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State of Necessity in International Law: A Study of International Judicial Cases

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Contents

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Introduction

In August 2001, the International Law Commission (ILC) adopted its "Draft Articles on Responsibility of States for Internationally Wrongful Acts."[(1)] In December 2001, the United Nations General Assembly adopted Resolution 56/83, which "commend[ed the articles] to the attention of Governments"[(2)].

It is true that articles adopted by the ILC can "have a direct influence on the content of the law."[(3)] However, its articles are not of themselves binding legal documents, and the adoption thereof does not always mean that all provisions stipulated therein reflect customary international law, or will definitely encourage the progressive development of international law. The extent to which a provision reflects customary law or will have an influence on the content of international law needs to be answered with careful con-

(1) *Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the work of its fifty-third session,* A/56/10 (2001) (hereinafter *2001 Report*).

(2) *Responsibility of States for internationally wrongful acts,* A/RES/56/83 (2001), para. 3.

(3) Ian Brownlie, Principles of Public International Law 12 (6th ed. 2003).; *see also* R.Y. Jennings, *Recent Developments in the International Law Commission: Its Relation to the Sources of International Law,* 13 Int'l & Com .L.Q.397 (1964).

sideration.[4]

Among the provisions in the ILC's articles on State responsibility, those relating to necessity are no doubt to be considered with great care, in view of the fact that "[t]he existence and limits of a plea of necessity has given rise to a long-standing controversy among writers."[5] Quite a few writers have been opposed to or sceptical about the existence of the exception of necessity to State responsibility. This is especially because of its potential for abuse as a pretext for wrongful conduct. Professor James Crawford, who was the Special Rapporteur in the ILC and drafted article 25, admitted that the provision is "perhaps the most controversial of the draft articles."[6]

The exception of necessity, nevertheless, was adopted in the ILC's articles. The provision is as follows:

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

(4) *See* David D. Caron, *The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority,* 96 AM. J. INT'L. L. 867 (2002).

(5) *2001 REPORT* 201.

(6) [1999] 1 Y. B. INT'L L. COMM'N 140.

for precluding wrongfulness if:

(a) The international obligation in question excludes the possibility of invoking necessity; or

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

Furthermore, even in a state of necessity, the wrongfulness of any act which is not in conformity with an obligation arising under a peremptory norm of general international law is not precluded (article 26)[7]. Moreover, article 27 (b) lays down a reservation as to the question of compensation for material loss caused by the conduct.[8]

These articles raise a number of fundamental questions. To what extent do articles 25, 26 and 27 reflect customary international law? To what extent will they be able to encourage the progressive development of international law? Has the adoption of these articles succeeded in overcoming a range of opposite or sceptical opinions?

This paper will, as part of a comprehensive study into these questions, examine international judicial cases. Many of them (cases 1-8, 10, 12-15) have been mentioned during the discussion on the exception of necessity in the ILC. In the rest of the cases (9, 11, 16, 17), as well, the issue of a state

(７) Article 26 (Compliance with peremptory norms): "Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law."

(８) Article 27 (Consequences of invoking a circumstance precluding wrongfulness): "The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to: (a) Compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists; (b) The question of compensation for any material loss caused by the act in question."

of necessity has been or could have been discussed. Due to limitations of space, I am not concerned in this paper with a study of State practice which will be dealt with in a forthcoming paper.

An objection could be raised that judicial cases are not formal sources of international law. However, in some instances at least they are regarded as authoritative evidence of the state of the law. A coherent body of jurisprudence will naturally have important consequences for the law.(9) As a result, an overview of the jurisprudence is a useful exercise.

Before proceeding to the investigation, there is a point which needs to be clarified. The main issue in respect of the doctrine of necessity is whether it can be acknowledged as a "general" exception which can be invoked without regard to different essential interests and international obligations in question. Professor Ian Brownlie, one of critics of the doctrine, states that "necessity as an omnibus category probably does not exist."(10) It follows that, while denying the existence of a general exception of necessity, he does not necessarily deny that there can be special rules of the state of necessity which will be applied in cases where particular types of interests or international obligations are in question. There are a wide range of "essential interests" and "international obligations" in international law. Thus, in looking at judicial cases, we must draw attention not only to whether a state of necessity was invoked in a given case but also whether it was intended to be the general exception.

1. The Neptune case (1797)(11)

The Neptune, which was on a voyage from Charleston on the east coast

(9) Brownlie, *supra* note 3, at 19.

(10) *Ibid.*, at 448.

(11) John Bassett Moore, 4 History and Digest of the International

of the U.S. to Bordeaux, was seized by Great Britain. The vessel, partly loaded with rice, was brought to London, where proceedings were begun against her in the High Court of Admiralty. This court ordered that the cargo be sold to the British Government. The question of the value of the cargo was referred to the registrar and merchants, before whom the claimant demanded the amount that the cargo would have brought at Bordeaux at the time it probably would have arrived there, had it not been seized. The registrar and merchants, however, allowed only the invoice price, together with a mercantile profit of 10 percent. For compensation for the loss occasioned by this allowance the claimant applied to the board of commissioners under article 7 of the Jay Treaty, estimating his loss as the difference between what he was allowed and what would have been the net value of the cargo at Bordeaux. The British Government resisted this claim on the grounds that the seizure was lawful, provisions being, under the circumstances of the case, liable to be treated as contraband of war; and that at any rate its conducts were justified by "necessity" since Great Britain had been threatened with a scarcity of the seized articles.(12)

With regard to the defence of necessity, William Pinkney, the American commissioner, stated that:

> "I shall not deny that *extreme necessity* may justify such a measure. ... 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

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Arbitrations to Which the United States Has Been a Party 3843-3885 (1898). This case was cited in Roberto Ago, *Addendum to the Eighth Report on State Responsibility,* A/CN.4/318/ADD.5-7, [1980] 2 Y. B. Int'l L. Comm'n (Part 2) (hereinafter *Ago Report*) 34.

(12) Moore, *supra* note 11, at 3843-3844.

> of appropriating the goods of others until all other means of relief consistent with the necessity have been tried and found inadequate. Rutherforth, Burlamaqui, and every other writer who considers this subject at all will be found to concur in this opinion."(13)

In addition, he held that, assuming a state of necessity existed in Britain for the seizure of the cargo, the British Government could have pre-empted the cargo only upon giving the neutral traders as much as they would have earned in the port of original destination.(14) In other words, he found that Great Britain was still obligated to pay a certain amount of compensation even on the supposition that the plea of necessity was accepted.(15)

Similarly, Christopher Gore, another American commissioner, quoted Grotius' view on necessity:

> "[T]he necessity must be really extreme to give any right to another's goods; second, that it should be requisite that there should not be the like necessity in the owner; third, when absolute necessity urges us to take, we should then take no more than it requires."(16)

Likewise, John Trumbull, the fifth commissioner, expressed a similar opinion, stating:

> "*The necessity which can be admitted to supersede all laws* and to dissolve the distinctions of property and right must be absolute and irresistible,

(13) *Ibid.,* at 3873.
(14) *Ibid.,* at 3874-3875.
(15) Antonio Cassese, International law 256 (2nd ed., 2005).
(16) Moore, *supra* note 11, at 3856.

> and we cannot, until all other means of self-preservation shall have been exhausted, justify by the plea of necessity the seizure and application to our own use of that which belongs to others."[italics added][17]

Here, these three commissioners seem to have accepted the principle of the state of necessity with several strict conditions. Yet, we should not overlook that the so-called "right of self-preservation" was also introduced. This is not necessarily identical to the positivist legal concept of necessity as provided for in article 25 of the ILC's Articles on State Responsibility. The difference is especially manifest in the opinion of Trumbull, declaring that a state of necessity "can be admitted to supersede all laws."

2. The Fur Seal case (1893)[18]

British fishery ships were seized by the United States in the high seas of the Bering Sea.

In its written argument, the United States Government asserted that the seizures, which it claimed to have made for the purpose of protecting its fur seal industry, could be justified by "self-defense". It asserted:

> "that the right of self-defense on the part of a nation is a perfect and paramount right, to which all others are subordinate ...; and that wherever an important and just national interest of any description is put in peril for the sake of individual profit by an act upon the high sea, even though such act would be otherwise justifiable, the right of the individ-

(17) *Ibid.,* at 3884.

(18) U.S. Government Printing Office, Fur Seal Arbitration: Proceedings of the Tribunal of Arbitration, Convened at Paris, 16 Vols (1895). This case was cited in *Ago Report* 27-28.

