohibition on the use of force and nor is there any basis for suggesting that necessity provides an exception within the prohibition on the use of force.

Necessity, Primary Rules and Emergency Exceptions

Primary rules may contain their own safety valves that regulate situations of emergency and this section examines how this has two consequences for the scope of necessity. The first consequence of this is that these primary rules that regulate situations of emergency must be applied prior to and independently of necessity as a defence and secondary rule of State responsibility. Where a State has invoked both a primary rule that regulates a situation of emergency and necessity as a defence and secondary rule of State responsibility, the tribunal must start at the level of the primary rules, consider whether there is a breach of a primary rule, and only then if there is a breach of a primary rule should a tribunal move on to consider whether there may be a defence to that breach under the secondary rules of State responsibility.

⁵⁶ Gray (n 17) 39 – 51; Corten (n 13) 245 – 247.

⁵⁷ *ibid.*

The second consequence is that these primary rules may regulate situations of emergency to the exclusion of necessity. This may be either as a practical consequence because the primary rule sets down a more lenient test than necessity, or as a matter of law because, in the words of Article 25(2)(a) of the ASR, ‘the international obligation in question excludes the possibility of invoking necessity’. That exclusion may be explicit or implicit,⁵⁸ although in reality there are few if any international obligations that explicitly exclude the possibility of invoking necessity. The real concern is with those situations where ‘the non-availability of the plea of necessity emerges clearly from the object and purpose of the rule.’⁵⁹

This section illustrates these two consequences by examining three situations where primary rules regulate situations of emergency. This section first examines in some detail non-precluded measures clauses in trade and investment treaties, which is where the greatest difficulties have arisen in practice. This section then turns to examine more briefly emergency derogations in human rights treaties and finally military necessity in the laws of armed conflict.

(i) Non-Precluded Measures in Trade and Investment Treaties

Some treaties, including most prominently trade and investment treaties, contain clauses that stipulate that the treaty does not *preclude* certain measures from being taken. The following discussion focuses on two very different examples of these clauses. The discussion first

⁵⁸ ASR Commentaries (n 18) 185.

⁵⁹ *ibid.*

considers Article XXI of the General Agreement on Tariffs and Trade (GATT), which strikingly contains a (largely) self-judging approach to when it may be invoked, and which quite clearly sets it apart from necessity.

The discussion then turns to consider Article XI of the US – Argentine BIT, which does not contain a self-judging approach and in respect of which a number tribunals have had considerable difficulties when deciding how this clause relates to necessity. But the following discussion contends that those difficulties can be overcome. The language of non-preclusion means that clauses like Article XI operate at the level of primary rules and delimit the scope of those primary rules. Those measures that are listed as being not precluded by the treaty are not affected by the treaty and remain outside the scope of the treaty and its application. This is in contrast to necessity as a defence and secondary rule of State responsibility, which only applies where there is a breach of an international obligation in the first place. The distinct role played by primary rules like Article XI of the US – Argentina BIT means that they must be applied prior to and independently of necessity.

Non-Precluded Measures and the General Agreement on Tariffs and Trade

Article XXI of the GATT provides that:⁶⁰

Nothing in this Agreement shall be construed

- (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or

⁶⁰ General Agreement on Tariffs and Trade (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 187.

- (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
 - (i) relating to fissionable materials or the materials from which they are derived;
 - (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
 - (iii) taken in time of war or other emergency in international relations; or
- (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

Article XXI has never been interpreted and applied by a World Trade Organisation (WTO) panel, despite being invoked by States on numerous occasions.⁶¹ Different views have been taken within the doctrine about the depth and breadth of the review that a WTO panel would be able to undertake of Article XXI(b), which is the most important paragraph in view of its potentially broad scope. On one view, and relying on Article XXI(b)'s self-judging language ('*it considers necessary*' (emphasis added)), no review is permitted and the only check on Article XXI(b)'s abuse is the restraint of States.⁶² But on another view, and notwithstanding the self-judging language, Article XXI(b) must at least be subject to a good faith review.⁶³ Some of the writers taking this view emphasise that Article XXI(b) should be dissected so

⁶¹ See, for a survey of the practice, Roger Alford, 'The Self-Judging WTO Security Exception' (2011) *Utah L Rev* 697, 706 – 725.

⁶² *ibid.*

⁶³ Michael Hahn, 'Vital Interests and the GATT: An Analysis of GATT's Security Exception' (1991) 12 *Michigan J Intl L* 558; Hannes Schloemann and Stefan Ohloff, "'Constitutionalization" and Dispute Settlement in the WTO: National Security as an Issue of Competence' (1999) 93 *AJIL* 424; Dapo Akande and Sope Williams, 'International Adjudication on National Security Issues: What Role for the WTO?' (2003) 43 *Virginia J Intl L* 365.

that whether the measures were ‘necessary’ would, again notwithstanding the self-judging language, be subject to a good faith review, whereas whether any of the situations listed in (i)-(iii) existed would be a question to which the self-judging language did not extend and thus one that a tribunal could review objectively.⁶⁴

Those writers that have argued for some role for WTO panels in reviewing a State’s invocation of Article XXI(b) are more persuasive than those who have argued against any such role. The ICJ has held in the *Djibouti* case, which involved a clause in a mutual criminal assistance treaty with self-judging language,⁶⁵ that France, which had invoked the clause, still had to apply the clause in good faith pursuant to Article 26 of the VCLT⁶⁶ and that the Court would review whether it had done so.⁶⁷ It is reasonable and unsurprising that clearer language must be required before a State can expect the extraordinary implication that its actions, no matter how abusive, remain entirely beyond third-party review. This must be especially so in a context where, as is the case with the GATT, States have consented to the compulsory jurisdiction of the WTO dispute settlement system.⁶⁸

But to say that there must be some review of a State’s invocation of Article XXI(b) is not to say that this review would be particularly intense or even very effective. First, a mere

⁶⁴ Akande and Williams, *ibid.*

⁶⁵ *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* [2008] ICJ Rep 177. The clause allows a State to refuse a request for criminal assistance ‘if it considers that execution of the request is likely to prejudice [the] sovereignty, . . . security, . . . *ordre public* or other . . . essential interests’ of the State (see [28]).

⁶⁶ Article 26 of the VCLT provides that: ‘Every treaty in force is binding upon the parties to it and must be performed by them in good faith.’ Article 31(1) of the VCLT of course also requires that a treaty be interpreted in good faith.

⁶⁷ At [145].

⁶⁸ Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex to the WTO Agreement (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 401, Article 23(1).

good faith review of the necessity of the measures would afford wide discretion to States. There may be a number of ways in which to define a concept as fuzzy as good faith, but on most definitions a finding of bad faith is going to be a rare finding. Dapo Akande and Sope Williams, for example, understand good faith as requiring that the State genuinely believes that the measures it is taking are necessary to protect its essential security interests,⁶⁹ in which case bad faith is a high threshold, tantamount to dishonesty, which an international tribunal may be reluctant to find has been crossed. Second, it may be doubted whether a WTO panel would be very intrusive when reviewing whether a State faces a ‘war or other emergency in international relations’ in the terms of Article XXI(b)(iii), which is the most relevant subparagraph in practice. What amounts to an ‘emergency’ in particular is probably by its inherently subjective nature only susceptible of a review that is highly deferential to the State that claims it is facing an emergency.⁷⁰ What is clear is that this clause is on its terms markedly different from, and provides a markedly more lenient test than, necessity as a defence to State responsibility.⁷¹

Non-Precluded Measures and Investment Treaties

Whereas Article XXI(b) of the GATT has not been the focus of litigation, one non-precluded measures clause in one investment treaty has repeatedly been the focus of litigation before investor-State tribunals and has given rise to significant problems for those tribunals. Non-

⁶⁹ See n 63, 389 – 390.

⁷⁰ Hahn (n 63) 587; Akande and Williams (n 63) 400 – 402.

⁷¹ Compare, for example, *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (Judgment) [1997] ICJ Rep 7, [51]: ‘the state of necessity can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met.’

precluded measures clauses have historically been found in a minority of investment treaties, although they are more commonly found in the most recent investment treaties (or investment chapters in broader economic treaties).⁷² But they have always been a feature of US investment treaties,⁷³ and it is the non-precluded measure clause in the US - Argentina BIT that has produced severe interpretive difficulties for arbitral tribunals, particularly with respect to its relationship with necessity. Article XI of that BIT provides:⁷⁴

This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests.

Article XI of the US-Argentina BIT shares the same language of non-preclusion with Article XXI of the GATT, but it otherwise contains important differences. Most significantly, Article XI of the US-Argentina BIT does not contain the self-judging language that is present in Article XXI of the GATT. Argentina nevertheless argued in the cases in which it invoked Article XI that Article XI was implicitly self-judging. This argument was sensibly rejected by the tribunals on every occasion.⁷⁵ Among other reasons that justified this rejection, there is

⁷² UNCTAD, *The Protection of National Security in IIAs* (2009) 72.

⁷³ See, for an historical survey of these clauses in US treaty practice, James Mendenhall, 'The Evolution of the Essential Security Exception in U.S. Trade and Investment Agreements' in Karl Sauvant, Lisa Sachs and Wouter Jongbloed (eds), *Sovereign Investment: Concerns and Policy Reactions* (OUP 2012) 310.

⁷⁴ Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment (adopted 14 November 1991, entered into force 20 October 1994) 31 ILM 124.

⁷⁵ *CMS v Argentina* (Award) ICSID Case No ARB/01/08, 12 May 2005, [366] – [373]; *LG & E v Argentina* (Decision on Liability) ICSID Case No ARB/02/1, 3 October 2006, [207] – [214]; *Enron v Argentina* (Award) ICSID Case No ARB/01/3, 22 May 2007, [331] – [339]; *Sempra v Argentina* (Award) ICSID Case No ARB/02/16, 28 September 2007 [373] – [388]; *Continental Casualty v Argentina* (Award) ICSID Case No ARB/03/9, 5 September 2008, [182] – [188]; *El Paso v Argentina* (Award) ICSID Case No ARB/03/15, 31 October 2011, [588] – [610].

nothing in the terms of Article XI to suggest that it should be self-judging, which is critical given that Article XXI of the GATT demonstrates that States are well aware of how to draft self-judging clauses if that is what they want.⁷⁶ But that was a rare example of consistency among these tribunals.

It did not take long for the jurisprudence on Article XI to descend into a state of disarray. The *CMS*,⁷⁷ *Enron*⁷⁸ and *Sempra*⁷⁹ tribunals all rejected that Argentina could establish either Article XI or necessity.⁸⁰ The *LG & E* tribunal, by contrast, held that Argentina had established Article XI with respect to a certain period of time during the nadir of Argentina's crisis.⁸¹ But what was striking about that split in the case law was that two of the members of the *LG & E* tribunal had either sat on the *CMS* tribunal or would sit on the *Enron* tribunal,⁸² yet the *LG & E* award contained no discussion of the very different approach that had been taken earlier by the *CMS* tribunal (and would also be taken later by the *Enron* tribunal, which in turn did not bother to discuss the approach taken by the *LG & E* tribunal either).⁸³ But the problems with these awards ran deeper than their unexplained

⁷⁶ The ICJ had made the same point with respect to a very similar non-precluded measures clause in a Friendship, Commerce and Navigation Treaty in issue in *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, [222].

⁷⁷ See n 75, [304] – [394].

⁷⁸ See n 75, [288] – [345].

⁷⁹ See n 75, [325] – [397].

⁸⁰ In all three cases Francisco Orrego Vicuña sat as President of the tribunal.

⁸¹ See n 75, [201] – [266].

⁸² Judge Francisco Rezek was a member of both the *CMS* and *LG & E* tribunals, and Albert Jan van den Berg was a member of both the *LG & E* and *Enron* tribunals.

⁸³ The *Sempra* tribunal did note the contrasting approach of the *LG & E* tribunal, but put it down to a different assessment of the seriousness of the crisis (see n 75, [346]).

inconsistency. None of the tribunals offered anything approaching a clear account of the relationship between Article XI and necessity.

The *CMS* tribunal was the first tribunal to consider the relationship between Article XI and necessity, and it was the least convincing in its understanding of that relationship. The *CMS* tribunal first assessed Argentina's measures against Article 25 of the ASR, which it considered set down the criteria for necessity under customary international law, found that these criteria had not been met and accordingly found that Argentina could not establish necessity.⁸⁴ The tribunal did purport to then go on and consider Article XI in a section it titled 'The Tribunal's Findings in Respect of the Treaty's Clauses on Emergency',⁸⁵ but proceeded neither to apply the conditions of Article XI nor to even make a finding as to whether Article XI applied or not. The tribunal's failure in those respects is explained by its earlier statement that Argentina had invoked 'the existence of a state of necessity under both customary international law and the provisions of the Treaty', and that this 'raised one fundamental issue in international law'.⁸⁶ The tribunal thus simply conflated Article XI and necessity, and it evidently saw no need to apply Article XI independently of necessity.

The *Enron* and *Sempra* tribunals did recognise that Article XI and necessity were distinct rules, but only in a formal sense. Both tribunals first found, as the *CMS* tribunal had, that Argentina's measures did not satisfy the customary necessity criteria set down in Article

⁸⁴ See n 75, [315] – [331].

⁸⁵ *ibid* [353].

⁸⁶ *ibid* [308]. It may be worth noting that, as the *CMS Annulment* committee would note (*CMS v Argentina* (Decision on Annulment) ICSID Case No ARB/01/08, 25 September 2007, [123]), Argentina had in its own pleadings conflated Article XI and necessity. As noted by Campbell McLachlan ('Investment Treaties and General International Law' (2008) 57 ICLQ 361, 387), it was only from the *Enron* case onwards that Argentina submitted that Article XI was separate from necessity.

25 of the ASR and that accordingly Argentina could not establish necessity.⁸⁷ Only then, again like the *CMS* tribunal, did these tribunals turn to Article XI. The tribunals formally recognised the distinctness of Article XI and necessity when they responded to the argument of Argentina’s legal experts that the BIT was the *lex specialis* by stating that it was ‘no doubt correct’ that ‘a treaty regime specifically dealing with a given matter will prevail over more general rules of customary law’.⁸⁸ But then both tribunals proceeded to explain that the problem here was that the treaty did not deal with the elements that had to be satisfied.⁸⁹ They then both jumped to the conclusion that the elements of necessity under customary international law would also supply the elements that had to be satisfied under the treaty. As the *Sempra* tribunal put it, ‘The rule governing such questions will thus be found under customary law’,⁹⁰ or as the *Enron* tribunal put it, ‘The Treaty thus becomes inseparable from the customary law standard insofar as the conditions for the operation of state of necessity are concerned.’⁹¹ Both tribunals had of course already concluded that Argentina could not establish those conditions.

In sum, the *CMS*, *Enron* and *Sempra* tribunals all drew heavily on necessity in the course of applying, or purporting to apply, Article XI of the US-Argentina BIT. But none of those tribunals provided anything approaching a clear account of the relationship between

⁸⁷ *Enron* (n 75) [303] – [313]; *Sempra* (n 75) [344] – [354].

⁸⁸ *Sempra* (n 75) [378]; *Enron* (n 75) [334].

⁸⁹ *ibid.*

⁹⁰ See n 75, [378].

⁹¹ See n 75, [334].

Article XI and necessity, and why it was appropriate that necessity was, in effect, applied in the place of Article XI.

The *LG & E* tribunal delivered its award after the *CMS* tribunal and before the *Enron* and *Sempra* tribunals, but its approach was slightly different from that of the *CMS*, *Enron* and *Sempra* tribunals, albeit it remained unconvincing. The *LG & E* tribunal first appeared to signal some method in its approach to the relationship between Article XI and necessity when it ‘underscore[d] that the claims and defences mentioned derive from the Treaty and that, to the extent required for the interpretation and application of its provisions, the general international law shall be applied.’⁹² But the tribunal’s subsequent analysis showed very little in the way of method. The tribunal did first apply Article XI without any reference to necessity, but in doing so simply applied Article XI on its bare terms without interpreting those terms and concluded that Article XI had been established, at least for a certain period of time during the height of Argentina’s crisis.⁹³ The tribunal then proceeded to ‘support’ its analysis by also applying the elements of necessity, which it held were satisfied, although it did not explain what the point of that ‘support’ was.⁹⁴

It was into this disarray that the *CMS Annulment* committee stepped, provided a clear account of the relationship between Article XI and necessity, and produced a decisive break in the jurisprudence. The committee chastised the lack of method in the *CMS* tribunal’s approach to Article XI and its relationship with necessity, and in terms that could also be applied more broadly with respect to the similarly haphazard approaches of the *Enron*,

⁹² See n 75 [206].

⁹³ *ibid* [226] – [242].

⁹⁴ *ibid* [245] – [261].

Sempra and *LG & E* tribunals. The committee explained that Article XI and necessity had a ‘different operation and content’.⁹⁵ The committee explained that they operated differently because Article XI was a ‘threshold requirement’, which meant that, ‘if it applies, the substantive obligations under the treaty do not apply’.⁹⁶ Necessity, by contrast, is ‘an excuse which is only relevant once it has been decided that there has otherwise been a breach of those substantive obligations’.⁹⁷ In terms of the different content of Article XI and necessity, the committee explained that Article XI ‘covers measures necessary for the maintenance of public order or the protection of each Party’s own essential security interests, without qualifying such measures’.⁹⁸ Necessity, on the other hand, ‘subordinates the state of necessity to four conditions’, including conditions that are not found in Article XI.⁹⁹

The *CMS Annulment* committee explained that the consequence of this different operation and content was that the tribunal needed to ‘take a position on their relationship and ... decide whether they are both applicable’.¹⁰⁰ The committee considered that the *CMS*

⁹⁵ See n 86, [131].

⁹⁶ Compare the position taken earlier by the annulment committee in *Mitchell v Democratic Republic of the Congo* (Decision on the Application for Annulment) ICSID Case no ARB/99/7, 1 November 2006, and which is not mentioned by the *CMS Annulment* committee, where the tribunal treated a non-precluded measures clause in the US-Democratic Republic of Congo BIT as ‘a provision relating to the causes for exemption from liability, or, in other words, a provision which precludes the wrongfulness of the behavior of the State in certain exceptional circumstances, and not a provision which delimits the scope of application of the Treaty’ ([55]). For the reasons discussed in *CMS Annulment* and throughout this chapter, that approach is not convincing.

⁹⁷ At [129]. The committee did demonstrate some hesitation when it came to characterising necessity as a primary rule or secondary rule. It observed that ‘One could wonder whether state of necessity in customary international law goes to the issue of wrongfulness or that of responsibility’, but explained that even if customary necessity were a primary rule, Article XI would take priority as the *lex specialis* ([132] – [133]). On the inapplicability of the *lex specialis* principle to the relationship between primary and secondary rules, and in particular to the relationship between non-precluded measures clauses like Article XI of the US-Argentine BIT and necessity, see Anastasios Gourgourinis, ‘General/Particular International Law and Primary/Secondary Rules: Unitary Terminology of a Fragmented System’ (2011) 22 EJIL 993, 1022 – 1026.

⁹⁸ *ibid* [130]

⁹⁹ *ibid*.

¹⁰⁰ *ibid* [131].

tribunal failed to do this, ‘simply assuming that Article XI and Article 25 [(necessity)] are on the same footing’.¹⁰¹ The committee characterised the failure to apply the different content of the treaty defence as a ‘manifest error of law’,¹⁰² and the failure to analyse the relationship between Article XI and customary necessity, and in particular whether Article XI amounted to a primary rule and necessity as a secondary rule, as ‘another error of law’.¹⁰³ Despite recognising these errors, the committee conceded that its mandate to review the award was a limited one and although the tribunal may have applied the law ‘cryptically and defectively’, it had still applied it. There could thus be no manifest excess of powers for the purpose of annulment under Article 52 of the ICSID Convention.¹⁰⁴

The *CMS Annulment* committee’s reasoning reveals the ‘orderly method of legal reasoning’¹⁰⁵ that a tribunal must take in cases where both a primary rule regulating a situation of emergency and necessity as a defence to State responsibility and secondary rule are in issue. This ‘orderly method’ requires that a tribunal starts at the level of the primary rules, considers whether there is a breach of a primary rule, and only then if there is a breach of a primary rule should the tribunal move on to consider whether there may be a defence to that breach under the secondary rules of State responsibility. If there is no breach of a primary rule in the first place because a non-precluded measures clause applies to take the

¹⁰¹ *ibid.*

¹⁰² *ibid* [130].

¹⁰³ *ibid* [132].

¹⁰⁴ *ibid* [136]. One of the members of the committee later noted the criticism it had received for its approach to annulment, observing that the ‘decision is, it must be said, more popular among scholars than practitioners. It has been suggested that if the Committee did not intend to kill the award, it should not have wounded it so severely’: James Crawford, ‘Ten Investment Arbitration Awards That Shook the World: Introduction and Overview’ 4 *Dispute Resolution Intl* (2010) 71, 78.

¹⁰⁵ McLachlan (n 86) 390.

measures in question outside the scope of the treaty, then there will be no need to move on to consider whether necessity as a defence to State responsibility and secondary rule may apply. If the non-precluded measures clause does not apply and there is a breach, the next question would be whether or not the non-precluded measures clause implicitly excludes the possibility of invoking necessity. But there would be little practical value in going down this path where, as appears to be the case with respect to Article XI, necessity sets down a stricter test than the one that the State has already failed to establish.¹⁰⁶

That alludes to the most significant practical consequence that may follow from applying primary rules that regulate situations of emergency, such as non-precluded measures clauses, prior to and independently of necessity. Their content may not only be different, but the primary rule may set down conditions that are more lenient compared to necessity. Article XI did not, for example, contain, at least on its terms, either the ‘only way’ condition under which necessity applies,¹⁰⁷ nor the condition by which it would be precluded from invoking Article XI if it had contributed to the situation of emergency and under which necessity also applies.¹⁰⁸ In addition, a State that establishes necessity may still bear an obligation to compensate the injured State for material loss.¹⁰⁹ By contrast, this obligation could not apply where a State has established Article XI given that, if it has done so, it has established that the

¹⁰⁶ *ibid.*

¹⁰⁷ ASR, Article 25(2)(a).

¹⁰⁸ ASR, Article 25(2)(b).

¹⁰⁹ ASR, Article 27(b).

measures in question are beyond the scope of the treaty and thus they could not possibly provide the basis for any liability.¹¹⁰

This ‘orderly method of reasoning’ does not rule out the possibility that in some cases necessity could be relevant to the interpretation of a primary rule that regulates a situation of emergency. That is what may have been hinted at by the *CMS*, *Enron*, *Sempra* and *LG & E* tribunals, though of course none of those tribunals explained in any detail, if at all, their interpretive methods. But the possibility that necessity could be relevant to the *interpretation* of a primary rule that regulates a situation of emergency is distinct from *applying necessity in the place of* the treaty provision, which is what the *CMS*, *Enron* and *Sempra* tribunals effectively did. This important distinction was captured recently by the tribunal in the *Indus Waters* arbitration when it emphasised that “If customary international law were applied ... to negate rights expressly granted in the Treaty, this would no longer be “interpretation or application” of the Treaty but the substitution of customary law in place of the Treaty.”¹¹¹ In other words, it is still the treaty provision that must be applied and necessity can only be relevant to the interpretation of that provision to the extent that the treaty provision itself permits.

It is international law’s rules of treaty interpretation that would need to be considered when examining what the treaty provision itself permits. Article 31 of the VCLT, which has

¹¹⁰ *CMS Annulment* (n 86) [146].

¹¹¹ *Indus Waters Kishenganga Arbitration (Pakistan v India)* (Final Award) Permanent Court of Arbitration, 20 December 2013, [112]. See also the Separate Opinion of Judge Higgins in *Oil Platforms (Iran v United States)* [2003] ICJ Rep 225, [49].

been recognised by the ICJ as reflecting customary international law,¹¹² provides the following ‘general rule’ of treaty interpretation:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
 - (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) Any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

The key part of that rule for the purpose of drawing on necessity when interpreting a primary rule in a treaty like Article XI is Article 31(3)(c), which requires the interpreter to ‘take[] into account ... relevant rules of international law applicable in the relations between the parties.’

It is clear that a rule of customary international law, such as necessity, would qualify as a

¹¹² *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)* [2009] ICJ Rep 213, [47].

‘rule[] of international law applicable in the relations between the parties.’¹¹³ It is less clear that necessity, as a defence and secondary rule of State responsibility, could be a ‘relevant’ rule when it comes to the interpretation of a non-precluded measures clause and primary rule like Article XI of the US – Argentina BIT, although the scope of ‘relevant’ is difficult to confine.¹¹⁴ But even if necessity were ‘relevant’, the next question would be how much weight it should be accorded in the interpretive process.¹¹⁵ Article 31(3) requires simply that a ‘relevant rule[]’ be ‘taken into account’, not that it must be decisive for the interpretation of the treaty provision in question.¹¹⁶ Answering how it should be ‘taken into account’ requires stepping back to consider how treaty interpretation works more broadly.

A treaty derives its legal force from the treaty parties’ intention to be bound by international law.¹¹⁷ It follows that treaty interpretation is about ascertaining *how* the treaty parties intended to be bound by international law. Article 31 of the VCLT ‘emphasizes the

¹¹³ Unless one of the parties was held to be a persistent objector to necessity as a customary rule and therefore not bound by it. In *BG v Argentina* (Final Award) UNCITRAL Case, 24 December 2007, [400], the investor contended that the UK was a persistent objector to necessity as a rule of customary international law, but the tribunal did not reach a conclusion on this point. (For the UK’s criticism of necessity, see Chapter 2, text to n 133.)

¹¹⁴ Bruno Simma and Theodore Kill, ‘Harmonizing Investment Treaty Protection and International Human Rights: First Steps Towards a Methodology’ in Christina Binder, Ursula Kriebaum, August Reinisch and Stephen Wittich (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP 2009) 696: ‘Almost any rule of international law will be “relevant” when considered with the proper degree of abstraction’. In the *Djibouti* case (n 65) the ICJ found ‘broad and general ... aspirational’ rules from the Treaty of Friendship and Co-operation between two States to be ‘relevant rules’ for the purpose of interpreting provisions in the Convention on Mutual Assistance in Criminal Matters between the same two States ([113]).

¹¹⁵ Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (OUP 2013) 156.

¹¹⁶ This was the approach taken by the ICJ in *Djibouti* (n 65) where it found that ‘relevant’ rules only ‘have a certain bearing on interpretation’ and ‘cannot possibly stand in the way’ of particular rules in the treaty under interpretation ([114]).

¹¹⁷ Frank Berman, ‘International Treaties and British Statutes’ (2005) 26 *Statute L Rev* 1, 3; Eirik Bjorge, *The Evolutionary Interpretation of Treaties* (OUP 2014) 56.

intention of the parties as expressed in the text, as the best guide to their common intention.¹¹⁸ This may be obvious where one is concerned with a good faith interpretation of the *treaty* and with the ‘ordinary meaning of the *terms of the treaty*’ (emphasis added). But it is less obvious, yet just as important, when an interpreter turns to consider the treaty’s context, its object and purpose and is drawn beyond the four corners of the treaty in order to consider the means listed in Article 31(3). Even here, Article 31(1) provides that it is still the ‘*terms of the treaty*’ that are to be considered ‘in light of’ the context and object and purpose (emphasis added), and this must apply also to those means listed in Article 31(3) that are ‘taken into account, together with the context’. What this means is that relevant rules of customary international law may be considered together with context when interpreting a treaty provision pursuant to Article 31(3)(c), but only to the extent that they illuminate the meaning of the ‘terms of the treaty’, which must always remain at the heart of the inquiry.

