

The Invocation of Necessity in International Law

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Abbreviations

Adv. Op.	Advisory Opinion
ARSIWA	Articles on the Responsibility of State for Internation-ally Wrongful Acts
cf.	confer (compare)
Cmnd.	Command Paper (United Kingdom)
CR	Court Records of the ICJ
Decl.	Declaration
Doc.	Document
e.g.	exempli gratia (for example)
ed.	editor
et seq.	et sequens (and the following)
GA	General Assembly of the United Nations
H CJ	High Court of Justice (Israel)
Hum.	Human
i.e.	id est (that is)
ibid.	ibidem (at the same place)
ICJ	International Court of Justice
ICJ Rep.	International Court of Justice Reports
ILC	International Law Commission
ILR	International Law Reports
Ind. Op.	Individual Opinion
Int'l	International
ITLOS	International Tribunal for the Law of the Sea
J.	Journal
L.	Law
op.	operative
para.	paragraph
RdC	Recueil des Cours de l'Académie de Droit Internatio-nal
Res.	Resolution
RIAA	Reports of International Arbitral Awards
Rts.	Rights
SC	Security Council of the United Nations
SCOR	Security Council Official Records
Sep. Op.	Separate Opinion
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
US	United States of America
v.	versus
VCLT	Vienna Convention on the Law of Treaties
YB	Yearbook

1 Introduction

‘State of necessity’, or plainly ‘necessity’¹, is a circumstance precluding the wrongfulness of an internationally wrongful act of a State. The prerequisites for the existence of such a situation are codified in the International Law Commission’s Articles on the Responsibility of States for Internationally Wrongful Acts, based on studies of international practice. In 2001, the General Assembly, in accordance with the recommendation of the ILC, took note of the Articles in a resolution, commending “them to the attention of Governments without prejudice to the question of their future adoption or other appropriate action”.² The ILC preferred this approach to a convention, as firstly, the Articles were generally considered to be codifications of custom, and secondly, because of possible adverse effects for the legitimacy of the Articles, should a convention not be a universal success.

Invocation of a state of necessity is construed as meaning a claim that a State finds itself in a situation where the sole means of safeguarding an essential interest of the State, when threatened by a grave and imminent peril, is to adopt conduct not in conformity with what is required of the State by an international obligation, owed to another State.³

The purpose of this essay is to examine the defence of necessity in public international law, to discuss the requisites of such a defence, and to explore the effects the same may have on the international legal order. In discussing the benefits of the necessity doctrine, I have focused on the application of the doctrine to varying uses of force.⁴ Any other field of application being in theory possible, I chose this particular application because these issues have been highlighted by events of humanitarian intervention in the late 1990s, international terrorism in the early 2000s and by the recent

¹ In the International Law Commission’s Articles on the Responsibility of States for Internationally Wrongful Acts, annexed to GA Res. 56/83 (2002), 12 Dec. 2001, labelled only as ‘necessity’. The two terms are here used interchangeably.

² GA Res. 56/83 (2002), op. para. 3.

³ J. Crawford, *The International Law Commission’s Articles on State Responsibility – Introduction, Text and Commentaries* (Cambridge University Press, 2002), 178; *Report of the International Law Commission on the Work of Its Thirty-Second Session*, (5 May-25 July 1980), UN Doc. A/35/10, 69; J. J. A. Salmon, ‘Faut-il codifier l’état de nécessité en droit international’, in J. Makarczyk, (ed.), *Essays in Honour of Judge Manfred Lachs* (Martinus Nijhoff, 1984) 235-70, 244.

⁴ See chapter 5, *infra*.

Construction of a Wall case. It is my impression that as far as *de lege ferenda* arguments go, this is where most scholars see a useful employment of the necessity doctrine.⁵ I will use this discussion on the need for a necessity defence in this field as a platform for the discussion which is the ultimate topic for this essay, namely whether necessity as a circumstance precluding wrongfulness can be reconciled with an in the international sphere developing principle of the rule of law.