> ual must give way, and the nation will be entitled to protect itself against the injury, by whatever force may be reasonably necessary, according to the usages established in analogous cases. ... All rights of self-defense are the result of necessity.[19]"

In the view of the U.S., "the right of self-defense" is based upon a threat to an important and just national interest, not upon either a preceding armed attack or any other wrongful act. In this respect, the scope of "self-defense" invoked here is much wider than what is provided for in article 51 of the UN Charter,[20] and seems to be comparable to the so-called "right of self-preservation" which had been claimed mainly by natural law theorists.[21] In fact, the United States argued that the law of nature was one of the sources of international law.[22]

In contrast, as can be seen from the hearings, the President of the Tribunal criticized the doctrine asserted by the United States.

> The U.S. Counsel: "It was simply an exercise of self-defensive power, standing upon the principle of necessity, and limited by the principle of

(19) 9 U.S. GOVERNMENT PRINTING OFFICE, *supra* note 18, at 140-144.

(20) Article 51 states that: "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."

(21) *AGO REPORT* 28.

(22) 9 U.S. GOVERNMENT PRINTING OFFICE, *supra* note 18, at 8.

> necessity. ... I refer to the case of the *Caroline*. ... A celebrated instance in history was the seizure by Great Britain of the Danish fleet in the harbour of Copenhagen."
>
> The President: "Do you not think that all of that takes us out of this sphere of law and right?"
>
> The U.S. Counsel: "Not at all. We are right within the sphere of law and right."
>
> The President: "I do not think the whole world generally considers it so."[(23)]

In the end, the tribunal rejected the plea, holding that:

> "[T]he United States has not any right of protection or property in the fur-seals frequenting the islands of the United States in Behring Sea, when such seals are found outside the ordinary three-mile limit."[(24)]

The doctrine of right of self-preservation invoked by the United States was criticized and rejected by the tribunal. Its rejection of the doctrine is made particularly explicit in the fact that a motion proposed by two American judges was voted down by the rest of judges.[(25)] The motion attempted to add to the end of the judgment quoted above the following reservation: "beyond the rights that all nations have under the international law, in respect of self-protection and self-defense."

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(23) 12 U.S. Government Printing Office, *supra* note 18, at 245-246.

(24) 1 U.S. Government Printing Office, *supra* note 18, at 78.

(25) John Bassett Moore, 1 History And Digest of the International Arbitrations to Which the United States Has Been a Party 919-920 (1898).

3. The Company General of the Orinoco case (1905)[26]

A French company, the Company General of the Orinoco, obtained from the Venezuelan Government concessions to exploit minerals and develop transport networks. Much of the area covered by the concession contracts, however, had been claimed by Colombia, which had grounds for considering it part of its territory. To make matters worse, the boundary question, which for a long time had been a matter of diplomatic controversy between these two countries, had been submitted to the arbitration of the King of Spain, and was pending at the time of the concessions being signed. Against this background, the Colombian Government strongly protested against the granting of the concessions and demanded the return of the area concerned. Wishing to avert the danger of severe conflict with Colombia, the Venezuelan Government decided to rescind the contracts. Then the liquidators of the company presented their claim through the Government of France before the France-Venezuela Mixed Claims Commission constituted under the protocol signed at Paris on 19 February 1902, claiming indemnity to the sum of 7,616,098.62 francs. Since the commissioner for France and the commissioner for Venezuela found themselves in serious disagreement, the claim was reserved for the consideration of the umpire.

The umpire, Frank Plumley, stated as follows:

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(26) *Company General of the Orinoco* case (1905), 10 Reports of International Arbitral Awards [hereinafter R.I.A.A.] 184-285. This case has been cited in *Ago Report* 29-30.; *Report of International Law Commission on the work of its thirty-second session (5 May - 25 July 1980)*, A/35/10 (1980) (hereinafter 1980 *Report*), 40.; James Crawford, *Second Report on State Responsibility: Addendum,* A/CN.4/498/ADD.2 (1999) (hereinafter *Crawford Report*), para.277, footnote 518.

> "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."[italics added][(27)]

and, as to the particular situation in this case, observed that:

> "Every day that the contract was continued it was more or less a menace to the peaceful relations then existing between those two countries. That which had been held as a valued enterprise, a boon to Venezuela, for the reasons stated had become a serious national danger. ... These contracts then became a source of constant annoyance to the administration at Caracas and of menace to the internal security and welfare of the State. ... It is not strange with all the cumulative reasons therefor that the Republic of Venezuela became very weary over the situation which its contracts had created or permitted, or that it sighed for relief therefrom at whatever cost."[(28)]

Here, we notice that the umpire recognizes the reasons for the rescission on the part of Venezuela.

On the other hand, he notes that it was the Venezuelan Government's "grave error" - by permitting the company to enter into possession of the litigated areas - that caused the crisis, whereas there has been no fault on the part of the company. He then held that:

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(27)　*Company General of the Orinoco, supra* note 26, at 280.

(28)　*Ibid.*, at 281-282.

> "A careful study of the events connected with this Governmental act, and of those which followed, reveals nothing which in any degree lightens the responsibility ... it was easily susceptible of proof that the respondent Government could not sustain its contention that it was without fault in the premises ..."[29]

The umpire finally found that Venezuela was responsible for the rescission of the concessions and was obliged to pay compensation which was substantially the value of the concession at that time on the grounds that the Government had contributed to the occurrence of the crisis.

However, it should be stressed that he mentions that, in general, the duty of self-preservation in order to avert a national danger could rise superior to any question of contract. In other words, the umpire implies that the Government would not have been responsible, unless it had contributed to the occurrence of the crisis.

As in the *Neptune* case, the concept of "self-preservation" was raised by the umpire. Again, it is debatable whether this is identical to the positivist concept of necessity in positive law as provided for in article 25 of the ILC's articles.

4. The French Company of Venezuela Railroads case (1905)[30]

A French company obtained a concession contract from the Government of Venezuela. The Government thereby conceded to the company rights to build railroads. However, as a result of the emergence of revolutionary

(29) *Ibid.*, at 282-283.

(30) *French Company of Venezuela Railroads* case (1905), 10 R.I.A.A. 285-355. This case has been cited in *Ago Report* 24.; *2001 Report* 198.

movements and the outbreak of civil war, the company had suffered a wide range of damage from the troubled conditions. The umpire Plumley denied the responsibility of Venezuela for part of the damage, namely the economic loss which was caused by failure to pay the debt to the company. He stated that:

> "The claimant company was compelled by *force majeure* to desist from its exploitation in October, 1899; the respondent Government, from the same cause, had been prevented from paying its indebtedness to the claimant company. The umpire finds no purpose or intent on the part of the respondent Government to harm or injure the claimant company in any way or in any degree. Its acts and its neglects were caused and incited by entirely different reasons and motives. Its 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."(31)

The umpire refers to various grounds for non-responsibility. As a result, it seems that the decision admits of multiple interpretations. On the one hand, he mentions the paramount importance of self-preservation. It gives the impression that the decision is based on the right of self-preservation which was dismissed in the *Fur Seal* case. On the other hand, he refers to *force majeure* and goes on to mention "no purpose or intent," in other words, the absence of subjective elements of responsibility. This deserves more than a passing notice, since, in the first half of the twentieth century, there

(31)　*French Company of Venezuela Railroads, supra* note 30, at 353.

were many judicial decisions in which subjective elements such as intention, negligence or lack of due diligence were considered definite grounds for responsibility.[32]

Accordingly, whichever interpretation is sounder, it is difficult to draw the conclusion that the decision supports the exception of a state of necessity as provided for in article 25 of the ILC's articles.

5. The Russian Indemnity case (1912)[33]

The Ottoman Government was obligated to repay its debt to Russia under article 5 of the Treaty of Constantinople, concluded on 27 January and 8 February 1879, which brought to an end the war between the two countries. To justify its delay in paying the debt, the Government invoked, among several reasons, the fact that it had been in an extremely difficult financial situation, which it described as *force majeure*.[34]

With regard to the exception of *force majeure,* the Permanent Court of Arbitration stated as follows:

> «*L'exception de la force majeure,* invoquée en première ligne, est opposable en droit international public aussi bien qu'en droit privé; le droit international doit s'adapter aux nécessités politiques. Le Government Impérial Russe admet expressément que l'obligation pour un Etat d'exécuter les traités peut fléchir «si l'existence même de l'Etat vient

(32) *See* Takuhei Yamada, Force majeure *and Distress in the International Law Commission's Articles on State Responsibility,* 32 Kobe Gakuin Hogaku (Kobe Gakuin University Law Review) 261 (2002). (Japanese)

(33) The *Russian Indemnity* case (1912), 11 R.I.A.A. 421-447. This case has been cited in *Ago Report* 22-23.; *1980 Report* 36.; *Crawford Report* para.277, footnote 518.; *2001 Report* 197.

(34) *Russian Indemnity, supra* note 33, at 439.