When that approach is applied to the interpretation of Article XI of the US – Argentina BIT, the significant textual differences between Article XI and necessity point against the latter providing any illumination of the former. Some of these textual differences have already been noted. As the *CMS Annulment* committee emphasised when highlighting the ‘different operation and content’ of Article XI and necessity,¹¹⁹ Article XI is drafted as a ‘threshold provision’ as opposed to a defence like necessity, and necessity is subject to a number of conditions that are simply not present in the terms of Article XI. But, in addition, Article XI also protects a broader and different set of interests. Whereas necessity protects an ‘essential interest’ of a State from a ‘grave and imminent peril’, Article XI provides for a

¹¹⁸ James Crawford, *Brownlie’s Principles* (n 5) 379.

¹¹⁹ See n 86, [131].

State to take certain measures ‘for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.’ All of these significant textual differences make it very difficult to conclude that the US and Argentina had any common intention to permit necessity to influence the interpretation of their very differently drafted non-precluded measures clause.¹²⁰ In the end, the ‘orderly method of reasoning’ demanded by the *CMS Annulment* committee means that not only should primary rules be *applied* independently of necessity as a defence and secondary rule of State responsibility, they must also be *interpreted* independently of necessity unless the interpretation of the primary rule directs otherwise. In the case of Article XI, the primary rule does not appear to direct otherwise.

The ‘orderly method of reasoning’ demanded by the *CMS Annulment* committee’s decision has exerted a considerable influence over the approaches that subsequent tribunals have taken towards Article XI in the context of the cases arising out of the Argentine crisis. The *Continental Casualty* tribunal, which was the next tribunal to consider Article XI, adopted the *CMS Annulment*’s approach to applying Article XI as a threshold provision that was distinct from necessity as a defence to State responsibility.¹²¹ On that basis the

¹²⁰ Jürgen Kurtz convincingly contends that the different and wider set of interests that Article XI protects is ‘important evidence of contemplation of priority of State action over and above the permissible limits at customary law’ (‘Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis’ (2010) 59 ICLQ 325, 340). By contrast, José Alvarez & Kathryn Khamisi implausibly contend that the ‘the threefold division within Article XI is consistent with the customary defences of *force majeure*, distress, and particularly necessity’, which is clearly not borne out by the actual terms of the interests protected within Article XI and which clearly have nothing to do with *force majeure* or distress (‘The Argentine Crisis and Foreign Investors: A Glimpse Into the Heart of the Investment Regime’ in Karl Sauvant (ed), *Yearbook of International Investment Law & Policy 2008-2009* (OUP 2009) 379, 431).

¹²¹ See n 75, [163] – [167] and n 236. The investor’s application for the annulment of the award was rejected in *Continental Casualty v Argentina* (Decision on the Application for Partial Annulment) ICSID Case No ARB/03/9, 16 September 2011.

Continental Casualty tribunal considered Article XI first and reasoned that, because of its different operation (and implicitly also because of its different content), Article XI was not subject to the same strict conditions as necessity.¹²² It added that this was explained by the contrasting scopes of Article XI and necessity. Whereas ‘necessity can be invoked in any context against any obligation’ (unless it is a peremptory obligation), Article XI is ‘a specific provision limiting the general investment protection obligations ... bilaterally agreed by the Contracting Parties’.¹²³ For the tribunal, this meant that Article XI did not need to be constrained to the same extent as necessity.

As for how the *Continental Casualty* tribunal interpreted Article XI itself, the tribunal interpreted the meaning of ‘essential security interests’ and ‘public order’ largely based on what it considered to be their ordinary meaning,¹²⁴ but then, and quite unlike any previous tribunal, it drew upon the concept of necessity under Article XX of the GATT (titled a ‘General Exceptions’ clause),¹²⁵ as developed by the WTO Appellate Body (AB), in order to interpret the meaning of ‘necessary’ in Article XI of the US-Argentine BIT.¹²⁶ This produced a more relaxed approach towards the meaning of ‘necessary’ compared to the earlier tribunals that had drawn on necessity as a defence to State responsibility. Instead of the ‘only way’ requirement, the tribunal drew upon the least-restrictive means approach that the WTO AB

¹²² *ibid* [167].

¹²³ *ibid*.

¹²⁴ *ibid* [170] – [180].

¹²⁵ Article XX provides: ‘Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (a) necessary to protect public morals; (b) necessary to protect human, animal or plant life or health; [etc] ...’

¹²⁶ At [192].

has developed when interpreting the meaning of ‘necessary’ in Article XX of the GATT.¹²⁷ This least-restrictive means approach involves asking ‘if another treaty consistent, or less inconsistent alternative measure, which the member State concerned could reasonably be expected to employ[,] is available’.¹²⁸ This new approach benefited Argentina. With the exception of one set of measures, Argentina managed to establish that its measures were not precluded.¹²⁹

Whether or not the *Continental Casualty* tribunal’s approach was convincing as a matter of treaty interpretation has been debated.¹³⁰ The tribunal took a single sentence to explain that Article XI had been drawn from Article XX of the GATT,¹³¹ a proposition for which it cited no evidence, and nor did it acknowledge the many differences in the subject and content of Article XX of the GATT compared to Article XI. But whether the particularities of the *Continental Casualty* tribunal’s interpretation of Article XI are correct is less important for the purposes of this thesis than the tribunal’s understanding of the more

¹²⁷ See, for example, WTO, *Korea: Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, Report of the Appellate Body, WT/DS169/AB/R, 11 December 2000; WTO, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Report of the Appellate Body, WT/DS285/AB/R, 7 April 2005. Both of these Reports were discussed by the *Continental Casualty* tribunal (at [193] – [194] and [195] respectively).

¹²⁸ At [195].

¹²⁹ At [196] – [222].

¹³⁰ See, for example, the criticism of José Alvarez and Tegan Brink, ‘Revisiting the Necessity Defence: *Continental Casualty v Argentina*’ in Karl Sauvant (ed), *Yearbook of International Investment Law & Policy 2010 – 2011* (OUP 2011) 315. Compare, defending the *Continental Casualty* tribunal’s approach, Jürgen Kurtz, ‘Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis’ (2010) 59 ICLQ 325, 365 – 370; Giorgio Sacerdoti, ‘BIT Protections and Economic Crises: Limits to their Coverage, the Impact of Multilateral Financial Regulation and the Defence of Necessity (2013) 28 ICSID Review 1 (although note that Sacerdoti was the President of the *Continental Casualty* tribunal).

¹³¹ At [192]: ‘Since the text of Art. XI derives from the parallel model clause of the U.S. FCN treaties and these treaties in turn reflect the formulation of Art. XX of GATT 1947, the Tribunal finds it more appropriate to refer to the GATT and WTO case law which has extensively dealt with the concept and requirements of necessity in the context of economic measures derogating to the obligations contained in GATT, rather than to refer to the requirement of necessity under customary international law.’

fundamental point concerning the relationship between Article XI and necessity. To that extent, the *Continental Casualty* tribunal was surely right in following the *CMS Annulment* committee's approach in drawing a clear contrast between Article XI as a threshold provision and necessity as a defence to State responsibility, and applying Article XI prior to and independently of necessity.

The *CMS Annulment* committee's 'orderly method of reasoning' was also followed by the *Sempra Annulment* committee.¹³² The committee accepted that 'it may be appropriate to look to customary law as a guide to the interpretation of terms used in the BIT',¹³³ but it emphasised the differences between Article XI and necessity, especially regarding their different operation and content, and concluded that necessity 'does not offer a guide to interpretation of the terms used in Article XI.'¹³⁴ Whereas the *CMS Annulment* committee recognised the errors of the *CMS* tribunal's approach but did not consider that they amounted to annulable errors, the *Sempra Annulment* committee considered that the *Sempra* tribunal had made errors that were annulable errors. For the committee, the *Sempra* tribunal had failed to apply the proper law and this was an annulable manifest excess of powers under Article 52(1)(b) of the ICSID Convention.¹³⁵

Finally, and in the *El Paso* case, which is the most recent case in which a tribunal has considered Article XI of the US-Argentine BIT, the tribunal again followed the approach of

¹³² *Sempra Energy International v Argentina* (Decision on the Application for Annulment of the Award) ICSID Case No ARB/02/16, 29 June 2010.

¹³³ *ibid* [197].

¹³⁴ *ibid* [199].

¹³⁵ *ibid* [205] – [219]. The committee's approach to annulment has been criticised as unduly expansive: Christoph Schreuer, 'From ICSID Annulment to Appeal: Half Way Down the Slippery Slope' (2011) 10 *The Law and Practice of International Courts and Tribunals* 211, 218 – 219.

the *CMS Annulment* committee, though with one major qualification. The *El Paso* tribunal adopted the *CMS Annulment* committee's approach to treating Article XI as a 'threshold provision' that, if satisfied, would mean that the treaty did not apply.¹³⁶ Yet, and this is the major qualification, the tribunal still accepted that Article XI could not be established where the State had substantially contributed to the situation giving rise to its plea. Fatally for Argentina's Article XI argument, the *El Paso* tribunal did (by majority) conclude that Argentina had substantially contributed to its crisis.¹³⁷ The tribunal explained that this non-contribution condition was still an element of Article XI by virtue of its being both an element of customary international law and a general principle of law, both of which it considered were relevant and could be used when interpreting Article XI by virtue of Article 31(3)(c) of the VCLT.¹³⁸ The tribunal's reasoning is problematic. It did not work through in any detail how it used Article 31(3)(c) to this effect and it has already been explained above how there is no textual basis for incorporating necessity's conditions, including the non-contribution condition, into the interpretation of Article XI. Perhaps the tribunal was itself aware of the thinness of its reasoning on this point and that is why it sought to fortify its reasoning by relying on the non-contribution condition as also being relevant via the general principle of law that no one may take advantage of his own wrong.¹³⁹ This second limb of the tribunal's reasoning may be less open to doubt as a matter of interpretive method, although

¹³⁶ See n 75, [553]. Argentina's application for the annulment of the award was rejected: *El Paso v Argentina* (Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic) ICSID Case No ARB/03/15, 22 September 2014.

¹³⁷ *ibid* [649] – [665]. The award records that one of the arbitrators, Brigitte Stern, was not prepared to hold that Argentina had substantially contributed to the crisis in a way that should have prevented it from establishing Article XI ([666] – [670]).

¹³⁸ *ibid* [613] – [624].

¹³⁹ Gerald Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law' (1957) 92 *Recueil des Cours* 5, 117 ('it admits of no doubt [that the] general principle is that States cannot profit from their own wrong').

the precise scope of that general principle remains unclear and the tribunal did little to flesh it out, particularly in terms of the level of fault that is or is not required.¹⁴⁰

The questionable approaches of the *Continental* and *El Paso* tribunals demonstrate that proceeding upon the ‘orderly method of reasoning’ that the *CMS Annulment* committee demanded does not solve all the interpretive problems that a spare and opaque non-precluded measures clause like Article XI will throw up. But it does provide the best framework for correctly understanding the relationship between primary rules like Article XI and necessity as a defence and secondary rule of State responsibility. It is only through this method that a tribunal can give appropriate effect both to how States have decided to regulate situations of emergency at the level of primary rules and how necessity can only play its role if there is a breach of one of those primary rules in the first place.

The following discussion notes two further points about necessity in the context of investment treaties that may be important given that it has been in this context that States have pleaded necessity most frequently over the last decade. The first point is that, because of the way in which non-precluded measures clauses have been drafted in many recent investment treaties, the kind of problems that arose with respect to the relationship between Article XI and necessity may be less prone to arise in the future, but at the expense of other problems. States are increasingly including the kind of self-judging language found in Article XXI of the GATT in their investment treaties (and investment chapters in trade treaties).¹⁴¹ The shift in US practice is the most striking in this respect. The US, despite some of its

¹⁴⁰ See further on this principle Chapter 4, beginning with text to n 142.

¹⁴¹ See the survey in Michael Nolan and Frédéric Sourgens, ‘The Limits of Discretion? Self-Judging Emergency Clauses in International Investment Agreements’ in Karl Sauvant (ed) *Yearbook on International Investment Law and Policy 2010 – 2011* (OUP 2012) 362.

investors taking the benefits of the non-self-judging nature of Article XI of the US – Argentina BIT, has not only ensured the inclusion of self-judging language in non-precluded measures clauses in its recent investment treaties, it has in some of these treaties ensured the addition of language clarifying that a State’s invocation of the clause is non-reviewable. In other words, the good faith review that a tribunal may still arguably undertake where there is self-judging language¹⁴² would in these circumstances appear to be excluded. Consider, for example, the 2006 US – Peru Trade Promotion Agreement,¹⁴³ which contains the following non-precluded measures clause:¹⁴⁴

Nothing in this Treaty shall be construed:

...

- (b) to preclude a Party from applying measures that *it considers* necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests (emphasis added).

A footnote to that clause clarifies that, ‘For greater certainty, if a Party invokes Article 22.2 in an arbitral proceeding initiated under Chapter Ten (Investment) or Chapter Twenty-One (Dispute Settlement), the tribunal or panel hearing the matter *shall find that the exception applies*’ (emphasis added).¹⁴⁵

Self-judging non-precluded measures clauses, and especially the apparently unreviewable variety now favoured by the US, dramatically shift the allocation of interpretive

¹⁴² See above text to nn 62 – 68, in the context of Article XXI of the GATT.

¹⁴³ Peru-United States Trade Promotion Agreement (signed on 12 April 2006, entered into force on 1 February 2009) <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/2721>>.

¹⁴⁴ *ibid* Article 22.2.

¹⁴⁵ *ibid* Note 2. See also United States-Colombia Trade Promotion Agreement (adopted 22 November 2006, entered into force 15 May 2012) <<http://www.ustr.gov/trade-agreements/free-trade-agreements/colombia-fta/final-text>>, Article 22(2)(b) n 2; United States-Panama Trade Promotion Agreement (adopted 28 June 2007, entered into force 31 October 2012) <<http://www.ustr.gov/trade-agreements/free-trade-agreements/panama->

power from the tribunal to the invoking State to such an extent that the legal value of the treaty's underlying obligations may be considerably undermined. As one former US investment treaty negotiator, Kenneth Vandeveld, has put it:¹⁴⁶

If a BIT party can excuse itself from BIT obligations at will, then it can be argued that the entire treaty is illusory - that the parties in fact have bound themselves to nothing more than a meaningless requirement that they go through a charade of citing national security.

This echoes what Judge Anzilotti had said in his Separate Opinion in the *Oscar Chinn* case where he had emphasised that 'international law would merely be an empty phrase if it sufficed for a State to invoke the public interest in order to evade its international obligations'.¹⁴⁷ He emphasised this in the context of discussing the need to place necessity within strict limits, which is a need that the ILC (and States) have recognised. It is surprising that so many States have been prepared to leave their investment treaties prone to the very abusive and destabilising effects that, when it came to necessity, they were so intent on avoiding.

The second further point that should be made about necessity in the context of investment treaties follows from the fact that not all investment treaties contain non-precluded measures clauses. Rather than regulate situations of emergency at the level of

tpa/final-text>, Article 21(2)(b) n 2. United States-Republic of Korea Free Trade Agreement (adopted 30 June 2007, entered into force 15 March 2012) <<http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text>>, Article 23(2)(b) n 2.

¹⁴⁶ Kenneth Vandeveld, 'Of Politics and Markets: The Shifting Ideology of BITs' (1993) 11 Berkeley J Intl L 159, 176. It may even be asked whether these apparently non-reviewable clauses do not just undermine the treaties of which they are a part, but actually render them void: see the Separate Opinion of Judge Lauterpacht in *Certain Norwegian Loans (France v Norway)* [1957] ICJ Rep 34, 48: 'An instrument in which a party is entitled to determine the existence of its obligation is not a valid and enforceable legal instrument of which a court of law can take cognizance. It is not a legal instrument. It is a declaration of a political principle and purpose'.

¹⁴⁷ *Oscar Chinn (United Kingdom v Belgium)* [1934] PCIJ Ser A/B No 63, Separate Opinion of Judge Anzilotti 107.

primary rules, these treaties leave that to necessity at the level of secondary rules. The *Funnekotter* and *Von Pezold* cases brought against Zimbabwe,¹⁴⁸ as well as the Argentine crisis cases brought under BITs other than the US – Argentina BIT,¹⁴⁹ all exemplify cases where non-precluded measures clauses were not involved, but necessity was.

The argument has been made that necessity is implicitly excluded by the object and purpose of investment treaties because they are designed to apply in situations of crisis.¹⁵⁰

The *BG* tribunal seemed to suggest this:¹⁵¹

... the Commentary to the ILC Draft Articles indicates that a defense based on necessity is precluded “*where the international obligation in question explicitly or implicitly excludes reliance on necessity.*” It can be argued that the Argentina-U.K. BIT implies such an exclusion. Thus, Argentina would not be entitled to invoke necessity to unilaterally revoke vested rights (e.g., a dollar denominated tariff and economic equilibrium) designed precisely to operate in situations where a run on the currency would lead to a situation of necessity. There is no question that Argentina is entitled to adopt such measures as it deems appropriate to emerge from the state of emergency. However, it remains obligated to pay compensation. This is one view as to how bilateral investment treaties operate to induce foreign investment. Assuming that necessity were to justify some fair and non-discriminatory measure by Argentina, an obligation to compensate would still obtain by virtue of the BIT.

That reasoning is hard to follow. But the important point is that the broader argument that the *BG* tribunal seems to be approving – that investment treaties by their object and purpose

¹⁴⁸ *Funnekotter v Zimbabwe* (Award) ICSID Case No ARB/05/06, 22 April 2009; *Von Pezold v Zimbabwe* (Award) ICSID Case No ARB/10/15, 28 July 2015.

¹⁴⁹ *BG v Argentina* (Final Award) UNCITRAL Case, 24 December 2007; *National Grid v Argentina* (Award) UNCITRAL Case, 3 November 2008; *Suez v Argentina* (Decision on Liability) ICSID Case no ARB/03/17, 30 July 2010; *Total v Argentina* (Decision on Liability) ICSID Case no ARB/04/1, 21 December 2010; *Impregilo v Argentina* (Award) ICSID Case no ARB/07/17, 21 June 2011.

¹⁵⁰ August Reinisch, ‘Necessity in International Investment Arbitration – An Unnecessary Split of Opinions in Recent ICSID Cases’ (2007) 8 *J World Investment & Trade* 191, 205; Andrea Bjorklund, ‘Emergency Exceptions’ in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 459, 490, citing Reinisch and considering this argument ‘plausible’.

¹⁵¹ See n 149, [409].

implicitly exclude the possibility of invoking necessity – is clearly not strong. This is because it relies on a narrow approach to the object and purpose of investment treaties that assumes they are about protecting investors at all costs.¹⁵² That is not the object and purpose of investment treaties. The tribunal in *Saluka v Czech Republic* explained how:¹⁵³

an interpretation which exaggerates the protection to be accorded to foreign investments may serve to dissuade host States from admitting foreign investments and so undermine the overall aim of extending and intensifying the parties' mutual economic relations.

A more appropriate approach to the object and purpose of investment treaties was set out by the *El Paso* tribunal:¹⁵⁴

The Tribunal considers that a balanced interpretation is needed, taking into account both State sovereignty and the State's responsibility to create and adapt an evolutionary framework for the development of economic activities, and the necessity to protect foreign investment and its continuing flow.

It cannot be said that investment treaties, when they are viewed from this more even-handed perspective, exclude the application of necessity by virtue of their object and purpose. Some tribunals have expressly confirmed this.¹⁵⁵ It is perfectly consistent both to reject the possibility that investment treaty obligations could be 'revoked' where compliance with them

¹⁵² Reinisch (n 150, 205): 'BITs generally aim at protecting investors against host state measures that are typically taken in situations of economic difficulties.'

¹⁵³ *Saluka Investments BV (The Netherlands) v Czech Republic* (Partial Award), UNCITRAL, 17 March 2006, [300]. See also Zachary Douglas, 'Nothing if not critical for investment treaty arbitration: *Occidental, Eureko and Methanex*' (2006) 22 *Arbitration Intl* 27, 51: 'The promotion of foreign investment is one of the key policies underlying the conclusion of investment treaties by states. So much is clear from their preambles. But this policy cannot be invoked to determine the rights and obligations of the parties to a *particular* investment dispute on the merits. If this policy is relied upon to decide the import of a treaty provision to the particular controversy between the parties, then the implication is that the investor must prevail for this policy objective of the treaty to be upheld. An interpretive approach that systematically favours the interests of one of the disputing parties need only be articulated to be proven unsound.'

¹⁵⁴ See n 75, [650].

¹⁵⁵ *Impregilo* (n 149) [355]; *Suez* (n 149) [240].

merely becomes difficult and yet at the same time accept that there must come a point where a State faces difficulties of such a magnitude that necessity can offer some respite from those difficulties. Even the *CMS* tribunal, which stated that the US – Argentina BIT ‘was clearly designed to protect investments at a time of economic difficulties’,¹⁵⁶ did not rule out that necessity could be available with respect to a breach of an investment treaty obligation if those difficulties were sufficiently serious.¹⁵⁷

It has also been suggested that necessity may not be available with respect to obligations owed by States to non-State actors such as investors. The *BG v Argentina* tribunal suggested, but again only vaguely, that necessity may not be available in the investor-State context because necessity ‘may relate exclusively to international obligations between sovereign States’.¹⁵⁸ Under investment treaties States may owe their obligations not just to each other but also to investors,¹⁵⁹ and Article 25(1)(b) of the ASR does, for example, provide that necessity may not be invoked unless the act in question ‘does not seriously impair an essential interest *of the State or States towards which the obligation exists*, or of the

¹⁵⁶ See n 75, [354].

¹⁵⁷ *ibid*: ‘in the absence of such profoundly serious conditions it is plainly clear that the Treaty will prevail over any plea of necessity. However, if such difficulties, without being catastrophic in and of themselves, nevertheless invite catastrophic conditions in terms of disruption and disintegration of society, or are likely to lead to a total breakdown of the economy, emergency and necessity might acquire a different meaning.’

¹⁵⁸ See n 149, [408]. Note also that the German Constitutional Court in the *Argentine Necessity Case* 138 ILR 1 held that Argentina could not invoke necessity under customary international law against non-State bondholders, although the decision was based on the obligations in question being governed by domestic law rather than public international law. The Court distinguished its case from disputes under BITs that are governed by public international law (13 – 14).

¹⁵⁹ The precise nature of those obligations, and in particular whether they are owed to the investor, either directly like human rights obligations or indirectly like treaties that bestow third party rights, or are owed only to the other State party (or parties) to the treaty and it is the investor that invokes its home State’s rights merely as that State’s agent, has been widely debated in the literature, and it is not necessary for this thesis to take a stand in this debate. For a sample of the literature, see Zachary Douglas, ‘The Hybrid Foundations of Investment Treaty Arbitration’ (2003) 74 BYIL 151, 160 – 184; Anthea Roberts, ‘Power and Persuasion in Investment Treaty Arbitration: The Dual Role of States’ (2010) 104 AJIL 179, 184 – 185; Martins Papatrakis, ‘Investment Treaty Arbitration and the (New) Law on State Responsibility’ (2013) 24 EJIL 617.

international community as a whole' (emphasis added). But this is still not a strong argument for several reasons. The ASR Commentaries explain that Part 1 of the ASR (of which the articles on defences to State responsibility are a part) applies to 'all international obligations of the State and not only those owed to other States' (emphasis original).¹⁶⁰ Certainly the other tribunals that have considered necessity in the investor-State context have considered necessity without this concern. It would also be illogical if a State could invoke necessity as a defence to a breach of an international obligation when it is facing a claim from a sovereign State, but it could not invoke necessity as a defence to a breach of an international obligation when it is faced with a claim from merely a foreign company or individual. The view suggested by the *BG* tribunal therefore takes an unusually restrictive as well as a logically unrealistic approach to the law of State responsibility.

(ii) Emergency Derogations in Human Rights Treaties

Fewer difficulties have arisen concerning the relationship between necessity and emergency derogations in human rights treaties. This is no doubt because the major human rights treaties deal with emergency situations in a relatively sophisticated manner, at least compared to the three lines in Article XI of the US-Argentine BIT that gave birth to so much trouble in the context of the cases discussed above.

¹⁶⁰ ASR Commentaries (n 18) 193. The Commentaries continue: 'Thus State responsibility extends, for example, to human rights violations and other breaches of international law where the primary beneficiary of the obligation breached is not a State.'

The relatively sophisticated manner in which the major human rights treaties deal with emergency situations is no doubt a product of the delicacy of the matter. It is precisely during situations of emergency that human rights are most vulnerable. Yet the States parties to these treaties have decided that the protection of human rights must be balanced against a State's need to respond to these times of emergency in the wider public interest and in a way that may involve restricting certain human rights.¹⁶¹ These States have responded to the delicate balance that needs to be struck here by both permitting derogations from human rights treaties but subjecting those derogations to legal scrutiny through the specifically calibrated regimes set out within the human rights treaties themselves. Article 15 of the European Convention on Human Rights (ECHR)¹⁶² and Article 4 of the International Covenant on Civil and Political Rights (ICCPR)¹⁶³ provide two leading examples of this:

European Convention on Human Rights, Article 15	International Covenant on Civil and Political Rights, Article 4
1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.	1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other

¹⁶¹ Rosalyn Higgins, 'Derogations under Human Rights Treaties' (1976) 48 BYIL 281.

¹⁶² Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 7 September 1953) 213 UNTS 221.

¹⁶³ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

<p>2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.</p>	<p>obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.</p>
<p>3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.</p>	<p>2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.</p> <p>3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.</p>

Emergency derogations like Article 15 of the ECHR and Article 4 of the ICCPR operate at the level of primary rules because, when a State validly invokes an emergency derogation, what it does is suspend the application of those rights with which the derogation is concerned for the period during which the emergency prevails. If an emergency derogation is

established, there is no breach of any of the rights in respect of which the State has derogated.¹⁶⁴

These emergency derogations not only operate at a different level of rules than necessity as a defence to State responsibility and secondary rule, they also operate subject to their own specific conditions and within their own institutional frameworks.¹⁶⁵ Common to paragraph (1) of both Article 15 of the ECHR and Article 4 of the ICCPR are the requirements that a situation of emergency ‘threatens the life of the nation’ and that the measures taken must be ‘strictly required by the exigencies of the situations’. The reference to ‘the life of the nation’ might be thought to bear some relationship to the concept of ‘self-preservation’ discussed in Chapter 1 of this thesis, but it is worth noting that, at least in the practice of the European Court of Human Rights (ECtHR),¹⁶⁶ a wide margin of appreciation has been afforded to States when determining the existence of a threat to ‘the life of the

¹⁶⁴ Thus in *Lawless v Ireland* (1961) 1 EHRR 15, 37, where the Court held that ‘Articles 5 and 6 of the Convention provided no foundation for the detention without trial’ of the applicant, the ECtHR nonetheless held that by virtue of a duly exercised derogation under Article 15 of the ECHR, ‘the facts found do not disclose a breach by the Irish Government of their obligations under the Convention.’

