

Traditional non-acceptance of the general emergency exception in international law

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Introduction

Domestic laws in many countries provide for general emergency exceptions, such as the defence of necessity in criminal law. In international law, however, the doctrine of the general emergency exception has long been criticised. This criticism is understandable, given its potential for abuse as a pretext for wrongful conduct in the decentralized international society that lacks objective adjudicating organs.

It may sound paradoxical, but it is due to the structure of the international society that emergency exceptions are required.⁽¹⁾ Specifically, emergency exceptions are expected to operate to ensure the rule of law in cases of emergency. It is a fact that State emergencies can occur, and the maxim ‘*summum ius, summa iniuria*’ applies not only to domestic laws but also to international law. Without emergency exceptions in international law, States in emergencies may, especially from the realist point of view, choose

(1) Sarah Cassella, *La nécessité en droit international: De l'état de nécessité aux situations de nécessité* (2011), pp. 10, 515-516.

inevitably to make light of or ignore international legal rules that prohibit dealing with appropriate situations. In this case, there is a danger that the maxim '*Necessitas non habet legem*' will turn into reality. The absence of emergency exceptions would not cause their abuse, but might bring about a more serious problem: a disregard of international law by States in emergencies. For this reason, emergency exceptions are indispensable to keep them willing to remain regulated by international law. In other words, the existence of emergency exceptions would contribute to ensuring the international rule of law.⁽²⁾

From this view, apparently, a remarkable example of the development of emergency exceptions is Article 25 ('Necessity') of the Articles on Responsibility of States for Internationally Wrongful Acts that the UN International Law Commission (ILC) adopted and the UN General Assembly took note of in its resolution. This provision states as follows:⁽³⁾

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 com-

(2) See Paul Weiden, *Necessity in International Law*, *Transactions of the Grotius Society*, Vol. 24 (1938), pp. 131-132; Théodore Christakis, *L'Etat avant le droit? L'exception de "sécurité nationale" en droit international*, *Revue Générale de Droit International Public*, Vol. 112 [2008/1] (2008), p. 8.

(3) Responsibility of States for internationally wrongful acts, A/RES/56/83 (28 January 2002).

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

The article sets forth the necessity defence as one of the causes precluding wrongfulness. Before that time, in 1997, the International Court of Justice (ICJ), referring to the previous draft, Article 33,⁽⁴⁾ stated in the *Gabcikovo-Nagymaros Project* case: ‘[T]he 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.’⁽⁵⁾

(4) 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:

- (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.

(5) *Gabcikovo-Nagymaros Project* (Hungary/Slovakia), Judgment, *I. C. J. Reports 1997*, para. 51, p. 40.

On the other hand, given the history of severe criticism for the doctrine of the general emergency exception in international law, I worry about this current trend. The primary reason why the general emergency exception has been criticised is the potential for abuse. The most effective way to deter abuse of a legal norm or concept is to establish objective adjudicating organs to provide thoughtful interpretations. However, these organs have not been sufficiently established under the existing circumstances of international society. Given this reality, I feel there is a need to pay careful attention to Article 25, which is formulated as the ‘general’ rule applicable to basically every international obligation. The need for emergency exceptions does not mean immediately and inevitably the need for the ‘general’ defence of necessity. For example, Brownlie stated that ‘necessity as an omnibus category probably does not exist’⁽⁶⁾, rejecting the general defence of necessity. Heathcote points out the difficulty in recognizing *opinio juris* of the general defence of necessity.⁽⁷⁾ Likewise, Sloane asserts that, contrary to necessity operating as ‘a primary rule’ in a particular field, ‘[n]either the existence nor the normative appeal of such a secondary rule [of necessity] in contemporary international law is clear.’⁽⁸⁾ Desierto also insists that ‘it is difficult to draw, with scientific precision, a universally applicable definition of the international law of necessity.’⁽⁹⁾ Given these opinions, we should consider with great care whether the ‘general’ defence of necessity has really been ac-

(6) Ian Brownlie, *Principles of Public International Law* (6th ed., 2003), p. 448.

(7) Sarah Heathcote, Est-ce que l'état de nécessité est un principe de droit international coutumier?, *Revue belge de droit international*, 2007/1 (2007), p. 78.

(8) Robert D. Sloane, On the Use and Abuse of Necessity in the Law of State Responsibility, *American Journal of International Law*, Vol. 106 (2012), p. 451.

(9) Diane A. Desierto, *Necessity and National Emergency Clauses: Sovereignty in Modern Treaty Interpretation* (2012), p. 59.

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 cepted by States.

On the basis of these thoughts, I will, in this article, examine whether the general defence of necessity had been established as a customary rule of international law prior to the *Gabcikovo-Nagymaros* case.

Before turning to the examination of this question, a few remarks should be made concerning several terms used in this article. An ‘emergency exception’ is a rule that, because of a state of emergency, denies or restricts the occurrence of responsibility of a State whose conduct is not in conformity with its international obligation. It consists of two types. First is a ‘specific emergency exception’ that applies only to a particular field of international law; and the second is a ‘general emergency exception’, which basically applies to all international obligations. Furthermore, when a general emergency exception is invoked as a defence, not a right, it is called ‘the necessity defence’ or ‘necessity’. Specific emergency exceptions can include rules that primarily apply to normal situations if they are also applicable to an emergency.

Chapter 1 Non-acceptance of the general emergency exception in past international practice

1. State practices

As the table shows, a number of international practices were considered during discussions on the general defence of necessity in the ILC.

Assessment of International Practices in the ILC							
○=contributory to the creation of necessity defence; ×=not contributory; / =irrelevant to necessity; ! =abuse of necessity; △=no assessment; number=paragraph no. in which reference to necessity is made; bold=practices examined in detail in this article							
Year	State practices	Judicial or quasi-judicial decisions	García-Amador, 3rd Report, Ch.6 ⁽¹⁰⁾	Ago, Ad-dendum to 8 th Report ⁽¹¹⁾	Art. 33 (on 1 st reading) Commentary ⁽¹²⁾	Crawford, 2 nd Report ⁽¹³⁾	Art. 25 Commentary ⁽¹⁴⁾

1797		The Neptune	○ 14	○ 47-48			
1832	Portugal's appropriation of the property of British subjects			○40	○18	△279	○ 4
1837	The Caroline			○ 57	○24	△280	○5
1846	Annexation of Free City of Krakow by Austria			! 55	! 22		
1870	Annexation of Rome by Italy			! 55	! 22		
1873	The Virginius			/46			
1893	Russia's actions to prohibit sealing			○33	○14	△279	○6
1893		Fur seal (<i>UK v. US</i>)		○34			
1904	Occupation of Korea by Japan during the Russo-Japanese war			! 55	! 22		
1905		Company General of the Orinoco		○39	○17	△279	
1905		Venezuelan Railroads		○26	○12		○8
1908	Annexation of Bosnia-Hercegovina by Austria-Hungary			! 55	! 22		
1912		Russian		○22	○7	△279	○7

- (10) Francisco V. García-Amador, Third Report on State Responsibility, A/CN.4/111 (1958), *Yearbook of the International Law Commission 1958*, Vol. II, pp. 50-55.
- (11) Roberto Ago, Addendum to the eighth report on State responsibility, A/CN.4/318/Add.5-7 (1980), *Yearbook of the International Law Commission 1980*, Vol. II, Part 1, pp. 13-51.
- (12) Report of the International Law Commission on the work of its thirty-second session (5 May—25 July 1980), A/35/10 (1980), *Yearbook of the International Law Commission 1980*, Vol. II, Part 2, pp. 34-52.
- (13) James Crawford, Second Report on State Responsibility, A/CN.4/498 and Add.1-4 (1999), *Yearbook of the International Law Commission 1999*, Vol. II, Part 1, pp. 3-100.
- (14) Report of the International Law Commission on the work of its fifty-third session (23 April-1 June and 2 July-10 August 2001), A/56/10 (2001), *Yearbook of the International Law Commission 2001*, Vol. II, Part 2, pp. 80-84.

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		Indemnity					
WWI	Occupation of Luxembourg and Belgium by Germany			! 55	! 22	! 280	! 2
	Occupation of certain Greek territories by the Entente Powers			! 55	! 22		
1923		PCIJ The Wimbledon		○ 44	○21		
1926		Properties of the Bulgarian minorities in Greece		○32	○13	△279	
1929		PCIJ Serbian Loans		○27	○12		○8
1933	Forests of Central Rhodope			○23	○7	△279	○7
1934		PCIJ Oscar Chinn, Anzilotti Opinion	○10	○41	○19	△279	○8
1936	Annexation of Ethiopia by Italy			! 55	! 22		
1939		PCIJ Société commerciale de Belgique		○ 28-31	○10-12	△279	○8
WWII	Occupation by Germany of Denmark, Norway, Belgium & Luxembourg; by Germany & Italy of Yugoslavia & Greece			! 55	! 22		
	Occupation of Iceland by the UK			! 55	! 22		
	Occupation of Iran by the UK & Soviet Union			! 55	! 22		
	Occupation of Portuguese Timor by the Netherlands & Australia			! 55	! 22		
		Armstrong Cork Company		/46			
1952		ICJ US Nationals in Morocco		○ 42-43	○20		
1960	Belgian intervention in the Congo			△64	△25	△281	△ 21
1964	Belgian intervention in the Congo			/64	/26		
1967	The Torrey Canyon			○35	○15	△279	○9
1976	Raid on Entebbe			/65	/26		

	by Israel						
1977	Raid on Mogadishu by West Germany			/65	/26		
1978	Raid on Larnaca by Egypt			/65	/26		
1990		The Rainbow Warrior				×285	×10
1991		LAFICO				△285	△10
1997		ICJ Gabčíkovo-Nagymaros				○286	○11
1998		ICJ Fisheries Jurisdiction				△287	△12

The table makes it clear that more than a few cases mentioned in the ILC are the ones in which a State in an armed conflict, for strategic reasons, infringed upon neutral States' rights. The most famous case is the occupation of Luxembourg and Belgium by Germany in 1914 when the German chancellor insisted that '*Not kennt kein Gebot!*'⁽¹⁵⁾ These cases have been generally criticised. Yet, we should not take a negative attitude toward the existence of the necessity defence rule by merely glancing at them, because they were criticised also in the ILC as examples of abuse of necessity.