> à être en danger, si l'observation du devoir international est ... self destructive.[35] »»

However, the tribunal rejected the plea, by continuing:

> «Il serait manifestement exagéré d'admettre que le payement (ou la conclusion d'un emprunt pour le payement) de la somme relativement minime d'environ six millions de francs due aux indemnitaires russes aurait mis en péril l'existence de l'Empire Ottoman ou gravement conpromis sa situation intétieure ou extérieure. *L'exception de la force majeure ne saurait donc être accueillie*.»

Although the tribunal finally rejected the plea in the light of the relevant facts in this case, it obviously accepted the exception of *force majeure* in principle. Furthermore, taking account of the condition stated in the decision - «si l'existence même de l'Etat vient à être en danger, si l'observati on du devoir international est ... *self destructive*», the concept of *force majeure* mentioned here is to be, as the ILC rightly points out,[36] considered more like

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(35)　*Ibid.,* at 443

(36)　"[T]he Ottoman Government, to justify its delay in paying its debt to the Russian Government, invoked ... the fact that it had been in an extremely difficult financial situation, which it described as *"force majeure"* but which was more like a state of necessity." (*2001 Report* 197.) In the ILC's view, *force majeure* differs from a situation of necessity (article 25) because an act of a State which would otherwise be internationally wrongful is involuntary or at least involves no element of free choice. (*2001 Report* 183.) Article 23 (*Force majeure*) states that:

"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

the exception of the state of necessity.[37]

6. Case Concerning the Payment of Various Serbian Loans Issued in France (1929)[38]

The French Government, which had taken proceedings on behalf of its creditor nationals, maintained that the Kingdom of the Serb-Croat-Slovene was obliged to pay the sums due to the creditors of the Serbian loans on the basis of the gold franc.

To justify its non-payment, the Serb-Croat-Slovene State asserted a wide range of situations, one of which was the economic crisis caused by the First World War, stating:

> «c'est le cas de la force majeure qui libère le débiteur de son obligation à raison de l'impossibilité où il se trouve de la remplir, lorsque cette impossibilité provient d'un fait imprévu et dont il n'est pas responsable; le type de la force majeure étant ce que les Anglais appelent l'*act of God*. Dans tous les droits, le cas de guerre est la circonstance qui domine le plus la volonté des individus.»[39]"

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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."

(37) Cavaré also stated that «[e]n réalité, comme le montre Cavaglieri, il s'agit ici plutôt de l'état de nécessité que de la force majeure.» L.Cavare, Le Droit International public positif, 2^e^éd., t.II, 428 (1962).

(38) Case concerning *the Payment of Various Serbian Loans Issued in France,* 1929 P.C.I.J. (Series A.) No. 20. This case has been cited in *Ago Report* 24-25.; *2001 Report* 198.

(39) *Oral Argument of Devèz,* P.C.I.J., Series C, No. 16-III, 211.

It then regarded the situations in question as *force majeure,* describing itself as the following: «la malheureuse Serbie, qui a subi plusieurs invasions, qui a soutenu trois guerres successives, qui a été victime de dévastations formidables, qui a versé des flots de sang, dont toute la jeunesse a été fauchée et qui ploie sous une charge financière sans précédent.»[40]

Although it described the economic crisis as *force majeure,* the assertion also looks like that of a state of necessity, in that it is due to its strong concern about the danger to its essential interests.

In contrast, France argued against the plea in the light of the facts in this case. Yet it did not protest the principle of *force majeure* invoked by the Serb-Croat-Slovene State.[41]

The Permanent Court of International Justice (PCIJ) addressed the question as to whether the economic crisis caused by the First World War could release the Serb-Croat-Slovene State from its obligation. It stated:

> "*Force majeure* - It cannot be maintained that the war itself, despite its grave economic consequences, affected the legal obligations of the contracts between the Serbian Government and the French bondholders. The economic dislocations caused by the war did not release the debtor State ..."[42]

The Court concluded that the economic crisis caused by the war did not release the Serb-Croat-Slovene State from its obligation to pay the debts. Since it did not go into detail about the grounds, it is not clear whether the Court accepted the doctrine asserted by the Serb-Croat-Slovene.[43] Thus, the

(40) *Ibid.,* at 214.

(41) *Oral Argument of Basdevant,* P.C.I.J., Series C, No. 16-III, 259-260.

(42) *Serbian Loans, supra* note 38, at 39-40.

decision seems to admit of two interpretations. One is that the Court rejected the doctrine, considering that it was impossible for any economic crisis caused by a war, however grave it was, to release a State from its debts. The other is that the Court did not deny the doctrine asserted by the Serb-Croat-Slovene, although it rejected the plea in the light of the facts in this case; that is to say, the obligation to pay the debts could have been exempted if a genuinely extreme economic crisis had existed.

Yet, even if the latter is sounder, it is not necessarily obvious whether the Court addressed a "general" exception, which can apply to failures of obligations other than debts. In fact, both the parties and the Court appear to have focused on the particular issue, namely the question of debt exemption. In particular, the Serb-Croat-Slovene State just argued that «*c'est le cas de la force majeure qui libère le débiteur de son obligation*», but did not mention any obligations other than debts.

7. The Oscar Chinn case (1934)[44]

In the course of 1930 and 1931, the severe commercial depression which prevailed throughout the whole world seriously affected trade in the Belgian Congo. The sharp fall of the prices obtained for produce from the area in the European markets necessitated an immediate reduction in the net price of the produce. The Belgian Government came to the conclusion that this reduction in the cost price must be effected, firstly, by a reduction of the expenses of transportation and handling, and, secondly, by a diminution of the overhead charges of colonial producers.[45] For this reason, the Government

(43) *See also Case Concerning the Payment in Gold of the Brazilian Federal Loans Issued in France,* 1929 P.C.I.J. (Series A.) No. 21, at 120.

(44) The *Oscar Chinn* case, 1934 P.C.I.J. (Series A./B.) No. 63. This case has been cited in *Ago Report* 30-31.; *1980 Report* 41.; *2001 Report* 198.

sent a communication to various companies whose tariffs it was in a position to control, ordering them to reduce the tariffs on transport and the handling charges. At the same time, it informed them that the losses caused by the reductions would be reimbursed.

According to the United Kingdom, one of its subjects, Oscar Chinn, had been harmed by the measures in question. It stated that these measures had created a "*de facto* monopoly" of fluvial transport in the Congo, which was contrary to the principles of "freedom of navigation," "freedom of trade" and "equality of treatment" provided for in articles 1 and 5 of the Convention of Saint-Germain-en-Laye of 10 September 1919.(46)

The PCIJ rejected the argument of the United Kingdom, finding that the conduct of the Belgian Government was not in conflict with its international obligations towards the United Kingdom.(47) Therefore, the question of necessity was not addressed by the Court.

The question, however, was considered in the individual opinion of Judge Anzilotti. Unlike the Court, he asserted that the conduct of Belgium was unlawful, and addressed the question as to whether it could be justified because of the exception of a state of necessity. He stated as follows:

> "The situation would have been entirely different if the Belgian Government had been acting under the law of necessity, since necessity may excuse the non-observance of international obligations."(48)

Even so, he noted that Belgium had not pleaded the exception, and observed

(45) *Oscar Chinn, supra* note 44, at 72.
(46) *Ibid.*, at 81-82.
(47) *Ibid.*, at 89.
(48) *Ibid.*, at 113.

that, even if it had, the Court would not have found that the economic crisis in this case was as serious and imminent as to constitute a state of necessity. However, he obviously acknowledged the exception of necessity in principle.(49)

8. The «Societe commerciale de Belgique» case (1939)(50)

There had been two arbitral awards requiring the Greek Government to pay a sum of money to a Belgian company in repayment of a debt contracted with the company. As the Greek Government was tardy in complying with the awards, the Belgian Government applied to the PCIJ for a declaration that the Greek Government, by refusing to carry out the awards, had violated its international obligations.(51)

The Greek Government, while not contesting *res judicata* of the arbitral awards, stated in its defence that its failure to comply with them was due not to any unwillingness but to the country's serious budgetary and monetary situation which it described as «*une nécessité impérieuse, indépendante de sa volonté, un cas de force majeure.*»(52) It also claimed that, in this case, «[*i*]*l ne s'agit donc ni d'un refus ni d'un acte fautif.*»(53) Furthermore, Jean Youpis, the Counsel for the Greek Government, in his oral argument, invoked an international judicial decision (the *Russian Indemnity* case), State practice and

(49) The view in his individual opinion was expressed in his textbook in which he stated that a state of necessity is one of circumstances precluding responsibility. Dionisio Anzilotti, 1 Cours de Droit International 505-517 (traduit par Gilbert Gidel, 3e éd. 1929) (1927).