¹⁶⁵ Compare Theodor Meron, ‘On a Hierarchy of International Human Rights’ (1986) 80 AJIL 1, 20: ‘Perhaps there is, indeed, some overlap in international law between derogations permitted by Article 4 of the Political Covenant and the customary rules of exception to the law governing state responsibility, such as those based on *force majeure*, state of necessity or self-defence ... It is not certain, however, that the match of these customary rules with derogations permissible under Article 4 is perfect, or that the scope of the derogations allowed is identical.’

¹⁶⁶ There is relatively little jurisprudence from the Human Rights Committee (HRC) regarding Article 4 of the ICCPR (Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (3rd ed, OUP 2013) 910 – 923), although see the guidance provided by the HRC, ‘General Comment 29: States of Emergency (article 4)’ (2001) UN Doc CCPR/C/21/Rev.1/Add.11.

nation'.¹⁶⁷ The Court has instead placed a greater focus on reviewing whether the measures taken were 'strictly required by the exigencies of the situation.'¹⁶⁸

Both articles then in paragraph (2) set out (slightly different) lists of rights from which States may never derogate. Finally both articles in paragraph (3) build the emergency derogation process into the institutional framework in which the treaties sit. It is this final aspect of these emergency derogation articles that is the most unique, at least compared to necessity. Paragraph 3 of both articles requires that the State making the derogation communicates with the Secretary General of the relevant institutional body on certain aspects of its derogation and at certain times, although there are differences in the precise wording of this requirement.¹⁶⁹ By building both articles into the wider institutional frameworks of the treaties in which they sit, these procedural requirements seek to provide some further protection against the vulnerability of human rights during situations of emergency.

¹⁶⁷ *Brannigan & McBride v United Kingdom* (1993) 17 EHRR 539, [43]: 'The Court recalls that it falls to each Contracting State, with its responsibility for 'the life of [its] nation', to determine whether that life is threatened by a 'public emergency' and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. Accordingly, in this matter a wide margin of appreciation should be left to national authorities ...'. The Court has in fact never rejected a State's claim that it was facing a 'war or other public emergency threatening the life of the nation' and the Court has in practice offered very little scrutiny of the issue (see, for example, *Aksoy v Turkey* (1997) 23 EHRR 553, [70], while in *Lawless* (n 164) [28] – [30], the Court, surprisingly it may be thought, held that the Irish Republican Army posed a threat to the life of *Ireland*). (By contrast the European Commission on Human Rights did reject the Greek military junta's claim that there was a 'public emergency threatening the life of the nation' upon its seizure in power in 1967 (*Denmark, Sweden, Norway and the Netherlands v Greece* (1969) 12 YB Eur Conv HR 'The Greek Case' 1, [152] – [165].)

¹⁶⁸ *Brannigan & McBride*, *ibid*: 'Contracting Parties do not enjoy an unlimited power of appreciation. It is for the Court to rule on whether *inter alia* the States have gone beyond the 'extent strictly required by the exigencies' of the crisis. The domestic margin of appreciation is thus accompanied by a European supervision ... At the same time, in exercising its supervision the Court must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation, the circumstances leading to, and the duration of, the emergency situation.' See also, for example, *Aksoy* (n 167) [76] – [78].

¹⁶⁹ Article 4(1) of the ICCPR adds a further procedural requirement of official proclamation of the emergency and which is not included in the terms of Article 15 of the ECHR, although in *Cyprus v Turkey* the European Commission on Human Rights stated that some official declaration would also usually be required in the context of Article 15 (4 EHRR 482 (1976) [527]).

Derogations from human rights treaties are a matter of concern for all States parties to such treaties and one of the points of requiring States to communicate with the relevant institutional body is so that body can in turn inform States parties of the derogation that has been made and those States parties can in turn monitor the situation.¹⁷⁰ In the context of the ECHR, a State may even bring an inter-State application to the European Commission.¹⁷¹ All of this is in addition to the right of individuals to make their own applications under the ECHR¹⁷² and ICCPR (via its Optional First Protocol)¹⁷³ to the ECtHR or HRC respectively. This right of individual application has become a particularly important institutional check on abusive invocations of emergency derogations in the context of the ECtHR,¹⁷⁴ which, unlike the HRC,¹⁷⁵ is empowered to render decisions that are binding under international law on the State against which the complaint is made.

¹⁷⁰ ‘If the idea that the Convention contains a collective guarantee is to mean anything at all, it surely ought to apply when exceptional measures of interference with human rights are introduced. The other parties to the Convention are thus put on notice that there is a situation which demands their consideration’ (David Harris et al, *Harris, O’Boyle and Warbirck: Law of the European Convention on Human Rights* (3rd ed, OUP 2014) 846).

¹⁷¹ As was the case, for example, in *Denmark et al v Greece* (n 167). It was even claimed in 1992 that, ‘In fact, under the European system, the inter-State complaints procedure has been the most successful in ensuring respect for the Convention in emergencies’ (Jaime Oraa, *Human Rights in States of Emergency in International Law* (Clarendon 1992) 58).

¹⁷² Article 34.

¹⁷³ First Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 302, Article 1.

¹⁷⁴ ‘The possibility of individual application was originally intended as an optional part of the system of protection, but has “over the years become of high importance and is now a key component of the machinery for protecting the rights and freedoms set forth in the Convention”’ (William Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2015) 731, citing *Mamatkulov and Abdurasulovic v Turkey*, nos 46827/99 and 46961/99, 6 February 2003, [122]). The right of individual application to the Court was introduced into the ECHR by way of Protocol No 11 in 1998 (see the discussion in Schabas, 731 – 735).

¹⁷⁵ Article 5(4) of the First Optional Protocol provides: ‘The Committee shall forward its *views* to the State Party concerned and to the individual’ (emphasis added), and see Joseph and Castan (n 166) [1.60]: ‘HRC views are not legally binding, as the HRC is not a judicial body’. But see also at [1.61]: ‘The HRC is the pre-eminent interpreter of the ICCPR which is itself legally binding. The HRC’s decisions are therefore strong indicators of legal obligations, so rejection of those decisions is good evidence of a State’s bad faith attitude towards its ICCPR obligations.’ See also HRC, ‘General Comment 33: The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights’ (2008) UN Doc CCPR/C/GC/33.

What emerges from this analysis is that not only do these emergency derogations apply independently of necessity as a defence to State responsibility, they must also apply to the exclusion of necessity. Human rights treaties ‘provide for a specialized system for the protection of individuals’ and ‘emergency exceptions in human rights treaties take due account of the specific requirements of the human rights protection regime.’¹⁷⁶ Ago himself gave Article 15 of the ECHR and Article 4 of the ICCPR as examples of rules that would as a matter of law exclude the possibility of a State invoking necessity.¹⁷⁷ He was right to do so. For a State to fail to establish the conditions of one of these emergency derogations, and yet be permitted to invoke necessity, would undermine not just the specifically calibrated terms of these derogations, it would also undermine the specifically calibrated institutional frameworks within which those derogations and the treaties in which they sit are a part. The ICJ seemed to recognise this in the *Wall* opinion, but it missed the opportunity to confirm it. The Court noted, without answering, that ‘it might be asked whether a state of necessity as recognized by customary international law could be invoked with regard to’ human rights treaties that contain ‘provisions for derogation’ given that they ‘already address considerations of this kind within their own provisions.’¹⁷⁸ The Court would have had a strong basis for answering that question in the negative.

¹⁷⁶ Christina Binder, ‘Non-Performance of Treaty Obligations in Cases of Necessity: From ‘Necessity Knows No Law’ via the ‘Law(s) of Necessity’ to Interfaces Between Different ‘Laws of Necessity’ (2008) 13 *Austrian Rev Intl & Eur L* 3, 11.

¹⁷⁷ Ago’s Addendum (n 22) 45.

¹⁷⁸ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, [140].

(iii) Military Necessity and the Laws of Armed Conflict

The laws of armed conflict regulate what must be the situation of emergency *par excellence*. The concept of military necessity plays an important role in how the laws of armed conflict regulate this ultimate emergency, and it is a role that is distinct from necessity as a defence to State responsibility, although the precise way in which it does so has not always been well understood. But a helpful starting point is provided by the classic definition of military necessity set down in the Lieber Code: ‘Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of war, *and which are lawful according to the modern law and usages of war*’ (emphasis added).¹⁷⁹ The most important aspect of that definition is that it makes it clear that military necessity operates within and subject to ‘the modern law and usages of war’. In other words, military necessity operates within the primary rules governing armed conflict, rather than operating as a self-standing principle over and above those primary rules.

That has not always been accepted by everyone. The old and infamous German doctrine of *Kriegsraison geht vor Kriegsmanier* (‘necessity in war overrules the manner of warfare’)¹⁸⁰ very much elevated military necessity to a level over and above the laws of

¹⁷⁹ Instructions for the Government Armies of the US in the Field, prepared by Francis Lieber, promulgated as General Orders No 100 by President Lincoln, 24 April 1863, article 14, reprinted in Dietrich Schindler and Jiri Toman, *The Laws of Armed Conflict: A Collection of Conventions, Resolutions and Other Documents* (4th edn, Martinus Nijhoff 2004) 3. As Michael Schmitt points out, ‘the Lieber Code was a national regulation, not a treaty. Nevertheless, it provided the foundation for much subsequent international humanitarian law’ (‘Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance’ (2010) 50 VJIL 795, n 20). See further, Burrus Carnahan, ‘Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity’ (1998) 92 AJIL 213.

¹⁸⁰ Hersch Lauterpacht, *Oppenheim’s International Law* vol II (War and Neutrality) (8th ed, Longmans 1967) 231 (not himself making the argument, but rather forcefully criticising it).

armed conflict. According to this argument, ‘the laws of war lose their binding force in case of extreme necessity’.¹⁸¹ This ‘case of extreme necessity’ was said to arise where ‘violation of the laws of war alone offers either a means of escape from extreme danger or the realisation of the purpose of war – namely, the overpowering of the opponent.’¹⁸²

The problem with this approach was that it could justify all manner of inhumane acts carried out simply because they were the only way of overpowering the opponent. It was just another way of saying that ‘necessity knows no law’. Thus in the *Peleus* case a German commander responsible for the machine-gunning of the civilian survivors of an Allied merchant vessel destroyed by a German submarine raised the defence of military necessity on the basis that machine-gunning the survivors, though they themselves posed no military threat, was the only way for the submarine to avoid detection and thus prevent a counter-attack.¹⁸³ This approach to military necessity, which was relied on by Germany during both World Wars,¹⁸⁴ inevitably fell into disrepute for the way in which it eviscerated the laws of armed conflict. In the *Peleus* case itself, the British Military Court at Hamburg rejected that military necessity could have justified the German commander’s actions, at least in those circumstances, while the idea that military necessity could provide a defence to a breach of

¹⁸¹ *ibid* 232.

¹⁸² *ibid*.

¹⁸³ *In re Eck and Others (The Peleus)*, British Military Court, Hamburg 13 ILR 248.

¹⁸⁴ Julius Stone, *Legal Controls of International Conflict* (2nd ed, Stevens 1959) 351 – 353.

the laws of armed conflict was categorically rejected by the American Military Tribunal at Nuremberg (AMT) in the *Krupp* case:¹⁸⁵

The contention that the rules and customs of warfare can be violated if either party is hard pressed in any way must be rejected ... War is by definition a risky and hazardous business ... It is an essence of war that one or the other side must lose, and the experienced generals and statesmen knew this when they drafted the rules and customs of land warfare. In short these rules and customs of warfare are designed specifically for all phases of war. They comprise the law for such emergency. To claim that they can be wantonly – and at the sole discretion of any one belligerent – disregarded when he considers his own situation to be critical, means nothing more or less than to abrogate the laws and customs of war entirely.

The result of this reasoning was stated shortly by the AMT in the *Hostages* case and in a way that reaffirmed the Lieber Code definition's focus on the primary rules governing armed conflict: 'Military necessity or expediency do not justify a violation of positive rules.'¹⁸⁶

Military necessity may not operate as a self-standing principle over and above the laws of armed conflict, but it does still perform an important role within and subject to the primary rules of the laws of armed conflict. It does so in two ways. Military necessity first performs a role where it has been 'included in terms in a number of treaty provisions in the field of international humanitarian law'.¹⁸⁷ In these instances military necessity 'affects the content of primary rules of [the law of armed conflict] by providing an inherent justification for conduct contrary to what is prescribed for ordinary circumstances of warfare.'¹⁸⁸ One example of this is provided by Article 53 of the Fourth Geneva Convention, which prohibits

¹⁸⁵ *In re Krupp and Others*, United States Military Tribunal, Nuremberg 15 ILR 620, 628.

¹⁸⁶ *In re List and Others (Hostages Trial)*, United States Military Tribunal, Nuremberg 15 ILR 632, 647.

¹⁸⁷ ASR Commentaries (n 18) 186.

¹⁸⁸ Gabriella Venturini, 'Necessity in the Law of Armed Conflict and in International Criminal Law' (2010) 41 *Netherlands Ybk Intl L* 45, 53.

an occupying power from destroying property within the occupied territory ‘except where such conduct is rendered absolutely necessary by military operations.’¹⁸⁹ In this sense military necessity does allow a State to act in a manner it would not otherwise be able to without that exception, but the role of military necessity here is carefully confined to the particular obligation to which that exception applies.¹⁹⁰ By implication, an obligation that does not contain a provision permitting an exception of military necessity is not subject to an exception of military necessity.¹⁹¹

But military necessity also performs a more pervasive and foundational function in the laws of armed conflict. Military necessity operates as what the ASR Commentaries describe as the ‘the underlying criterion for a series of substantive rules of the law of war and neutrality’.¹⁹² In fact, the entire corpus of primary rules governing armed conflict can be viewed as the result of States marking out the boundaries between where military necessity ends and humanitarian considerations begin.¹⁹³ States have thus decided that military necessity provides a lawful basis for the targeting of combatants or civilians engaged in hostilities but have decided that it must give way to humanitarian considerations when it comes to targeting soldiers *hors de combat* or civilians not engaged in hostilities.¹⁹⁴ ‘Every single norm’ of the laws of armed conflict, as Yoram Dinstein has summarised, ‘confronts an

¹⁸⁹ Geneva Convention Relative to the Protection of Civilians in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 297.

¹⁹⁰ And it has itself been applied strictly – in the *Wall* opinion the ICJ was content to spend a single sentence rejecting that Israel’s conduct was ‘rendered absolutely necessary by military occupations’ (see n 178, [135]).

¹⁹¹ Ago’s Addendum (n 22) 37.

¹⁹² ASR Commentaries (n 18) 186.

¹⁹³ Schmitt (n 179).

¹⁹⁴ See extensively on lawful targets under the laws of armed conflict: Nils Melzer, *Targeted Killing in International Law* (OUP 2008).

inveterate tension between the demands of military necessity and humanitarian considerations, working out a compromise formula.¹⁹⁵

What follows from the pervasive and foundational role of military necessity within the laws of armed conflict is that this whole area of law is ‘in itself a law of emergency or necessity’.¹⁹⁶ In other words, much like necessity provides a safety valve within the general law of State responsibility that alleviates the harsh consequences that may follow from having to comply with the law at all costs, the laws of armed conflict provide a safety valve within the law of peace that alleviates the harsh consequences that may follow from having to comply with peacetime obligations during the exigencies of war.¹⁹⁷ That the laws of armed conflict themselves provide ‘a law of emergency or necessity’ means that, as the ASR Commentaries put it, ‘while considerations akin to those underlying Article 25 may have a role [in the laws of armed conflict], they are taken into account in the context of the formulation and interpretation of the primary obligations.’¹⁹⁸ It follows that not only do the laws of armed conflict themselves provide ‘a law of emergency or necessity’, they do so in a way that, by the object and purpose of those rules, excludes the possibility of invoking necessity as a defence to State responsibility. This is because it would undermine the whole point of the specifically calibrated primary rules within the laws of armed conflict if a State

¹⁹⁵ Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2nd ed, CUP 2010) 5.

¹⁹⁶ Robert Kolb, *Advanced Introduction to International Humanitarian Law* (Elgar 2014) 85. See also the *Krupp* case (n 185) where the AMT stated that the laws of armed conflict ‘comprise the law for such emergency’.

¹⁹⁷ Although it appears that a State may in some ways still be subject to human rights obligations during times of war (to the extent that it has not derogated from those obligations such as by way of Article 4 of the ICCPR or Article 15 of the ECHR): *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 263 [25]; *Wall* (n 178) [106].

¹⁹⁸ ASR Commentaries (n 18) 186.

could fail to establish the tests set down in those rules but have a second bite at the cherry by way of necessity as a defence to State responsibility and secondary rule. The ICJ seemed to recognise this in the *Wall* opinion, as it had with respect to the relationship between emergency derogations in human rights treaties and necessity, but, as was the case there, it again missed the opportunity to confirm it. The Court noted, without answering, that ‘it might be asked whether a state of necessity as recognized by customary international law could be invoked with regard to’ treaties governing the law of armed conflict given those treaties ‘already address considerations of this kind within their own provisions.’¹⁹⁹ The Court would again have had a strong basis for answering that question in the negative.

Conclusion

This chapter has examined two limits to the scope of application of necessity as defence and secondary rule of State responsibility. This chapter first examined how necessity cannot be invoked as a defence to the breach of a peremptory rule of international law. This chapter focused on the peremptory prohibition on the use of force, which is where the most relevant and controversial issues concerning necessity and its relationship to peremptory rules have arisen, and it concluded that it is clear that necessity cannot provide a defence to a breach of this rule nor does necessity operate as an exception within this rule. This puts to bed the fears that necessity could today provide a basis for the kind of forcible interventions with which necessity is perceived to have been associated in the past.

¹⁹⁹ See n 178, [140].

This chapter then examined how primary rules may contain their own safety valves that regulate situations of emergency. This chapter focused on the examples of non-precluded measures clauses in trade and investment treaties, emergency derogation in human rights treaties and military necessity in the laws of armed conflict, and it illustrated how these primary rules have two consequences for the scope of necessity. The first consequence is that these primary rules that regulate situations of emergency must be applied prior to and independently of necessity as a defence and secondary rule of State responsibility. The second consequence is that these primary rules may regulate situations of emergency to the exclusion of necessity as a defence to State responsibility. This may be either as a practical consequence because the primary rule sets down a more lenient test than necessity, or as a matter of law because, in the words of Article 25(2)(a) of the ASR, ‘the international obligation in question excludes the possibility of invoking necessity’. In every case it is clear that the scope within which necessity can apply must be determined before one turns to consider under what conditions it may apply.

4. THE CONDITIONS OF NECESSITY

Introduction

This chapter fleshes out the conditions that a State must satisfy in order to establish necessity. This chapter is central to establishing the main claim of the thesis: that necessity operates as a safety valve within the law of State responsibility that mediates between the binding quality of international obligations and the harsh consequences that may follow from requiring compliance with those obligations at all costs. If the conditions under which necessity applies are too lenient, then the binding quality of international obligations may be unduly weakened. If, on the other hand, the conditions under which necessity applies are too strict, then the defence may be practically useless. Either way, necessity's role as a safety valve would be undermined. Necessity would no longer promote the reasonable application of international law and it would no longer provide a means by which international law can bend so that it does not break.

In fact, despite the widespread fears of necessity's vulnerability to abuse, or perhaps because of those fears, some tribunals, especially in the context of the Argentine crisis cases, have taken unrealistically strict approaches to the conditions that a State needs to satisfy in order to establish necessity. This has been particularly so with respect to the 'only way' and non-contribution conditions. These unrealistically strict approaches threaten to render necessity practically useless. This chapter critiques these unrealistically strict approaches and instead seeks to elaborate these conditions, as well as necessity's conditions more generally, in a way that should guard against abuse without rendering necessity practically useless. The conditions for necessity's application remain strict, but they are not unrealistically strict.

This chapter must be approached with three preliminary points in mind. First, and as the ICJ made clear in the *Gabčíkovo* case, the State invoking necessity ‘is not the sole judge of whether those conditions have been met’.¹ While the State will inevitably be the first judge of its position under international law, this will not be conclusive and it will be for any tribunal that later comes to consider the matter to itself judge whether the State in question has satisfied the conditions of necessity. Second, it is the State that has invoked necessity that, as with any defence to State responsibility, bears the burden of persuading a tribunal that it has satisfied those conditions.² Third, those conditions must be cumulatively satisfied,³ which means that a failure to satisfy any one of the conditions will be fatal for the defence.

A final point should be made about the structure of this chapter. This chapter is structured around the conditions of necessity as they are set out in Article 25 of the ASR. But as Chapter 2 of this thesis sought to emphasise, the ASR are not themselves a source of international law. The key question is rather the extent to which Article 25 reflects customary international law. Chapter 2 concluded that customary international law recognised the *existence* of necessity, but it left the *contours* of necessity as a rule of customary international law to be examined in the subsequent chapters, including this one. This chapter therefore structures the analysis around the terms of Article 25 as a useful starting point, but it by no means treats those terms as authoritative in their own right.

¹ *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (Judgment) [1997] ICJ Rep 7, [51].

² ‘In principle, State responsibility is not to be presumed, and the onus of establishing such responsibility lies on the State which asserts it. However, where conduct in conflict with an international obligation of a State is attributable to that State and it seeks to avoid its responsibility by relying on some circumstance under Chapter V, the position changes and the onus lies on that State to justify or excuse its conduct. In addition, it will often be the case that only the invoking State is fully aware of the circumstances of the case’ (James Crawford, ‘Second Report on State Responsibility’ (19 July 1999) UN Doc A/CN.4/498 in *Ybk ILC* (1999) II(1) 3, 85).

³ *Gabčíkovo* (n 1) [51].

Safeguarding an Essential Interest

A State cannot establish necessity unless its act was, in the terms of Article 25(1)(a) of the ASR, ‘the only way for the State to *safeguard an essential interest* against a grave and imminent peril’ (emphasis added). What amounts to an ‘essential interest’ is impossible to define with either precision or objectivity. Different States will have different essential interests. Ago emphasised this when he explained that ‘the interest of a State in defeating, if need be, any subjective right of another State must in turn be one of those interests which are of exceptional importance *to the State seeking to assert it*’ (emphasis added).⁴ It is difficult to see how one State, let alone an international tribunal, is appropriately placed to tell another State what is and what is not exceptionally important to that State. As Hersch Lauterpacht put it, and he was nothing if not an advocate for a strong role for international tribunals, ‘It is ... doubtful whether any tribunal acting judicially can override the assertion of a State that a dispute affects its security or vital interests’.⁵

This explains why Ago sought to illuminate the term by way of illustration rather than definition. He explained that necessity could apply not just where there was a danger ‘to the existence of the State itself’, but also where there was a danger to ‘its political or economic survival, the continued functioning of its essential services, the maintenance of internal peace, the survival of a sector of its population [or] the preservation of the environment of its territory or a part thereof.’⁶ The ASR Commentaries, in the same vein, refrain from setting

⁴ Roberto Ago, ‘Addendum – Eighth Report on State Responsibility’ (29 February, 10 and 19 June 1980) UN Doc A/CN.4/318/Add.5-7 in *Ybk of the ILC* (1980) II(1) 19.

⁵ Hersch Lauterpacht, *The Function of Law in the International Community* (OUP 1933) 196.

⁶ Ago’s Addendum (n 4) 14 and see also at 19. See, further, James Crawford, *State Responsibility: The General Part* (CUP 2013) 308.

down the precise limits of an ‘essential interest’ and explain that ‘the extent to which a given interest is “essential” depends on all the circumstances, and cannot be prejudged’.⁷ But, and as Ago foresaw, environmental and economic interests have emerged as two of the most important examples in practice. The ICJ, in the *Gabčíkovo* case, explained that it had ‘no difficulty in acknowledging that the concerns expressed by Hungary for its natural environment in the region affected by the Gabčíkovo-Nagymaros Project related to an “essential interest” of that State’.⁸ Several tribunals have held that economic and social stability in a time of economic crisis, including the provision of essential services,⁹ such water and sewage,¹⁰ and even the provision of electricity at affordable prices,¹¹ can amount to an ‘essential interest’.

The term ‘essential interest’ may elude a positive definition, but something can still be said about what it does not mean. It is clear that an ‘essential interest’ need not be one that threatens the State’s existence. It was discussed in Chapter 1 how a State’s claim of self-preservation is illogical because, ‘When we speak of the existence of the state, we are always making a mere supposition, for no one really knows what will endanger the existence of the state’,¹² and it has also been discussed, including in the preceding paragraph, how in practice

⁷ ILC, ‘The International Law Commission’s Articles on State Responsibility: Introduction, Text, and Commentaries’ (CUP 2002) 183.

⁸ See n 1, [53].

⁹ *LG & E v Argentina* (Decision on Liability) ICSID Case No ARB/02/1, 3 October 2006, [257].

¹⁰ *Impregilo v Argentina* (Award) ICSID Case no ARB/07/17, 21 June 2011, [346]; *Suez v Argentina* (Decision on Liability) ICSID Case no ARB/03/17, 30 July 2010, [260]: ‘The provision of water and sewage services to the metropolitan area of Buenos Aires certainly was vital to the health and well-being of nearly ten million people and was therefore an essential interest of the Argentine State’.

¹¹ *Total v Argentina* (Decision on Liability) ICSID Case no ARB/04/1, 21 December 2010, [345]. The *Total* tribunal also recognised at [484] that ‘in time of shortages, diverting gas intended for export to domestic consumption could qualify, in the abstract, as an act adopted “to safeguard an essential interest against a grave and imminent peril”’.

¹² Ellery Stowell, *Intervention in International Law* (John Byrne 1921) 392 n 2 and see Chapter 1, text to n 136.

necessity has been considered relevant in situations that could not reasonably be said to implicate the State's existence.¹³ It was with some basis, then, that Ago emphasised that an interest need not be one that implicates the State's existence in order to be considered 'essential'.¹⁴

But several of the tribunals considering necessity in the context of the Argentine crisis cases ignored this. The *CMS*, *Enron* and *Sempra* tribunals all held that an economic crisis could in principle engage an essential interest,¹⁵ but what they appeared to give with one hand they took away with the other. The *CMS* tribunal held that although the crisis was severe, it was not a situation of 'total collapse' (whatever that might entail) and thus necessity could not succeed.¹⁶ The *Enron* and *Sempra* tribunals similarly emphasised that the crisis had not threatened the 'very existence of the State and its independence', and on that basis alone held the plea of necessity could not succeed.¹⁷

Fortunately not all of the tribunals erred by conflating an essential interest with a State's existence. The *LG & E* tribunal clearly stated that 'What qualifies as an "essential" interest is not limited to those interests referring to the State's existence',¹⁸ while the *Impregilo* tribunal expanded upon this by explaining that an 'essential interest' 'can

¹³ *ibid.*

¹⁴ Ago's Addendum (n 3) 17.

¹⁵ *CMS v Argentina* (Award) ICSID Case No ARB/01/08, 12 May 2005, [319], [359]; *Enron v Argentina* (Award) ICSID Case No ARB/01/3, 22 May 2007, [332]; *Sempra v Argentina* (Award) ICSID Case No ARB/02/16, 28 September 2007, [374].

¹⁶ *CMS*, *ibid* [322], [354] – [355].

¹⁷ *Enron* (n 15) [306]; *Sempra* (n 15) [348].