Therefore, there is a need to make careful consideration of the practices that have continuously been assessed as contributing to the creation or existence of the necessity defence rule. They consist of the following five practices: Portugal's appropriation of the property of British subjects (1832), the *Caroline* (1837-42), the prohibition of fur seal fisheries by Russia (1893), the forests of Central Rhodope (1933), and the *Torrey Canyon* (1967). Are these practices really contributory to the creation of the necessity defence?

(15) Th. Niemeyer and K. Strupp, *Jahrbuch des Völkerrechts*, III. Band (Sonderband): Politische Urkunden zur Vorgeschichte des Weltkrieges (1916), p. 728.

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1) Portugal's appropriation of the property of British subjects

(1832)

This incident is very old, but the ILC has continuously attached great importance to the letter of His Majesty's Advocate-General regarding the incident. The Special Rapporteur Roberto Ago cited the letter, saying '[d]espite its age, this case is ... a particularly sound precedent, mainly because the two parties were agreed on the principles enunciated and hence on express recognition of the validity of the plea of necessity where the conditions for it are fulfilled.'⁽¹⁶⁾ The same sentence is included in the commentary of the previous draft Article 33.⁽¹⁷⁾ Then, the commentary of Article 25 also cites the letter as one of 'substantial authority in support of the existence of necessity as a circumstance precluding wrongfulness.'⁽¹⁸⁾

The facts of this incident are as follows.

Great Britain concluded a treaty of comity and commerce with Portugal, which had practically become a British protectorate in 1808. When a civil war, which started in 1828, began to cause damage to British nationals in Portugal, the British Consul General in Lisbon, Richard Belgrave Hoppner, became significantly involved in claims for damages against the Portuguese Government on behalf of the complainants. One of these claims was for a British merchant, William Payant, in April 1832. According to the claim, a certain portion of wine he owned was appropriated by the Corregidor of Alcobaca to be used by the Government Army.

In response to the claim, the British Consul immediately sent the letter dated 20 April 1832 to the Portuguese minister, the Viscount de Santarem, requesting him to take immediate steps such as restitution and compensa-

(16) Ago, Addendum to the eighth report, *supra* note 11, p. 30, para. 40.

(17) Report of the ILC 1980, *supra* note 12, pp. 40-41, para. 18.

(18) Report of the ILC 2001, *supra* note 14, pp. 80-81, paras. 3-4.

tion. In his reply dated 9 May, the minister stated that the British citizen had not shown any legal document to prove his ownership; in other words, at the beginning, he attempted to justify the appropriation by arguing that the wine was not deemed the property of the British citizen.

Then, the Consul claimed again to the minister by a letter on 14 May and, as he did not receive any reply, again on 28 September.⁽¹⁹⁾

In the letter dated 5 November, the Portuguese minister admitted that the appropriated wine had been purchased by the British citizen, withdrawing the accusation of non-ownership. Instead, he wrote as follows:

‘[T]he Rights or Principles claimed by Mr. Payant and other Englishmen ... to exempt from Embargoes for the use of the Army the Articles of Commerce and of chief necessity which they purchase in this Country ... are incompatible with the essential Rights of the Sovereignty of the State, whose primary law is that of providing for its security and preservation by availing itself for this purpose of all the means and resources existing within the limits of its territory.

As therefore *public necessity* (well known to all the world) requires those Embargoes to be made to provide for the subsistence of the National Army in the struggle in which it is now engaged against a foreign aggression, no Wines or Provisions of primary necessity found within the Portuguese Territory, whether possessed by Natives or Foreigners, can be so exempt: it being to be understood, that all Individuals, without exception, living and possessing Property within the limits of any State, live under this *Law of Necessity* ...’⁽²⁰⁾ (italics added for emphasis)

(19) The four letters are enclosed in Hoppner to Palmerston, 6 November 1832, FO/63/389, No. 185.

(20) Visconde de Santarem to Hoppner, 5 November 1832, *enclosed in*

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sis).

In this letter, he argued that the appropriation could be justified under the 'Law of Necessity'.

The Consul General severely criticised the argument of the 'Law of Necessity' in his letter of 8 November:

'Personal safety and the security of private property are the basis on which all society is founded, and their attainment the principle of all legislation.—The pretension now advanced by Y. E. is a departure from this principle, and is ... an infraction of the rights and immunities which the British Govt. with a provident care for the Welfare of its subjects in foreign States has secured to the latter by express stipulations in in their treaties with Portugal. ...

But Y. E. says that the notorious wants of the State give you a right to seize any Merchandize and goods of primary necessity even though they belong to foreigners residing in the Country. What, I would ask, have these foreigners, what in particular have H. B. M. Subjects to do with the wants of the Govt. of Portugal, and why are they to be made to contribute to its support?... Y. E. however would derive this right from the law of necessity. *In Jurisprudence there is no such law: the law of Necessity is the law of Anarchy...* Such a law would sap and undermine the ground work of all society, and so far from having that universal existence which Y. E. asserts it is the object of all legislation to prevent such a return to a state of primitive barbarism'⁽²¹⁾ (italics added).

Hoppner to Palmerston, 6 November 1832, in FO/63/389, No. 185.

(21) Hoppner to Visconde de Santarem, 8 November 1832, *enclosed in* Hoppner to Palmerston, 8 November 1832, in FO/63/389, No. 190.

On 19 November, the Portuguese minister argued back against the criticism of the ‘Law of Necessity’, saying:

‘It remains for me to reply to the strange assertion which you advance that “the law of Necessity is that of Anarchy.”

The law of the Necessity of the State has never hitherto been controverted: it is not only consigned in the writings of all publicists, but suggested by the conviction that not only societies but even individuals ought to employ every means to defend their existence⁽²²⁾ (italics added).

Meanwhile, the Consul demanded an instruction to the British Foreign Secretary, Lord Palmerston.⁽²³⁾ Then, Lord Palmerston requested an opinion to His Majesty’s Advocate-General, Herbert Jenner. It is his reply dated 22 November that has been cited by the ILC:

‘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 ... 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

(22) Visconde de Santarem to Hoppner, 19 November 1832, *enclosed in* Hoppner to Palmerston, 19 November 1832, FO/63/389, No. 194.

(23) Hoppner to Palmerston, 6 November 1832, FO/63/389, No. 185; Hoppner to Palmerston, 19 November 1832, FO/63/389, No. 194.

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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.

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⁽²⁴⁾ (italics added).

It is true that in his letter, the Advocate-General seems to have accepted the argument of the “Law of Necessity” made by the Portuguese minister, which is no doubt the reason why the ILC has attached great importance to the letter.

However, what has to be noticed is that the opinion expressed in the letter is that of the Advocate-General. In order to find out the final position of the British Government, we must look into the instruction that the Foreign Secretary finally gave to the Consul General in Lisbon. From this view, we must draw particular attention to the letter from the Foreign Secretary to the Consul General dated 2 December:

‘I have to instruct you to renew in the most positive manner your de-

(24) Jenner to Palmerston, 22 November 1832, in FO/83/2323 (Portugal 1832–1836), No. 564, *reprinted in* Clive Parry (ed.), *Law Officers’ Opinions to the Foreign Office 1763–1860*, Vol. 57 (1970), pp. 74–76. This letter is also reprinted in Arnold D. McNair (ed.), *International Law Opinions*, Vol. 2 (1956), p. 231.

mand for the immediate restitution of any British property so detained and for compensation to the owners on account of any damage which such property may have sustained while sequestered, and for the value of any part of it which may not be at once restored.

H. M. Govt. cannot admit the doctrine set forth in M. de Santerem's letters of the 5th and 19th of Nov.—M. de Santerem contend that necessity, of which the Portuguese Govt. is to be the Judge, authorizes that Government to violate the Treaties between the two Countries, and to deal as it pleases, with the property of British subjects.

This doctrine is equivalent to saying that Treaties are binding so long only as it may suit the convenience and interests of both Parties to observe them, and that engagements, which are specifically intended to protect the subjects of the one against the violence and injustice of the other, are to cease to be obligatory, when the very case arises, which they were specially framed to provide against. If on the one hand the Portuguese army requires extraordinary contributions in Kind for its support, British subjects on the other hand are exempted by the stipulations of Treaties from being compelled to furnish such contributions, and *H. M.'s Govt. are determined not to permit the rights of British subjects to be violated by the Govt. of Portugal*⁽²⁵⁾ (italics added).

This passage makes it clear that, in contrast to the Advocate-General, the Foreign Secretary did not accept the argument made by the Portuguese Minister. Furthermore, in the letter dated 22 December, the Foreign Secretary again instructed the Consul General to claim to the Portuguese Government 'full and prompt compensation for the whole damage' suffered by

(25) Palmerston to Hoppner, 2 December 1832, FO/63/385, No. 57.

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the wine owner through ‘the unjustifiable proceedings’ of the Portuguese
(26)
Army.

Thus, it can be concluded that the Advocate-General’s opinion cited by the ILC actually ended up being merely his personal opinion. Therefore, the British Government’s attitude in this incident cannot be regarded as a precedent supporting the creation of the rule for the necessity defence.

2) *The Caroline incident* (1837-42)

The commentary of Article 25 mentions that this incident ‘really involved
(27)
the plea of necessity.’