(50) The «*Société commerciale de Belgique*» case, 1939 P.C.I.J. (Series A./B.) No. 78, 160-190. This case has been cited in *Ago Report* 25-26.; *1980 Report* 37-38.; *Crawford Report* para.277, footnote 518.; *2001 Report* 198.

(51) *Ago Report* 25.; *1980 Report* 37.; *2001 Report* 198.

(52) *Counter-Memorial of the Greek Government,* P.C.I.J., Series C, No. 87, 100.

(53) *Ibid.*

several writers' opinions in support of his argument that, in the case of extreme financial crisis, the obligation of full payment of debts can be exempted on the grounds of *force majeure*.(54) What is more, the concept of *force majeure* is, in his view, identical to a "state of necessity."(55)

In view of the above-mentioned Greek argument, the Court should have addressed the exception of *force majeure* or state of necessity before judging whether a breach of the obligations existed. However, the Court ended up not addressing the question, since the Belgian Government had changed the application in the middle of the procedure and, in the end, had only requested the declaration of *res judicata* of the arbitral awards, not a breach of the obligations. The Court, therefore, did not mention anything about either *force majeure* or state of necessity.(56)

However, it should be pointed out that, although the Belgian Government argued against the Greek Government's plea in light of the facts concerned,(57) it admitted the principle of state of necessity. It stated:

> «Dans une savante étude sur la question de la force majeure au regard des obligations des États, M.Youpis exposait hier qu'un État n'est pas tenu de payer sa dette si, en la payant, il devait compromettre ses serv-

(54)　*Oral Argument of Youpis,* P.C.I.J., Series C, No. 87, 206-207.

(55)　He asserted: «C'est la théorie de la force majeure, exprimée par une autre formule, et on sait qu'il y a des écoles et des auteurs qui expriment la même idée par le terme: «état de nécessité». Si la terminologie diffère, tout le monde est pourtant d'accord sur le sens et la portée de la théorie; tous estiment que l'État débiteur n'encourt aucune responsabilité s'il se trouve dans une situation pareille.» *ibid.,* at 209.

(56)　«*Société commerciale de Belgique*», *supra* note 50, at 160-179.

(57)　*Oral Argument of Sand,* P.C.I.J., Series C, No. 87, 234-260.

ices publics essentiels. Sur le principe ainsi énoncé, le Gouvernement belge serait sans doute d'accord.»[58]

Even so, we need to doubt whether both parties regarded a state of necessity as a general exception which could be applied in urgent situations other than financial crises or to failures of international obligations other than debts. In fact, Youpis limited the discussion to the issue concerning pecuniary obligations of States. He mentioned: «à propos de la force majeure, je voudrais présenter quelques développements relativement à la doctrine et à la jurisprudence internationale, surtout en ce qui concerne la force majeure appliquée aux obligations pécuniaires des États.»[59]

9. The Corfu Channel case (Merits) (1949)[60]

On 22 October 1946, two British cruisers and two destroyers proceeded northward through the North Corfu Strait. The two destroyers struck mines in Albanian waters and were gravely damaged. Three weeks later, on 12/13 November, the North Corfu Channel was swept by British minesweepers and 22 moored mines were cut.[61]

In the second part of the Special Agreement, the following question is submitted to the International Court of Justice (ICJ):

(2) Has the United Kingdom under international law violated the sovereignty of the Albanian People's Republic by reason of the acts of the Royal Navy in Albanian waters on the 22nd October and on the 12th and

(58) *Ibid.*, at 236.
(59) Youpis, *supra* note 54, at 204.
(60) *Corfu Channel case, Judgment of April 9th, 1949*: I.C.J. Reports 1949, p. 4
(61) *Ibid.*, at 12-13.

13th November 1946 and is there any duty to give satisfaction?[62]

While observing that the passage in October was innocent, the ICJ, as regards the sweeping operation in November, rejected the defence of Great Britain: the doctrine of self-help.[63]

Likewise, Judge Krylov also rejected the argument of Great Britain to justify the operation, pointing out:

> "It should be observed that the British argument on this point, i.e., their defence of the alleged right of self-help - which is nothing else but intervention - relied on assertions which have already been outstripped by the further development of international law, especially since the ratification of the Charter of the United Nations. 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)."[64]

Furthermore, Judge Azevedo, not in respect of the sweeping operation, but the passage in October, was of the opinion that the situation in question was not considered "a state of necessity."[65]

What is immediately apparent in these extracts is that the Court rejected the doctrine of self-help, and Judge Krylov goes on to deny "the law of ne-

(62)　*Ibid.*, at 26.
(63)　*Ibid.*, at 35.
(64)　*Ibid.*, at 76-77.
(65)　*Ibid.*, at 109

cessity (*Notrecht*)" which, in his view, is another denomination of the right of self-help. Thus, they appear to have denied the exception of the state of necessity.

However, we must not forget that Great Britain invoked the doctrine of self-help for the purpose of justifying its navy's sweeping operation which would otherwise be considered an unlawful threat or use of force. Likewise, it is important to bear in mind that the Court and Judge Krylov rejected the plea mainly because conducts contrary to article 2 paragraph 4 of the United Nations Charter[66] should not be justified by the plea of necessity. In other words, they did not necessarily deny that the principle of a state of necessity could apply to international obligations other than article 2 paragraph 4 of the Charter. In addition, as mentioned above, Judge Azevedo did not deny the exception of state of necessity in principle.

10. Case concerning Rights of Nationals of the United States of America in Morocco (1952)[67]

By a decree of 30 December 1948 of the French authorities in the Moroccan Protectorate, import regulations introduced in 1939 was restored. As a result, imports not involving an official allocation of currency were subjected to a system of license control. But these import regulations did not apply to France or other parts of French Union. Imports from France and other parts of the French Union into the French zone of Morocco were free.

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(66) Article 2IV states: "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."

(67) Case concerning *Rights of Nationals of the United States of America in Morocco, Judgment of August 27th, 1952*: I.C.J. Reports 1952, p. 176. This case has been cited in *Ago Report* 31-32.; *1980 Report* 41-42.

The United States maintained that this discrimination in favour of France contravened its treaty rights.(68)

In its Judgment of 27 August 1952, the ICJ held that the import controls were contrary to the Treaty between the United States and Morocco of 1836 and the General Act of Algeciras, on the grounds that they involved discrimination in favour of France against the United States.(69)

Although the Court did not consider the question of the state of necessity, the parties addressed it.

France alleged that, due to the serious shortage of foreign currency against the background of the financial and currency crisis, it had been compelled to prevent an outflow of foreign currency by exports. France argued that the defence of *l'ordre public* could be an exception to the principle of economic liberty without any inequality. *L'ordre public* was, in its view, defined as *le maintien de la sécurité, de la tranquillité et de la santé publiques,* being different from the theory of *l'ordre public* in private international law. In its view, it is international law, especially international practice, that defines the meanings and the limits of *l'ordre public* invoked here.(70)

The U.S. Government protested the argument, stating:

> "[T]he theory of *ordre public* advanced in the argument is of a character so arbitrary as to clearly command its repudiation both as a general principle of international law and as a principle of specific application in this particular case.

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(68) *Rights of Nationals of the United States of America in Morocco, supra* note 67, at 183.

(69) *Ibid.,* at 181-186.

(70) *Oral Argument of Reuter,* I.C.J. Pleadings, Morocco Case (France v. U.S.A.), Vol. II, 194.

> The theory of *ordre public* advanced in the Reply is not a coherent and organized theory. The Reply does not even attempt to indicate its meaning in some general sense; much less does it attempt to suggest the limits of its application. ... The theory of *ordre public* advanced by the Reply simply purports to vest arbitrary justifications with the character of legitimacy.
>
> It is hardly necessary to point to the threat to the stability of international relations which is implicit in this concept of *l'ordre public*. Besides being an innovation, the theory is a negation of the whole international treaty structure, since it permits States to avoid treaty obligations through the simple expedient of selecting, if not creating, a given internal condition and claiming that compliance with the obligation would create a danger, actual or threatened, to the amorphous whole known as *l'ordre public*.[(71)] ..."

At the same time, the French Government also argued *l'exception de force majeure,* invoking the decision of the Russian Indemnity case. It stated three requirements for the exception - ***imprévisibilité, extériorité par rapport à l'Ètat qui invoque force majeure, et contrainte qui empêche l'Ètat d'exécuter son obligation*** - and concluded that these had been met in this case.[(72)] As regards the argument of *force majeure,* the U.S. Government did not protest the principle and just maintained that the situation in this case had not constituted a situation of *force majeure*.[(73)]

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(71) *Rejoinder Submitted by the Government of the United States of America,* I.C.J. Pleadings, Morocco Case (France v. U.S.A.), Vol. II, 99.