¹⁸ *LG & E* (n 9) [251].

encompass not only the existence and independence of a State itself, but also other subsidiary but nonetheless “essential” interests’.¹⁹

On the other hand, and notwithstanding the deference that must inevitably be given to each State to define its essential interests, those interests do not include those of the government only, as distinct from those of the State and its people more broadly. The ASR Commentaries clarify that the relevant interests are the ‘particular interests of the State and its people’,²⁰ and this point was made and illustrated²¹ by the tribunal in the *Von Pezold v Zimbabwe* case. In that case, the tribunal explained that the ‘Invasions’ of farms by the ‘Settlers/War Veterans’ did not threaten a ‘State-wide’ essential interest. The only essential interest at stake was ‘the survival of the incumbent Government and its President at a political level’, given their reliance on the political support of the Settlers/War Veterans.²¹ The tribunal buttressed this distinction by observing that no state of emergency had been introduced under Zimbabwe’s domestic legislation, the implementation of the ‘fast-track’ land reforms that the ‘Invasions’ triggered had actually been rejected by the people of Zimbabwe in a national referendum, and the situation could have been controlled by Zimbabwe’s law enforcement authorities.²² The *Von Pezold* case exemplifies that there are some reviewable limits to a State’s claim that it is safeguarding one of its essential interests.

¹⁹ See n 10, [346]. It further explained that these essential interests included ‘the preservation of the State’s broader social, economic and environmental stability, and its ability to provide for the fundamental needs of its population.’

²⁰ See n 7, 183.

²¹ *Von Pezold v Zimbabwe* (Award) ICSID Case No ARB/10/15, 28 July 2015, [630] – [631].

²² At [629] – [630]. The tribunal clarified that the absence of a state of emergency under domestic legislation was not decisive for this question of whether Zimbabwe was safeguarding an essential interest, which had to be determined under international law, but it was nonetheless relevant evidence ([630]). See, to the same effect, *Funnekotter v Zimbabwe* (Award) ICSID Case No ARB/05/06, 22 April 2009, [103].

It should also be noted that, at least according to the ASR and its Commentaries, the essential interest being protected may extend not just to the interests of ‘the State and its people’, but may also extend to an essential interest of the international community as a whole.²³ This extension of necessity could be important in environmental cases, although there is as yet little practice to support this possible extension. One early example may be the Fur Seals controversy where Russia took certain measures to protect the fur seal population in the Bering Sea (although Russia could also just have been protecting its own economic interests).²⁴ This possible extension of necessity may also be relevant in other contexts. It has been suggested, for example, that States could invoke necessity as a defence to a breach of Syria’s territorial integrity in order to provide humanitarian assistance to civilians within Syria without the consent of the Syrian government,²⁵ although no State appears to have invoked this as a basis for such actions. James Crawford, during whose rapporteurship the ILC extended the concept of ‘essential interest’ to include essential interests of the international community, has subsequently acknowledged that this extension represents a ‘progressive development’ of the law.²⁶ It remains to be seen whether States will themselves take up this development.

²³ Article 25 refers simply to ‘safeguarding an essential interest’ and see ASR Commentaries (n 7) 183.

²⁴ *British and Foreign State Papers, 1893-1894* vol 86 (HM Stationery Office 1899) 220.

²⁵ Emanuela-Chiara Gillard, ‘The Law Regulating Cross-Border Relief Operations’ (2013) 95 *Intl Rev Red Cross* 351, 372 – 373.

²⁶ *State Responsibility* (n 1) 309.

The vagueness of the term ‘essential interest’ produced some criticism during the ILC’s work from both States²⁷ and ILC members.²⁸ There are two responses to this. The first is that it is difficult to see how one could be less vague with respect to such an ineluctably subjective concept. An analogy can be drawn here with the experience of the ECtHR, which has on a number of occasions been required to consider whether a State faces ‘a public emergency threatening the life of the nation’ in the context of interpreting and applying the emergency derogation contained in Article 15 of the ECHR. The Court has accorded a particularly wide margin of appreciation to States on this question and has in fact never rejected a State’s claim that it was facing a ‘public emergency threatening the life of the nation’²⁹ What the Court has done instead is focus on the other conditions that a State needs to satisfy, and especially the condition that the State’s measures must be ‘strictly required by the exigencies of the situation’.³⁰ This leads in to the second response to the criticism of the vagueness of the term ‘essential interest’ in the context of necessity. Even if tribunals accord a wide measure of deference to States to identify what amounts to an essential interest, there are, as will be discussed throughout the remainder this chapter, a number of further conditions that are more strictly reviewable.

²⁷ See, for example, UNGA, ‘Summary Record of the 53rd Meeting’ (19 November 1980) UN Doc A/C.6/35/SR.53, [28] (Mongolia).

²⁸ See, for example, ILC, ‘Summary Record of the 1618th Meeting’ (24 June 1980) UN Doc A/CN.4/SR.1618 in *Ybk ILC* (1980) I 177, 178 (Pinto).

²⁹ See Chapter 3, text to n 167.

³⁰ See Chapter 3, text to n 167.

Grave and Imminent Peril

A State cannot establish necessity unless its act was, in the terms of Article 25(1)(a) of the ASR, ‘the only way to safeguard an essential interest against a *grave and imminent peril*’ (emphasis added). The following discussion examines those two elements of gravity and imminence in turn.

(i) Grave peril

Tribunals have given little consideration to the requirement of grave peril and have tended to conflate it with whether or not an essential interest is engaged.³¹ But the requirement of grave peril could act as a valuable check against States too readily invoking threats to their essential interests. Although it is difficult to reject a State’s broad claim that it is acting to safeguard an essential interest of the State, it may be less difficult to reject a State’s more specific claim that it is acting to safeguard that essential interest *against a grave peril*. The *Russian Indemnity* case illustrates this. The tribunal explained that:³²

It would clearly be exaggeration to admit that the payment (or the obtaining of a loan for the payment) of the comparatively small sum of about six million francs due the Russian claimants would imperil the existence of the Ottoman Empire or seriously compromise its internal or external situation.

This was in the context of the fact that during the same period ‘Turkey was able to obtain loans at favorable rates, redeem other loans, and, finally, pay off a large part of its public

³¹ See, for example, *CMS* (n 15) [319] – [322].

³² *Russian Indemnity (Russia v Turkey)* (1912) XI UNRIAA 421, translated in (1913) 7 AJIL 178, 196.

debt, estimated at 350,000,000 francs.³³ Even if Turkey's economic straits did mean that it could claim that its actions were broadly directed at safeguarding the essential interest it had in its economic stability, Turkey could not reasonably claim that avoiding its obligation to pay the small sum in question was more specifically directed at safeguarding that essential interest *against a grave peril*.

(ii) Imminent peril

The requirement of an 'imminent peril' has been subject to greater consideration by States, tribunals, the ILC and writers, and it has thrown up some difficult questions in the context of environmental peril in particular.

In the Anglo-Portuguese dispute of 1832, Jenner, the British Advocate General, stated that the Portuguese could appropriate the property of British subjects if, among other conditions, the necessity of doing so was 'imminent and urgent.'³⁴ In the context of the Fur Seals controversy, Russia pointed to the imminence of the next fur seal hunting season when invoking the necessity of its 'immediate provisional measures'.³⁵ But it is the ICJ, in the *Gabčíkovo* case, that has given the closest judicial or arbitral consideration of the concept of imminent peril.³⁶ The ICJ began by first considering the meaning of 'peril'. The Court observed that 'peril' was something that, by its very nature of taking place in the future, could

³³ *ibid.*

³⁴ Arnold McNair, *International Law Opinions* vol 2 (CUP 1956) 231, 232.

³⁵ Great Britain Foreign and Commonwealth Office, *British and Foreign State Papers, 1893-1894* vol 86 (HM Stationery Office 1899) 220.

³⁶ All quotations from this paragraph are from [54] of the *Gabčíkovo* judgment (n 1).

not be conclusively established. The word ‘peril’, the Court explained, ‘certainly evokes the idea of risk; that is precisely what distinguishes “peril” from material damage’. But, on the other hand, the Court explained that ‘necessity could not exist without a “peril” duly established at the relevant point of time; the mere apprehension of a possible “peril” could not suffice in that respect’. The Court considered that this was borne out by the adjectives ‘grave’ and ‘imminent’. The Court did not explain the meaning of ‘grave’, although it did explain that ‘imminent’ was ‘synonymous with “immediacy” or “proximity” and goes far beyond the concept of “possibility”’. But the Court added a significant qualification to this. The Court explained that ‘a “peril” appearing in the long term might be held to be “imminent” as soon as it is established, at the relevant point in time, that any realization of that peril, however far off it might be, is not thereby any less certain or inevitable.’

The Court’s difficult and sometimes contradictory reasoning needs to be fleshed out. The most important point is that the Court, contrary to what it said to begin with, actually dispenses with any requirement of ‘imminence’, at least in the context of environmental peril. A ‘long-term peril’ that is ‘certain or inevitable’ will be sufficient. The Court contrived to call this ‘imminent’ too, but it is not at all ‘imminent’ in the sense the Court defined that word just sentences earlier as meaning ‘immediacy’ or ‘proximity’. A long-term peril is the opposite of that. What the Court sets down instead is the requirement of *likelihood*. A sufficiently *likely peril*, which the Court equated with a ‘certain or inevitable peril’, is what is required.

This is not to say that imminence in the sense of proximity is not at all relevant. It may still be relevant in at least two ways. First, the more imminent the peril is, the easier it will be to establish the likelihood of the peril. Second, the more imminent the peril is, the easier it will be to establish that the act taken was the ‘only way’ of safeguarding the essential interest in question. If there is still a long period of time until the peril is going to be realised,

this makes it far more likely that there will be other, for example co-operative, ways of responding to the peril rather than the unilateral breach of an international obligation that necessity entails.³⁷ Either way, however, it is likelihood that is the primary focus, and not imminence.

An implicit element of the Court's reasoning in the *Gabčíkovo* case, but never mentioned in terms by the Court, is the precautionary principle. The Court's removal of the requirement of imminence and its focus instead on the requirement of likelihood placed in sharp relief the level of scientific certainty that was needed to satisfy this likelihood requirement. But the Court's language was 'not precautionary language, premised as it [was] on the need to establish the certainty and inevitability of serious harm.'³⁸ The Court dismissed all the perils raised by Hungary as being 'long-term' and 'uncertain',³⁹ yet at no point did the Court try to unpack the level of uncertainty. The Court's failure to take into account the precautionary principle when evaluating the likelihood of the relevant perils has been criticised, with some justification, for failing to take into account the realities of scientific evidence in respect of which there will always be some level of uncertainty regarding future environmental harm.⁴⁰

Uncertainty does not exist simply in the environmental context. There exists considerable uncertainty, for example, in predicting economic crises. But there are two

³⁷ As the Court recognised (ibid [57]): 'What is more, negotiations were under way which might have led to a review of the Project and the extension of some of its time-limits, without there being need to abandon it.'

³⁸ Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (3rd ed, CUP 2012) 224.

³⁹ See n 6, [55] – [56].

⁴⁰ Daniel Dobos, 'The Necessity of Precaution: The Future of Ecological Necessity and the Precautionary Principle' (2002) 13 *Fordham J Intl Comp L* 375; Caroline Foster, 'Necessity and Precaution in International Law: Responding to Oblique Forms of Urgency' (2008) 23 *New Zealand Univ L Rev* 265; Malgosia Fitzmaurice, 'Necessity in International Environmental Law' (2010) 41 *Netherlands Ybk Intl L* 159.

features particular to environmental damage that raise the stakes of uncertainty in this context. The first feature is the irreversibility of much environmental damage.⁴¹ The second feature is the long period of time over which environmental degradation takes place. Each increment of damage may be barely perceptible, but the overall effect of that incremental damage could be serious or even catastrophic. It is in this context that the precautionary principle has emerged as a popular, though legally ambiguous, tool in contemporary environmental debates.

The classic articulation of the precautionary principle is that adopted at the 1992 Rio Earth Summit in Principle 15 of the Rio Declaration:⁴²

In order to protect the environment, the precautionary principle shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

The Rio Declaration is not itself a legally binding instrument⁴³ and the precautionary principle's precise normative status within international law is unclear. To the extent that it has not been specifically incorporated into a treaty, it remains unclear whether it exists more generally as a rule of customary international law or as a general principle of law.⁴⁴ But another way to look at the precautionary principle, and one that seems to match the reality of how many States and tribunals actually use the precautionary principle, is to place the

⁴¹ *Gabčíkovo* (n 6) [141]: 'The Court is mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of this type of damage.'

⁴² Rio Declaration on Environment and Development, concluded on 13 June 1992, 31 ILM 874.

⁴³ Dinah Shelton, 'Stockholm Declaration (1972) and Rio Declaration (1992)', in *MPEPIL* (OUP online) [41].

⁴⁴ Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (3rd ed, OUP 2009) 159: 'How far the precautionary principle as found in Principle 15 of the Rio Declaration must now be applied by all states as a matter of international law is an open question'.

traditional sources of international law to one side and view the precautionary principle from a different perspective.

Vaughan Lowe has referred to the idea of ‘a meta-principle, acting upon other legal rules and principles – a legal concept exercising a kind of interstitial normativity.’⁴⁵ Vaughan Lowe argues that this is how the principle of sustainable development operates in international law, and this approach may apply equally with respect to the precautionary principle, which may be viewed as one aspect of sustainable development. The first plank of Lowe’s argument was that ‘sustainable development’ lacked a ‘fundamentally norm-creating character’.⁴⁶ By this he meant that the principle of sustainable development was not by itself a means to constrain States’ behaviour. It was not a breach of international law every time a State did something unsustainable, such as recover oil from the ground.⁴⁷ The same could be said about the precautionary principle. It is difficult to see how the precautionary principle constrains States’ behaviour, at least in a direct sense. Patricia Birnie, Alan Boyle and Catherine Redgwell, for example, doubt that the precautionary principle as stated in Principle 15 of the Rio Declaration ‘has or could have the normative character of a rule of law’, and they point to the fact that the principle ‘says only that scientific uncertainty is not to be used as a reason for postponing cost-effective measures; it does not say anything about what those

⁴⁵ Vaughan Lowe, ‘Sustainable Development and Unsustainable Arguments’, in Alan Boyle and David Freestone (eds) *International Law and Sustainable Development: Past Achievements and Future Challenges* (OUP 2009) 19, 31.

⁴⁶ Lowe drew this phrase from the ICJ’s judgment in the *North Sea Continental Shelf* cases (*North Sea Continental Shelf (Federal Republic of Germany/Netherlands; Federal Republic of Germany/Denmark)* [1969] ICJ Rep 3, [72]) where the ICJ explained that with respect to whether the relevant provision of the Continental Shelf Convention had generated a rule of customary international law: ‘It would in the first place be necessary that the provision concerned should, at all events potentially, be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law.’

⁴⁷ Lowe (n 45) 25.

measures should be.⁴⁸ But it is at this stage that the second plank of Lowe's argument comes in. For Lowe, the fact that sustainable development (and, for present purposes, the precautionary principle) lacks 'a fundamentally norm-creating character' does not mean that it lacks normative force altogether.⁴⁹

Sustainable development can properly claim a normative status as an element of the process of judicial reasoning. It is a meta-principle, acting upon other legal rules and principles – a legal concept exercising a kind of interstitial normativity, pushing and pulling the boundaries of true primary norms^[50] when they threaten to overlap or conflict with each other.

So may the precautionary principle also 'properly claim a normative status as an element of the process of judicial reasoning'. This seems to be how, for example, the ICJ treated the precautionary principle in the *Pulp Mills* case.⁵¹ In that case, concerning the potential cross-border effects of the operation of two pulp mills constructed in Uruguay, the Court accepted, amid scientific uncertainty as to those effects, that 'a precautionary approach may be relevant in the interpretation and application of the provisions of the [Uruguay River] Statute'.⁵² The point is that whether or not the precautionary principle exists as a free-standing rule of customary international law or as a general principle of law, it should still exert some

⁴⁸ See n 44, 161. See also at 162: 'most national systems view it only as a principle which governments and legislatures may lawfully take into account or be guided by ... but not normally as a legal obligation which can be used to direct or require stronger action by governments.'

⁴⁹ See n 45, 31.

⁵⁰ Lowe does not appear to be using the term 'primary norms' here in the sense of the distinction between primary and secondary rules in the law of State responsibility, but rather in a more general sense to describe customary rules of international law.

⁵¹ *Pulp Mills (Argentina v Uruguay)* [2010] ICJ Rep 14.

⁵² *ibid* [164]. On the facts of the case the Court held that there was insufficient evidence to establish that Uruguay had breached any of its substantive obligations under the Uruguay River Statute, although it was held to have breached some procedural obligations existing under the Statute and customary international law.

influence on how States and international tribunals apply rules of international law.⁵³ The influence it may exert is that it ‘helps us identify whether a legally significant risk exists by addressing the role of scientific uncertainty’.⁵⁴ It follows from the fact of scientific uncertainty that it is ‘No longer necessary to prove that serious or irreversible harm is certain or likely before requiring that appropriate preventive measures be taken’,⁵⁵ while leaving what those ‘appropriate preventive measures’ may be to rules of international law that specifically address that matter.

It is on this basis that the precautionary principle may play a role within the context of necessity by helping to identify whether there is a likely peril in circumstances where that needs to be ascertained amid scientific uncertainty. The role, more precisely, would be that the threshold of likelihood would not need to be as high as ‘certain and inevitable’ if there were scientific uncertainty. Crawford, as Special Rapporteur, did consider after the *Gabčíkovo* case whether the precautionary principle should be expressly incorporated within the ASR’s provisions on necessity. He recommended that it should not. He explained that ‘The cases for and against are rather evenly balanced, but given the need to keep the defence of necessity within tight bounds, and the possibility of reflecting that element in the commentary, no change has been made.’⁵⁶ The ILC agreed and there is no mention of the precautionary principle in the text of Article 25.

⁵³ Caroline Foster, *Science and the Precautionary Principle in International Courts and Tribunals: Expert Evidence, Burden of Proof and Finality* (CUP 2011) 21.

⁵⁴ *ibid* 161.

⁵⁵ *ibid* 163.

⁵⁶ ‘Second Report on State Responsibility’ (n 2) 32. At n 563, Crawford cited a possible alternative to what would become Article 25(1)(a): ‘(a) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril, the occurrence of which could not reasonably be excluded on the best information available.’

Crawford clearly considered that the precautionary principle could exert an influence on how necessity was applied. He explained that because ‘by definition the peril will not yet have occurred, ...it cannot be required that the invoking State prove that it would *certainly* have occurred otherwise’ (emphasis original),⁵⁷ thus exposing the logical flaw in the *Gabčíkovo* judgment where the Court stated that certainty was required. He then went on to cite the *Gabčíkovo* judgment for the twin propositions that (i) the invoking State could not be the sole judge of necessity and (ii) the existence of scientific uncertainty does not by itself establish the required peril.⁵⁸ But he then departed from the *Gabčíkovo* judgment by stressing that although those propositions were ‘plainly right’:⁵⁹

neither should a measure of scientific uncertainty about the future disqualify a State from invoking necessity, if the peril is established on the basis of the evidence reasonably available at the time (as based, for example, on a proper risk assessment procedure)

This approach, which is carried through into the ASR Commentaries,⁶⁰ sets down a far more realistic standard for assessing the existence of a grave and imminent (or likely) peril in environmental cases.

It is helpful now to return to the facts of the *Gabčíkovo* case to provide some final clarification about how the precautionary principle may operate in the context of necessity. It is clear, as has been discussed, that the Court placed the bar unrealistically and illogically

⁵⁷ *ibid* 31.

⁵⁸ *ibid*.

⁵⁹ *ibid*.

⁶⁰ See n 7, 184, where the Commentaries explain that ‘a measure of uncertainty about the future does not necessarily disqualify a State from invoking necessity, if the peril is *clearly* established on the basis of the evidence reasonably available at the time’ (emphasis added). The addition of the word ‘clearly’ may be thought to be contradictory in a context where there is scientific uncertainty.

high when it demanded that the peril be established as ‘certain and inevitable’. But it is equally clear that Hungary must in any event have fallen short of establishing a sufficient level of likelihood. This is because much of what Hungary advanced was not positive evidence of a likely peril, but rather the absence of evidence about the future environmental effects of the project, and which it claimed was sufficient to evidence the peril faced.⁶¹ It cannot suffice for a party simply to raise the fact that there is some uncertainty, point to the precautionary principle and expect that this will be enough to establish a likely peril. There must still be a scientifically verified basis for the peril, but the point is that the scientific basis need not demonstrate certainty or inevitability.⁶² The requirement of a likely peril must be applied within realistic limits, but at the same time the precautionary principle must itself be applied within appropriate limits.

The Only Way

A State cannot establish necessity unless its act was, in the terms of Article 25(1)(a) of the ASR, ‘the *only way* to safeguard an essential interest against a grave and imminent peril’ (emphasis added). The WTO Appellate Body, in the *Korea-Beef* case, noted that the dictionary definition of ‘necessity’ extended across a spectrum of meanings, ranging from the

⁶¹ See n 1, [56].

⁶² Nor does the body of scientific opinion need to be unanimous, and perhaps it does not even need to be the majority opinion: Birnie, Boyle and Redgwell (n 44) 156 (although those authors clarify that the mere fact of dissent does not on its own establish risk because ‘it is usually possible to find a scientist to oppose any conclusion of a body of experts.’)

term expressing ‘mere convenience [to] that which is indispensable’.⁶³ Article 25(1)(a) situates necessity, as a defence to State responsibility, at the latter end of this spectrum.

The ‘only way’ condition was among those set down by Grotius⁶⁴ and Vattel,⁶⁵ and the centrality of the ‘only way’ requirement to necessity also emerges clearly from State practice and the decisions of international tribunals. With respect to the *Chichester* affair, Herbert Jenner, the British Advocate General, stressed that the embargo ‘was *the only measure*, which could be resorted to for the purpose of preventing a disclosure to the Enemy which might be productive of infinite danger to the State’ (emphasis added).⁶⁶ Several years later, with respect to the Anglo-Portuguese dispute of 1832, the same Advocate General stressed that the acts in question had to be ‘absolutely and indispensably necessary’.⁶⁷ Similarly in the *Neptune* arbitration Commissioner Pinkney explained that the act in question could not be taken ‘until all other means of relief consistent with the necessity have been tried and found inadequate’,⁶⁸ and Commissioner Trumbull likewise stated that the act could not be taken ‘until all other means of self-preservation shall have been exhausted.’⁶⁹ Greece’s

⁶³ WTO, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, AB-2000-8, Report of the Appellate Body, WT/DS169/AB/R, 11 December 2000, [159] – [160].

⁶⁴ *De Jure Belli ac Pacis Libri Tres* vol II (Francis Kelsey tr, first published 1625, Clarendon 1925) Bk 2, ch 1, cl 4.

⁶⁵ Emerich de Vattel, *Law of Nations* (Joseph Chitty tr, first published 1758, Sweet 1834) Bk 2, ch 9, cl 119. Pufendorf was more ambiguous. He explained (*De Jure Naturae et Gentium Libri Octo* (W A Oldfather tr, first published 1672, Clarendon 1934) bk 2, ch 6, cl 8) that ‘a necessity that touches our own property apparently allows one the permission to destroy or appropriate the property of another, but with the following restrictions: ... that it cannot be averted in any more *convenient way*’ (emphasis added).

⁶⁶ Arnold McNair, *International Law Opinions* vol 2 (CUP 1956) 231.

⁶⁷ *ibid* 232.

⁶⁸ *The Neptune, Jeffries, Master: Provision Case*, in John Bassett Moore, *International Adjudications* vol IV (OUP 1931) 372, 399.

⁶⁹ *ibid* 433.

counsel in the *SCB* case also pointed to it being ‘impossible’ for Greece to discharge ‘the debt in full and at the same time to provide the people with a fitting administration and to guarantee the conditions essential for its moral, social and economic development.’⁷⁰

More recently, the tribunal in the *LAFICO* case rejected Burundi’s necessity plea because its expulsion of Libyan nationals did ‘not appear ... to have been the only means of safeguarding an essential interest of Burundi’.⁷¹ ITLOS in the *M/V Saiga* case also rejected Guinea’s plea of necessity with one of the reasons being that Guinea had not established that extending its customs laws to parts of its exclusive economic zone was the only way to maximise its tax revenues from the sale of oil to fishing vessels.⁷² Further examples are provided by the *Wall* opinion, where the ICJ concluded that the construction of the wall along the route chosen was not the only way for Israel to safeguard its interests against the peril that it claimed justified the wall,⁷³ and by the *Von Pezold* case, where the tribunal concluded that the Zimbabwean government’s failure to deal with the farm invasions was a political decision and was not the only way the government could have responded.⁷⁴

⁷⁰ *Société Commerciale de Belgique (Belgium v Greece)* [1939] PCIJ Series C, No 87, 204.

⁷¹ *LAFICO v Burundi* (1994) 96 ILR 279, 319.

⁷² *MV Saiga (No 2) (St Vincent and the Grenadines v Guinea)* (Merits) Judgment of 1 July 1999, [135].

⁷³ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, [140].

⁷⁴ See n 21, [638] – [646].

(i) 'Only' means 'only'

State practice and the decisions of international tribunals demonstrate that the 'only way' condition must be read literally. As Crawford summarises: 'Here 'only' means 'only'; it is not enough if another lawful means is more expensive or less convenient.'⁷⁵ That the 'only way' requirement must be read literally emerges even more clearly from the ICJ's judgment in the *Gabčíkovo* case. The Court considered that Hungary's unilateral suspension and then termination of its share of the project was not the only way to respond to the threats the project may have posed to the quality of Budapest's drinking water. One of the examples the Court gave as an alternative way of responding to that threat was by purifying the water so that it could still be supplied to Budapest as drinking water. The Court added that this possibility was relevant and prevented the establishment of necessity even though 'the purification of the river water ... clearly would have been a more costly technique.'⁷⁶

Questions have been raised by some writers as to whether the 'only way' condition may be unrealistically strict. These writers have raised these questions with a particular focus on necessity in the context of economic crises. Michael Waibel, for example, has contended that, partly because of the unrealistic strictness of the 'only way' condition, necessity is 'a crude instrument for dealing with sovereign financial crises' and 'is ill-suited to appropriately balance interests of investors and countries in sovereign financial distress.'⁷⁷ August Reinisch

⁷⁵ Crawford, *State Responsibility* (n 6) 311. This was cited with approval in *EDF v Argentina* (Decision on Annulment) ICSID Case No ARB/03/23, 5 February 2016, [335].

⁷⁶ *Gabčíkovo* (n 1) [55].

⁷⁷ Michael Waibel, 'Two Worlds of Necessity in ICSID Arbitration: *CMS* and *LG & E*' (2007) 20 *Leiden J Intl L* 637, 638.

has, for similar reasons, suggested that the ‘only way’ condition should be read down to include a proportionality approach.⁷⁸

The Argentine crisis cases furnish a series of important examples with which to analyse this issue. The approach taken by some of the tribunals is indeed unrealistically strict. The *CMS* tribunal found that Argentina could not satisfy the ‘only way’ condition in these terms:⁷⁹

The views of the parties and distinguished economists are wide apart on this matter, ranging from support of those measures [taken by Argentina] to the discussion of a variety of alternatives, including dollarization of the economy, granting of direct subsidies to the affected population or industries and many others. Which of these policy alternatives would have been better is a decision beyond the scope of the Tribunal’s task, which is to establish whether there was only one way or various ways and thus whether the requirements for the preclusion of wrongfulness have or have not been met.

The International Law Commission’s comment to the effect that the plea of necessity is “excluded if there are other (otherwise lawful) means available, even if they may be more costly or less convenient,” is persuasive in assisting this Tribunal in concluding that the measures adopted were not the only steps available.