On 29 December 1837, during the insurrection in Canada, British armed forces entered the United States territory, attacking and destroying a vessel, the *Caroline*, owned by American citizens. The vessel was carrying recruits and military materials to Canadian insurgents.

In his letter to the British Minister in Washington, Henry S. Fox, on 24 April 1841, the US Secretary of State Daniel Webster wrote:

‘It is admitted that *a just right of self-defence attaches always to nations as well as to individuals*, and is equally necessary for the preservation of both. But the extent of this right is a question to be judged of by the circumstances of each particular case, and when its alleged exercise has led to the commission of hostile acts within the territory of a Power at peace, nothing less than a clear and absolute necessity can afford ground of justification. . . . *It will be for that Government to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also, that the local*

(26) Palmerston to Hoppner, 22 December 1832, FO/63/385, No. 59.

(27) Report of the ILC 2001, *supra* note 14, p. 81, para. 5.

authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, *did nothing unreasonable or excessive; since the act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.* It must be shown that admonition or remonstrance to the persons on board the *Caroline* was impracticable, or would have been unavailing; it must be shown that day-light could not be waited for; that there could be no attempt at discrimination between the innocent and the guilty; that it would not have been enough to seize and detain the vessel; but that there was a necessity, present and inevitable, for attacking her in the darkness of the night, while moored to the shore, and while unarmed men were asleep on board, killing some and wounding others, and then drawing her into the current, above the cataract, setting her on fire, and, careless to know whether there might not be in her the innocent with the guilty, or the living with the dead, committing her to a fate which fills the imagination with horror. *A necessity for all this, the Government of the United States cannot believe to have existed*⁽²⁸⁾ (italics added).

Here, we notice that the United States admitted Great Britain enjoys 'a just right of self-defence', although it criticised the British forces' actions on the grounds that it did not fulfil the requirements for the right.

In his letter to the US Secretary of State on 28 July 1842, the British special envoy to the US, Lord Ashburton, having recognized the principle of territorial integrity, continued:

(28) *British and Foreign State Papers*, Vol. 29, pp. 1132-1133, 1138.

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‘[I]t is admitted by all writers, by all Jurists, by the occasional practice of all nations, including your own, that a strong overpowering necessity may arise, when this great principle [of the territorial integrity] may and must be suspended. It must be so for the shortest possible period, during the continuance of an admitted over-ruling necessity, and strictly confined within the narrowest limits imposed by that necessity. Self-defence is the first law of our nature ... Agreeing therefore on the general principle and on the possible exception to which it is liable, the only question between us is whether this occurrence came within the limits fairly to be assigned to such exception, *whether, to use your words, there was “that necessity of self-defence, instant, overwhelming, leaving no choice of means” which preceded the destruction of the Caroline*, while moored to the shore of the United States⁽²⁹⁾’ (italics added).

Here, we must notice that he entirely accepted the requirements the US Secretary of State had mentioned.

In his reply on 6 August 1842, the US Secretary of State agreed with the solution for this dispute:

‘[W]hile it is admitted on both sides that there are exceptions to this rule, he is gratified to find that your Lordship admits that such exceptions must come within the limitations stated, and the terms used in a former communication [on 24 April 1841] from this department to the British Plenipotentiary here.’⁽³⁰⁾

It is clear from these letters that both States were in accord on the require-

(29) *British and Foreign State Papers*, Vol. 30, p. 196.

(30) *British and Foreign State Papers*, Vol. 30, p. 201.

ments for self-defence.

Although the word ‘self-defence’ was used in the letters, some scholars have considered this incident to be a precedent of the necessity defence rather than self-defence. Specifically, as mentioned in details afterwards, several eminent scholars such as Oppenheim, Anzilotti, and Ago regarded as a typical example of necessity a military activity into a neighbouring State to suppress an armed group that was attempting cross border raids and was not expected to be suppressed by the State.⁽³¹⁾

Even so, the question of whether this incident may be regarded as a precedent of the necessity defence should be judged in light of subsequent practice—whether States have relied on necessity to justify their cross border mopping-up operations, especially since 1945 when self-defence was provided in Article 51 of the UN Charter. Thus, I will defer my final decision and return to it later.

3) Russia’s actions to prohibit sealing (1893)

Facing the danger of extermination of a fur seal population by unrestricted hunting in the Bering Sea, Russia began to arrest British fishing boats outside its 3-mile territorial sea. The commentary of Article 25 cites the letter sent from the Russian Minister of Foreign Affairs to the British Ambassador dated 12 February (24 February)⁽³²⁾ 1893. In this letter, the Russian Minister insisted on the need to prohibit sealing in a certain area of the high seas, specifically within zones of 10 miles from the Russian coasts and 30 miles

(31) Lasa F. L. Oppenheim, *International Law*, Vol. 1 (1st ed., 1905), pp. 178–179; Dionisio Anzilotti, *Corso di Diritto Internazionale, Volume Primo: Introduzione-Teorie Generali* (3rd ed., 1928), p. 452; Roberto Ago, *Le délit international, Recueil des cours de l’Académie de droit international de la Haye*, Vol. 68 (1939), p. 541.

(32) Report of the ILC 2001, *supra* note 14, p. 81, para. 6.

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around Komandorski and Robben islands. The minister explained the reason for extending the prohibition area beyond its territorial sea:

‘I think I should emphasize the essentially provisional character of the above-mentioned measures, which were taken under the pressure of exceptional circumstances and may be regarded as a case of *force majeure* and assimilated to cases of self-defence.’⁽³³⁾

Can we regard this incident as contributing to the creation of the necessity defence rule?

First, we should consider whether Great Britain accepted the Russian argument. It is true that, as a result of subsequent negotiations, Great Britain concluded with Russia an agreement that prohibited sealing in the zones Russia had proposed (Article 1) and allowed Russia to capture British boats disregarding the prohibition (Article 3)⁽³⁴⁾. However, we should pay attention to Article 7, which provides the following:

‘It is understood that the present Agreement relates solely to the year 1893. It has consequently no retroactive force or effect—more espe-

(33) M. Chichkine to Sir R. Morier, 24 (12) February 1893, *British and Foreign State Papers*, Vol. 86, pp. 218–220.

(34) Article 1: ‘During the year ending the 31st December, 1893, Her Britannic Majesty’s Government will prohibit British subjects from killing or hunting seals within the following limits: (a) Within a zone of 10 marine miles following the sinuosities of the Russian coasts which border on Behring Sea and any other part of the North Pacific Ocean. (b) Within a zone of 30 marine miles round the Komandorski Islands, and round Tulénew (Robben Island)’; Article 3: ‘British vessels engaged in killing or hunting seals within the aforesaid limits may be seized either by British or Russian cruisers...’ Clive Parry (ed.), *Consolidated Treaty Series*, Vol. 178, pp. 453–454.

cially as regards the British vessels captured previously by Russian cruisers.’

This article clearly shows that, while allowing capture of its vessels by Russian cruisers after the conclusion of the agreement, Great Britain did not deem justifiable any captures prior to that time. This position can be also found in a diplomatic document. While, on 17 March, the British Foreign Office expressed its willingness to enter into the agreement, it emphasised:

‘Her Majesty’s Government could not admit that Russia has therefore the right to extend her jurisdiction over British vessels outside the usual territorial limits.’

Furthermore, it accepted no retroactive effect of the agreement. Thus, Great Britain kept holding that the captures made before the agreement were illegal.

Second, and more importantly, we should pay attention to the position of the Russian Government. While the Government desired to conclude the agreement, noticeably, it did not rely on any general defences such as *force majeure* or necessity in order to justify its captures. It admitted the non-retroactive effect of the agreement. For example, in his letters on 18 April and 22 May, the Russian Minister of Foreign Affairs expressed his willingness to accept British positions including the non-retroactive effect.

(35) The Earl of Rosebery to Sir R. Morier, 17 March 1893, *British and Foreign State Papers*, Vol. 86, pp. 225-227.

(36) M. Chichkine to Sir R. Morier, 18 (6) April 1893, *British and Foreign State Papers*, Vol. 86, pp. 228-231.

(37) M. Chichkine to Mr. Howard, 22 (10) May 1893, Clive Parry (ed.), *Consolidated Treaty Series*, Vol. 178, pp. 454-456.

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It raises the question of how they attempted to justify their captures made prior to entering into the agreement. We should make note of the awards issued by the special committee set up by the decree of the Russian emperor; the committee was set up to adjudicate cases of arrests off the Russian territorial waters. While the committee rejected the obligation of the Government to indemnify to the owners and the crews of the vessels whose small boats were sealing within the Russian territorial waters, it admitted the obligation in other cases.⁽³⁸⁾ This means that, as legal grounds, the Committee relied on the right of hot pursuit based on the 'constructive presence' set forth later in Article 111 (4) of the United Nations Convention on the Law of the Sea (UNCLOS). In addition, the Russian Government also agreed with these awards. In his letter cited above, the Russian Minister said:

'These measures would be justified...by the fact that, while vessels remained 7 to 9 miles off the coast, their boats and their crews engaged in hunting on the coast as well as in the territorial waters.'

This shows that Russia regarded as a legal grounds for capturing British vessels the fact that, while having remained outside Russian territorial limits, they engaged in sealing within the limits by using small boats. Thus, the legal grounds Russia relied on to justify its capture of British vessels in the high seas was not necessity but its right of hot pursuit based on 'constructive presence'. Given this view, we doubt whether the Russian Minister intended to make a legal justification in his letter. We should find that the minister intended not to legally justify the past captures on the basis of necessity, but to express his political desire to make Great Britain un-

(38) Sir R. Morier to the Earl of Rosebery, 12 June 1893, *British and Foreign State Papers*, Vol. 86, pp. 235-248.

derstand the need to temporarily extend the prohibition beyond the territorial limits and reach an agreement allowing future captures.⁽³⁹⁾

As demonstrated above, Great Britain kept holding its view that the captures prior to the agreement had been illegal, and Russia did not rely on necessity for justification. We cannot, therefore, regard this incident as a precedent of necessity.