(72) Reuter, *supra* note 70, at 182-183.

(73) *Oral Argument of Adrian Fisher,* I.C.J. Pleadings, Morocco Case (France v. U.S.A.), Vol. II, 241.

As has been noted, with reference to the financial and currency crisis in question, France invoked the exceptions of *ordre public* and *force majeure*. As regards the former, the United States categorically denied it, saying that it could be a threat to the stability of international relations. As regards the latter, while saying that the conditions for the exception of *force majeure* had not been met in the particular case, it did not question the existence of the principle.

It should, however, be stressed that the concept of *force majeure* invoked by France is not necessarily the same as what was invoked in the *Russian Indemnity* case. In the present case, France attached importance to ***imprévisibilité*** and ***extériorité***. This view is literally more similar to the concept of *force majeure* provided for in Article 23 (*see* footnote 36) of the ILC's articles adopted in 2001 than the state of necessity.(74)

11. Case concerning Right of Passage over Indian Territory (Merits) (1960)(75)

In the Application, the Government of Portugal stated that its territory in the Indian Peninsula included two enclaves surrounded by the territory of India, Dadra and Nagar-Aveli. It asserted that Portugal was the holder of a right of passage between its coastal territory (Daman) and the enclaves, and between each of the latter. In July 1954 the Government of India prevented Portugal from exercising that right of passage and Portugal was thus placed in a position in which it became impossible for it to exercise its rights of sovereignty over the enclaves.(76)

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(74)　*See* Yamada, *supra* note 32, at 289.

(75)　Case concerning *Right of Passage over Indian Territory* (*Merits*), *Judgment of 12 April 1960*: I.C.J. Reports 1960, p. 6.

(76)　*Ibid.*, at 9.

According to the Indian Government, there had been hostility toward the Portuguese authorities on the part of a population. It contended that suspension of all passage became necessary in view of the abnormal situation which had arisen in Dadra and the tension created in the surrounding Indian territory. It stated in 1954:

> "This tension is bound to increase if Portuguese officials are permitted to go across Indian territory .... The passage of these officials across Indian territory might also lead to other undesirable consequences in view of the strong feelings which have been aroused by the repressive actions of the Portuguese authorities. In these circumstances, therefore, the Government of India regret that they cannot entertain the demand of the Portuguese authorities for facilities to enable them to send a delegation from Daman to Dadra and Nagar-Aveli across Indian territory."(77)

In the view of India, the refusal of passage was necessary in order to safeguard its interest against a peril. It might be argued that this argument is based on the idea of a state of necessity.

The ICJ held that the conduct of India had been lawful, stating:

> "In view of the tension then prevailing in intervening Indian territory, the Court is unable to hold that India's refusal of passage to the proposed delegation and its refusal of visas to Portuguese nationals of European origin and to native Indian Portuguese in the employ of the Portuguese Government was action contrary to its obligation resulting

(77) *Ibid.*, at 45.

from Portugal's right of passage. Portugal's claim of a right of passage is subject to full recognition and exercise of Indian sovereignty over the intervening territory and without any immunity in favour of Portugal. The Court is of the view that India's refusal of passage in those cases was, in the circumstances, covered by its power of regulation and control of the right of passage of Portugal."(78)

Having taken into account the tension which had been arising, the Court found the rejection of passage lawful. However, the Court held so, not because the rejection was justified on the grounds of a certain circumstance precluding wrongfulness, but because it was within the Indian sovereign right. In the Court's view, the right of passage included a number of intrinsic restrictions since it was exercised in Indian territory. This view was admitted by the Portuguese Government. Portugal did not dispute Indian sovereignty over the territory, through which transit must be effected, and admitted that the passage remains subject to the regulation and control of India.(79) Based on that understanding, the Court held that the rejection in question, which was due to the concern about the tension, was within India's competence to restrict the right of passage. Therefore, it did not need to consider the question of a certain exception, such as a state of necessity.(80)

(78)　*Ibid.*

(79)　*Ibid.*, at 28.

(80)　I am indebted to the discussion on the case by Hugh Thirlway, *The Law and Procedure of the International Court of Justice 1960-1989 Part Seven,* 66 BRIT.Y.B.INT'L L. 70-71 (1995). He observed that:

"[T]he Court held that 'in view of the tension then prevailing in Indian territory' ... , India's action was not 'action contrary to its obligation resulting from Portugal's right of passage'. There is an obvious affinity between this reasoning and the hypothesis of a state of necessity mentioned in Article 33 of the

12. The Rainbow Warrior case (1990)[81]

In 1985, French agents sabotaged and sank the vessel Rainbow Warrior in harbour in New Zealand. The UN Secretary-General was asked to mediate, and his ruling in 1986 provided, *inter alia,* for French payment to New Zealand and the transfer of two French agents to an isolated French military base outside of Europe, where they were to stay for three years and not to leave without the mutual consent of the two Governments. However, both the agents were repatriated to France before the expiry of the three years without the consent of New Zealand. France argued that the acts had been due to urgent reasons.

The arbitral tribunal, in addressing the question as to whether the urgent reasons could justify the French measures, examined three of the circumstances precluding wrongfulness provided for in the ILC Draft Articles on State Responsibility on first reading - *force majeure* (Article 31), distress (Article 32) and state of necessity (Article 33). While finding *force majeure* as established under customary international law, the tribunal, in respect of the doctrines of distress and necessity, stated:

> "The [ILC's] report also distinguishes with precision the ground of justification of Article 32 from the controversial doctrine of the state of

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ILC Draft Articles [on first reading] as a circumstance precluding wrongfulness ... But the Court's reasoning was that on a proper interpretation of the obligation itself, no breach had occurred ... [This is] a question of determination whether there had been a breach of an international obligation at all, rather than ascertaining whether such a breach, although committed, was excused by a situation of necessity."

(81) *Rainbow Warrior* (*New Zealand v. France*), 82 I.L.R. 499-590 (1990). This case has been cited in *Crawford Report* para.283.; *2001 Report* 198.

necessity dealt with in Article 33. Under Article 32, on distress, what is "involved is situations of necessity" with respect to the actual person of the State organs or of persons entrusted to his care, "and not any real 'necessity' of the State." On the other hand, Article 33, which allegedly authorizes a State to take unlawful action invoking a state of necessity, refers to situations of grave and imminent danger to the State as such and to its vital interests. This distinction between the two grounds justifies the general acceptance of Article 32 and at the same time the controversial character of the proposal in Article 33 on state of necessity.(82)

Furthermore, citing a passage from a paper written by Eduardo Jiménez de Aréchaga(83) who was the President of the Tribunal at this case, the Tribunal continued:

"[There is] no general principle allowing the defence of necessity. There are particular rules of international law making 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 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."(84)

(82)　*Rainbow Warrior, supra* note 81, at 554.

(83)　Eduardo Jiménez de Aréchaga, *International Responsibility,* in MANUAL OF INTERNATIONAL LAW (SØRENSEN ed.) 543 (1968).

(84)　*Rainbow Warrior, supra* note 81, at 554-555.

The Tribunal accepted the doctrine of distress, the scope of which seems to be broader than the ILC's view.[85] In contrast, it should be stressed that it categorically rejected the doctrine of necessity adopted by the ILC.

13. The Lafico and the Republic of Burundi Case (1991)[86]

The Libyan Arab Republic and the Republic of Burundi concluded an agreement in 1975 which established the Libyan Arab Republic - Burundi Holding Company (HALB). HALB's objective was to invest in companies operating within certain sectors of the Burundi economy.[87] This agreement provided that "the assets of the Company [HALB] shall not be the subject of nationalization, confiscation, sequestration nor any other measure capable of infringing the rights of the shareholders or limiting the ability of the Company to achieve its objects. (article 15, paragraph 1)[88] In 1978 HALB started its investment programme. Investments were either held directly by HALB or by its two subsidiaries ACC and AGRIBAL. In 1981 Libya transferred its shareholding in HALB to the Libyan Arab Foreign Investment Company (LAFICO).[89]

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(85) The ILC rightly pointed out that: "[t]he Tribunal in the Rainbow Warrior arbitration appeared to take a broader view of the circumstances justifying a plea of distress, apparently accepting that a serious health risk would suffice. The problem with extending article 24 to less than life-threatening situations is where to place any lower limit." *2001 Report* 192.

(86) The *LAFICO and the Republic of Burundi* case, 96 I.L.R. 279-333 (1994). The original text is French. *See Affaire LAFICO / État du Burundi, Sentence arbitrale du 4 mars 1991,* 1990 Revue belge de droit international 517-562. This case has been cited in *Crawford Report* para.284, footnote 542.; *2001 Report* 198.