In a similar vein, the *Enron* and *Sempra* tribunals found that Argentina could not satisfy the ‘only way’ condition in these terms:⁸⁰

It is thus quite evident that measures had to be adopted to offset the unfolding crisis. Whether the measures taken under the Emergency Law were the “only way” to achieve this result and no other alternative was available, is also a question on which the parties and their experts are profoundly divided ... A rather sad world comparative experience in the handling of economic crises, shows that there are always many approaches to address and correct such critical events, and it is difficult to justify that none of them were available in the Argentine case.

⁷⁸ August Reinisch, ‘Necessity in International Investment Arbitration – An Unnecessary Split of Opinions in Recent ICSID Cases’ (2007) 8 *J World Investment & Trade* 191, 201. See also, appearing to approve of Reinisch’s suggestion, Andrea Bjorklund, ‘Emergency Exceptions’ in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 459, 485.

⁷⁹ *CMS* (n 15) [322] – [323].

⁸⁰ *Enron* (n 15) [308] – [309]; *Sempra* (n 15) [350] – [351] in materially identical terms.

While one or other party would like the Tribunal to point out which alternative was recommendable, it is not the task of the Tribunal to substitute for the government determination of economic choices, only to determine whether the choice made was the only way available, and this does not appear to be the case.

The approaches of the *CMS*, *Enron* and *Sempra* tribunals demonstrate clear examples of how the ‘only way’ condition should *not* be applied.⁸¹ The tribunals straitjacketed themselves within a clearly erroneous view as to the scope of their arbitral role. The *CMS* tribunal had, ironically, set out the proper approach to be taken by a tribunal in this context in its Decision on Jurisdiction:⁸²

... the Tribunal concludes ... that it does not have jurisdiction over measures of general economic policy adopted by the Republic of Argentina and cannot pass judgment on whether they are right or wrong. The Tribunal also concludes, however, that it has jurisdiction to examine whether specific measures affecting the Claimant’s investment or measures of general economic policy having a direct bearing on such investment have been adopted in violation of legally binding commitments made to the investor in treaties, legislation or contracts.

This echoed the sensible approach set down by Judge Anzilotti many years earlier in his Separate Opinion in the *Oscar Chinn* case.⁸³

No one can, or does, dispute that it rested with the Belgian Government to say what were the measures best adapted to overcome the crisis: provided always that the

⁸¹ See also the approach taken by the *Suez* tribunal (n 10) [260], which did not turn on the appraisal of economic experts. In that case, the tribunal held that there were other ways by which Argentina could have assured the continuation of water and sewerage services to the people of Buenos Aires without breaching its international obligations, including by relieving the investor of certain commitments that rendered the concession so expensive to operate without tariff increases or by providing subsidies to the poor. The *EDF* tribunal simply stated that it was not convinced that Argentina’s measures were the only way to protect its essential interests without explaining why (*EDF v Argentina* (Award) ICSID Case No ARB/03/23, 11 June 2012, [1172]).

⁸² *CMS v Argentina* (Decision of the Tribunal on Objections to Jurisdiction) ICSID Case No ARB/01/8, 17 July 2003, [33].

⁸³ *Oscar Chinn (United Kingdom v Belgium)* [1934] PCIJ Ser A/B No 63, Separate Opinion of Judge Anzilotti 107, 114.

measures selected were not inconsistent with its international obligations, for the Government's freedom of choice was indisputably limited by the duty of observing those obligations.

But the *CMS* tribunal, as well as the *Enron* and *Sempra* tribunals, proceeded to ignore this sound approach. The *CMS*, *Enron* and *Sempra* tribunals simply cut through the Gordian knot of what it called the 'profoundly divided' experts by pointing to the fact that there were potentially other alternatives that Argentina could have taken, without reasoning through independently of the evidence of the investors' economic experts whether they properly could be considered alternatives. Naturally the expert evidence would need to be at the heart of the tribunals' reasoning, but as in other contexts in which international tribunals appraise expert evidence, it is the tribunal that must remain the judge of the experts.⁸⁴

(ii) Feasibility and effectiveness

The *CMS*, *Enron* and *Sempra* tribunals failed to consider what this thesis proposes are two key questions that must logically form part of the 'only way' inquiry. Those questions concern whether the potential alternatives are both *feasible* and *effective*. The alternative must be *feasible* to the State in the sense that the State is actually capable in the circumstances in which it finds itself of taking the alternative. The alternative must also be feasible in the sense that the State is capable of taking the act without the cost of taking that alternative itself imperilling an essential interest of that State. The alternative must be *effective* in the sense

⁸⁴ Foster, *Science and the Precautionary Principle* (n 53) 136-182; *Starrett Housing Corp v Iran* (Final Award) (1987) 16 Iran-US CTR 112, 565: 'No matter how well qualified an expert may be ... it is fundamental that an arbitral tribunal cannot delegate to him the duty of deciding the case.'

that it does actually safeguard the essential interest of the State from the grave and likely peril. In sum, if the act in question is either unfeasible or ineffective, that act cannot properly be called an alternative and therefore should not stand in the way of a State satisfying the ‘only way’ condition. Recognising the relevance of feasibility and effectiveness goes some way to responding to the argument that the ‘only way’ condition is unrealistically strict, while at the same time it does not dilute the ‘only way’ condition in a way that departs from the practice that quite clearly requires this condition to be interpreted strictly.

The *CMS*, *Enron* and *Sempra* tribunals clearly failed to consider the feasibility or effectiveness of the potential alternative measures. This can be illustrated by focusing on just one example of an apparent alternative that those tribunals considered Argentina could have taken, which is the dollarization of Argentina’s economy. It may reasonably be doubted whether full dollarization would have been both feasible and effective, and it may therefore reasonably be doubted whether dollarization existed as an alternative that should properly have prevented Argentina from satisfying the ‘only way’ condition. First, regarding feasibility, it could be questioned whether Argentina had the ability to embark on dollarization in the midst of such a severe crisis given the significant foreign currency reserves that would be required to convert all pesos into dollars and the considerable depletion of those reserves throughout 2001 as Argentina sought to maintain its currency peg. Even if Argentina did theoretically have that ability, the extent to which it may have depleted Argentina’s foreign currency reserves may itself have aggravated Argentina’s economic crisis and thus imperilled an essential interest. Either way, the tribunal offered no consideration of the feasibility of dollarization. Second, regarding effectiveness, Argentina’s economic problems were arguably caused in the first place at least partly by an overvalued currency produced by the pegging of the Argentine peso to the US dollar and so it is reasonable to doubt whether dollarization would have been an effective way to respond to Argentina’s

situation. At the very least, these questions of feasibility and effectiveness are questions the tribunals should have examined closely in light of the expert evidence before it. Two paragraphs reciting the difficulty of the question and one sentence answering it are surely insufficient.

It was therefore unsurprising that at least one of these awards was annulled on the basis of its analysis – or lack thereof – of the ‘only way’ condition. The *Enron Annulment* committee criticised the approach of the *Enron* tribunal on the basis that it had simply applied the views of the investor’s economic expert when determining the legal question of whether Argentina’s measures were the only way to safeguard an essential interest from a grave and imminent peril.⁸⁵ The *Enron Annulment* committee accordingly annulled the *Enron* award on the basis of its failure to apply the applicable law, which it considered amounted to the tribunal manifestly exceeding its powers under Article 52(1)(b) of the ICSID Convention,⁸⁶ and on the basis of its failure to state reasons under Article 52(1)(e) of the ICSID Convention.⁸⁷

But the *Enron Annulment* committee did not stop there. The committee explained that the tribunal failed to address three questions that were essential to answering whether the ‘only way’ condition was met. The first of these questions concerned the best interpretation of ‘only way’. The committee considered that there was more than one possible interpretation of ‘only way’ and the tribunal should have addressed this. The committee first explained that ‘only way’ could be interpreted literally so that Argentina could rely on necessity only ‘if

⁸⁵ *Enron v Argentina* (Decision on the Application for Annulment) ICSID Case No ARB/01/3, 30 July 2010 [376] – [377].

⁸⁶ *ibid* [377].

⁸⁷ *ibid* [378].

there were genuinely no other measures that Argentina could possibly have adopted in order to address the economic crisis'.⁸⁸ The committee went on to explain that because there would typically be more than one way for a State to respond to an economic crisis, necessity could 'rarely if ever be invoked in relation to measures taken by a Government to deal with an economic crisis.'⁸⁹ But, as has been discussed above, provided that the feasibility and effectiveness of the alternative measures are considered, this literal interpretation of 'only way' may be strict, but not unrealistically strict. That the 'only way' condition must be realistically interpreted in this way was actually recognised by the *Enron Annulment* committee when it stated that under this interpretation there needed to be '*genuinely* no other measures that Argentina could possibly have adopted ...' (emphasis added).⁹⁰ But the *Enron Annulment* committee broached what it considered to be an alternative interpretation of 'only way'. On this interpretation, 'there must be no alternative measures that the State might have taken for safeguarding the essential interest in question that did not involve a similar or graver breach of international law.'⁹¹ Yet this interpretation is less an alternative interpretation but rather a clarification of how the 'only way' condition is already typically understood to operate. The ASR Commentaries, for example, state that the 'plea is excluded if there are other (*otherwise lawful*) means available, even if they may be more costly or less convenient' (emphasis added).⁹² The existence of an alternative measure that would also

⁸⁸ *ibid* [369].

⁸⁹ *ibid*.

⁹⁰ *ibid*.

⁹¹ *ibid* [370].

⁹² See n 7, 184. See also Ago's Addendum (n 4) 20: 'The adoption by a State of conduct not in conformity with an international obligation towards another State must truly be the only means available to it for averting the extremely grave and imminent peril which it fears; in other words, it must be impossible for the peril to be averted by any other means, even one which is much more onerous but which can be adopted *without a breach of international obligations*' (emphasis added).

breach the international obligation in question does not prevent a State from satisfying the ‘only way’ condition, which should be understood as reading ‘only *lawful* way’. This is subject to one important exception. If there is an alternative measure that would also have breached the international obligation in question, but breached that obligation to a lesser extent than the measure taken, then this must prevent a State from satisfying the ‘only way’ condition. It is well-accepted that the measure must not only be necessary, but must go no further than what is necessary.⁹³ It would not make sense, and would lead to abuse, if it were the case that, where there is a range of unlawful alternatives, the State were free to select out of those alternatives that which breached the obligation in question to the greatest extent. On the contrary, it must select the alternative that breaches the obligation in question to the least extent.

The second question raised by the *Enron Annulment* committee concerned the relative effectiveness of the measures taken and not taken. The committee set out the following hypothetical situation:⁹⁴

... suppose that there are two possible measures that a State might take in order to seek to safeguard an essential interest. One is 90 per cent probable to be 90 per cent effective to safeguard that essential interest, while the other is 50 per cent probable to be 60 per cent effective. Suppose that the former measure would (subject to the potential application of the principle of necessity) be inconsistent with obligations of the State under international law, while the latter measure would not. Would the State be precluded from invoking the principle of necessity if it adopted the former measure, on the basis that there was an alternative available? Or could the State claim that the measure taken was the “only way” that stood a very high chance of being very effective?

⁹³ ASR Commentaries (n 7) 184; Ago’s Addendum (n 4) 20: ‘Any action in excess of what is strictly necessary for that purpose is *ipso facto* a wrongful act, even if the excuse of necessity would otherwise be allowed to operate.’

⁹⁴ *Enron Annulment* (n 85) [371].

This issue does not appear to have arisen in previous practice. But it is clear that inquiring into relative effectiveness produces significant difficulties. Above all, it is impractical, and probably impracticable, for a tribunal to weigh, compare and contrast the probability of effectiveness in these mathematical terms. Certainly the economic experts in the *Enron* case and in the other Argentine crisis cases did not presume to present the evidence in such clinical terms. If they cannot, then surely a tribunal of non-economist lawyers cannot. The question of whether an act safeguards an essential interest from a grave and imminent peril should therefore be viewed as doing so if it crosses a minimum threshold. An act either safeguards an essential interest against a grave and likely peril or it does not. So, if an alternative crosses that threshold, whether or not it is more or less effective than the act taken, then, it is an alternative that would prevent a State from satisfying the ‘only way’ condition. But if the alternative act in question does not pass that threshold, then it should be considered for these purposes to be ineffective and should not prevent a State from satisfying the ‘only way’ condition.

The third and final question raised by the *Enron Annulment* committee concerned the temporal perspective from which the tribunal examined the ‘only way’ condition. The question was more precisely whether the tribunal could approach the question with the benefit of hindsight or whether it should be determined on the basis of what a reasonably qualified decision-maker would have determined on the information reasonably available at the time.⁹⁵ Related to this second possible approach was whether a margin of appreciation should be afforded to the State in question in order to reflect that reasonable minds may differ on the issue.⁹⁶ The nature of necessity raises this issue in stark terms. Necessity, unlike *force*

⁹⁵ *ibid* [372].

⁹⁶ *ibid* [372].

majeure for example, 'is forward looking in that steps are taken in response to a peril that has not yet materialized, or to forestall the continued development of the crisis.'⁹⁷ Yet the tribunal will typically be assessing the question at a point in time when it is looking backwards at whether the peril has or has not materialised or the crisis has or has not further developed. Tribunals generally appear to have taken the view that the question should be appraised strictly and with the benefit of all the available evidence that may be available with hindsight. With one potential, but unpersuasive, exception, which will be discussed immediately below, no tribunal has afforded a margin of appreciation to a State in this respect or expressly considered the matter from the perspective of the State at the time it took the act. This is justified. It must be recalled in this context that if necessity is being considered, then this means that a State has breached an international obligation owed to another (usually innocent) State. That other State should not have to bear the consequences of a State's mistaken assessment of its situation and its available responses to that situation. Nor, for that reason, should a margin of appreciation be afforded to the State. This is not to say that the State invoking necessity is required to prove beyond all doubt that the act in question was the only way. There is no reason why the ordinary burden of establishing the matter on the balance of probabilities would not apply here.

The preceding discussion of the Argentine crisis cases has been based on cases wherein the 'only way' requirement was applied in an unrealistically strict manner. These cases stand in stark contrast to the *LG & E* case, where the 'only way' condition was applied far too leniently.⁹⁸ The tribunal confirmed that 'the act must be the only means available to

⁹⁷ Bjorklund (n 78) 506.

⁹⁸ See n 9.

the State in order to protect an [essential] interest',⁹⁹ but it applied that test at a staggeringly abstract level. The tribunal explained that 'an economic recovery package was the only way of responding to the crisis'.¹⁰⁰ It observed that there 'may have been a number of ways to draft the economic recovery plan', but concluded that the evidence before it 'demonstrate[d] that an across-the-board response was necessary'.¹⁰¹ That was the extent of the tribunal's reasoning. On this approach, all a State has to establish is that it engaged in some kind of comprehensive economic recovery plan and it is irrelevant if the plan does little to address the problems, or if it goes far beyond what is needed to address the problems. This approach leaves the State with virtually complete discretion over how to establish the 'only way' condition, renders that condition next to meaningless and is clearly wrong.

There is clearly a middle ground to be reached between the uncontrollable looseness of the *LG & E* tribunal's approach and the unrealistic strictness of the approach taken by the *CMS*, *Enron* and *Sempra* tribunals. The preceding discussion has contended that an appropriate middle ground can be reached by recognising that 'only' means 'only', but also that the 'only' way must be understood as the only *feasible* and *effective* way.

Balancing Interests

Necessity provides a State with a defence to the responsibility that would otherwise arise from its breach of an international obligation, but the breach of that obligation must produce a lesser evil than the evil that is thereby avoided. Article 25 of the ASR does not itself refer

⁹⁹ *ibid* [250].

¹⁰⁰ *ibid* [257].

¹⁰¹ *ibid*.

expressly to the balancing of interests. Article 25(1)(b) requires that the State invoking necessity ‘does not seriously impair an essential interest of the State or States towards which the international obligation exists, or of the international community as a whole.’ The literal reading of that paragraph is that necessity cannot be invoked as soon as a certain threshold is crossed, which is the serious impairment of an essential interest of the State or States towards which the international obligation exists, or of the international community as a whole. That is the reading that was taken by the tribunal in the *Von Pezold* case. The tribunal in that case held that Zimbabwe failed to satisfy this condition because its actions amounted to unjustifiable racial discrimination. The tribunal held that Zimbabwe’s actions therefore involved the breach of an *erga omnes* obligation and this meant that Zimbabwe had impaired an essential interest of the international community as a whole.¹⁰² At no point, however, did the tribunal explain whether or why this ‘*seriously* impaired’ (emphasis added) an essential interest of the international community as a whole, much less how one is meant to distinguish between an impairment that is serious and an impairment that is not.

But there is a second, and better, reading of how the condition in Article 25(1)(b) is meant to work. Ago, when originally proposing Draft Article 33 (which would become Article 25), stipulated that necessity could apply ‘only in so far as failure to comply with the obligation towards another State does not entail the sacrifice of an interest of that other State comparable or superior to the interest which it was intended to safeguard.’¹⁰³ In other words, this condition was about balancing interests and not about disqualifying the defence as soon as a certain threshold was crossed. It was the ILC’s Drafting Committee that purported

¹⁰² See n 21, [647] – [657]. The tribunal seemed to base its conclusion that racial discrimination involved the breach of an *erga omnes* obligation on the ICJ’s dictum to that effect in *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Second Phase) [1970] ICJ Rep 3, [33].

¹⁰³ Ago’s Addendum (n 4) [81].

merely to inject ‘greater clarity and precision’ by redrafting this condition in the form in which it now appears in Article 25(1)(b).¹⁰⁴ The Chairman of the Drafting Committee (Stephan Verosta) insisted that the Committee had not changed the meaning of this condition and explained that the terms of Article 25(1) still ‘implied a comparison between the two interests involved.’¹⁰⁵ Whatever the merits of that drafting decision, the Commentaries to the final ASR make it clear that Article 25(1)(b) does entail a balancing inquiry. The ASR Commentaries introduce necessity as a term ‘used to denote those exceptional cases where the only way a State can safeguard an essential interest threatened by a grave and imminent peril is, for the time being, not to perform some other international obligation *of lesser weight or urgency*’ (emphasis added).¹⁰⁶ The Commentaries later explain that ‘the interest relied on [by the State invoking necessity] must outweigh all other considerations, not merely from the point of view of the acting state but on a reasonable assessment of the competing interests, whether these are individual or collective.’¹⁰⁷

The reference to collective interests recalls the changes made under Crawford’s rapporteurship.¹⁰⁸ The essential interests of the ‘international community as a whole’ are, according to the ASR and their Commentaries, relevant both in the sense of the essential interests that can be relied on when invoking necessity, as well as in the sense of the interests of those to whom the international obligation in question is owed where *erga omnes* obligations are concerned. It may be logical from a conceptual perspective that, if an

¹⁰⁴ ILC, ‘Texts Adopted by the Drafting Committee: Articles 33 – 35’ (17 July 1980) UN Doc A/CN.4/L.318, in *Ybk ILC* (1980) I 270, [46].

¹⁰⁵ *ibid.*

¹⁰⁶ See n 7, 178.

¹⁰⁷ *ibid.* 184.

¹⁰⁸ See Chapter 1, text to nn 147 – 149.

obligation is owed to the ‘international community as a whole’, then the interests of the State that breaches that obligation must be balanced against the interests of the ‘international community as a whole’, although there may be difficulties regarding how one is to weigh the interests of a single State against the more diffuse interests of the international community as a whole. On the other hand, and as noted above, the extension of necessity to include the safeguarding of an essential interest of the international community is better characterised as a ‘progressive development’ of international law and has not yet been reflected in State practice or developed by international tribunals.¹⁰⁹

It has long been recognised among writers that the balancing of interests is one of the conditions under which necessity applies and this balancing requirement also has a strong basis in principle. It was among the conditions set down by Grotius,¹¹⁰ Pufendorf¹¹¹ and Vattel,¹¹² and more recently Bin Cheng explained how the balancing of interests was both at the heart of necessity’s rationale and at the same time a constraint on the circumstances in which it can be established. He drew the link between the balancing of interests and necessity’s rationale in these terms:¹¹³

The law of necessity is a means of preserving values. It is the great disparity in the importance of the interests actually in conflict that alone justifies a reversal of the legal protection normally accorded to these interests, so that a socially important interest shall not perish for the sake of respect for an objectively minor right. In every case, a comparison of the conflicting interests appears to be indispensable.

¹⁰⁹ See text to n 26.

¹¹⁰ See n 64 Bk 2, ch 3, cl 8.

¹¹¹ See n 65 Bk 2, ch 6, cl 8.

¹¹² See n 65 Bk 2, ch 9, cl 121.

¹¹³ *General Principles of Law as Applied by International Courts and Tribunals* (CUP 1994) 74.

Bin Cheng explained the constraining role of the balancing of interests in terms of the sovereign equality of States: ‘As States are equal, the conflicting interests are thus also of equal importance.’¹¹⁴ Even if complying with an international obligation will produce significant hardship for a State, this will be a hardship it will have to bear if the act in question causes even greater hardship for another State.

(i) The critique of the balancing inquiry

There was concern both within the ILC¹¹⁵ and among States in the General Assembly’s Sixth Committee¹¹⁶ about how workable this balancing inquiry would be in practice. In the same vein, some writers have contended that the international system is simply not capable of carrying out this balancing inquiry at all and have on that basis contended that necessity should not have a place within the law of State responsibility. Robert Sloane, in particular, has contended that this balancing inquiry, which he says is ‘redolent of the choice-of-evils necessity paradigm found in some national legal systems’,¹¹⁷ produces significant difficulties when transposed to the international context. Sloane’s key point is that there is no hierarchy of interests in the international system compared to what he claims to be ‘the comparatively high degree of normative consensus that exists in robust national legal systems’¹¹⁸ in which

¹¹⁴ *ibid* 75.

¹¹⁵ See, for example, ILC, ‘Summary Record of the 1618th Meeting’ (24 June 1980) UN Doc A/CN.4/SR.1618 in *Ybk ILC* (1980) I 177, 178 (Christopher Pinto).

¹¹⁶ See, for example, UNGA, ‘Summary Record of the 53rd Meeting’ (19 November 1980) UN Doc A/C.6/35/SR.53, [28] (Mongolia).

¹¹⁷ Robert Sloane, ‘On the Use and Abuse of Necessity in the Law of State Responsibility’ (2012) 106 *AJIL* 447, 458.

¹¹⁸ *ibid* 478.

he says that a ‘normative hierarchy ... is almost always implicit in, and inferred from, not only positive laws but the principles that animate them and the sociopolitical context in which they operate’.¹¹⁹ Much the same point had actually been made almost a century earlier by Charles de Visscher. De Visscher also based his critique of necessity (*Notrecht*) on the lack of a clear hierarchy of interests in the international system:¹²⁰

Where is to be found the general interest, the standard of rights and duties, which controls conflicting interests, imposes the necessary sacrifices and operates in so striking a manner in criminal law by establishing a graduated scale of crimes and punishments? When lifted into the regions of international law, the theory of *Notrecht* strikes across the fundamental principle of the absolute independence and the irreducible equality of sovereign states.

There can be no doubt here that de Visscher, a Belgian writing in 1916, had in mind the recent sacrifice of Belgium’s essential interests on the altar of Germany’s apparent essential interests.

The gist of this critique is that domestic law concepts should not be thoughtlessly transposed to the international law context.¹²¹ It recalls Judge McNair’s admonition that ‘private law institutions’ must not be imported ‘lock, stock and barrel’ into international law.¹²² But this is not what has happened with necessity as a defence to State responsibility. Chapters 1 and 2 of this thesis discussed at some length the historical development of

¹¹⁹ *ibid* 476.

¹²⁰ Charles de Visscher, *Belgium’s Case: A Judicial Inquiry* (Eleanor Jourdain tr, Hodder & Stoughton 1916) 45 – 46. See also *Theory and Reality in Public International Law* (Revised ed, trans by P E Corbett, Princeton 1968) 275 – 277, 291 – 292.

¹²¹ Sloane and de Visscher both also place emphasis on the issue of the lack of guaranteed third party review in the international law context. That wider issue is considered below in Chapter 5, beginning with text to n 83.

¹²² *International Status of South-West Africa* (Advisory Opinion) [1950] ICJ Rep 125, Separate Opinion of Sir Arnold McNair, 145, 148.

necessity over a long period of time and its firm basis in the practice and *opinio iuris* of States. This is not to say that the balancing inquiry inherent in the international law conception of necessity may not present difficulties. It may. But those difficulties are hardly foreign to international law. In the law of self-defence, for example, difficult balancing assessments have to be made when evaluating whether a State's use of force is proportionate to the threat faced.¹²³ Difficult balancing assessments must also be made, for example, with respect to countermeasures when assessing the commensurability of the countermeasures that a State takes vis-à-vis the injury that it has suffered.¹²⁴ In neither the case of self-defence nor countermeasures has it been suggested, at least widely or convincingly, that because of those difficulties international law should not recognise self-defence or countermeasures. Nor should these difficulties be overstated when it comes to necessity. The following discussion seeks to demonstrate that in practice few difficulties arise in the majority of cases and in the minority of cases where they may arise those difficulties can be accommodated.

(ii) Balancing interests in practice

In the majority of cases it will be clear where the balance of interests lies. This is logically unsurprising. Necessity seeks to provide a safety valve for a State where breaching an international obligation is the only way to safeguard an essential interest from a grave and

¹²³ See, for example, the discussions in Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (CUP 2004) 155 – 187 and in Yoram Dinstein, *War, Aggression and Self-Defence* (5th ed, CUP 2012) 262 – 267.

¹²⁴ As Article 51 of the ASR sets down: 'Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.' See, for example, *Naulilaa (Responsibility of Germany for Damage Caused in the Portuguese Colonies in the South of Africa)* (1928) II RIAA 1013, 1028; *Air Services Agreement of 27 March 1946 (United States v France)* XVIII RIAA 417, 444; *Gabčíkovo* (n 1) [85] – [87].

imminent peril. In other words, necessity is designed to apply only in the most exceptional of situations. It is inherently unlikely that a State against which necessity is invoked will also happen to face a comparably, let alone more, exceptional situation.

In this connection it should be clarified precisely what is being balanced. It was noted above how the ASR Commentaries introduce necessity as a term ‘used to denote those exceptional cases where the only way a State can safeguard an essential interest threatened by a grave and imminent peril is, for the time being, not to perform some other international obligation of *lesser weight or urgency*’ (emphasis added). It is thus not just the *weight* of the competing interests that needs to be balanced, but also the *urgency* with which those interests need to be protected that needs to be balanced. This may be illustrated by recalling the example discussed in Chapter I of where a tsunami has damaged State A’s crops and this has created food shortages following which State A decides to breach an international obligation to deliver crops to State B in order to prioritise the feeding of its own population.¹²⁵ It may be that State B has just as important an interest in feeding its own population, but it may also be the case that this interest is in less urgent need of protection than in the case of State A because it is not facing the kind of emergency food shortages that State A is.

Ago sought to emphasise during the ILC’s discussions of necessity how the balancing of interests gave rise to few difficulties in practice. He first gave the example of the *Torrey Canyon* incident where (had necessity actually been invoked) it could not seriously be doubted that the UK’s ‘interest in avoiding serious pollution of its coast really took precedence over the flag State’s interest in avoiding the destruction of the wreck.’¹²⁶ He also

¹²⁵ See Chapter 1, text to n 159.