4) The Forests of Central Rhodope incident (1933)

In the arbitral award on 29 March 1933 in the case of the *Forests of Central Rhodope (Merits)* where the rights of Greek citizens in forests in the territory of Bulgaria had been infringed, Bulgaria was ordered to pay to Greece reparations totalling 475,000 gold leva, plus interest of 5 per cent from the date of the award.⁽⁴⁰⁾ However, as Bulgaria failed to comply with the award within the specified time, Greece appealed to the Council of the League of Nations on 6 September 1934 to propose the measures set forth in Article 13(4) of the Covenant of the League of Nations.

The representative of Bulgaria is reported to have stated the following before the Council:

‘M. BATOLOFF, representative of Bulgaria, said that *it was not the Bulgarian Government’s intention*, as might perhaps be supposed from the Greek Government’s action in asking for this question to be placed on the Council’s agenda (Annex 1516), *to evade the obligation* imposed upon it by the arbitral award in question. He confirmed, therefore, the statement that *his Government was prepared to discharge to Greece the*

(39) See Sloane, *supra* note 8, p. 467.

(40) *Affaire des Forêts du Rhodope Central (Fond)*, *Report of International Arbitration Awards*, Vol. 3, pp. 1405–1436 (1933).

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payment stipulated in the award. The present situation of the national finances, however, prevented the Bulgarian Government from contemplating a payment in cash. His Government was nevertheless prepared to examine immediately, with the Greek Government, any other method of payment which might suit the latter. In particular, *the Bulgarian Government would be able to discharge its debt by deliveries in kind*. He therefore ventured to point out to the Council that the only outstanding question in the matter at present before it was one of execution and not one of substance⁽⁴¹⁾ (italics added).

In this statement, with the excuse of its financial difficulties, Bulgaria requested Greece to accept an alternative form of payment, that is, deliveries in kind. At least in its understanding, Bulgaria was only attempting to change the form of repayment, not admitting that it disregarded its obligation; neither did it attempt to be exempted from its obligation nor justify the breach. Hence, it did not have the intension to invoke the defence of necessity.

Yet, objectively speaking, the unilateral change of the way to repay may be a breach of the obligation. This raises the question of how Greece reacted to Bulgaria's request. The representative of Greece is reported to have answered:

'M. Politis, representative of Greece, took note with satisfaction of the Bulgarian representative's statement that his Government was ready to discharge the debt incumbent upon it under the arbitral award. He

(41) Eighty-second Session of the Council of the League of Nations, (10 : 30 a. m., 19 September 1934), League of Nations, Official Journal, 15th year, No. 11 (Part I) (November 1934), p. 1432.

noted that the Bulgarian Government was proposing a settlement in kind. *The Greek Government*, taking into consideration Bulgaria's financial difficulties, *assented to that proposal* and was prepared to settle immediately, *in agreement with the Bulgarian Government*, the nature and quantity of the deliveries which it could conveniently accept in payment of its claim'⁽⁴²⁾ (italics added).

This passage makes it clear that, due to the financial difficulties in Bulgaria, Greece 'assented' to the proposal to settle in kind.

Thus, given that first, Bulgaria was of the view that it had acted in conformity with its obligation and, second, that Greece had voluntarily accepted the proposal to change the way of discharge, we should not regard this incident as a precedent of necessity.

5) *The Torrey Canyon incident (1967)*

On 18 March 1967, a supertanker chartered by British Petroleum (B. P.), the *Torrey Canyon*, was stranded on the high seas off the coast of Great Britain and a massive amount of oil began to flow out. While the owner of the tanker is a company of Liberian registry, the practical owner is its parent company, the Union Oil Company of California. Although detergent was dropped and salvage was attempted, these efforts were not successful and the oil finally began to drift ashore. Facing the deteriorated situation, the British Government finally decided to bomb the tanker aiming to burn away the oil. The bombing operations by the navy and air force lasted from 28 March to 30 March. The number of bombs and rockets they used reached 207.

(42) *Ibid.*

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While the ILC, in its commentary of Article 25, admits that '[t]he British Government did not advance any legal justification for its conduct', it points out that the Government 'stressed the existence of a situation of extreme danger and claimed that the decision to bomb the ship had been taken only after all other means had failed'⁽⁴³⁾. It seems to consider that the British Government virtually invoked necessity.

Now what we must consider is how the British Government actually explained the legal grounds of its bombing operation. The official position is expressed in the white paper issued on 4 April after the bombing operation ended. It says in paragraph 6:

'The overriding concern of the Government throughout has been to preserve the coasts from oil pollution and to adopt the course most likely to achieve this end. *Neither legal nor financial considerations inhibited Government action at any stage*'⁽⁴⁴⁾ (italics added).

Furthermore, it closes the paper by stating in the final paragraph (para. 46):

'The law relating to international shipping is highly complex and in a number of respects quite out of date. Formulation of proposals to improve its condition will be pressed forward with urgency.'⁽⁴⁵⁾

Only these two passages out of the entire paper of 10 pages reference legal

(43) Report of the ILC 2001, *supra* note 14, p. 82, para. 9.

(44) The 'Torrey Canyon', Presented to Parliament by the Secretary of State for the Home Department by Command of Her Majesty, Cmnd. 3246 (April 1967), p. 3.

(45) *Ibid.*, p. 10.

questions. Since the latter simply expresses the eagerness to make a new treaty, the former is only related to the legal appreciation of the bombing operation. What does it mean that no legal consideration ‘inhibited Government action at any stage’?

On the same day, the Prime Minister Harold Willison explained the white paper in the House of Commons:

‘At no time, if we had decided that action contrary to normal international law and practice were required, were we inhibited from doing so. . . . B. P. issued a Press statement on 3rd April saying: “We spoke to the Government authorities on the Sunday after the ‘Torrey Canyon’ grounded and suggested that if she could not be refloated, and they were satisfied regarding the legal considerations, she should be fired.” . . . but *we did not concern ourselves, as B. P. did, with the question of the legal considerations*⁽⁴⁶⁾’ (italics added).

We should pay attention in this passage to the words ‘we did not concern ourselves . . . with the question of the legal considerations.’ Given the explanation, the words ‘not inhibited’ in the white paper would mean that the government was not concerned with the legal considerations. On the other hand, he expressed his eagerness as follows to make a new treaty:

‘We are now urgently considering the proposals which are to be put before the meeting of the Inter-Governmental Maritime Consultative Organisation to ensure that new international regulations and any necessary changes in international law and practice can be pressed on with

(46) The Parliamentary Debates (Hansard), House of Commons, Official Report, 5th series, Vol. 744 (4-14 April 1967), pp. 42, 47-49.

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the urgency which is required.⁽⁴⁷⁾

Just as he said, in the third extraordinary session of the International Maritime Consultative Organization (IMCO) Council held in London one month later, the British representative proposed the draft of the Convention on measures in the high seas;⁽⁴⁸⁾ then, after discussions by the IMCO Legal Committee, the *International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties* was finally adopted in Brussels in November 1969.

As demonstrated above, while the British Government indicated its concern with making a new framework to regulate future actions against pollution, it emphasised its lack of concern with legal considerations on its bombing operations. Therefore, it ‘did not advance any legal justification for its conduct’ (the Commentary of Article 25), and more boldly, it went so far as to express its lack of concern with a legal justification. This attitude was so bold that it was criticised in the House of Commons on 10 April.⁽⁴⁹⁾

(48) IMCO Council, 3rd Extraordinary Session, Summary Record of the First Meeting (4 May 1967), 13 June 1967, C/ES.III/SR.1, p. 7, FCO 14/309 No. 75.

(49) Dr. David Owen (Plymouth, Sutton) criticised it, stating: ‘I am extremely concerned about paragraph 6 of the White Paper which says that: “Neither legal nor financial considerations inhibited Government action . . .” I read this to mean that the Government, having taken all due advice, took the decision irrespective of legal and financial considerations only because those considerations did not intrude. I hope, however, that the Government would take notice of legal implications in the normal course of events. I reject utterly the attitude that because one’s own shores are affected one can flout international law. It is absolute nonsense. I also find bitterly distasteful some journalist’s comments on these events, inciting the Government to do what they liked irrespective of international law. The Government are committed to uphold international law. If, in some cases, we feel bound to go against international law,

As a matter of fact, however, the Government internally discussed a legal justification for its operation. After careful consideration, nevertheless, it finally decided to intentionally adopt a contrary attitude, expressing its lack of concern with a legal justification. This decision was due to political reasons. In the Cabinet debate on the first draft of the white paper on 31 March, the Home Secretary said:

‘The Opposition were likely to allege that the Government had been slow to take action in the first few days of the emergency, and the draft White Paper should provide the answer to any criticism along these lines. . . . The section of the White Paper concerned with the attempt to refloat the TORREY CANYON *should emphasise that the Government’s actions were not determined by legal or financial consideration*⁽⁵⁰⁾’ (italics added).

Here, he claims that because the opposition party is expected to criticise the Government’s delay to bomb because it held firm to the attempt for salvage, the Cabinet should counter-argue in the white paper. Specifically, his opinion is that the Government should make it clear that the delay in bombing was not because it was bound by legal (and financial) considerations. This opinion stemmed from the harsh public opinions; people criticised that it was not until 10 days after the stranding that the Government started the

those cases are matters of political judgment, but in normal circumstances we should take every consideration, international and financial, into account. I hope that paragraph 6 does not mean that the Government did not consider international law . . .’ The Parliamentary Debates, *supra* note 46, pp. 801-802.