(87) *LAFICO,* 96 I.L.R., *supra* note 86, at 282.

(88) *Ibid.,* at 314.

(89) *Ibid.,* at 283.

On 5 April 1989 Burundi decided to break off diplomatic relations with Libya, expel all Libyan nationals residing in Burundi and prohibit all Libyans from entering the territory of Burundi. As a result, the Director-General of HALB and the Director-General of ACC, who were Libyan citizens, were required to leave Burundi within forty-eight hours of the expulsion order. On 28 May 1989, a meeting was held between representations of LAFICO and the Government of Burundi. During the meeting, LAFICO expressed its desire that HALB be allowed to continue its activities, whereas Burundi indicated that it wished HALB to be put into liquidation. On 17 June 1989, LAFICO and Burundi agreed to take the matter to arbitration.(90)

The reason why the Government of Burundi took the measure is shown in the following note issued by the Government. It said that the course of action was taken since ...

> "for some time the diplomatic personnel of the Peoples' Bureau in particular, and all Libyan nationals resident in Burundi in general, have been participating in activities of destabilization putting the peace and internal and external security of the Republic of Burundi in danger."(91)

As just quoted, the Government of Burundi argued that the measure had been a means to safeguard itself against the danger to internal peace and security. In what legal frameworks did the arbitral tribunal consider the argument?

First of all, the tribunal considered the question as to whether the expulsion order was a breach of a rule of customary international law. It stated:

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(90)　*Ibid.*

(91)　*Ibid.*, at 300.

> "The Tribunal does not deny the right of every State to expel an alien who represents a threat to its security, subject to certain conditions being fulfilled, in particular those mentioned by the Government of Burundi itself. It is also undeniable that in such matters States enjoy a wide margin of discretion. ... Expulsion constitutes an act affecting an alien as an individual. This is logical because the assessment by the competent authorities of the threat to public order or national security must be made in relation to the behaviour of the individual concerned.(92)"

The first thing that one notices is that the tribunal acknowledged a right of every State to expel an alien who represented a threat to its security. Therefore, in the tribunal's view, expulsion due to a state of necessity can be justified by the particular right of expulsion established under customary international law. At the same time, the tribunal expressed that the assessment by the competent authorities of the threat to public order or national security had to be made in relation to the behaviour of the individual concerned. Therefore, collective expulsion of foreigners simply because of their particular nationality is prohibited. Based on the principle, the tribunal found the expulsion order contrary to customary international law on the grounds that it had been issued to Libyan nationals simply because of their nationality. It follows that, if the Government had expelled a particular alien causing danger to its peace and security, the measure would have been found consistent with its right under customary international law. In any case it would not matter whether the general rule of state of necessity exists in international law. In that sense, the same feature as shown in the case concerning *Right of Passage over Indian Territory* can be seen in this

(92) *Ibid.*, at 311.

case.

On the other hand, with regard to the question as to whether Burundi's measure was a breach of article 15 of the 1975 Agreement, the tribunal considered whether the measure could be justified by *force majeure* (article 31 of the ILC Draft Articles on State Responsibility on first reading) or a state of necessity (article 33). The tribunal took the view that the former provision reflects customary international law, although finding that the conditions provided for in article 31 had not been met in the present case. As to the latter, the tribunal stated 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. Even supposing that such an article could govern the international obligations of Burundi, it should be noted that the various measures taken by that State against the rights of the shareholder LAFICO do not appear to the Tribunal to have been the only means of safeguarding an essential interest of Burundi against a grave and imminent peril, especially since the two Libyan employees in question do not appear to have constituted such a peril."(93)

It cannot be emphasized too strongly that the tribunal deliberately avoids making an appraisal of article 33 in view of the fact that the doctrine laid down therein has been a problem under debate. It just states that, whatever the appraisal of the provision is, Burundi's measure cannot be found lawful,

(93)　*Ibid.*, at 319.

since the conditions provided for in the article had not been fulfilled in this case.[94]

14. The Gabcíkovo-Nagymaros Project case (1997)[95]

In 1989, Hungary suspended and subsequently abandoned completion of the construction and operation of the Gabcíkovo-Nagymaros barrage system provided for in the Budapest Treaty of 16 September 1977, alleging that it entailed grave risks to the Hungarian environment and the water supply of Budapest.[96] To justify its conduct, Hungary relied essentially on "state of ecological necessity," while expressly acknowledging that, in any event, such a state of necessity would not exempt it from its duty to compensate its partner.[97] In contrast, Slovakia denied that there had been any kind of

(94) Before this case, Salmon, the president of the tribunal, critically explored the content of Article 33 of the ILC Draft Articles on State Responsibility on first reading in the following paper. Jean J.A. Salmon, *Faut-il codifier l'état de nécessité en droit international?,* in Essays In International Law In Honour Of Judge Manfred Lachs (J.Makarczyk ed.) 235-270 (1984).

(95) *Gabcíkovo-Nagymaros Project* (*Hungary/Slovakia*), *Judgment,* I.C.J. Reports 1997, p. 7. This case has been cited in *Crawford Report* para.284.; *2001 Report* 199-200.

(96) *Gabcíkovo-Nagymaros Project, supra* note 95, at 35-36.

(97) *Ibid.,* at 39.; *Oral Argument of Crawford,* CR97/4, Wednesday 5 March 1997, para.36 (p. 25). He stated that "[a]s to the financial interests, the first point to note is that these amounts were capable of adjustment and compensation. Loss of money as such is rarely an essential interest for the purposes of the defence of necessity. The whole point of compensation is to make up for such losses, the risk of which anyway is inherent in an investment. The ILC Draft Articles explicitly envisage compensation in situations of necessity, and Hungary was from the start prepared to negotiate such compensation within the framework of the Treaty. ... So it was not a question of reparations for wrongful conduct but compensation for a failed investment. Czechoslovakia had a legitimate interest in compensation, and in any negotiations would no

"ecological state of necessity" in this case either in 1989 or subsequently.[98]

With respect to the doctrine of the state of necessity, the ICJ, first of all, stated as follows:

> "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."[99]

Furthermore, referring to article 33 of the ILC Draft Articles on State Responsibility on first reading, the Court enumerates the following five conditions which, in its view, reflect customary international law: (1) it must have been occasioned by an "essential interest" of the State which is the author of the act conflicting with one of its international obligations; (2) interest must have been threatened by a "grave and imminent peril"; (3) the act being challenged must have been the "only means" of safeguarding that interest; (4) that act must not have "seriously impair[ed] an essential interest" of the State towards which the obligation existed; and (5) the State which is the author of that act must not have "contributed to the occurrence of the state of necessity."[100]

The Court then proceeded to a consideration of the facts in this case. While the Court acknowledged that the first condition was met, it found the second, third and fifth conditions unfulfilled and finally concluded that the acts of Hungary were not justified by the exception of necessity.[101]

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doubt have sought more than Hungary had initially implied was on offer."; *see also Oral Argument of Sands,* CR97/5, Thursday 6 March 1997, para.7 (p. 67), para.16 (p. 70).

(98) *Gabcíkovo-Nagymaros Project, supra* note 95, at 37.

(99) *Ibid.,* at 40.

(100) *Ibid.,* at 40-41.

What is more, Hungarian Judge Herczegh gave a noteworthy point of view on the question of the state of necessity. He stated:

> "[T]he party in question will be released from the consequences of the violation of international law, since it acted in a state of necessity. The state of necessity is a circumstance which exonerates from responsibility: in other words, it exonerates the author of the unlawful act from that international responsibility."(102)

What the passage makes clear at once is that he regarded a state of necessity as circumstance precluding responsibility, not wrongfulness as provided for in the ILC's articles. Then he proceeded to a consideration of the situations in this case. First of all, he distinguished suspension and abandonment of the works at Nagymaros and suspension of the works at Dunakiliti. He then considered each situation separately.(103)

As to the former, in his opinion, the requirements for state of necessity were met in this case, and responsibility is precluded.

As to the latter, he admitted that the ecological risks might not have been as imminent as in the former case, and the measure of suspension had impaired the economic interests of Czechoslovakia. On the other hand, he observed that Hungary's anxieties about the ecological risks should not be taken lightly, whereas the interests of Czechoslovakia were of a financial nature and easy to compensate. Furthermore, he added that the measure of suspension was undoubtedly provisional, and the installations at Dunakiliti had been maintained in good condition by Hungary. Taking account of these

(101) *Ibid.*, at 41-46.
(102) *Ibid.*, at 183.
(103) *Ibid.*, at 183-189.

facts, in respect of suspension of the works at Dunakiliti, he concluded as follows:

> "Although the circumstances prevailing on that site do not entirely relieve Hungary of its responsibility, they do nonetheless provide some mitigation which the Court should have taken into account."(104)

From this point of view, he voted for paragraph 2D of the judgment which held that both States were obliged to compensate.(105)

As shown above, relying entirely on the provision of the state of necessity (article 33) in the ILC Draft Articles on State Responsibility on first reading, the Court accepted that a state of necessity is a circumstance precluding wrongfulness under customary international law. Certainly, this decision might have been facilitated by the fact that, in this case, the Parties had been in agreement in considering that the existence of a state of necessity must be evaluated in the light of the criteria laid down in article 33.(106) Yet it is epoch-making that the Court expressly and assertively regarded a state of necessity as "a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation."