¹²⁶ ILC, ‘Summary Record of the 1618th meeting’ (n 115) 183.

gave the examples of the Fur Seals controversy where he emphasised how if the Russian government did not take the measures in question, ‘an ecological disaster would have occurred, which would have prejudiced not only Russia’s interests but also those of the other States concerned.’¹²⁷ Ago finally gave the example of the *Orinoco* case, where it was clear that the risk of war breaking out between Venezuela and Colombia outweighed France’s interests in the mineral and transport concession of one of its companies.¹²⁸ Ago concluded that, ‘In all those cases, therefore, no subjective aspect had complicated the situation. The importance and frequency of the difficulties which might arise out of some subjective elements should not, therefore, be exaggerated.’¹²⁹

Ago’s pragmatic assessment has been borne out by recent experience. The hardship suffered by Argentina during its financial crisis clearly outweighed that suffered by any of the investors to which it owed obligations (or the home States of those investors). This was particularly clear given the nature of the interests that were threatened in Argentina, which went far beyond merely financial interests. In the *Argentine Necessity Case* before the German Constitutional Court, Judge Lübbe-Wolff, in her dissenting opinion, explained that:¹³⁰

With this plea, in so far as it is a matter of financial obligations of the State, the principle is recognized that certain elementary tasks and obligations of the State, above all those on which the life and health of its citizens directly depend, as a rule take precedence over punctual service of creditors’ interests ...

The prioritization of [the State over creditors] which is central to the legal principle of necessity is also underpinned today by the *ius cogens* of human rights ... An enforcement of State payment obligations vis-à-vis foreign creditors that would risk

¹²⁷ *ibid.*

¹²⁸ *ibid.*

¹²⁹ *ibid.*

¹³⁰ 138 ILR 1, 29 – 30.

an interruption of elementary State functions caused, increased or extended by such enforcement would be violative of human rights – in so far as no equally essential interests were also at stake on the creditor side.

Judge Lübbe-Wolff may have been too expansive to the extent that she appears to suggest that all human rights obligations may be *ius cogens*, but her underlying point about the nature of the crisis State's interests is critical: in times of financial crisis, the essential interests involved on the crisis State's part may go far beyond just financial concerns and engage a wide range of fundamental human rights that can only be protected by the provision of certain essential public services and which must clearly outweigh competing financial interests. That was certainly the thrust of Argentina's submission in the *Suez* cases, which concerned the effect of Argentina's crisis measures on foreign investors providing water and sewerage services, and where Argentina submitted that it took the measures it did 'in order to safeguard the human right to water of the inhabitants of the country'.¹³¹ Of course that the State's essential interests are extremely important and outweigh the competing interests will not be the end of the matter. The State invoking necessity will still have to satisfy necessity's other conditions. Thus in the *Suez* cases the tribunal acknowledged the importance of the right to water, but held that Argentina's plea of necessity still failed because the measures did not satisfy the only way or non-contribution conditions.¹³²

Cases involving disputes between States and foreign investors provide a category of cases where the balance of interests can be assessed without much difficulty. It is unlikely that an investor's interests could ever be said to engage the essential interests of its home

¹³¹ See n 10, [252].

¹³² See n 10, [257] – [265].

State and indeed none of the tribunals that considered the matter during the Argentine crisis cases considered that Argentina's measures seriously impaired the various home States' essential interests.¹³³

It has, however, been suggested that in investor-State cases it is the essential interests of the investor as the beneficiary of investment treaty obligations that should be balanced against the interests of the State invoking necessity.¹³⁴ In this vein the *Enron* and *Sempra* tribunals spoke of 'the need to take into consideration the interests of the private entities who are the ultimate beneficiaries of those obligations' and they concluded that the essential interests of the claimant investor were seriously impaired, which they appeared to hold as another reason why Argentina could not establish necessity in those cases.¹³⁵ But the *Enron* and *Sempra* tribunals made no attempt at actually balancing Argentina's interests against the investor's interests and therefore did not explain how it would go about balancing the interests of a State against a company, which is a very different legal entity with very different (and more dispensable) interests.¹³⁶ Aside from the practical difficulties, considering the investor's interests as comparable with a State's interests would also represent a significant re-conceptualisation of why the balancing of interests exists as a constraint upon necessity. Constraining necessity with this balancing of interests condition respects the sovereign equality of States by recognising that the essential interests of the State or States to

¹³³ *CMS* (n 15) [325], [358]; *LG & E* (n 9) [257]; *Enron* (n 15) [341]; *Sempra* (n 15) [390]; *Suez* (n 10) [261]; *Impregilo* (n 10) [354].

¹³⁴ Reinisch (n 78) 201. See, with respect to the nature of investment treaty obligations, Chapter 3, n 159.

¹³⁵ *Enron* (n 15) [342]; *Sempra* (n 15) [390]. Compare *Impregilo* (n 10) [354] expressly rejecting this.

¹³⁶ See, in this respect, Jan Paulsson, 'The Power of States to Make Meaningful Promises' (2010) 1 *Journal Int Disp Settlement* 341, 347: 'It is nonsense to speak of the interests or rights of corporations in the abstract. We have no *a priori* stake in the survival of corporations as a way of doing business. If they did not serve society, they could be abolished without regret.'

whom an obligation is owed may be just as important as those of the State that has breached that obligation and is invoking necessity.¹³⁷ There is no basis either in practice or principle to accept that an investor's essential interests may be considered as important as those of a State. As was discussed above,¹³⁸ the protection of investors and their investments is just one among several objects and purposes of investment treaties. Elevating investors to the level of sovereign States for the purposes of this balancing inquiry would give undue weight to the narrow goal of investment protection.

Cases may arise where the competing interests of two or more States are more finely balanced. But the example with which de Visscher, for example, was most concerned, namely Germany's invasion of Belgium in 1914, would not cause difficulties today because, as Chapter 3 made clear, necessity cannot provide a defence to a breach of the peremptory prohibition on the use of force. If difficult cases were to arise, they could be accommodated by requiring that a State that invokes necessity must demonstrate that the weight and urgency of the essential interest that it is safeguarding *clearly* outweighs the weight and urgency of the essential interest of the State to whom the obligation is owed.¹³⁹ In fact, it seems that something akin to this heightened burden has already been accepted by some. Thus Bin Cheng, in the passage quoted at the start of this section, spoke of how it is '*the great disparity* in the importance of the interests actually in conflict that alone justifies a reversal of the legal

¹³⁷ See n 114.

¹³⁸ See Chapter 3, text to n 153 – 154.

¹³⁹ The law of countermeasures has taken a similar approach. Thus the tribunal in the *Air Services* arbitration (n 124) acknowledged (at [83]) that 'judging the 'proportionality' of counter-measures is not an easy task and can at best be accomplished by approximation', and held (at [83]) that the particular measures in question 'do not appear to be *clearly* disproportionate' (emphasis added). See also the *Naulilaa* arbitration (n 124), where the tribunal held (at 1028) that 'one should certainly consider as excessive and therefore unlawful reprisals *out of all proportion* to the act motivating them' (emphasis added).

protection normally accorded to these interests' (emphasis added).¹⁴⁰ Ago himself stated that 'the interest sacrificed on the altar of 'necessity' must *obviously be less important* than the interest it is thereby sought to save'¹⁴¹ (emphasis added). In this way necessity is not rejected altogether on the basis of the rare cases in which the application of this balancing inquiry presents difficulties, but rather those difficulties are accommodated in a way that will allow necessity to operate in the cases in which it is meant to operate while at the same time protecting the sovereign equality of the States against which necessity is invoked.

Contribution to the Situation of Necessity

Article 25(2)(b) of the ASR provides that a State cannot establish necessity if it has 'contributed to the situation of necessity.' The rationale for this condition is clear. It reflects, as the *Enron* and *Sempra* tribunals recognised,¹⁴² the general principle that a State cannot take advantage of its own wrong.¹⁴³ But the condition's basis in practice, its contours and whether it actually furthers its rationale are less clear. All of that calls into question the extent to which the condition expressed in Article 25(2)(b) can be considered a part of the customary defence of necessity. The following discussion contends that a State should only be prevented from establishing necessity by reason of its contribution to the situation of necessity if it has deliberately brought about the situation of necessity. This is in the sense

¹⁴⁰ See n 113.

¹⁴¹ Ago's Addendum (n 4) 20.

¹⁴² *Enron* (n 15) [311]; *Sempra* (n 15) [353].

¹⁴³ Gerald Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law' (1957) 92 *Recueil des Cours* 5, 117 ('it admits of no doubt [that the] general principle is that States cannot profit from their own wrong').

that the State not merely intended the acts that gave rise to the situation of necessity, but also more specifically intended, or at least knew that it would be virtually certain, that those acts would give rise to the situation it later claims to be a situation of necessity.

(i) The thin basis of the non-contribution condition in practice

Despite the numerous occasions on which States have invoked necessity, the non-contribution condition was barely mentioned in practice and international decisions until the Argentine crisis cases.¹⁴⁴ In the *Orinoco* case, for example, the fact that the situation had arisen through what the French-Venezuelan Mixed Commission described as the ‘grave error’ of Venezuela (given that it had granted a concession to the French company on disputed territory) did not prevent it from establishing what was in substance a defence of necessity.¹⁴⁵ The views expressed by States within the General Assembly’s Sixth Committee in response to the ILC’s work were varied. Some States did expressly support the condition,¹⁴⁶ while other States were more doubtful.¹⁴⁷

¹⁴⁴ As for the classical writers, Grotius and Vattel did not include this condition in their discussions of necessity, but Pufendorf did require that the situation of necessity arise through no fault of the party invoking it (n 65) Bk 2, ch 6, cl 8.

¹⁴⁵ *Company General of the Orinoco Case (France v Venezuela)* (1905) X RIAA 184, 281.

¹⁴⁶ See, for example, Brazil (UNGA Sixth Committee (35th Session) ‘Summary Record of the 47th Meeting’ (12 November 1980) UN Doc A/C.6/35/SR.47, [20] – [23]; Finland (ibid ‘Summary Record of the 48th Meeting’ (13 November 1980) UN Doc A/C.6/35/SR.48, [50]; Italy (ibid ‘Summary Record of the 49th Meeting’ (14 November 1980) UN Doc A/C.6/35/SR.49, [32] – [35]).

¹⁴⁷ See, for example, Federal Republic of Germany (ibid ‘Summary Record of the 45th Meeting’ (11 November 1980) UN Doc A/C.6/35/SR.45, [8]); Israel (ibid ‘Summary Record of the 50th Meeting’ (17 November 1980) UN Doc A/C.6/35/SR.50, [14]); Argentina (ibid [25]); United States (ibid ‘Summary Record of the 51st Meeting’ (17 November 1980) UN Doc A/C.6/35/SR.51, [3]); Tunisia (‘Summary Record of the 52nd Meeting’ (18 November 1980) UN Doc A/C.6/35/SR.52, [45]).

The non-contribution condition was considered by the ICJ in the *Gabčíkovo* case, but in an unfortunately thin manner. The ICJ explained how Hungary was aware of the need to protect the environment throughout the project and this was even reflected in the terms of the treaty itself. Further, after beginning the project, Hungary slowed down its share of the project partly for environmental reasons, but then later and after ‘the state of scientific knowledge had undergone significant development’, it asked for the works to be speeded up before soon thereafter suspending and then abandoning them.¹⁴⁸ In these circumstances the Court held that even if Hungary had been able to satisfy the other conditions of necessity, it would not have been able to rely on necessity because it had ‘helped, by act or omission to bring ... about’ the situation of necessity.¹⁴⁹ But understanding Article 25(2)(b) merely in terms of ‘help’ tells us little about the contours of the non-contribution condition.

(ii) The uncertain contours of the non-contribution condition

There are two key issues regarding the contours of this condition. The first concerns the extent of the contribution that is required. The ASR Commentaries state that the contribution must be ‘sufficiently substantial and not merely incidental or peripheral’,¹⁵⁰ which begs the question of what is *sufficiently* substantial. The second key issue concerns whether fault is relevant. ‘Must the conduct of the State in question’, the *Enron Annulment* committee asked, ‘be deliberate (in the sense of being deliberately intended to bring about the situation of

¹⁴⁸ See n 1, [57].

¹⁴⁹ *ibid.*

¹⁵⁰ See n 7, 185.

necessity), or does it suffice that the conduct was reckless or negligent, or is some even lesser degree of fault sufficient?’¹⁵¹

This is the backdrop against which a number of tribunals considered whether and how Argentina’s contribution to its financial crisis could prevent it from establishing necessity in the many cases in which it invoked that defence. Unfortunately these tribunals have taken unconvincing and inconsistent approaches that have served more to confuse than clarify this issue. Most of the tribunals focused simply on whether Argentina substantially contributed to the crisis without seriously unpacking what a ‘substantial’ contribution means and without considering the relevance of fault.

The *CMS*, *Enron* and *Sempra* tribunals all proceeded by way of assertion rather than explanation and their awards shed little or no light on the extent of the contribution that is required and the nature of any fault that is required. The *CMS*, *Enron* and *Sempra* tribunals, consistent with their approach to necessity generally, approached this condition extremely strictly. The *CMS* tribunal simply stated that although ‘exogenous factors did fuel additional difficulties’, the crisis was substantially caused by ‘governmental policies and their shortcomings,’ without explaining how it reached that conclusion.¹⁵² The reasoning of the *Enron* and *Sempra* tribunals was just as thin. Although both tribunals recognised that the non-contribution condition was a reflection of the general principle that no State can take advantage of its own wrong,¹⁵³ neither tribunal actually unpacked the contours of that general principle let alone apply it to the facts of the cases before them. Both tribunals simply

¹⁵¹ See n 85, [389].

¹⁵² See n 15, [329].

¹⁵³ See n 142.

proceeded from the banal premise that the crisis was caused by both endogenous and exogenous factors,¹⁵⁴ and then moved directly from this to the conclusion that ‘This means that to an extent there has been a substantial contribution of the State to the situation of necessity and that it cannot be claimed that the burden falls entirely on exogenous factors.’¹⁵⁵ That conclusion did not necessarily follow.

It was therefore unsurprising that at least one of these awards was annulled for its want of reasoning. The *Enron Annulment* committee, as it had when criticising the *Enron* tribunal’s approach to the ‘only way’ condition, took aim at the *Enron* tribunal’s failure to explain the law it was apparently applying and its uncritical adoption of the investor’s expert evidence. The committee explained that the investor’s expert was addressing the issue as an expert economist and was not applying the legal condition in Article 25(2)(b).¹⁵⁶ Article 25(2)(b) was for the tribunal to apply, but because it simply adopted the expert’s reasoning it had not and it had therefore failed to apply the applicable law,¹⁵⁷ which the committee held amounted to a manifest excess of powers under Article 52(1)(b) of the ICSID Convention.¹⁵⁸

The *Suez* and *National Grid* tribunals, and a majority of the *El Paso* tribunal, may have appraised the expert evidence more closely, but they also took extremely strict approaches to the issue of contribution without seriously unpacking what was meant by a ‘substantial’ contribution and without considering the relevance of fault. The *Suez* tribunal sought to stress that ‘The operative word of this condition is “contribute”, not “cause” or

¹⁵⁴ *Enron* (n 15) [311]; *Sempra* (n 15) [353].

¹⁵⁵ *Enron* (n 15) [312]; *Sempra* (n 15) [354].

¹⁵⁶ See n 85, [391].

¹⁵⁷ *ibid* [392] – [393].

¹⁵⁸ *ibid* [393].

“create”¹⁵⁹. It followed from this for the *Suez* tribunal that the fact that there may have been other actors beside the State invoking necessity that had contributed to the situation of necessity did not mean that the State could not also be held to have contributed.¹⁶⁰ But the real question, as the *Suez* tribunal itself noted with reference to the ASR Commentaries, was whether the State’s tribunal was *sufficiently* substantial.¹⁶¹ The tribunal’s answer to that question reveals the question-begging nature of that standard. The tribunal cited a litany of ways in which it considered Argentina had contributed to the crisis, namely through ‘excessive public spending, inefficient tax collection, delays in responding to the early signs of the crisis, insufficient efforts at developing an export market, and internal political dissension and problems inhibiting effective policy making.’¹⁶² It added that ‘One might also suggest if external, global factors alone had created Argentina’s crisis, it is surprising that other countries did not experience a crisis of equal magnitude at the time.’¹⁶³ The obvious response to that ‘suggestion’ is that neither Argentina nor its economic expert had gone so far to claim that Argentina played no role in contributing to its crisis. The question was whether Argentina had made a *sufficiently* substantial contribution, and it remains unclear how a tribunal is meant to answer that. On top of all that, the *Suez* tribunal did not give any consideration to the issue of fault.

In a similar vein, the *National Grid* tribunal simply stated that it was ‘Mindful of the categorical terms of’ Article 25(2)(b)¹⁶⁴ and from that strict premise concluded that it was

¹⁵⁹ See n 10 [263].

¹⁶⁰ *ibid.*

¹⁶¹ *ibid.*

¹⁶² *ibid* [264].

¹⁶³ *ibid.*

¹⁶⁴ *National Grid v Argentina* (Award) UNCITRAL Case, 3 November 2008, [260].

enough that Argentina's role in creating the structural vulnerabilities had left Argentina prone to external shocks.¹⁶⁵ Again the *National Grid* tribunal did not consider the issue of fault.

A majority of the *El Paso* similarly based its finding of Argentina's substantial contribution simply on its reading of the evidence without shedding any more light on what made that contribution *sufficiently* substantial.¹⁶⁶ Yet again the majority of the *El Paso* tribunal did not consider the issue of fault.

The *EDF* tribunal was the most recent tribunal to consider Argentina's necessity defence and its analysis of the non-contribution condition was virtually non-existent in terms of the legal standard it was applying and it was notably brief in terms of its assessment of the evidence. After a short analysis relying on little more than a concession by a former Argentine president in a newspaper column that Argentina had contributed to its crisis, the tribunal concluded that 'Although external factors may have aggravated the economic turmoil, Argentina's contribution to its economic situation is clear or was far from negligible'.¹⁶⁷ The *EDF* tribunal did not consider the issue of fault.

Some of the tribunals did appear to consider aspects of fault when analysing this non-contribution condition, but generally not in a very sophisticated, and certainly not in a consistent, way. The *LG & E* tribunal concluded first that the investor had not proved that Argentina had contributed to the crisis,¹⁶⁸ and second that the Argentine government had

¹⁶⁵ *ibid.*

¹⁶⁶ *El Paso v Argentina* (Award) ICSID Case No ARB/03/15, 31 October 2011, [649] – [665].

¹⁶⁷ See n 81, [1173] – [1176].

¹⁶⁸ See n 9, [256].

‘shown a desire to slow down by all the means available the severity of the crisis’.¹⁶⁹ The tribunal offered no explanation of why Argentina’s measures did not substantially contribute to the crisis nor did it expand upon the extent to which a State could substantially contribute to the situation of necessity and yet still be able to invoke necessity because it had ‘shown a desire’ to not contribute. The tribunal clothed its absence of analysis in its decision to place the burden on the investor to prove that Argentina had contributed to the crisis. That reverses, and without explanation, the rule that it is for the State invoking necessity, and indeed any defence to State responsibility, to establish that it has satisfied the conditions of the defence.¹⁷⁰

The *Continental* tribunal focused on the interpretation of Article XI of the US-Argentine BIT and it emphasised that customary necessity, including Article 25(2)(b), was not relevant to its interpretation of Article XI. But it still considered whether Argentina’s own conduct could bar it from invoking Article XI and the approach it took to considering Argentina’s contribution to the crisis is interesting for its more subtle approach to the evidence. The tribunal tried to move beyond the dichotomous views of the parties’ experts by looking to the views of the IMF and others and considering whether, in light of those views, Argentina had acted reasonably. The tribunal concluded that, given the IMF and the international community had supported Argentina’s economic policies, Argentina was not barred by its own conduct from establishing Article XI.¹⁷¹ That approach, which focuses not so much on Argentina’s factual contribution to its crisis, but more on whether it had acted

¹⁶⁹ *ibid.*

¹⁷⁰ See n 2.

¹⁷¹ *Continental Casualty v Argentina* (Award) ICSID Case No ARB/03/9, 5 September 2008, [235] – [236].

reasonably, even if it had factually contributed to its crisis, represents a very different approach to that taken by most of the other tribunals.

The *Impregilo* tribunal provided some consideration of the nature of fault before reaching a different conclusion to that of the *Continental* tribunal. The tribunal explained that:¹⁷²

a State's contribution to its necessity situation need not be specifically intended or planned – it can be the consequence, *inter alia*, of well-intended but ill-conceived policies. This result comports with common sense, because a contrary interpretation always would have to ascribe underhanded motives to the government or, more frequently, to the several governments that control the State successively prior to a situation of necessity.

Although that reasoning purports to be based on 'common sense', working out which policies are 'ill-conceived' seems just as difficult, if not more difficult, than working out which policies are 'specifically intended'. For the *Impregilo* tribunal's part, it acknowledged the role of international market forces, but held that it was Argentina's own policies, including high public indebtedness and market inflexibilities, that rendered Argentina vulnerable to those exogenous forces and led to the crisis.¹⁷³ But as the *Continental* tribunal had emphasised, many of Argentina's policies bore the imprimatur of the IMF, among others. For the *Continental* tribunal, at least, it would have been difficult to categorise all of Argentina's policies as 'ill-conceived'.

The conclusion of the *Impregilo* tribunal was only reached by a majority. In this case, as well as in the *El Paso* case, which was discussed above, Brigitte Stern was critical of the

¹⁷² *ibid* [356].

¹⁷³ *ibid* [358].

majority approaches. In the *Impregilo* case, Stern considered that ‘as a matter of principle ... the State’s contribution to a situation of economic crisis should not be lightly assumed’,¹⁷⁴ and she stated that she was ‘not convinced that a substantial contribution of the Argentine authorities to the crisis ha[d] been satisfactorily proven by strong and convincing evidence.’¹⁷⁵ Stern is surely correct that this question is not to be answered by way of assumption, but in appearing to suggest that the contribution needs to be proven, rather than the lack of contribution be proven, she appears to shift the burden of proof on to the claimant, which cuts across how the burden on establishing necessity is typically understood to operate.¹⁷⁶

Stern subsequently expanded on these views in the *El Paso* case. The award records that Stern again considered that it had not been ‘sufficiently proven by strong and uncontroverted evidence presented by the Claimant that Argentina had substantially contributed to the crisis.’¹⁷⁷ Thus Stern again reverses the burden of proof. Stern also repeated her position that ‘the contribution of a State to an economic crisis should not be lightly assumed’¹⁷⁸ and she further asked in this connection whether ‘the US [should] be held responsible [for] the worldwide sub-prime crisis as it contributed to it, because the SEC [(Securities Exchange Commission)] did not monitor the banks closely enough?’¹⁷⁹ Stern then stepped back to add that a State’s contribution to an economic crisis should also not be

¹⁷⁴ *ibid* [360].

¹⁷⁵ *ibid*.

¹⁷⁶ See n 2.

¹⁷⁷ See n 166, [666].

¹⁷⁸ *ibid* [667].

¹⁷⁹ *ibid* [666].

lightly assumed in the context of ‘a liberal market economy, where the invisible hand of the market is more powerful than the hand of the State.’¹⁸⁰ In this connection Stern considered economics to be a ‘complicated art’ and was not convinced by the way the tribunal had sided with the evidence of the investor’s expert over that of Argentina’s expert, especially given that Argentina’s policies had been supported by the ‘international financial community’, including the IMF.¹⁸¹ In both the *Impregilo* and *El Paso* cases Stern injected some warranted criticism, but that criticism alone does not take us much closer to how then the non-contribution condition should be applied

This, then, is the state of the jurisprudence on the non-contribution condition. There is no *jurisprudence constante*, but there is rather an array of mainly undeveloped views that serve more to confuse than clarify how this condition is meant to work. What amounts to a *sufficiently* substantial contribution is no less opaque than it was before these cases. As for the issue of fault, most tribunals did not consider this issue at all, while those that did took approaches that were generally not very sophisticated and were certainly not consistent.

(iii) The weak basis for the non-contribution condition in principle

The inconsistent, and often unconvincing, reasoning on display in the Argentine crisis cases, combined with the dearth of State practice and decisions regarding the non-contribution condition before those cases, raises a broader and more fundamental question about the extent to which this condition even exists or should exist. The following discussion looks beyond

¹⁸⁰ *ibid* [667].

¹⁸¹ *ibid* [666] – [670].

the dearth of State practice and the unconvincing and inconsistent decisions and considers whether there is a solid basis for the existence of the condition in principle. This discussion concludes that there is not, at least outside of the exceptional situation where a State deliberately brings about the situation of necessity. This conclusion is derived first from the perspective of the rationale for necessity generally, and second from the perspective of the rationale for the non-contribution condition specifically.

First, and from the perspective of the rationale for necessity generally, it must be recalled that necessity is ultimately about providing a safety valve within the law of State responsibility that mediates between the binding quality of international obligations and the harsh consequences that may follow from requiring compliance with international obligations at all costs. In short, necessity is about the reasonable application of the law. The non-contribution condition threatens to throw States back upon those harsh consequences and prevent the reasonable application of the law through its own harsh and unreasonable operation. The following comment by Ago at one of the ILC's meetings was both prescient and insightful on this point:¹⁸²

It was a moot point whether a State was in a "state of necessity" if it found itself in a situation which was not really "caused by" it but to which it had contributed, for instance by pursuing too lax a financial policy. If that situation was nevertheless fraught with extreme danger for it, was it fair to not allow it any excuse?

It is, as Alan Sykes has more recently stated, 'uncomfortable to suggest that a country is disabled from taking steps essential to avoid macroeconomic disaster and massive social unrest because of its political officials' past mistakes.'¹⁸³

¹⁸² 'Summary Record of the 1618th Meeting' (n 115) 181.

¹⁸³ Alan Sykes, 'Economic "Necessity" in International Law' (2015) 109 AJIL 296, 318.

Another example, this time introduced by the Federal Republic of Germany (FRG) during a meeting of the Sixth Committee of the General Assembly, further illustrates the potential harshness of the non-contribution condition:¹⁸⁴

If, for example, an oil tanker such as the *Torrey Canyon* was grounded off the coast of State X through the fault of that State, which had omitted to put out sufficient lights or warnings on a recently discovered reef, and the tanker was losing huge quantities of oil and threatening the coast with severe pollution, should State X be prohibited from bombing the tanker in order to protect its coast against pollution? His delegation did not consider that that would be fair.

That was, and is, a reasonable conclusion. The FRG proceeded to state that the situation would be different if State X had deliberately or fraudulently brought about the situation of necessity.¹⁸⁵ This is reasonable too. It would hardly now be harsh or unreasonable to deny a State legal respite from the very situation it had sought to bring about.¹⁸⁶ One might think that it would be rare that those who act for a State would deliberately bring about a situation of necessity in the sense that the State not merely intended the acts that gave rise to the situation of necessity, but also more specifically intended, or at least knew that it would be virtually certain, that those acts would give rise to the situation it later claims to be a situation of necessity. But it is not unprecedented. One example of where a State was held to be prevented from establishing necessity by virtue of its deliberate role in bringing about the situation of necessity is provided by the *Von Pezold* case. In that case, the tribunal concluded that ‘Zimbabwe not only contributed to its economic decline, but was also one of the primary

¹⁸⁴ UNGA Sixth Committee (35th Session) ‘Summary Record of the 45th Meeting’ (11 November 1980) UN Doc A/C.6/35/SR.45, [8].