(50) Draft White Paper, Cabinet Meeting, Extract of Minutes of MISC 145 (67) 5th meeting held on 31 March 1967 at 3 : 00 p. m., DEFE 24/853, CAB 130/318.

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(51)
bombing operation. The Times, for instance, criticised the Government for delaying the bombing operation due to its excessive concern with obeying existing legal norms. For this reason, the Government supposed that, in order to get through expected criticisms from opposing parties, it should pre-
(52)
tend not to be concerned with legal considerations.

This makes it clear that the Government intentionally avoided making any legal justification. Therefore, given its intension, we cannot consider that the British Government virtually invoked necessity.

2. Judicial cases

The next question we should examine is whether the establishment of the necessity defence has been supported in international judicial cases. As the table above indicated, the cases prior to the *Gabcikovo-Nagymaros Project*

(51) The Times, in its editorial on 28 March, criticised the delay in taking action, arguing that the bombing operation, although being ‘undoubtedly illegal’ under the existing obsolescent law, would be consistent with ‘a principle which ought to be established’ (The Torrey Canyon Case, *The Times*, 28 March 1967). On 2 April, The Sunday Times ran a special feature on the last 11 days since the stranding, analysing the reasons why the Government’s decision to launch the bombing operation had been delayed (*The Sunday Times*, 2 April 1967). In The Times, letters from readers who criticised the delay in bombing had appeared (M. R. Nunns, *The Times*, 30 March 1967; Professor David H. N. Johnson (LSE), *The Times*, 31 March 1967). The editorial on 5 April, the day after the white paper was publicised, still deplored the delay (Busy But Improvident, *The Times*, 5 April 1967). Given that the cuttings of these articles have been collected in the file ‘Torrey Canyon — Press Comments’ in DEFE 13/521, it is evident that the Government was concerned about the tone of the press, especially of The Times.

(52) Hence, the criticism expressed in the House of Commons on 10 April as cited above surprised the Government. This miscalculation was expressed in the following letter. Gillian Brown (Foreign Office), Torrey Canyon: House of Commons Debate, 11 April 1967, FCO 14/323 No. 183.

case, which, in the view of the special rapporteurs and the ILC, supported the existence of the necessity defence, are as follows: the *French Company of Venezuelan Railroads* case, the *Russian Indemnity* case, the *Serbian Loan* case and the *Société commerciale de Belgique* case.⁽⁵³⁾

1) The French Company of Venezuelan Railroads case (1905)

The French Company of Venezuelan Railroads obtained a concession of railroad construction and operation from the Government of Venezuela in 1888. As a result of the emergence of revolutionary movements and the outbreak of a civil war at the end of the 1890s, the company suffered a wide range of damage from the troubled conditions. The umpire Frank Plumley, at the France-Venezuela Mixed Claims Commission, 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 laid down in the concession. He stated that:

(53) In the *Oscar Chinn* case, 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. Therefore, the question of necessity was not addressed by the Court. (Affaire Oscar Chinn, 1934 C. P. J. I (sér. A/B) N° 63, p. 89.) 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.’ Even so, he noted that Belgium had not pleaded the exception, and observed 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 (*Ibid.*, p. 113 (Opinion individuelle de M. Anzilotti)).

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‘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’⁽⁵⁴⁾ (italics added).

Apparently, the umpire refers to various grounds for non-responsibility for failure to pay the debt. On one 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 on the part of Venezuela. However, on the other hand, he states that, by devoting its limited revenues to the war budget, the government shall fulfil its first and paramount duty of self-preservation. This may be interpreted as the umpire relying on necessity to reject responsibility.

2) The Russian Indemnity case (1912)

The Ottoman Government was obligated to repay its debt to the Russian Empire as set forth under Article 5 of the Treaty of Constantinople, concluded in 1879, that brought to an end the war between the two countries.

(54) French Company of Venezuelan Railroads, Award, France-Venezuela Mixed Claims Commission, *Report of International Arbitration Awards*, Vol. 10, p. 353.

Yet, as the payment was delayed, Russia demanded the payment of interest in arrears that amounted to more than twice the principal. To justify its delay, the Ottoman Government invoked, among several reasons, the fact that it had been in an extremely difficult financial situation, which it described as *force majeure*.⁽⁵⁵⁾ The Commentary of Article 25 describes the situation as ⁽⁵⁶⁾ ‘more like a state of necessity.’

While dismissing the plea in light of the facts in this case, the Permanent Court of Arbitration stated as follows:

‘As far as the responsibility endangers the existence of the state, it would constitute a case of *force majeure* that could be invoked in public international law as well as by a private debtor. . . . *The exception of force majeure*, invoked in the first place, is arguable in public international law, as well as in private law; international law must adapt itself to political exigencies. The Imperial Russian Government expressly admits . . . that the obligation for a State to execute treaties may be weakened “if the very existence of the State is endangered, if observation of the international duty is . . . *self-destructive*.”⁽⁵⁷⁾’

The Court admits that the plea of *force majeure* is applicable in international law as well as domestic private laws. The Court, while using ‘*force majeure*’, seems to, as the ILC considers, discuss necessity as far as we see ‘if the very existence of the State is endangered, if observation of the international duty is . . . self-destructive.’ Thus, we can consider that the Court

(55) *Affaire de l'indemnité russe, Report of International Arbitration Awards*, Vol. 11, p. 439.

(56) Report of the ILC 2001, *supra* note 14, p. 81, para. 7.

(57) *Affaire de l'indemnité russe, supra* note 55, pp. 442-443.

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acknowledged the existence of the necessity defence.

3) The Serbian Loans case (1929)

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 in the form of the gold franc.

The Court accepted the French claim, deciding that the respondent was obliged to make the payment in gold franc. We should pay attention to the fact that, before reaching the conclusion, the Court examined the respondent's argument that it could be released from its obligation on the grounds of its economic crisis due to World War I. The Court dismissed the argument, stating as follows:

'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, although they may present equities which doubtless will receive appropriate consideration in the negotiations and—if resorted to—the arbitral determination for which Article II of the Special Agreement

(58) *Oral Argument of Devèz*, P. C. I. J., Series C, No. 16-III, pp. 211-214.

(59) Article 2(2) of the Special Agreement provides that, in the event of the Court's award being in favour of the Applicant, the respondent and the representatives of the bondholders will begin negotiations with a view to concluding an arrangement that, regarding the respondent's economic and financial situation and capacity for payment, will make certain concessions to the respondent. *Affaire concernant le paiement de divers emprunts serbes émis en France, 1929 C. P. J. I. (sér. A) N° 20*, pp. 15-16.

(60)
provides.’

Here, the Court concluded that the respondent’s obligations were not affected by its grave economic consequences. While we can interpret that the Court denied the existence of the necessity defence, we cannot interpret in the opposite way. At the same time, referring to Article 2 of the Special Agreement, the Court admits that, due to the respondent’s economic and financial situation and capacity for payment, its obligation can be mitigated through negotiations with the representatives of the bondholders. This shows that the Court is of the opinion that the obligation of payment can only be mitigated by an agreement between the parties concerned.

4) *The Société commerciale de Belgique case (1939)*

The Greek Government made a contract on the construction and repair of railroads with *Société commerciale de Belgique* in 1925. Due to Greece’s breach of its obligation under the contract, an arbitral tribunal was set up. The two arbitral awards in 1936 required the Greek Government to pay a sum of money to the company in repayment of a debt contracted with the company. Yet, as the Greek Government was tardy in complying with the awards, the Belgian Government applied to the Permanent Court of International Justice (PCIJ) for a declaration that the Greek Government, by refusing to carry out the awards, violated its international obligations in 1938.

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 that it described as ‘*une nécessité impérieuse, indépendante de sa*

(60) *Ibid.*, pp. 39–40.

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⁽⁶¹⁾
volonté, un cas de force majeure'. It also claimed that, in this case, '[i]l ne
⁽⁶²⁾
s'agit donc ni d'un refus ni d'un acte fautif'. Furthermore, Jean Youpis,
 Counsel for the Greek Government, in his oral argument, invoked the *Rus-*
sian Indemnity case, State practice and several writers' opinions in support
 of his argument that, in a case of extreme financial crisis, the obligation of
 full payment of debts can be exempted on the grounds of *force majeure*.⁽⁶³⁾ What
 is more, the concept of *force majeure* is, in his view, identical to a 'state of
⁽⁶⁴⁾
 necessity'.

In view of the Greek argument, the Court was supposed to address the
 exception of *force majeure* or state of necessity before judging whether a
 breach of the obligations existed. However, the Court ended up not men-
 tioning the question, because the Belgian Government had changed the ap-
 plication 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 ob-
 ligations. The Court, therefore, did not mention either *force majeure* or state
 of necessity.⁽⁶⁵⁾

In all of these four judicial cases, non-performance of monetary debts was
 addressed. It is true that the first two decisions—in the French Company of
 Venezuelan Railroads case and the Russian Indemnity case—might be con-
 sidered as accepting the existence of the necessity defence. However, the
 latter two cannot be considered examples supporting its existence. In addi-
 tion, as demonstrated below, there are several recent cases in which the ex-

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

(62) *Ibid.*

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

(64) *Ibid.*, p. 209.

(65) *Société commerciale de Belgique, 1939 C.P.J.I. (sér. A/B) N° 78*, p. 157.

istence of the necessity defence was rejected, or at least doubted.

5) The Rainbow Warrior case (1990)

In 1985, French agents sabotaged and sank the vessel *Rainbow Warrior* in a 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 unable to leave without the mutual consent of the two Governments. However, both agents were repatriated to France before the expiration of the three years, without the consent of New Zealand. France argued that the acts committed were 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 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

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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*⁽⁶⁶⁾ (italics added).