At the same time, it is interesting that Judge Herczegh classified a state of necessity as a circumstance precluding or mitigating responsibility. In his view, the degree of responsibility would be decided by taking account of relevant facts and reflected in the amount of compensation.

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(104)　*Ibid.*, at 189.
(105)　*Ibid.*, at 83.
(106)　*Ibid.*, at 39.

15. The Fisheries Jurisdiction (Spain v. Canada) case (1998)[107]

On 9 March 1995, the *Estai,* a fishing vessel flying the Spanish flag and manned by a Spanish crew, was intercepted and boarded some 245 miles from the Canadian coast, in the Northwest Atlantic Fisheries Organization (NAFO) Regulatory Area, by Canadian Government vessels. The vessel was seized and its captain was arrested on charges of violations of the Coastal Fisheries Protection Act and its implementing regulations. On 10 March the Canadian Government stated that "[t]he *Estai* resisted the efforts to board her made by Canadian inspectors in accordance with international practice" and that "the arrest of the *Estai* was necessary in order to put a stop to the overfishing of Greenland halibut by Spanish fishermen."[108]

Before the ICJ, the Canadian Government, in addition to arguing the lack of jurisdiction of the Court, with a view to justifying its actions, also asserted that:

> "[T]he background to the legislation was the fisheries crisis of the early 1990s. Canada had faced the successive collapse of one after another of the commercial fish stocks off its Atlantic coast. ... Faced with a conservation crisis, and unfortunately unable to persuade all States involved to control their vessels, the Canadian Government felt compelled to take special measures to conserve the fisheries. ... Since diplomatic approaches had failed to prevent this unilateral EU action, Canada felt compelled to take emergency actions to prevent the over-

(107) *Fisheries Jurisdiction* (*Spain v. Canada*), *Jurisdiction of the Court, Judgment,* I.C.J. Reports 1998, p. 432. This case has been cited in *Crawford Report* para.285.; *2001 Report* 200-201.

(108) *Fisheries Jurisdiction, supra* note 107, at 443.

> fishing of Greenland halibut by Spain and Portugal. ... Despite Canada's continued efforts to address the conservation crisis in co-operation with all States concerned, it had become clear that Spanish and Portuguese vessels were prepared to far exceed even the quotas allocated by NAFO. ... Canada therefore felt compelled to enforce its conservation and management measures against Spanish vessels in the NAFO Regulatory Area."(109)

In contrast, Spain mentioned that "Canada even suggest[ed] the existence of a kind of state of environmental necessity or of also environmental preventive self-defence," and asserted:

> "As regards the suggestion of a hitherto unheard of preventive self-defence, or of a conservationist state of necessity, said in fact to be circumstances precluding wrongfulness, that has nothing to do with Articles 33 [State of necessity] and 34 [Self-defence] of the draft of the International Law Commission ... ."(110)

The Court held that it had no jurisdiction to adjudicate upon the dispute brought before it on the grounds that it came within the terms of the reservation contained in paragraph 2 (d) of the Canadian declaration of 10 May

(109) *Oral Argument of Blair Hankey,* 11 June 1998, CR 98/11, paras.73-77., I.C.J. Pleadings, Fisheries Jurisdiction (Spain v. Canada) 516-517.

(110) *Oral Argument of Sánchez Rodríguez,* 15 June 1998, CR 98/13, para.6., I.C.J. Pleadings, Fisheries Jurisdiction (Spain v. Canada) 567. Furthermore, Spain invoked as precedent for its argument the decision of the *Fur Seal* case in which, as well as in this case, the capture with the purpose of the fisheries regulation had been in question and the plea by the captor had been rejected. (*ibid.*)

1994. Therefore, it did not proceed to the merits and arguments such as that of a state of necessity. However, as quoted above, although Spain did not approve of the argument of the state of ecological necessity, it implicitly approved of the principle of a state of necessity as provided for in article 33 of the ILC Draft Articles on first reading. All Spain wanted to assert is that ecological protection not be covered by the principle of the state of necessity.(111) Therefore, both States approved of the principle of the state of necessity itself, although they were in disagreement concerning its scope.

16. The M/V "SAIGA" case (No. 2) (1999)(112)

On 28 October 1997 Guinean patrol boats arrested off the coast of West Africa the oil tanker M/V "SAIGA" flying the flag of Saint Vincent and the Grenadines. Guinea claimed that the M/V "SAIGA" was engaged in smuggling activities off its coast when arrested. To justify the exercise of its jurisdiction in the exclusive economic zone (EEZ), Guinea asserted the following right as one of "other rules of international law (UNCLOS Article 58 paragraph 3)":

(111) In the sixth committee of the U.N. General Assembly, the Spanish delegation agreed with the Special Rapporteur and the Commission on maintaining the restrictive character of recourse to the state of necessity set forth in article 33 of the 1996 draft. Nonetheless, he wished to draw attention to the reference to the *Fisheries Jurisdiction* (*Spain v. Canada*) case, discussed in paragraph 285 of the 2nd report of the Special Rapporteur. In that case, the arrest of a Spanish vessel on the high seas and by force, in his view, could in no way be justified by the state of necessity, and the case in question should not be mentioned in the commentary on article 33. (*The Sixth Committee, Summary record of the 21st meeting, on Friday 29 October 1999,* A/C.6/54/SR.21, para.21.)

(112) *The M/V "SAIGA" (No. 2)* (*Saint Vincent and the Grenadines v. Guinea*), *ITLOS, judgment of 1 July 1999,* 38 I.L.M. 1323 (1999).

> "Guinea alleged that it has an inherent right to protect itself against unwarranted economic activities in its exclusive zone that considerably affect its public interest."(113)

As evidence, Guinea invoked the argument of Great Britain in the *Corfu Channel* case: that the British minesweeping operation in the Albanian territorial waters was justified as an act of self-help. It asserted that, although the Court had rejected the British argument in the light of the particular facts, it had not denied the argument in principle. It then continued that "the same principle has been recognized as the doctrine of necessity in general international law," and invoked the provision of the "state of necessity" proposed by the Special Rapporteur Roberto Ago in his eighth report on State responsibility to the ILC.(114)

Having divided these Guinean arguments into that of "public interest" or "self-protection" and that of "state of necessity," the Tribunal rejected the first plea on the grounds that:

> "In the view of the Tribunal, recourse to the principle of "public interest", as invoked by Guinea, would entitle a coastal State to prohibit any activities in the exclusive economic zone which it decides to characterize as activities which affect its economic "public interest" or entail "fiscal losses" for it ... this would be incompatible with the provisions of articles 56 and 58 of the Convention regarding the rights of the coastal State in the exclusive economic zone."(115)

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(113) *Republic of Guinea, Counter-Memorial,* 16 October 1998, para.112.

(114) *Ibid.*

(115) *The M/V "SAIGA" (No. 2), supra* note 112, at 1351.

As to the latter plea, the Tribunal, referring to the judgment of the *G/N Project* case and article 33 of the ILC Draft Articles on first reading, rejected it. It pointed out that:

> "No evidence has been produced by Guinea to show that its essential interests were in grave and imminent peril. But, however essential Guinea's interest in maximizing its tax revenue from the sale of gas oil to fishing vessels, it cannot be suggested that the only means of safeguarding that interest was to extend its customs laws to parts of the exclusive economic zone."[116]

The Tribunal addressed the issues of right of self-preservation and state of necessity. As regards the former, the Tribunal took the negative view. On the other hand, as regards the latter, it held that the conditions laid down in the judgment of the *G/N Project* case, in which the provision of state of necessity in the ILC Draft Articles had been accepted as rule of customary international law, were not met in this case. However, the Tribunal approved of the principle of the state of necessity itself.

17. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion (2004)[117]

On 10 December 2003 the UN Secretary-General officially communicated to the ICJ the decision taken by the General Assembly to submit the question set forth in its resolution, adopted on 8 December 2003 at its Tenth

(116) *Ibid.*, at 1352

(117) *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion,* I.C.J. Reports 2004, p. 136.