¹⁸⁵ *ibid.*

¹⁸⁶ Ago himself had noted that: ‘It would obviously be out of the question for a State intentionally to create a situation of danger to one of its major interests solely for the purpose of evading its obligation to respect a subjective right of another State’ (Ago’s Addendum (n 4) 20).

instigators of the situation that gave rise to the imminent peril.’¹⁸⁷ When Zimbabwe was ‘directly assisting and supporting the Settlers/War Veterans in their pursuit of land ownership’,¹⁸⁸ it was doing so precisely with the intention of supporting the farm invasions in order to gain the political support of the ‘Settlers/War Veterans’.

Second, and from the perspective of the rationale for the non-contribution condition, the rationale of this conditions is, as noted above, to prevent a State from taking advantage of its own wrong.¹⁸⁹ Yet it is unlikely that the non-contribution condition goes very far in furthering the moral hazard aspect of this rationale, at least again outside the exceptional situation where the State deliberately brings about the situation of necessity. As Sykes put it in the context of the Argentine crisis cases, ‘political officials who are responsible for imprudent policies [often] do not bear the costs directly, with the bulk of the costs falling on ordinary citizens.’¹⁹⁰ The extent to which a State that invokes necessity can properly be said to be ‘taking advantage’ of any wrong may also be minimal. This is first because the State itself will typically be the greatest victim of its situation of necessity, as was clearly the case for Argentina with its economic crisis. It is also because, as will be discussed in greater detail in the next chapter, the consequences of a State establishing necessity themselves constrain the extent to which a State ‘takes advantage’ of the situation. In particular, a State invoking necessity may still be liable to make reparation for the material loss that it has caused another

¹⁸⁷ See n 21 [667]

¹⁸⁸ *ibid* [662].

¹⁸⁹ See above text to nn 142 – 143.

¹⁹⁰ See n 183, 319.

State.¹⁹¹ That compensation requirement provides an important check on a State seeking to take advantage of its own wrong by invoking necessity.

Imposing a broad non-contribution condition on top of a compensation obligation not only adds little but also threatens to unduly restrict necessity by way of a condition that, as seen above, presents significant difficulties in its application, both in terms of deciding what is a sufficiently substantial contribution, and what level of fault is required and whether that fault exists. For these reasons, and outside the rare scenario where a State deliberately brings about the situation of necessity, a State should not be prevented from establishing necessity because it contributed to that situation.

Conclusion

The conditions that a State must satisfy in order to establish necessity are strict in order to prevent States from too readily escaping their international obligations, but they are not so strict that they render necessity practically useless to States. In fact, despite the widespread fears of necessity's vulnerability to abuse, or perhaps because of those fears, some tribunals, especially in the context of the Argentine crisis cases, have taken unrealistically strict approaches to the conditions that a State needs to satisfy in order to establish necessity. This has been particularly so with respect to the 'only way' and non-contribution conditions. This chapter critiqued these unrealistically strict approaches and instead developed approaches to these conditions, as well as necessity's conditions more generally, that should enable necessity to operate as a safety valve within the law of State responsibility that mediates

¹⁹¹ See Chapter 5, beginning with text to n 19.

between the binding quality of international obligations and the harsh consequences that may follow from requiring compliance with those obligations at all costs.

5. THE CONSEQUENCES OF NECESSITY

Introduction

Necessity provides a State with a defence to the responsibility that would otherwise arise from its breach of an international obligation. It is therefore clear that the obligations in Part Two of the ASR, which set out the content of the international responsibility of a State, including the obligations of cessation¹ and reparation,² the latter of which may be discharged by way of restitution, compensation and/or satisfaction,³ cannot apply where a State has established necessity.⁴ But this chapter examines how a State that has established necessity still bears two important obligations that constrain the way in which necessity operates. First, necessity is a temporary defence, which means that a State that has established necessity must resume compliance with the underlying primary obligation as soon as the situation of necessity has expired. Second, a State that has established necessity must still compensate the party to whom it owes the primary obligation for any material loss caused to it during the period of necessity, although the quantum of that compensation may be affected by the

¹ ‘Articles on Responsibility of States for Internationally Wrongful Acts’ in ‘Report of the International Law Commission on the Work of its 53rd Session’ (23 April – 1 June and 2 July – 10 August 2001) UN Doc A/56/10, Article 30: ‘The State responsible for the internationally wrongful act is under an obligation: (a) to cease that act, if it is continuing; (b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.’

² *ibid* Article 31(1): ‘The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.’

³ *ibid* Article 34: ‘Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this Chapter.’ See, respectively, on restitution, compensation and satisfaction, Articles 35, 36 and 37.

⁴ Part Two of the ASR only applies where there is an internationally wrongful act, and necessity, at least in the terms of the ASR, precludes the wrongfulness of (and therefore the responsibility for) an act. Article 28 of the ASR provides: ‘The international responsibility of a State which is entailed by an internationally wrongful act in accordance with the provisions of Part One involves legal consequences as set out in the Part.’

conduct of the injured party and the underlying situation of necessity. This chapter finally steps back to consider the systemic effect of necessity and defends necessity's systemic role within international law.

A Temporary Defence

Article 27(a) of the ASR provides that the invocation of a defence to State responsibility is 'without prejudice to ... compliance with the obligation in question, if and to the extent that the [defence] no longer exists'. The provision is framed in 'without prejudice' terms but, as was discussed in Chapter 1 of this thesis, it is clear that, as a rule, defences to State responsibility only operate temporarily and do not cut down the underlying obligation.⁵ In the *Gabčíkovo* case, Hungary had pleaded necessity as a justification for its termination of the treaty governing the project,⁶ but Slovakia had forcefully pleaded in response that necessity was not a ground for the termination of a treaty.⁷ The ICJ confirmed that Slovakia was correct in this respect:⁸

... even if a state of necessity is found to exist, it is not a ground for the termination of a treaty. It may only be invoked to exonerate from its responsibility a State which has failed to implement a treaty. Even if found justified, it does not terminate a Treaty; the Treaty may be ineffective as long as the condition of necessity continues to exist; it may in fact be dormant, but - unless the parties by mutual agreement terminate the Treaty - it continues to exist. As soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives.

⁵ See Chapter 1 text to nn 110 – 112.

⁶ Memorial of the Republic of Hungary, vol 1, 2 May 1994, [10.9].

⁷ Memorial Submitted by the Slovak Republic, vol 1, 2 May 1994, [8.12] – [8.13].

⁸ *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (Judgment) [1997] ICJ Rep 7, [101]. See also *Rainbow Warrior (New Zealand v France)* (1990) 82 ILR 500, [75].

Some older case law and practice bears this out. In the *Venezuelan Railroads* case, Umpire Plumley considered that although Venezuela was excused from paying debts owed to a French company in circumstances where ‘the appeal of the company for funds came to an empty treasury, or to one only adequate to the demands of the war budget’,⁹ Venezuela still bore an obligation to discharge its debt when it could pay.¹⁰ There was some debate in the context of the 1930 Hague Codification Conference about whether necessity could form a basis for the repudiation as opposed to merely the suspension of sovereign debt obligations. Whereas Austria had submitted that necessity could be a basis for the repudiation of a sovereign debt obligation,¹¹ the Preparatory Committee, in its Bases of Discussion, considered that necessity only suspended or modified the obligation rather than repudiated it.¹² In the *SCB* case, Greece pleaded that necessity may permit a State to ‘suspend or even to reduce the service of debt’,¹³ suggesting that it considered suspension was the normal effect, and reduction was exceptional. Belgium was clearer. Belgium pleaded that even if Greece could make out its plea, necessity would merely suspend rather than terminate Greece’s payment obligations: ‘Incapacity to pay [could] entail only a full or partial suspension of payment, which may moreover be modified and terminated; it [could] not entail release from the debt, even in part.’¹⁴

⁹ *French Company of Venezuela Railroads (France v Venezuela)* (1905) X RIAA 285, 353.

¹⁰ *ibid* 354 – 355.

¹¹ Roberto Ago, ‘Addendum – Eighth Report on State Responsibility’ (29 February, 10 and 19 June 1980) UN Doc A/CN.4/318/Add.5-7 in *Ybk of the ILC* (1980) II(1) n 45.

¹² Bases of Discussion No 4 and No 9 in League of Nations, ‘Conference for the Codification of International Law, Bases of Discussion for the Conference drawn up by the Preparatory Committee vol III (Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners)’ (1929) LN Doc C.75.M.69.1929.V, 37, 40, 62.

¹³ *Société Commerciale de Belgique (Belgium v Greece)* [1939] PCIJ Series C, No 87, 204-205.

¹⁴ *ibid* 237. And see further at 270: ‘... in the case of obligations relating to fungible things, such as a sum of money, there is never *force majeure*, there can only be a more or less prolonged state of insolvency which does

Although necessity does not cut down the underlying primary obligation, the ASR Commentaries explain that ‘it may be that the effect of the facts which disclose a [defence] may also give rise to the termination of the obligation.’¹⁵ This is because the same facts that may disclose a defence may also engage a rule under the law of treaties that provides for the termination of a treaty obligation. The same facts that may establish a defence of necessity could also, for example, establish a fundamental change of circumstances, which may terminate a treaty obligation.¹⁶ This is not to say that necessity and fundamental change of circumstances are coterminous. They are not. A fundamental change of circumstances cannot be established where, for example, the change was foreseen,¹⁷ but foresight does not prevent necessity’s application.

There may be situations where ‘the conditions preventing compliance gradually lessen and allow for partial performance of the obligation’.¹⁸ It is for this reason that Article 27(a) is stated to be ‘without prejudice ... to compliance with the obligation in question, if and *to the extent* that the [defence] no longer exists’ (emphasis added). One example of this situation may be where a State is emerging from a financial crisis and is able to partially discharge an

not affect the legal obligation to pay; the debtor State continues to be bound, for the obstacle is not insurmountable. The debt subsists in its entirety, pending the return of more prosperous times. The debtor must pay what he can.’

¹⁵ ILC, ‘The International Law Commission’s Articles on State Responsibility: Introduction, Text, and Commentaries’ (CUP 2002) 189.

¹⁶ See Article 62 of the Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331, which provides for the conditions under which a fundamental change of circumstances may be invoked to terminate or withdraw from a treaty or suspend its operation. The ICJ has held that Article 62 ‘in many respects’ reflects customary international law: *Fisheries Jurisdiction Case (United Kingdom v Iceland)* (Jurisdiction) [1973] ICJ Rep 4, [36]; *Gabčíkovo* (n 8) [42].

¹⁷ Article 62(1) of the VCLT opens by stating: ‘A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, *and which was not foreseen by the parties ...*’ (emphasis added). See also *Gabčíkovo* (n 8) [104].

¹⁸ ASR Commentaries (n 15) 189.

obligation, but it cannot afford to completely discharge it without placing itself in a situation of necessity.

The Question of Compensation

Necessity allows a State to avoid the harsh consequences that may follow from having to comply with the law at all costs. But the question arises as to the extent to which the party to whom the primary obligation is owed should have to bear the burden of that first State's decision to prioritise its essential interests over its international obligation. It is clear that under the ordinary rules of reparation, and which are set out in Part 2 of the ASR, a State bears an obligation to compensate an injured party for loss caused *before* and *after* the period of necessity. The question here is whether a State may also bear an obligation to compensate for loss caused *during* the period of necessity.¹⁹ The question is an important one, especially in certain fields of international law where compensation is in practice the primary remedy. In investor-State arbitration, for example, it is of considerable importance to investors who almost always invoke the responsibility of a State for the purpose of obtaining compensation.²⁰ But it is therefore equally important for the States who may be paying that compensation, and if a State still bears an obligation to compensate even where it has established necessity, it may well ask what the point of necessity is, at least in this context.²¹

¹⁹ See, making this distinction, and considering this question in the context of investor-State arbitration, Sergey Ripinsky and Kevin Williams, *Damages in International Investment Law* (BIICL 2008) 338 – 353.

²⁰ Martins Paparinskis, 'Investment Treaty Arbitration and the (New) Law on State Responsibility' (2013) 24 *EJIL* 617, 633 – 634.

²¹ *ibid.*

The answer, and which will be fleshed out in the following discussion, is that a State that has established necessity must still compensate the party to whom it owes the primary obligation for material loss caused to it during the period of necessity, but the quantum of that compensation may be affected by the conduct of the injured party and the underlying situation of necessity. In this way the injured party may not bear the full burden of a State's plea of necessity, but the point of necessity is not unduly undermined either.

Although the obligations set out in Part 2 of the ASR regarding reparation, including by way of compensation, do not apply with respect to the period during which necessity has been established, the ASR leave open the possibility that a special obligation to compensate may nonetheless be borne by a State for the loss it has caused during that period. The ASR do so in Article 27(b) of the ASR, which provides that 'The invocation of a circumstance precluding wrongfulness in accordance with this Chapter is without prejudice to: ... the question of compensation for any material loss caused by the act in question.' Article 27(b) is, like Article 27(a), 'a "without prejudice" clause.'²² Article 27(b) 'refers to "the question of compensation" and does not attempt to specify in which circumstances compensation could be due, notwithstanding the state of necessity'.²³ The ASR Commentaries explain that Article 27(b) does not attempt to specify the circumstances in which compensation could be due because that would not be 'appropriate' given 'the range of possible situations covered by Chapter V'. The Commentaries proceed to explain that 'it will be for the State invoking a circumstance precluding wrongfulness to agree with any affected States on the possibility and

²² See *CMS v Argentina* (Decision on Annulment) ICSID Case No ARB/01/08, 25 September 2007, [147], criticising the position of the tribunal in *CMS v Argentina* (Award) ICSID Case No ARB/01/08, 12 May 2005, [390], which had read Article 27(b) as a stipulation rather than a without prejudice clause.

²³ *ibid.*

extent of compensation payable in a given case.²⁴ The reluctance to provide specification is understandable when one considers that the considerations applicable to, say, self-defence, which is typically premised upon the wrongful act of the injured State, may be very different from those applicable to necessity, where the injured State will often, though not always, be without fault. Yet leaving it to the States involved to agree is unlikely to be very helpful where the invocation of necessity and its consequences are disputed. Necessity needs to be considered closely and on its own terms in order to determine the position regarding compensation where the parties do not agree.

(i) The obligation to compensate in practice and principle

A number of writers, tribunals, as well as, most importantly, States, have taken the view that a State that establishes necessity still bears an obligation to compensate an injured party for loss caused during the period of necessity. Grotius,²⁵ Pufendorf²⁶ and Vattel²⁷ all recognised an obligation to compensate. In the *Neptune* arbitration, Commissioner Pinkney considered that Great Britain could not invoke necessity, but that even if it could, it would still bear an obligation to compensate: ‘Great Britain might be able to say to neutrals “You shall sell to us,” but it does not follow that she could also say “You shall sell to us upon worse terms than

²⁴ ASR Commentaries (above n 15) 190.

²⁵ Hugo Grotius, *De Jure Belli ac Pacis Libri Tres* vol II (Francis Kelsey tr, first published 1625, Clarendon 1925) Bk 2, ch 2, cl 9.

²⁶ Samuel Pufendorf, *De Jure Naturae et Gentium Libri Octo* (W A Oldfather tr, first published 1672, Clarendon 1934) Bk 2, ch 6, cl 8. Pufendorf added that the State that had established necessity must ‘bear a part of the loss, if the other’s property, which now is sacrificed to preserve [that of the State that has established necessity], would otherwise have been lost along with ours.’

²⁷ Emerich de Vattel, *Law of Nations* (Joseph Chitty tr, first published 1758, Sweet 1834) Bk 2, ch 9, cl 121.

you would have procured elsewhere in the lawful prosecution of your commerce.”²⁸ In the *Orinoco* case, Umpire Plumley upheld Venezuela’s actions as a lawful exercise of its right of self-preservation in circumstances where it had rescinded a concession but ‘substituted therefor the *duty of compensation*’ (emphasis added).²⁹

The view that there must remain an obligation to compensate has also been taken by writers such as Schwarzenberger³⁰ and Bin Cheng,³¹ as well as several members within the ILC.³² Stephen Schwebel, as a member of the ILC, took the view that ‘the burden of compensation should fall not on the innocent State whose rights had been violated but on the State which had pleaded necessity.’³³ Schwebel went so far as to propose a specific provision providing for the ‘equitable considerations of distribution of loss’,³⁴ although this was not taken up by the ILC.³⁵ As for States themselves, few comments were offered on the ILC’s work in this respect, although the UK, which would later come to oppose the inclusion of

²⁸ *The Neptune, Jeffries, Master: Provision Case*, in John Bassett Moore, *International Adjudications* vol IV (OUP 1931) 372, 400.

²⁹ *Company General of the Orinoco Case (France v Venezuela)* (1905) X RIAA 184, 280.

³⁰ Georg Schwarzenberger ‘The Fundamental Principles of International Law’ (1955) 87 *Recueil des Cours*, 343.

³¹ *General Principles of Law as Applied by International Courts and Tribunals* (CUP 1994) 75.

³² ILC, ‘Summary Record of the 1616th Meeting’ (20 June 1980) UN Doc A/CN.4/SR.1616 in *Ybk ILC* (1980) I 170, 172 (Calle y Calle); ILC, ‘Summary Record of the 1617th Meeting’ (23 June 1980) UN Doc A/CN.4/SR.1617 in *Ybk ILC* (1980) I 172, 177 (Tsuruoka); ‘Summary Record of the 1618th Meeting’ (24 June 1980) UN Doc A/CN.4/SR.1618 in *Ybk ILC* (1980) I, 177, 178 (Pinto).

³³ ILC, ‘Summary Record of the 1616th Meeting’, *ibid* 171.

³⁴ *ibid*. The provision, in full, provided: ‘The applicability of paragraph 1 [providing for the conditions under which necessity may be invoked] does not affect equitable considerations of distribution of loss; as between an innocent beneficiary of an international obligation and a State which fails to perform that obligation for reasons of necessity, the latter shall bear the resultant burdens and pay any compensation necessary to make whole the former.’

³⁵ It was Ago’s view that prevailed. Ago (ILC, ‘Summary Record of the 1618th Meeting’ (24 June 1980) UN Doc A/CN.4/SR.1618 in *Ybk ILC* (1980) I 177, 181) took the view that ‘... in some cases, compensation should be made, even in full, whereas in others it might not be required at all. Each case had to be considered on its merits ...’

necessity within the ASR altogether, did comment that necessity may ‘not entirely preclude the wrongfulness of the conduct’, and the UK reasoned that on this basis compensation should still be payable.³⁶

More recently, the ICJ observed in the *Gabčíkovo* case that ‘Hungary expressly acknowledged that, in any event, such a state of necessity would not exempt it from its duty to compensate its partner.’³⁷ A number of tribunals in the Argentine crisis cases have upheld an obligation to compensate, although not always on the basis of very convincing reasoning. In response to Argentina’s submission that establishing necessity would relieve it of any liability, the *CMS* tribunal, although rejecting that Argentina could establish necessity, nonetheless considered that Argentina would still have been liable for material loss even if it had established necessity.³⁸ This, however, was based on a misreading Article 27(b), which the *CMS* tribunal read as stipulating this obligation, even though as discussed above Article 27(b) is a ‘without prejudice’ clause that does not itself stipulate any obligation. The *LG & E* tribunal appeared to depart from the approach of the *CMS* tribunal when it concluded that ‘the damages suffered during the state of necessity should be borne by the investor’,³⁹ although the tribunal conflated Article XI of the US-Argentine BIT with the defence of necessity under customary international law when it spoke of the ‘state of necessity’ and so it is unclear which rule it was applying.⁴⁰ Elsewhere the *BG* tribunal seemed to accept that Argentina would bear an obligation to compensate even if it had established necessity, when

³⁶ ILC, ‘State Responsibility – Comments and Observations Received by Governments’ (25 March, 30 April, 4 May and 20 July 1998) UN Doc A/CN.4/488 in *Ybk ILC* (1998) II(1) 130.

³⁷ *Gabčíkovo* (n 8) [48].

³⁸ See n 22, [390].

³⁹ *LG & E v Argentina* (Decision on Liability) ICSID Case No ARB/02/1, 3 October 2006, [264].

⁴⁰ *ibid* [260] – [261].

it concluded that ‘whether the Tribunal accepts or rejects Article 25 of the ILC Draft Articles, the result is the same: Argentina may not invoke the “state of necessity” doctrine under customary international law to excuse ... its obligation to pay compensation under the treaty’.⁴¹ The *EDF* tribunal also concluded, albeit vaguely, that ‘at some reasonable point in time, [Argentina] should have compensated Claimants for injury suffered as a result of measures enacted during any arguable period of necessity in late December 2001.’⁴²

The proposition that a State that has established necessity bears an obligation to compensate an injured party for loss caused during the period of necessity emerges more clearly at the level of principle. ‘Without the possibility of such recourse’, the ASR Commentaries explain, ‘the State whose conduct would otherwise be unlawful might seek to shift the burden of the defence of its own interests or concerns on to an innocent third State’.⁴³ That encompasses two interrelated rationales. The first is the rationale of countering moral hazard. The problem of moral hazard is that ‘actors will take risks that imperil them to an excessive degree if they can save themselves by imposing costs on others.’⁴⁴ It follows that the law ought not to encourage such behaviour by permitting a State to impose the costs of prioritising its ‘interests or concerns’ over its international obligations.

The second rationale is that an obligation to compensate respects the sovereign equality of States. The State invoking necessity has made a choice to prioritise an essential interest over the legal right of another State to which it owes an international obligation and there is no obvious reason why that second State should be required to bear the costs of that

⁴¹ *BG v Argentina* (Final Award) UNCITRAL Case, 24 December 2007, [412].

⁴² *EDF v Argentina* (Award) ICSID Case No ARB/03/23, 11 June 2012, [1178].

⁴³ *ibid.*

⁴⁴ Alan Sykes, ‘Economic “Necessity” in International Law’ (2015) 109 *AJIL* 296, 299.

first State's choice. This rationale applies less obviously to non-State actors such as the individuals and companies to whom investment treaty obligations may be owed, although it could still be argued that a party that is owed an international obligation, even if it is not a State, should not have to bear all the costs of a State's decision to prioritise one of its essential interests over that obligation. Irrespective of whether the obligation is owed to a State or a non-State actors, this rationale assumes that the party to whom the obligation is owed has itself played no role in contributing to the first State's situation of necessity and is therefore, as the ASR Commentaries put it, 'innocent'. This may not always be the case. For example, were a fire to break out in State A and threaten a nuclear plant just inside State B's border with State A,⁴⁵ State B may invoke necessity as a defence to its entry onto State A's territory to put out the fire if State A is unwilling or unable to do so. But, and depending on the circumstances, State A may not be entirely innocent in terms of its role in contributing to the situation of necessity and may reasonably be expected to bear some, if not all, of any loss it incurs in these circumstances as a result of State B's actions. But this does not undermine the existence in principle of an obligation to compensate. As Schwebel had emphasised,⁴⁶ the obligation to compensate is ultimately about striking the appropriate balance between the States (or other actors) involved and, as will be discussed below, an international tribunal would have a wide discretion when assessing the quantum of the compensation. But the legal basis of this obligation to compensate must be clarified first.

⁴⁵ This is based on an example discussed during one of the ILC's meetings ('Summary Record of the 1614th Meeting' (18 June 1980) UN Doc A/CN.4/SR. 1614 in *Ybk ILC* (1980) I, 160, 165).

⁴⁶ See nn 33 – 34.

(ii) The legal basis of the obligation to compensate

It is clear, as stated at the outset of this chapter, that the obligation borne by a State that has established necessity to compensate an injured party cannot be derived from the general obligations of reparation and compensation reflected in Part Two of the ASR. But this begs the question of what, then, is the legal basis for this obligation.

Answering that question has been made more difficult than it needs to be by virtue of the terminology employed in the ASR. Necessity, in the terms of the ASR, is a ‘circumstance precluding wrongfulness’. If an act is not wrongful, then it is difficult to see what basis there could be for nonetheless obliging a State to pay for its ‘non-wrongful’, and therefore presumably ‘right’, behaviour.⁴⁷ It was suggested by some ILC members during the ILC’s discussions of necessity that the basis of the obligation to compensate may emerge from the regime governing injurious consequences arising out of acts not prohibited by international law.⁴⁸ But the problem with that approach is that necessity comes into play because a State has breached an international obligation and thus precisely when a State has acted in a way that is prohibited by international law.⁴⁹ That is why the State needs a defence to the responsibility that would otherwise arise from the breach of that obligation. It is therefore

⁴⁷ Unless the primary obligation itself provided for a requirement of compensation, as is the case with expropriation (see generally Ripinsky & Williams (n 19) 64 – 88), but which is not the case for the vast majority of primary obligations.

⁴⁸ See, for example, ILC, ‘Summary Record of the 1615th Meeting’ (19 June 1980) UN Doc A/CN.4/SR.1615 in *Ybk ILC* (1980) I 166, 168-169 (Quentin-Baxter); ‘Summary Record of the 1617th Meeting’ (n 32) 176 (Barboza). In terms of the ‘injurious consequences’ regime itself, this regime, as Vaughan Lowe explained in 1999, ‘appears to be developing into a limited project essentially confined to environmental law’ (‘Precluding Wrongfulness or Responsibility: A Plea for Excuses’ (1999) 10 EJIL 405, 410). Since then, the ILC has confirmed this by adopting the Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities (ILC, ‘Report of the ILC on the Work of its 58th Session’ (1 May – 9 June and 3 July – 11 August 2006) UN Doc A/61/10 in *Ybk ILC* (2006) II(2) 1, 58).

⁴⁹ Mathias Forteau, ‘Reparation in the Event of a Circumstance Precluding Wrongfulness’ in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) 887, 890 – 891.

difficult to see how the injurious consequences regime is relevant and it is not surprising that Crawford has explained that this issue has ‘nothing to do with’ that regime.⁵⁰

The reality is that, as was foreshadowed in Chapter 1 of this thesis,⁵¹ not all of the so-called ‘circumstances precluding wrongfulness’ actually do preclude the wrongfulness of the State’s act. Necessity is one of these. Necessity would be better termed a ‘circumstance precluding responsibility’, and would be better understood as an excuse rather than as a justification (or exculpation).⁵² The fact that a State that has established necessity still bears an obligation to compensate an injured party for loss caused during the period of necessity makes it difficult to characterise the State’s behaviour as not wrongful, or right, in the sense that it is justified (or exculpated). The State’s behaviour is more naturally characterised as wrongful, but nonetheless excused. The State that has established necessity does not bear all the obligations of reparation that normally follow from breaching an international obligation and that are set out in Part Two of the ASR, such as restitution, satisfaction or even the same obligation to compensate, but it does still bear a more specific obligation to compensate. The ASR have themselves in Article 27(b) left open the possibility of this obligation, and both the practice and principle discussed above support its existence.

⁵⁰ ‘Second Report on State Responsibility’ (19 July 1999) UN Doc A/CN.4/498 in *Ybk ILC* (1999) II(1) 3, [339]. The ILC ultimately concluded that this basis for an obligation to compensate did not have ‘a sufficient basis in international law’ ‘Report of the ILC on the Work of its 51st Session’ (3 May – 23 July 1999) UN Doc A/54/10 in *Ybk ILC* (1999) II(2) 1, 85.

⁵¹ See text to nn 113 – 123.