Furthermore, citing a passage from a paper written by Eduardo Jiménez de Aréchaga,⁽⁶⁷⁾ who was the President of the Tribunal in 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’⁽⁶⁸⁾ (italics added).

Thus, while the Tribunal accepted the doctrine of distress, the scope of which seems to be broader than the ILC’s view, it categorically rejected the existence of the necessity defence rule.

(66) *Rainbow Warrior (New Zealand v. France)*, France-New Zealand Arbitration Tribunal, 30 April 1990, *International Law Reports*, Vol. 82, pp. 554–555.

(67) Eduardo Jiménez de Aréchaga, *International Responsibility*, in *Manual of International Law* (Sørensen ed.), p. 543 (1968).

(68) *Rainbow Warrior*, *supra* note 66, pp. 554–555.

6) The LAFICO and the Republic of Burundi case (1991)

In 1975, the Libyan Arab Republic and the Republic of Burundi concluded an agreement that 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.⁽⁶⁹⁾ Article 15(1) of the agreement provided that 'the assets of the Company [HALB] shall not be the subject of nationalization, confiscation, sequestration, or any other measure capable of infringing the rights of the shareholders or limiting the ability of the Company to achieve its objects.'⁽⁷⁰⁾ 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).⁽⁷¹⁾

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 representatives 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 liquidated. On 17 June 1989, LAFICO and Burundi agreed to take the matter to arbitration.⁽⁷²⁾

(69) The LAFICO and the Republic of Burundi case, *International Law Reports*, Vol. 96, p. 282 (1994). The original text is French. See *Affaire LAFICO/État du Burundi*, Sentence arbitrale du 4 mars 1991, *Revue belge de droit international*, 1990-2, pp. 517-562.

(70) LAFICO, ILR, *supra note* 69, p. 314.

(71) *Ibid.*, p. 283.

(72) *Ibid.*

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The reason why the Government of Burundi took the measure is shown in the following note issued by the Government. The document stated, in part:

‘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.’⁽⁷³⁾

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

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 a state of necessity (Article 33), stating:

‘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

(73) *Ibid.*, p. 300.

question do not appear to have constituted such a peril'⁽⁷⁴⁾ (*Italics added*).

Here, the tribunal deliberately avoids making an appraisal of Article 33 in view of the fact that the doctrine set forth therein has been an issue under debate. It states only that, whatever the appraisal of the provision is, Burundi's measure cannot be found lawful, because the conditions provided for in the article were not fulfilled in this case.⁽⁷⁵⁾

3. Conclusions of this chapter

I deduce from the examinations in this chapter the following conclusions:

First, except the *Caroline* incident, none of the State practices addressed in the ILC are regarded as contributory in creating the customary rule of the necessity defence.

Second, we can hardly deduce from judicial cases addressed in the ILC the conclusion that the rule has existed. In no cases have permanent tribunals—the PCIJ and the ICJ—acknowledged the rule. Although there are the two supportive cases in the beginning of the 20th century, we cannot find subsequent cases. Instead, in the 1990s, we can find two cases, one is in opposition to and the other intentionally avoided the conclusion on the existence of the necessity defence.

Therefore, it is concluded that, at least prior to *Gabcikovo-Nagymaros*, a customary rule of necessity had not been established in international law.

(74) *Ibid.*, p. 319.

(75) 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.), pp. 235-270 (1984).

Chapter 2 Traditional methods of addressing emergency situations

As demonstrated in the prior chapter, a customary rule of necessity was not established in international law. However, it does not mean that State emergencies have never occurred. This raises the question of how international law has traditionally allowed States to address emergency situations. In this chapter, I will consider not only rules in the law of State responsibility but also various international legal rules and methods of interpretation by which a state of emergency may be handled. I will also cover recent examples that reflect the traditional methods.

1. Normal rules

1) Consideration of emergencies in the process of interpreting international obligations

Responsibility for conduct that would otherwise be contrary to international obligations has sometimes been denied because emergencies are considered in the process of examining whether there are breaches of the obligations. I will consider several examples.

A. Internal security crisis

Insurgents involved in a riot or revolution have often caused damage to foreign residents. In principle, a State is not responsible for the damage caused by private citizens within its territory unless it violates its obligation of diligence in preventing or punishing them. This principle also applies to insurgents.⁽⁷⁶⁾ There are a number of international judicial decisions that con-

(76) Oppenheim, *supra* note 31, pp. 550–551; Bases of Discussion Drawn by

cluded that a State was not responsible for the damage to foreigners caused by insurgents unless the State violated its obligation of diligence due to its lack of reasonable care, or its negligence in preventing or punishing them.⁽⁷⁷⁾ In reality, responsibility has more often been declined in the case of a strife, because, in many cases, a breach of obligation of diligence is not likely to exist. It follows that, as a whole, States have not needed to invoke exceptions such as necessity to deny their responsibilities. In addition, a State is not required to pay more compensation for the damage suffered by foreigners than that of their nationals.⁽⁷⁸⁾

One of the recent typical examples of an emergency is massive terrorist

the Preparatory Committee in Hague International Law Codification Conference (1929), no. 22 & no. 22(a), *reprinted in* Shabtai Rosenne (ed.), *League of Nations Conference for the Codification of International Law [1930]*, Vol. 4 (1975), p. 1623.

(77) Sentence arbitrale sur la réclamation numéro 71, présentée par Dona Carolina Galvarro, veuve de Don José Cresceri (*Italie v. Pérou*) (1901), *Report of International Arbitration Awards*, Vol. 15, p. 452; Sambiaggio case (*Italy v. Venezuela*) (1903), *ibid.*, Vol. 10, pp. 507, 511, 524; Kummerow, Otto Redler & Co., Fulda, Fischbach, and Friedericy Cases (*Germany v. Venezuela*) (1903), *ibid.*, Vol. 10, p. 398; Jennie L. Underhill Case (*U. S. v. Venezuela*) (1903), *ibid.*, Vol. 9, p. 159; Home Frontier and Foreign Missionary Society of the United Brethren in Christ (*U. S. v. Gr. Brit.*) (1920), *ibid.*, Vol. 6, pp. 42-44; Affaire des biens britannique au Maroc espagnol (*Grande-Bretagne v. Espagne*) (1924-1925), *ibid.*, Vol. 2, p. 642; Several British Subjects (*Gr. Brit. v. U. S.*) (1925), *ibid.*, Vol. 6, pp. 158-160; Laura M. B. Janes et al. (*U. S. v. United Mexican States*) (1925), *ibid.*, Vol. 4, pp. 86-87; Home Insurance Co. (*U. S. v. United Mexican States*) (1926), *ibid.*, Vol. 4, p. 52; J. J. Boyd (*U. S. v. United Mexican States*) (1928), *ibid.*, Vol. 4, pp. 380-381; James F. Bartlett (*Gr. Brit. v. United Mexican States*) (1931), *ibid.*, Vol. 5, p. 152; John Gill (*Gr. Brit. v. United Mexican States*) (1931), *ibid.*, Vol. 5, p. 157; *Asian Agricultural Products Limited (AAPL) v. Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/87/3, 27 June 1990), paras. 53, 67, 72-73.

(78) Bases of Discussion, No. 22(b), Rosenne, *supra* note 76, p. 1623.

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activities. To crack down on terrorists effectively within their territories, States have often acted in a way that contradicts the right to liberty and security of person. Specifically, some States claim that, in order to avoid the possible retaliation against judges or witnesses, an administrative organ such as the police needs to extend its detention of terrorist suspects to keep interrogating, and not bringing them to a judge. One example is the UK's crack down on the Irish Republican Army (IRA). In the *Brogan and others* case, the European Committee on Human Rights interpreted the word 'promptly' in Article 5(3) of the European Convention on Human Rights in a flexible way. While bearing in mind its case-law according to which a suspect should not be detained for more than four days without being brought before a judicial authority, the Committee, taking into account the general interest of the community in the struggle against terrorism, softened the case-law, accepting the five-day detention.⁽⁸⁰⁾

B. Economic crisis

In the *ELSI* case, the ICJ addressed the economic crisis, although in the limited area in Italy. ELSI is a company established in Palermo, Sicily, where it had a plant for the production of electronic components. All of its shares were held by American companies. When the American parent companies were going to close ELSI due to its deterioration in business, the

(79) European Convention on Human Rights, Article 5(3): 'Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. ...'

(80) *Brogan and Others v. the United Kingdom*, Nos. 11209/84, 11234/84, 11266/84, and 11386/85, Commission Report of 14 May 1987, Series A No. 145-B, paras. 106-107, 124.

mayor of Palermo issued an order for requisitioning its plant and related assets. He argued that, given that the shutdown of the plant would cause serious damage to the general economic public interest and public order in the district, he had prevented it by deciding to requisition the plant and all equipment.⁽⁸¹⁾

The Chamber of the Court dismissed the US argument that Italy acted in breach of Article 1 of the Supplementary Agreement to the Treaty of Friendship, Commerce, and Navigation that prohibited arbitrary or discriminatory measures to the other party's nationals, by stating that:

(81) The mayor announced as follows: '[C]onsidering the fact that ELSI is the second firm in order of importance in the District, because of the shutdown of the plant a serious damage will be caused to the District, which has been so severely tried by the earthquakes had during the month of January 1968; ... [F]urthermore, the present situation is particularly touchy and unforeseeable disturbances of public order could take place; ... [T]here is sufficient ground for holding that there is a grave public necessity and urgency to protect the general economic public interest (already seriously compromised) and public order, and that these reasons justify requisitioning the plant and all equipment ...' *Electronica Sicula S.p.A. (ELSI)*, Judgment, I. C. J. Reports 1989, p. 32, para. 30.