Emergency Special Session, for an advisory opinion. The question was the following:

> "What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?"[(118)]

The Court found the construction illegal on the grounds that the conduct contradicted several obligations under customary international law and treaties to which Israel is a party.[(119)] In addition, it went on to consider the question as to whether the conduct could be justified by the exception of a state of necessity. With regard to this issue, it observed that:

> "As the Court observed in the case concerning the *Gabcíkovo-Nagymaros Project* (*Hungary/Slovakia*), "the state of necessity is a ground recognized by customary international law" that "can only be accepted on an exceptional basis"; it "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" (*I.C.J. Reports 1997,* p. 40, para. 51). One of those conditions was stated by the Court in terms used by the International Law Commission, in a text which in its present form requires that the act being chal-

(118)　*Ibid.*, at 141.
(119)　*Ibid.*, at 181-194.

> lenged be "the only way for the State to safeguard an essential interest against a grave and imminent peril" (Article 25 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts; see also former Article 33 of the Draft Articles on the International Responsibility of States, with slightly different wording in the English text). In the light of the material before it, the Court is not convinced that the construction of the wall along the route chosen was the only means to safeguard the interests of Israel against the peril which it has invoked as justification for that construction."[120]

The Court concluded that, in this case, the conditions for a state of necessity had not been fulfilled. However, we should notice that it recognized the principle of the state of necessity in article 25 adopted by the ILC in 2001 as a rule of customary international law.

Concluding remarks

The study of international judicial cases in this paper leads to the following three remarks.

First, in respect of the doctrine of the state of necessity, no coherent body of jurisprudence can be found in international judicial cases prior to the early 1990s.

On the one hand, the doctrine was affirmed in the *Russian Indemnity* case, and that decision was cited by the parties in subsequent cases (the «*Société commerciale de Belgique*» case and the case concerning *Rights of Nationals of the United States of America in Morocco*). Moreover, in the *Corfu Channel*

(120) *Ibid.*, at 195.

case, while the ICJ dismissed the plea of the U.K. to justify its navy's operation, the Court (also Judge Krylov and Judge Azevedo) did not deny the principle of necessity as a defense against conduct not in conformity with international obligations other than article 2 paragraph 4 of the U.N. Charter.

On the other hand, the doctrine was categorically dismissed in the *Rainbow Warrior* case. Furthermore, in the *LAFICO* case, the arbitral tribunal, in respect of the question as to whether Burundi's measure was a breach of article 15 of the 1975 Agreement, deliberately avoided making an appraisal of the ILC provision of state of necessity in view of the fact that the doctrine laid down therein had been a problem under debate.

In addition, it is doubtful whether, in the rest of the cases, the courts and the tribunals have supported the doctrine of the state of necessity. The doctrine of the right of self-preservation was mentioned in the *Neptune* case and the *Company General of the Orinoco* case. This doctrine of self-preservation is not necessarily identical to the positivist legal concept of necessity as provided for in article 25 of the ILC's Articles and was criticized in the *Fur Seal* case and the *M/V "SAIGA"* case (No. 2). In the *French Company of Venezuela Railroads* case, the umpire denied responsibility on the grounds of absence of the subjective element for responsibility or the right of self-preservation. In the case concerning *the Payment of Various Serbian Loans Issued in France,* it is not necessarily obvious whether the Court addressed a "general" exception which can apply to failures of obligations other than debts.

Moreover, in the case concerning *Right of Passage over Indian Territory,* although the danger to internal security was in question, the doctrine of state of necessity was not discussed since the Court found the rejection of passage was within the Indian sovereign right. Nor was the doctrine discussed in respect of the question concerning the expulsion order in the

LAFICO case, in which the tribunal found that the question of expulsion due to a state of necessity was covered by the particular rule of expulsion established under customary international law.

Among individual opinions of judges and the parties' arguments, Judge Anzilotti clearly, in the *Oscar Chinn* case, recognized the general exception of state of necessity. Yet, in the «*Société commerciale de Belgique*» case, I doubt whether both parties regarded a state of necessity as a general exception which could be applied in situations other than financial crises or to failures of international obligations other than debts. In addition, in the case concerning *Rights of Nationals of the United States of America in Morocco,* both parties appear to have discussed, not the doctrine of state of necessity, but the exception of force majeure which was afterwards provided for in article 23 of the ILC's articles adopted in 2001.

Second, it follows from the preceding observations that, especially since 1997 and the judgment of the *G/N Project* case, there has been a definite tendency for international courts and tribunals to regard the exception of the state of necessity as a rule of customary international law.

This tendency is shown in the *M/V "SAIGA"* case (No. 2) and the Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. In the *Fisheries Jurisdiction* (*Spain v. Canada*) case, as well, the parties were in agreement concerning this principle.

It goes without saying that this acceptance is a result of the ILC's work. The fact that the decision on the question of the state of necessity in the *G/N Project* case was invoked by the ILC results in "[a]n intriguing "feedback loop" between the ILC and the ICJ"[121] with respect to the doctrine of the

(121) To borrow Professor Bederman's phrase. David Bederman, *Counterintuiting Countermeasures,* 96 Am. J. Int'l. L. 818, 822 (2002).

state of necessity.(122)

(122) In connection with interdependence between the ICJ and the ILC, another question will arise as to the scope of "an essential interest" to be safeguarded against a grave and imminent peril. Article 33 of the ILC Draft Articles on first reading had provided "an essential interest of the State," whereas the reference to "of the State" was dropped in article 25 adopted in 2001. It shows that not only interests of a State but also interests of its people as well as of the international community as a whole are covered by the rule. (*2001 REPORT* 202.) However, in the *G/N Project* case, the ICJ cited article 33 on first reading, stating that, in customary international law, an interest to be safeguarded by the exception of a state of necessity is an essential interest *of a State*. While the Court mentioned the importance of environmental protection for the whole of mankind, it clearly embraced the idea of limiting the interests to be safeguarded to those of States. It stated:

"The Court has no difficulty in acknowledging that the concerns expressed by Hungary for *its* natural environment in the region affected by the Gabcíkovo-Nagymaros Project related to an "essential interest" *of that State,* within the meaning given to that expression in Article 33 of the Draft of the International Law Commission." [italics added] (*Gabcíkovo-Nagymaros Project, supra* note 95, para.53.)

At the very least, the Court did not recognize that a State could invoke the exception of a state of necessity against environmental harm which was not expected to reach the State's territory at all. In addition, in the *Fisheries Jurisdiction* (*Spain v. Canada*) case, the Spanish Government, while approving of the content of article 33 on first reading, protested the argument that a state of ecological necessity was within the scope of the article. This also suggests that the scope of the interests to be safeguarded may be limited.

It is true that decisions in future judicial cases might be influenced by the new provision - article 25 - to the effect that invocation of a state of necessity by a State in the case concerning environmental harm altogether outside the State's territory is accepted. (In the advisory opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* the ICJ did not pay attention to this problem since the interest in question was only Isra el's.) However, in view of the history of abuse of this doctrine, which has been

Finally, a State which relies on the exception of state of necessity can still have an obligation to pay compensation for actual loss suffered by others. In the *G/N Project* case, the Court noted that Hungary had expressly acknowledged that a state of necessity would not exempt it from its duty to compensate its partner. Judge Herczegh classified a state of necessity as a circumstance precluding or mitigating responsibility. Even when a state of necessity exists, an obligation to provide a certain amount of compensation, in his view, can be imposed in some circumstances on the grounds that the state of necessity only mitigates part of responsibility.(123) Furthermore, in the *Neptune* case, although the doctrine of right of self-preservation was in question, one of American commissioners, William Pinkney, mentioned an obligation to pay compensation.

This paper has been considering international judicial cases. Other neces-

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one of main reasons for criticism, the question still remains as to the expansion of the scope of "an essential interest." The Austrian delegation to the sixth committee pointed out that the deletion of "of the State" entailed major consequences as it broadened the article's scope of application, and the changes in wording of article 33 should be examined carefully in view of their far-reaching effects and the potential for abuse. (*The Sixth Committee, Summary record of the 22nd meeting, on Monday 1 November 1999,* A/C.6/54/SR.22, para.16.)

(123) Professor Crawford pointed out that, although a State might invoke necessity as a reason for its action, there was no reason for it to require the other innocent State to bear the costs. (*supra* note 6, at 174.) He stated that, as for state of necessity, a State which invoked a state of necessity ought to bear the financial consequences, at least to the extent that was equitable or appropriate. He therefore argued very strongly that, at least in cases where circumstances precluding wrongfulness were an excuse rather than a justification, i.e. those which might be classified as cases of circumstances precluding responsibility, the Draft Articles should expressly envisage the possibility of compensation. (*ibid.,* at 143.)

sary study such as that of State practice will be dealt with in the forthcoming paper.