⁵² It is worth noting that in the *Gabčíkovo* case the ICJ avoided using the language of ‘circumstance[s] precluding wrongfulness’ and instead, when discussing the effects of necessity, referred to how necessity ‘may only be invoked to *exonerate from its responsibility* a State which has failed to implement a treaty’ (n 8, [101]) (emphasis added).

(iii) Assessing compensation

Two general points define the basis on which international law calculates the compensation payable by a State for a breach of an international obligation. The first is the general rule of full compensation: the compensation must, ‘as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed’.⁵³ The second key point moderates this rule by accepting that the method by which compensation is ultimately assessed is discretionary and circumstance-dependent: the overriding principle is the ‘concern to reach an equitable and acceptable outcome.’⁵⁴ This ‘concern to reach an equitable and acceptable outcome’ must play an even greater role in moderating the full compensation rule when it comes to assessing the compensation owed by a State that has breached an international obligation but is excused by necessity.

Article 27(b) of the ASR left open the ‘question of compensation for any *material loss* caused by the act in question’ (emphasis added), and although this provision is, as emphasised above, a without prejudice clause, it nonetheless provides, in the absence of any clear State practice on this point, a natural starting point for the future development of this issue. The ASR Commentaries explain that the reference to ‘material loss’ in Article 27(b) is ‘narrower than the concept of damage elsewhere in the articles’.⁵⁵ That general ‘concept of damage’ is set out in Article 31(2) of the ASR and is stated to include both material and moral damage. It follows that, taking Article 27(b) as the starting point for what

⁵³ *Factory of Chorzów*, Merits, 1928, PCIJ Series A, No 17, 4, 47. See also ASR Commentaries (n 15) 218 – 230.

⁵⁴ ASR Commentaries (n 15) 220.

⁵⁵ *ibid* 190.

compensation may be payable to an injured State by a State that has established necessity, moral damage may not be compensable. This would exclude the payment of compensation for moral damage in the form of pain and suffering of individuals,⁵⁶ while moral damage in the form of affronts to the State and which are not financially assessable but not normally repaired by satisfaction,⁵⁷ would also be excluded.

As for material loss, the calculation of material loss may be affected by the underlying situation of necessity. Even in those Argentine crisis cases where necessity was rejected, some of the tribunals were still at pains to clarify in the context of calculating compensation that the value of the investment would inevitably have been affected by the crisis conditions with or without Argentina's unlawful measures.⁵⁸ As the *Sempra* tribunal put it, it is not as though the investor 'would have merrily sailed through the major economic crisis which Argentina suffered and brought home large returns on equity, as if nothing ever happened.'⁵⁹ This will also be relevant when assessing compensation for material loss where a State has succeeded in establishing necessity.

The underlying situation of necessity may also more broadly affect a tribunal's approach to what amounts to an 'equitable and appropriate outcome'. This would include a consideration of the injured State's role in creating the situation of necessity but it may also go wider than that and may again be relevant both where a State has failed to establish necessity as well as, and in fact more so, when it has. Sergey Ripinsky and Kevin Williams

⁵⁶ *ibid* 202.

⁵⁷ *ibid* 218.

⁵⁸ See, most clearly, *CMS* (n 22) [356], [443] – [446]; *Enron v Argentina* (Award) ICSID Case no ARB/01/3, 22 May 2007, [407]; *Sempra v Argentina* (Award) ICSID Case No ARB/02/16, 28 September 2007, [436].

⁵⁹ *ibid* [436].

have suggested that, at least in the context of investor-State arbitration, ‘There is some evidence to support the view that the public nature of respondent States does have an effect on the quantum of damages awarded.’⁶⁰ In particular, Ripinsky and Williams suggest that it could be relevant (i) whether the State’s conduct resulted in the transfer of wealth to it and (ii) whether a large amount of compensation would have ‘a serious adverse effect on the State’s welfare.’⁶¹ Thus, and illustrating the first of those two factors, in the *Himpurna v PLN* case an Indonesian state entity had breached a long-term investment contract in the wake of the Asian economic crisis of the late 1990s. The arbitral tribunal held that the crisis did not provide a defence, but that it was relevant to the assessment of the investor’s lost profits because:⁶²

The respondent did not seek actively to dispossess the claimant of valuable contractual rights; it has suffered helplessly from a precipitate deterioration in the macroeconomic value of the project with respect to which it had accepted the entire market risk.

In terms of where a large amount of compensation would have ‘a serious adverse effect on a State’s welfare’, the approach of the *Himpurna* tribunal is again relevant here for its reduction of compensation on the basis that compensation for lost profits ‘would tend to

⁶⁰ Ripinsky and Williams (n 19) 353.

⁶¹ *ibid.*

⁶² *Himpurna v PLN*, Final Award of 4 May 1999, (2000) XXV Ybk Comm Arb 15, [332].

impoverish the host State'.⁶³ The tribunal invoked the same Latin maxim that some, including Roberto Ago, have cited as a rationale for necessity:⁶⁴

The principle is old; one need only recall Cicero's *summum jus, summum injuria*. To say that the blind application of a rule may lead to iniquitous results is to recognise that the search for justice would fail if the law could do no more than validate relative positions of strength, or consolidate the status quo indefinitely. Thus, the exercise of a particular right may be inhibited if it would abase the law.

As with necessity, this approach to assessing compensation moderates the literal application of the law in order to promote a value higher than that which would be reflected by the literal application of the law. The claimant may not be made whole, but severe consequences for the respondent State and its population are thereby avoided.

Another noteworthy example expressing such concerns is provided by Ian Brownlie's Separate Opinion in *CME v Czech Republic*, wherein he emphasised that:⁶⁵

the Respondent is a sovereign State, which is responsible for the well-being of its people. This is not to confer a privilege on the Czech Republic but only to recognize its special character and responsibilities. The Czech Republic is not a commercial entity.

Brownlie considered that it would be 'strange indeed, if the outcome of acceptance of a bilateral investment treaty took the form of liabilities "likely to entail catastrophic repercussions for the livelihood and economic well-being of the population" of the Czech

⁶³ *ibid* [326]. Compare Crawford's view that the defences of necessity and *force majeure* could extend to the secondary obligations in the ASR ('Third Report on State Responsibility' (4 August 2000) UN Doc A/CN.4/507 in *Ybk ILC* (2000) II(1) 3, 20 – 21) but that necessity and *force majeure* could only 'entitle a state to delay payment of compensation' and could not 'affect the quantum of compensation due' (*State Responsibility: The General Part* (CUP 2013) 483).

⁶⁴ *ibid* [327].

⁶⁵ *CME v Czech Republic*, UNCITRAL Case, Separate Opinion of Ian Brownlie, 14 March 2003, [74].

Republic.’⁶⁶ Brownlie drove his point home by noting that ‘Even States which have been responsible for wars of aggression and crimes against humanity are not subjected to economic ruin.’⁶⁷ All of this was in the context of a case where the Czech Republic had not even raised the possibility of invoking necessity. Again it follows that, where a State is able to establish necessity, there would be an even stronger case for taking account of these considerations when calculating compensation.

It must be acknowledged that Brownlie’s approach is by no means universally accepted. The majority in *CME*, for example, did not take account of these considerations and went on to award damages of over US\$350 million,⁶⁸ which was about as much as the Czech Republic’s annual health budget.⁶⁹ But a more recent consideration of the issue by the

⁶⁶ *ibid* [78]. Brownlie was quoting the judgment of the Chamber of the ICJ in *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)* [1984] ICJ Rep 342, [237]: ‘It is, therefore, in the Chamber’s view, evident that the respective scale of activities connected with fishing – or navigation, defence or, for that matter, petroleum exploration and exploitation – cannot be taken into account as a relevant circumstance or, if the term is preferred, as an equitable criterion to be applied in determining the delimitation line. What the Chamber would regard as a legitimate scruple lies rather in concern lest the overall result, even though achieved through the application of equitable criteria and the use of appropriate methods for giving them effect, should unexpectedly be revealed as radically inequitable, that is to say, as likely to entail catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned.’

⁶⁷ *ibid* [77]. Brownlie went on (at [79]) to cite the reparations clause in Article 14 of the Japanese Peace Treaty, which provided in part that ‘It is recognised that Japan should pay reparations to the Allied Powers for the damage and suffering caused by it during the war. Nevertheless it is also recognised that the resources of Japan are not presently sufficient if it is to maintain a viable economy, to make complete reparation for all such damage and suffering and at the same time meet its obligations.’ Brownlie did not mention the Treaty of Versailles. But, as the Ethiopia-Eritrea Claims Commission observed when considering but not ultimately determining whether the crippling effect of compensation could affect the quantum of compensation, ‘the prevailing practice of States in the years since the Treaty of Versailles has been to give very significant weight to the needs of the affected population in determining amounts sought as post-war reparations’ (*Final Award: Eritrea’s Damages Claims* (2009) 26 RIAA 505, [21]; *Final Award: Ethiopia’s Damages Claims* (2009) 26 RIAA 631, [21]) (although compare Crawford, *State Responsibility* (n 63) 484, criticising the limited practice cited in support of that conclusion about ‘prevailing practice’).

⁶⁸ *CME v Czech Republic* (Final Award) UNCITRAL Case, 14 March 2003. In *Siemens v Argentina* (Award) ICSID Case No ARB/02/8, 17 January 2007, a case arising out of measures taken by the Argentine government before and unconnected with the economic crisis, Argentina submitted that the damages should be reduced to take account of its subsequent economic straits, but the tribunal dismissed this submission as undeveloped ([346], [354]).

⁶⁹ Peter Green, ‘Czech Republic Pays \$355 Million to Media Concern’, *New York Times* (16 May 2003).

Ethiopia-Eritrea Claims Commission demonstrates that the potentially debilitating effects on States of large compensation awards is coming into greater focus. The Commission observed that ‘compensation of the magnitude sought by each Party would impose crippling burdens upon the economies and populations of the other’.⁷⁰ The Commission ultimately did not have to take into account the extent to which this consideration could reduce the quantum of compensation. But its decision to broach this issue may well come to be echoed by other tribunals, especially in a world where the responsibility of States for breaches of international obligations is being invoked ever more frequently before international tribunals, including not just by States but also by individuals and corporations, and often with a view to obtaining substantial awards of damages.

The result of all of this is that establishing necessity has important consequences. A State that has established necessity is not bound by the obligation to cease its breach of an international obligation for so long as the situation of necessity prevails. Nor is it bound by the general obligation to make reparation for its breach by way of compensation, restitution or satisfaction. But a State that establishes necessity does still bear a more specific obligation to compensate a State that it has caused material loss, albeit the quantum of that compensation may in turn be affected by that second State’s conduct as well as the underlying situation of necessity.

Necessity and the Stability of International Law

This chapter now finally steps back to consider the systemic consequences of necessity. That there were once fears that necessity could substitute *Realpolitik* for and destabilise

⁷⁰ *Final Award: Eritrea’s Damages Claims* (n 67) [21]; *Final Award: Ethiopia’s Damages Claims* (n 67) [21].

international law is unsurprising given that a German Chancellor had launched World War I with the words that ‘necessity knows no law’.⁷¹ Charles de Visscher must have been reflecting the fears and memories of more than just his Belgian compatriots when he dismissed necessity as ‘the negation of law’.⁷² Yet Chapter 1 of this thesis sought at length to demonstrate that such fears can only be based on selective memories. It emerged from the survey of Grotius, through Pufendorf, Vattel and the early practice that even in 1914 the German Chancellor’s words had nothing to do with international law. The Chancellor’s approach to necessity bears even less resemblance to how international law approaches necessity today. Today, as Chapter 2 sought to demonstrate, necessity is solidly grounded in customary international law, and, as Chapters 3, 4 and the preceding sections of this chapter sought to demonstrate, necessity operates within a particular scope and subject to a strict set of legally reviewable conditions.

But this has not stopped some contemporary writers from maintaining fears that necessity may destabilise international law. Francisco Orrego Vicuña, for example, has complained about what he has called the ‘softening’ of necessity:⁷³

If the threshold is lowered to the extent that recent decisions have suggested[,] one may wonder whether a state of necessity may not be invoked by the United States in view of a major financial crisis, the United Kingdom in the light of its GDP having

⁷¹ ASR Commentaries (n 15) n 373.

⁷² *Belgium’s Case: A Judicial Inquiry* (EF Jourdain tr, Hodder 1916) 49.

⁷³ ‘Softening Necessity’ in Mahnoush Arsanjani, Jacob Katz Cogan, Robert Sloane and Siegfried Wiessner (eds), *Looking to the Future: Essays in Honour of W. Michael Reisman* (Brill 2011) 741, 751. It may be noted that Orrego Vicuña was the presiding arbitrator in the *CMS*, *Enron* and *Sempra* cases. It may also be noted that Orrego Vicuña was disqualified as arbitrator from a subsequent case in which a non-precluded measures clause similar to that in the US-Argentina BIT was likely to be an issue because this article, in combination with the reasoning of the *CMS*, *Enron* and *Sempra* tribunals, was held to give rise to reasonable doubts as to Orrego Vicuña’s ability to approach the issue impartially (*Devas v India* (Decision on the Respondent’s Challenge to the Hon Marc Lalonde as Presiding Arbitrator and Prof Francisco Orrego Vicuña as Co-Arbitrator) PCA Case No 2013-09, 30 September 2013).

fallen to levels comparable to the postwar years, or Spain for having unemployment reaching a third of its work force.

In the same vein, and citing Orrego Vicuña, Robert Sloane has expressed the view that:⁷⁴

The real cause for concern is [that]: in practice and over time, the de facto threshold for necessity will atrophy or “soften”. The evidence to date suggests that the mere existence of the ILC codification of necessity in the Articles on State Responsibility encourages states and tribunals to raise the plea, often in circumstances in which compliance with an obligation may be painful or inconvenient, to be sure, but perhaps not *necessary* in the genuinely exigent sense intended by the ILC. What should be the rare exception increasingly becomes less so, and the high threshold established in the Articles on State Responsibility tends to atrophy over time through an evolutionary process of assertion, adjudication, and interpretation.

But it is far from clear that Orrego Vicuña’s complaint about the ‘softening’ of necessity is an accurate assessment of the case law, nor is it clear that Sloane’s concerns for what necessity may hold for the future have any basis in recent experience.

Taking Orrego Vicuña’s complaint first, it is not accurate to say that the case law has ‘softened’ the conditions that must be satisfied for establishing necessity. Orrego Vicuña’s complaint is based around the Argentine crisis cases, but to the extent that the later cases arising out of the US-Argentine BIT have shifted their focus from the customary defence of necessity towards the non-precluded measures clause in Article XI of the US-Argentine BIT, and which has at times been interpreted less strictly than necessity, then that simply reflects, as was discussed in Chapter 3 of this thesis, a more refined approach to treaty interpretation that should be welcomed rather than bemoaned. If one looks beyond the cases brought under the US-Argentine BIT to the Argentine crisis cases brought under other BITs, it is quite clear that the tribunals that have considered necessity have on every occasion rejected the application of the defence and in doing so have maintained a strict approach to the necessity’s

⁷⁴ ‘On the Use and Abuse of Necessity in the Law of State Responsibility’ (2012) 106 AJIL 447, 502.

conditions.⁷⁵ As Chapter 3 observed, sometimes tribunals have taken too strict an approach to necessity.

As for Sloane's concerns, it is not clear why it is a problem that States and tribunals have raised the plea in circumstances where it is 'not necessary in the genuinely exigent sense intended by the ILC' given that tribunals have, where that has been the case, rejected those pleas. To be sure, States have increasingly pleaded necessity before tribunals, but there are no signs that, through the process of adjudication and interpretation, necessity's high threshold has begun to 'atrophy'. Sloane's concerns rather appear to be an example of what Rupert Cross once called, in a speech dedicated to the defence of necessity in domestic criminal law, the 'bogus defence fallacy'.⁷⁶ Cross explained that this fallacy was based on 'the idea ... that a defence which would be properly admissible if genuine must not be recognised by the law because it could easily be contrived.'⁷⁷ He proceeded to explain that 'This is true of self-defence, but no one has objected to that particular head of lawful homicide.'⁷⁸ The short point is that any defence may be abused, and recent experience does not portend any special risk of abuse so far as necessity as a defence to State responsibility is concerned.

The argument has been made that it would enhance compliance with the law if one were not to recognise necessity but rather maintain the requirement to comply with the law

⁷⁵ *BG v Argentina* (Final Award) UNCITRAL Case, 24 December 2007; *National Grid v Argentina* (Award) UNCITRAL Case, 3 November 2008 [255]; *Funnekotter v Zimbabwe* (Award) ICSID Case No ARB/05/06, 22 April 2009; *Suez v Argentina* (Decision on Liability) ICSID Case no ARB/03/17, 30 July 2010, [249]; *Total v Argentina* (Decision on Liability) ICSID Case no ARB/04/1, 21 December 2010, [220]; *Impregilo v Argentina* (Award) ICSID Case no ARB/07/17, 21 June 2011; *EDF v Argentina* (Award) ICSID Case No ARB/03/23.

⁷⁶ Rupert Cross, 'Necessity Knows no Law' (1968) 3 *University of Tasmania L Rev* 1, 9. Cross' choice of title was ironic.

⁷⁷ *ibid.*

⁷⁸ *ibid.*

and deal with situations of necessity on a discretionary and extra-legal basis. Lowe suggests this approach with the following example drawn from domestic law:⁷⁹

one might impose a strict speed limit but give the authorities discretion not to prosecute, say, a driver who breaks the speed limit in order to take an emergency patient to hospital. Alternatively, one might prescribe a speed limit but make the obligation to obey the limit subject to a qualification allowing drivers to break the speed limit in cases of necessity. Both save the emergency driver from conviction for breaking the law; but it is entirely possible that the second approach leads in practice to much wider disregard of the speed limit than does the first.

The example does not translate well into the international context where there is typically no analogue to a central police authority that could exercise this kind of discretion. But the wider problem with the example is the uncertain standards by which that discretion would be exercised. If a State can sidestep objectively reviewable legal constraints and justify its actions by reference to subjective and unreviewable extra-legal standards, then one may reasonably see this as still very much liable to abuse and simply another guise in which *Realpolitik* may supplant international law.⁸⁰ The way in which necessity excuses breaches of international law is different. Necessity brings the State's plea within the fold of international law and subjects it to strict, but not unrealistically strict, legal constraints.

The discretion that falls to States to interpret and apply international law does, however, give rise to another critique. It is 'a truism that international judicial jurisdiction is based on and derives from the consent of States.'⁸¹ This permits States, should they not consent otherwise, to insulate their actions, whether or not those actions comply with

⁷⁹ See n 48, 410.

⁸⁰ See, in this connection, James Crawford, 'The Problems of Legitimacy-Speak' (2004) ASIL Proceedings 271.

⁸¹ Hugh Thirlway, 'Law and Procedure of the International Court of Justice 1960 – 1989: Part Nine' (1998) BYIL 1, 4. See also *Status of Eastern Carelia* (Advisory Opinion) [1923] PCIJ Series B No 5 27: 'It is well established in international law that no state can, without its consent, be compelled to submit its disputes with other states either to mediation or to arbitration, or to any other kind of pacific settlement.'

international law, from third party review.⁸² It is in this context that de Visscher and Sloane have argued that, even if necessity is in principle governed by legal standards, the idea that international law can constrain necessity is illusory because the default position in international law is that, unlike in domestic legal systems, there is no guarantee that a tribunal can ensure that the invocation of necessity is thus constrained. For Sloane, the fact that international law lacks the effective institutions of national legal systems, particularly ‘a hierarchical court system with compulsory jurisdiction ... [that can] help to resolve clashes between what may be competing values and interests in some contexts,’⁸³ makes necessity an undesirably dangerous rule of international law. De Visscher, again, had made much the same point almost a century earlier:⁸⁴

In the realm of criminal and civil law the application of the theory of *Notrecht* [(necessity)] is made under the authority and control of the courts to which has been confided the task, assuredly a very delicate one, of weighing the interests at variance: it is only their intervention which can possibly secure an equitable regulation of them. It is their task not only to weigh the respective values of contending claims, but also to exact the proof that the necessity of which the agent claims the advantage is not one attributable to his fault. This essential guarantee provided by the presence of a regulating authority is entirely wanting in the actual organisation of international relations: the claims of a state to sacrifice the rights of a neighbouring state in order to safeguard its own interests can only be determined by the relation of forces ... which puts the weaker at the mercy of the stronger. The theory of *Notrecht* then appears here to be the negation of the law: it leads to anarchy, or rather it is anarchy in person.

When de Visscher wrote that ‘the claims of a state to sacrifice the rights of a neighbouring state in order to safeguard its own interests can only be determined by the relation of forces’, he was clearly speaking of how Germany had claimed to sacrifice the rights of neighbouring

⁸² Leo Gross, ‘States as Organs of International Law and the Problem of Autointerpretation’ in GA Lipsky (ed), *Law and Politics in the World Community* (UC Press 1953) 59.

⁸³ See n 74, 477.

⁸⁴ See n 72, 48 – 49.

Belgium in order to safeguard its own interests and determined that relation by way of invasion.

These arguments have, however, been overstated. It should first be recalled that today it is clear that necessity can in no circumstances provide a legal basis for the use of force and so necessity today does not furnish the potential for the grave form of abuse with which de Visscher was concerned and which had manifested itself in the form of German aggression in 1914. But, and more generally, it is precisely because of the greater frequency with which the responsibility of States is now being invoked before international tribunals, including not just by States but by individuals and corporations, and often with a view to obtaining substantial awards of damages, that necessity has become increasingly relevant to States. The rise of investor-State arbitration, and the experience of Argentina in particular, bear that out.

That necessity may sometimes be invoked in a context where there may be no third party review does not thereby make it unmanageable as a legal principle. The argument would prove too much for it would mean that large swathes of international law would also have to be set aside as unmanageable. It is seldom heard, for example, that the existence of self-defence as a lawful basis for the use of force is undesirable because its exercise cannot always be controlled by an international tribunal. Sloane and de Visscher have suggested that there is something different about necessity given the difficulties of balancing the interests of States,⁸⁵ but neither explain why that difficulty exceeds that of determining, for example, the proportionality of force used in self-defence or the proportionality of countermeasures, both of which are questions that require difficult balancing exercises.⁸⁶ The reality is that

⁸⁵ See Chapter 4 text to nn 117 – 120.

⁸⁶ Compare also Jan Paulsson, *Denial of Justice* (CUP 2005) 8 with respect to denial of justice: ‘...claims of denial of justice cannot be decided without balancing a number of complex considerations which tend to be specific to each instance. Anyone who insists that international responsibility in this regard may not arise unless

international law does not become meaningless in all those circumstances where it cannot be interpreted and applied by an international tribunal. To quote Oscar Schachter, whenever a State breaches international law, it is ‘judged by other states, by international organs, by non-governmental groups and by concerned individuals everywhere.’⁸⁷ So too would a State be judged if it breaches international law and then invokes necessity, and as this thesis has sought to bear out, there are a set of strict conditions against which a State could be so judged.

Conclusion

This chapter has demonstrated that the mediating role played by necessity as a safety valve within the law of State responsibility can also be witnessed when analysing how international law regulates the consequences of necessity. Necessity provides a State with a defence to State responsibility, but it is a temporary defence and the State must resume compliance with the underlying primary obligation once the necessity has expired. Necessity also excuses a State from the full consequences of State responsibility, but it must still compensate an injured State for its material loss, although in turn the conduct of the injured State and the circumstances of necessity may affect the quantum of that compensation. This chapter finally rebutted the arguments of those who see necessity as a threat to the stability of international law and it instead reasoned that necessity, by virtue of its role as safety valve within the law

it is the product of a perfectly predictable application of objective criteria simply does not accept international adjudication of denial of justice – and to be consistent would have to maintain the same posture with respect to other fundamental matters such as international determinations of ‘equitable’ delimitation or ‘proportional’ armed response.’

⁸⁷ ‘Self-Judging Self-Defence’ (1987) 19 Case W Res J Intl L 121, 126.

of State responsibility, has the greater potential to strengthen rather than destabilise international law.

CONCLUSION

The purpose of this thesis has been to examine the role of necessity, as a defence to State responsibility, in international law. The current of opinion into which this thesis has stepped is deeply sceptical of the idea that necessity can play anything but a negative role in international law. Necessity remains plagued by a perception that it has been abused in the past and by fears that it will be abused in the future, and the spectre of the words of the German Chancellor on the eve of World War I – ‘necessity knows no law’ – still hangs heavily over contemporary discussions of necessity.

The contribution of this thesis has been to show that this perception is flawed and these fears are unfounded. Its main claim has been that necessity operates as a safety valve within the law of State responsibility that mediates between the binding quality of international obligations and the harsh consequences that may follow from requiring compliance with those obligations at all costs. This claim built on the approach outlined by Roberto Ago who, as the ILC’s second Special Rapporteur on State Responsibility, used the metaphor of a safety valve when outlining the role that necessity could play in international law. The seeds of two key ideas emerged from the way in which Ago outlined that role. First, necessity is not about permitting a State to act beyond international law, but it is rather about promoting the reasonable application of international law. Yet necessity is about more than that. Necessity can play a systemic role too. Necessity recognises that international law must sometimes bend so that it does not break. Necessity accepts the political realities of international life, but it brings those realities within the constraints of international law rather than leaving them to destabilise international law from without.

This is what this thesis means by necessity’s role as a safety valve and the thesis bore out the claim that necessity can provide this safety valve in several steps. The thesis first

examined the origins and development of necessity, and it contended that necessity has a stronger pedigree than is commonly appreciated. The thesis then turned to examine necessity's place within the sources of international law and it established that necessity is today solidly grounded in customary international law.

The rest of the thesis was concerned with charting the contours of necessity and with demonstrating that necessity not only operates within, but it is also constrained by, customary international law. The scope of necessity's application was considered first and it was explained how necessity cannot provide a defence to a breach of a peremptory rule of international law. The thesis also explained how necessity relates to primary rules that contain their own safety valves that regulate situations of emergency. The thesis explained how primary rules that regulate situations of emergency must be applied prior to and independently of necessity as a defence and secondary rule of State responsibility, and it also explained how these primary rules may regulate situations of emergency to the exclusion of necessity.

The scope of necessity's application having been determined, the thesis then turned to consider the conditions under which necessity applied. It was noted how despite the fears regarding necessity's vulnerability to abuse, or perhaps because of those fears, some tribunals, especially in the context of the Argentine crisis cases, had taken unrealistically strict approaches to some of necessity's conditions. These approaches threaten to render necessity practically useless. The thesis therefore elaborated the conditions of necessity in a way that would guard against the abuse of necessity without rendering necessity practically useless. Necessity's conditions remain strict, but they are not unrealistically strict.

The thesis finally considered the consequences of necessity, both in terms of the obligations still borne by a State that has established necessity as well as more generally for

the stability of international law. It was discussed how necessity provides a State with a temporary defence and how the State must resume compliance with the underlying primary obligation once the situation of necessity has expired. It was then discussed how necessity excuses a State from the full consequences of State responsibility, but it was also discussed how that State must still compensate an injured State for its material loss, although in turn the conduct of the injured State and the circumstances of necessity may affect the quantum of that compensation. The thesis finally rebutted the arguments of those who still see necessity as a threat to the stability of international law and it instead reasoned that necessity, by virtue of its role as safety valve within the law of State responsibility, has the greater potential to strengthen rather than destabilise international law. Any suggestion that 'necessity knows no law' has no place in international law today.

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