(82) 'The nationals, corporations and associations of either High Contracting Party shall not be subjected to arbitrary or discriminatory measures within the territories of the other High Contracting Party resulting particularly in: (a) preventing their effective control and management of enterprises which they have been permitted to establish or acquire therein; or, (b) impairing their other legally acquired rights and interests in such enterprises or in the investments which they have made, whether in the form of funds (loans, shares or otherwise), materials, equipment, services, processes, patents, techniques or otherwise. Each High Contracting Party undertakes not to discriminate against nationals, corporations and associations of the other High Contracting Party as to their obtaining under normal terms the capital, manufacturing processes, skills and technology which may be needed for economic development.'

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‘[O]ne must remember the situation in Palermo at the moment of the requisition, with the threatened sudden unemployment of some 800 workers at one factory. It cannot be said to have been unreasonable or merely capricious for the Mayor to seek to use the powers conferred on him by the law in an attempt to do something about a difficult and distressing situation. ... *These are not at all the marks of an “arbitrary” act.* ... The Chamber does not, therefore, see in the requisition a measure which could reasonably be said to earn the qualification “arbitrary”, as it is employed in Article I of the Supplementary Agreement. Accordingly, there was no violation of that Article⁽⁸³⁾’ (italics added).

It is clear that, in judging that the requisition is not an arbitrary measure, the Court takes into consideration the economic difficulties in Palermo.⁽⁸⁴⁾

More recent examples involving an economic crisis are disputes over damage to foreign investments in Argentina. Taking into account the economic and social crisis in Argentina, the tribunal in *National Grid* shortened the period for which Argentina had violated its obligation of fair and equitable treatment under paragraph 2 of Article 2 of the UK-Argentina Bilateral Investment Treaty (BIT):

‘The determination of the Tribunal must take into account all the circumstances and in so doing cannot be oblivious to the crisis that the Ar-

(83) *Ibid.*, pp. 76-77, paras. 129-130.

(84) Thirlway points out that ‘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.’ Hugh Thirlway, *The Law and Procedure of the International Court of Justice 1960-1989 Part Seven*, *British Year Book of International Law*, Vol. 66 (1995), p. 71.

gentine Republic endured at that time. What is fair and equitable is not an absolute parameter. *What would be unfair and inequitable in normal circumstances may not be so in a situation of an economic and social crisis.* The investor may not be totally insulated from situations such as the ones the Argentine Republic underwent in December 2001 and the months that followed. For these reasons, the Tribunal concludes that the breach of the fair and equitable treatment standard did not occur at the time the Measures were taken on January 6, 2002 but on June 25, 2002 when the Respondent required that companies such as the Claimant renounce to the legal remedies they may have recourse as a condition to re-negotiate the Concession⁽⁸⁵⁾ (italics added).

In addition, the tribunal also took the crisis into account when it concluded that Argentina had not violated its obligation not to impair investments by unreasonable measures set forth in the same paragraph:

‘It is clear from the evidence before the Tribunal that the Measures were taken by the Respondent in the context of an unfolding crisis. They may have contradicted commitments made to the Claimant but each one of them provided the reasons why it was taken.’⁽⁸⁶⁾

2) Consideration of emergencies in the process of calculating compensation

Even if a breach of international obligation exists, urgent situations have sometimes been considered in calculating compensation for damage to cor-

(85) *National Grid plc v. Argentina* (UNCITRAL Arbitration), Award (3 Nov 2008), para. 180.

(86) *Ibid.*, para. 198.

Traditional non-acceptance of the general emergency exception⁽⁸⁷⁾ porate assets. In order to ‘wipe out all the consequences of the illegal act and re-establish the situation that would, in all probability, have existed if that act had not been committed’⁽⁸⁸⁾, the damage to a corporation, which will be part of the compensation, has been calculated on the basis of the difference between the corporate value estimated without the illegal act and the actual value. In this case, the former will usually be lower than in normal situations due to the influence that the economic crisis puts on business, with the result that the amount of compensation will be lower than in normal situations. The examples we can give are the *CMS*,⁽⁸⁹⁾ *Enron*,⁽⁹⁰⁾ and *Sempra*⁽⁹¹⁾ cases.

2. Specific emergency exceptions

There are also specific emergency exceptions in each field of international law, although many of them are applicable in normal situations as well.

1) Economics

An example that is applicable to various kinds of emergencies is Article 20 (‘General Exceptions’) of the General Agreement on Tariffs and Trade (GATT). This article allows contracting parties to, in certain conditions, take measures ‘necessary to protect public morals’ (para. (a)), ‘necessary

(87) Alberto Alvarez-Jimenez, *New Approaches to the State of Necessity in Customary International Law: Insights from WTO Law and Foreign Investment Law*, *The American Review of International Arbitration*, Vol. 19 (2008), pp. 482-484, 488.

(88) *Usine de Chorzów*, fond, arrêt no 13, 1928, *C. P. J. I. série A no 17*, p. 47.

(89) *CMS Gas Transmission Company v. Argentina* (ICSID Case No. ARB/01/8), Award (12 May 2005), paras. 443-446.

(90) *Enron Corporation and Ponderosa Assets, L. P. v. Argentina* (ICSID Case No. ARB/01/3), Award (22 May 2007), paras. 232, 407.

(91) *Sempra Energy International v. Argentina* (ICSID Case No. ARB/02/16), Award (28 Sep. 2007), paras. 397, 417, 434-436, 442.

to protect human, animal, or plant life or health' (para. (b)) or 'relating to the conservation of exhaustible natural resources' (para. (g)). The same is provided in Article 14 of the General Agreement on Trade in Services (GATS). To more clearly specify Article 20(b) of the GATT, the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) was also made. Article 27(2) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) is also the exception clause to allow measures 'necessary to protect *ordre public* or morality, including to protect human, animal, or plant life or health or to avoid serious prejudice to the environment'.

The security exception clauses are the following examples: Article 21 of the GATT, Article 14 *bis* of the GATS, Article 73 of the TRIPS Agreement, Article 2102 of NAFTA, and Article 24 of the Energy Charter Treaty. As a similar example, Article 346 of the Treaty on the Functioning of the European Union allows member States to supply no information the disclosure of which it considers contrary to the essential interests of its security and to take such measures as it considers necessary for the protection of the essential interests of its security that are connected with the production of or trade in arms, munitions, and war material.

There are specific exceptions for an economic crisis. While any restrictions other than duties, taxes, or other charges on importation or exportation are prohibited in Article 11(1) of the GATT, the GATT has some exceptions. 'Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party' are allowed (Article 11(2)(a)); and 'in order to safeguard its external financial position and its balance of payments', any contracting party may restrict the quantity or value of merchandise permitted to be imported (Article 12).

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To prevent serious injury to domestic producers' products, safeguard measures are permitted in Article 19 of the GATT, Agreement on Safeguards and Article 10 of the GATS.

We can give so many examples in treaties among a small number of States, such as bilateral treaties. Many Economic Partnership Agreements (EPAs) and BITs that Japan has concluded include the provisions similar to Articles 20 and 21 of the GATT.⁽⁹²⁾ In addition, many of them include exception clauses for safeguard measures.⁽⁹³⁾

2) Prevention of ocean pollution

In the *Torrey Canyon* incident, as demonstrated above, the UK Government, while not invoking necessity as a justification, took the initiative to make a treaty that allows coastal States to take measures to deal with oil pollution off their territorial waters. As a result, the International Conven-

(92) E. g. Japan-Peru EPA, Arts. 10, 11; Japan-India EPA, Arts. 11, 109, 115; Japan-Peru BIT, Art. 19; Japan-Vietnam EPA, Art. 8; Japan-Switzerland EPA, Arts. 22, 55, 56, 69, 83, 95, 129; Japan-Uzbekistan BIT, Art. 17; Japan-ASEAN EPA, Arts. 7, 8; Japan-Philippine EPA, Arts. 23, 66, 83, 84, 99, 114, 115; Japan-Laos BIT, Art. 18; Japan-Indonesia EPA, Art. 11; Japan-Brunei EPA, Art. 8; Japan-Cambodia BIT, Art. 18; Japan-Thailand EPA, Arts. 10, 144; Japan-Chile EPA, Arts. 151, 192-193; Japan-Malaysia EPA, Arts. 10, 87, 130; Japan-Mexico EPA, Arts. 168, 169; Japan-Vietnam BIT, Art. 15; Japan-Korea BIT, Art. 16; Japan-Singapore EPA, Arts. 4, 19, 54, 69, 83, 95.

(93) E. g. Japan-Peru EPA, Arts. 13, 29-36; Japan-India EPA, Arts. 23, 97; Japan-Peru BIT, Art. 20; Japan-Vietnam EPA, Arts. 20, 73; Japan-Switzerland EPA, Arts. 20, 97; Japan-Uzbekistan BIT, Art. 18; Japan-ASEAN EPA, Art. 20; Japan-Philippine EPA, Art. 100; Japan-Laos BIT, Art. 19; Japan-Indonesia EPA, Arts. 24, 70, 89; Japan-Brunei EPA, Arts. 21, 68; Japan-Cambodia BIT, Art. 19; Japan-Thailand EPA, Arts. 22, 68, 84, 108; Japan-Chile EPA, Arts. 20-26, 85; Japan-Malaysia EPA, Arts. 23, 88, 106; Japan-Mexico EPA, Arts. 51-56, 72; Japan-Vietnam BIT, Art. 16; Japan-Korea BIT, Art. 17; Japan-Singapore EPA, Arts. 18, 84.

tion Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties was adopted two years later in 1969. Article 1(1) of the Convention provides that contracting parties may take such measures on the high seas as may be necessary to prevent danger to their coastline from oil pollution.⁽⁹⁴⁾ This means that, when it comes to legal justification for measures by coastal States on the high seas, the UK chose to rely not on necessity but on the specific treaty provision.

Furthermore, in 1973, the Protocol Relating to Intervention on the High Seas in Cases of Pollution by Substances Other Than Oil was adopted. Article 221 of the UNCLOS provides that the rights of coastal States set forth in these Conventions were not prejudiced.

3) Protection of foreign citizens

For what grounds can a State decline its responsibility for damage suffered by foreign citizens within its territory in the process of suppressing a strife? According to *Bases of Discussion* in the League of Nations Codification Conference, while a State is responsible for damage suffered by a foreigner as the result of failure of its executive power to show such diligence in the protection of foreigners as could be expected from a civilized State, a State is, in principle, not responsible for damage caused to a foreigner by its armed forces or authorities in the suppression of a strife.⁽⁹⁵⁾ Likewise, Max⁽⁹⁶⁾

(94) Article 1(1): 'Parties to the present Convention may take such measures on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution or threat of pollution of the sea by oil; following upon a maritime casualty or acts related to such a casualty, which may reasonably be expected to result in major harmful consequences.'

(95) *Bases of Discussion*, No. 10. Rosenne, *supra* note 76, p. 1623.

(96) *Bases of Discussion*, No. 21. *Ibid.*

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Huber, as a sole arbitrator for British Claims in the Spanish Zone of Morocco, declares the principle that a State is not responsible for consequences from its activities to re-establish order or combat the enemy, since, at that time, it only performs its 'primordial duty'⁽⁹⁷⁾. Thus, this principle of non-responsibility for damage caused by suppression activities can be considered a specific emergency exception.

4) Human Rights

Several human rights treaties have derogation clauses that allow contracting States to, in time of public emergency, derogate from its obligations. The examples are Article 4 of the International Covenant on Civil and Political Rights (ICCPR), Article 15 of the European Convention on Human Rights (ECHR), Article 30 of the European Social Charter, Part 5, Article F of the European Social Charter (revised), and Article 27 of the American Convention on Human Rights.

In addition, limitation clauses can also function as exceptions for the state of emergency. Examples of general limitation clauses are Article 4 of the International Covenant on Economic, Social, and Cultural Rights (ICESCR), Article 31 of the European Social Charter, and Part 5, Article G of the European Social Charter (revised)⁽⁹⁸⁾. Furthermore, there are several examples of

(97) *Affaire des biens britannique au Maroc espagnol*, *supra* note 77, p. 645. See also *The Luzon Sugar Refining Company, Limited (Philippine War Claim)* [Claim No. 41], Award rendered in Washington, November 30, 1925, *American Journal of International Law*, Vol. 20 (1926), p. 391.

(98) In addition, in Article 9 of the Convention relating to the Status of Refugees and the Convention on the Status of Stateless, 'in time of war or other grave and exceptional circumstances', a Contracting State is allow to take 'provisionally measures which it considers to be essential to the national security'.

specific limitation clauses. For example, freedom of movement shall be subject to restrictions necessary to protect national security, public order, public health, or morals.⁽⁹⁹⁾ Setting up no-entry zones after the Fukushima Daiichi nuclear disaster in March 2011 would be justified on the grounds of this exception. Other examples can be found in provisions as to prohibitions of forced labor,⁽¹⁰⁰⁾ the arbitrary expulsion of resident aliens,⁽¹⁰¹⁾ right to a fair trial,⁽¹⁰²⁾ freedom of religion and thought,⁽¹⁰³⁾ freedom of speech,⁽¹⁰⁴⁾ freedom of association and assembly,⁽¹⁰⁵⁾ right to form and join trade unions,⁽¹⁰⁶⁾ right of life,⁽¹⁰⁷⁾ right of privacy,⁽¹⁰⁸⁾ and right of property.⁽¹⁰⁹⁾

(99) ICCPR, Article 12(3). The similar provisions are: Protocol No. 4 to the ECHR, Articles 2(3) & (4); American Convention on Human Rights, Articles 22(3) & (4). *See also* Article 12(2) of the African Charter on Human and Peoples' Rights and Article 10(2) of the Convention on the Rights of the Child.

(100) Article 8(3) (c) (iii) of the ICCPR, Article 4(3) (c) of the ECHR. *See also* Article 2(2) (d) of the Forced Labour Convention in 1930.

(101) Article 13 of the ICCPR. *See also* Article 1(2) of Protocol No. 7 to the ECHR.

(102) Article 14(1) of the ICCPR and Article 6 of the ECHR.

(103) Article 18(3) of the ICCPR, Article 14(3) of the Convention on the Rights of the Child, and Article 12(3) of the American Convention on Human Rights[ACHR]. *See also* Article 9(2) of the ECHR.

(104) Article 19(3) (b) of the ICCPR and Article 13(2) (b) of the Convention on the Rights of the Child. *See also* Article 10(2) of the ECHR and Article 13(2) (b) of the ACHR.

(105) Articles 21 & 22(2) of the ICCPR, Article 15(2) of the Convention on the Rights of the Child, Articles 15 & 16 of the ACHR. *See also* Article 11(2) of ECHR and Article 11 of African Charter on Human and Peoples' Rights.

(106) Article 8(1) (a) (c) of the ICESCR.

(107) Article 2(2) (c) of the ECHR.

(108) Article 8(2) of the ECHR.

(109) Article 1 of Protocol No. 1 to the ECHR. *See also* Articles 21(1) & (2) of the ACHR, Article 14 of the African Charter on Human and Peoples' Rights.

5) Regulation of armed force

A. The right of self-defence

Since the prohibition on the use of force as set forth in Article 2(4) of the UN Charter was established, the right of self-defence in cases of armed attacks from another State as set forth in Article 51 has been the exception to the prohibition.

Then, the important point to note is that many States have invoked the right of self-defence, whether or not the requirements for it were actually fulfilled, as a legal grounds for their transborder excursions against rebels or terrorists as in the *Caroline* incident. For example, when Israel conducted an airstrike on the headquarters of the Palestine Liberation Organization (PLO) in Tunisia on 1 October 1985, it invoked its right of self-defence to justify its operation.⁽¹¹⁰⁾ Furthermore, in August 1998 when the US conducted the cruise missile strikes on Afghanistan and Sudan, it invoked its right of self-defence, claiming that the targets were terrorist camps and a chemical weapons factory linked to Osama Bin Laden who was the mastermind of the bombings of the American embassies in Kenya and Tanzania.⁽¹¹¹⁾ Given these practices, the *Caroline* incident should be historically placed as the classical case of self-defence rather than necessity. Dinstein says, ‘There is no way to cut retrospectively the historical umbilical cord of the *Caroline* incident to self-defence.’⁽¹¹²⁾

(110) S/PV. 2611 (2 October 1985), paras. 59, 68–69. However, many States disagreed with Israel’s argument, and the Security Council deplored the operation. S. C. Res. 573 (4 October 1985).

(111) Letter dated 20 August 1998 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, S/1998/780 (20 August 1998).

(112) Yoram Dinstein, *War, Aggression and Self-defence* (5th ed., 2012), p. 272.

B. Law of armed conflict

The law of armed conflict itself can be considered to consist of rules of emergency exceptions, in that it is designed to regulate conduct in an emergency of armed conflict.

In addition, there are provisions of the exception as follows: Regulations respecting the Laws and Customs of War on Land (1907), Articles 15, 23, 43, and 54; Convention Respecting the Rights and Duties of Neutral Powers and Persons in Cases of War on Land (1907), Article 19; Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949), Articles 8(3), 33(2), and 50; Convention (II) for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea (1949), Articles 8(3), 28, and 51; Convention (III) Relative to the Treatment of Prisoners of War (1949), Articles 8(3), 126(2); Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949), Articles 9(3), 18(4), 30(2), 49(2)(5), 53, 108(2), 143(3), and 147; Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954), Articles 4(2) and 11(1); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977), Articles 54(5), 62(1), 67(4), and 74(3); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (1977), Article 17(1); and the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (1999), Article 6.

C. Arms Control

Many of the treaties on arms control have provisions on a contracting State's right to withdraw from the treaty that apply when the State decides

Traditional non-acceptance of the general emergency exception.....

that extraordinary events, related to the subject matter of the Treaty, have jeopardized its own supreme interests. Although, strictly speaking, the provisions, which go on to permit the withdrawal, might not be emergency exceptions, they are, broadly speaking, the provisions designed to deal with emergencies.

Conclusion

As demonstrated in Chapter 1, at least prior to *Gabcikovo-Nagymaros*, the general defence of necessity had not been established as a customary rule of international law. As confirmed in Chapter 2, instead of invoking the necessity defence, States have generally deferred to their interpretations of established rules or have created and applied specific emergency exceptions in order to deal with emergencies.

(113) E. g. Partial Nuclear Test Ban Treaty, Article 4; NPT, Article 10(1); Protocol 1 of the South Pacific Nuclear Free Zone Treaty, Article 5; Protocol 2, Article 6; Protocol 3, Article 5; Protocol of the Southeast Asia Nuclear-Weapon-Free Zone Treaty, Article 5; Biological Weapons Convention, Article 13(2); Chemical Weapons Convention, Article 16(2); Comprehensive Nuclear Test Ban Treaty (CTBT), Article 9(2); US-Russia New Strategic Arms Reduction Treaty, Article 14(3).

(114) See Laurence Andre & Julie Dutry, *La responsabilité internationale des États pour les situations d'extrême pauvreté*, *Revue belge de droit international* (1999), p. 80.

(115) See Weiden, *supra* note 2, p. 131: 'Certain practical results approved by everyone, as, for example, anticipatory breach of neutrality, might very well be dissolved from any underlying right of necessity. They could be recognised as independent institutions of International Law. Such transition could be similar to the development of *angary* which is to-day, if at all, only loosely connected with the general doctrine.'