In this essay, I will set out from the stance of the ICJ in the *Gabčíkovo-Nagymaros Project* case that necessity does exist as a defence under international law, but that it through international practice and case law has been strictly circumscribed. It is thus a narrow concept of necessity that will here be applied to the international legal system; a system, which is presumably based on the respect for legal norms and which values peaceful dispute settlement through adjudication by international courts and tribunals.⁶ It will be submitted that international adjudicative organs in their application of the principle of necessity in general take due account of the rule of law, in terms of stability of treaties and elevation of certain principles to the status of overriding norms no longer dependent on the explicit consent of States. The main field of examination of this essay is then whether necessity as a principle constitutes a threat to international legal regime building, or whether it is on the contrary a necessary safety valve in order for States to remain faithful to the general norms, from which the necessity defence may allow them to deviate only *in casu*.⁷

Since responsibility is a natural corollary of a relationship comprising a right and an obligation⁸, legal responsibility follows from every act which is incompatible with pledges made to other States.⁹ The primary obligation of a State – that which it owes to other States under conventional or customary international law – is transformed, as state responsibility is incurred, into a secondary obligation. The secondary obligation occurs separately under the law of state responsibility as a procedural consequence flowing from the nature of international law, and it entails that a State is obliged to, as far as possible, make good the harm that has occurred as a result of the breach of the

⁵ The use of force has traditionally been the focal point of the necessity doctrine, see O. Spierman, 'Humanitarian Intervention as a Necessity and the Threat or Use of *Jus Cogens*', 71 *Nordic J. of Int'l L.* (2002) 523-43, 533.

⁶ See Article 2(3) and Chapter XIV of the UN Charter, 1 *UNTS* XVI.

⁷ See I. Johnstone, 'The Plea of Necessity in International Legal Discourse: Humanitarian Intervention and Counter-Terrorism', 43 *Columbia J. Transnational L.* (2005) 337-88, 354 *et seq.*

⁸ *Chorzów Factory* (Germany v. Poland), *PCIJ*, Ser. A (1927) No. 9, 21; see also the statement of Judge Huber in the *Spanish Zone of Morocco Claims* (Great Britain v. Spain), (1925) II *RIAA* 615 at 641; *cf.* I. Brownlie, *Principles of International Law* (Oxford University Press, 2003), 421.

⁹ Article 1 of the ARSIWA; M. N. Shaw, *International Law* (Cambridge University Press, 2003), 694; Brownlie, 2003, 419 and 422; A. Cassese, *International Law* (Oxford University Press, 2001), 192; C. Tomuschat, 'International Responsibility and Liability', 281 *RdC* (1999) 268-303, 268; A. Tahvanainen, *Statsansvar för allvarliga förbrytelser gentemot det internationella samfundet i sin helhet* (Åbo akademi, 2002), 31.

primary obligation.¹⁰ It is essential to the legal character of international law that there exists a system spelling out consequences of breaches of international obligations. Absent such a system, the primary obligations risk becoming devoid of any real, practical meaning and lose their character of imposing legal duties on the State.¹¹

In its classical form, international law leaves enforcement of rights under international regimes up to States themselves, employing self-help, reprisals and retorsions in order to give effect to the letter of international law.¹² Some of these approaches, such as self-defence and countermeasures, have subsequently been incorporated as enforcement measures under international law, in the sense that a State can deploy such means to force another State to comply with its obligations, but it can also vest these in the form of legal claims under the scheme of state responsibility. Nevertheless, the risk is that States go too far in vindication of their rights, thus threatening international peace and security.¹³ Hence, the enforcement of rights and the limits thereto has been given considerable consideration by the International Law Commission in its codification endeavours in relation to state responsibility.

The notion of necessity may at first sight not appear to govern the vindication of rights under international law. However, taking account of what will be said below about necessity representing a circumstance where the State in reality has a choice with regard to its actions, but where certain interests are given preference – and of the fact that the state of necessity emanates from and still closely relates to the concept of a right of self-preservation of the State – it is clear that the protection and vindication of legitimate rights and interests are at the very heart of the discussion on necessity. In some cases where issues concerning necessity may be raised, one will deal with a situation of intersecting wrongs. Both parties will act to protect legitimate, incompatible interests, and in the process wrong the interests of other States. For instance, this may be said to be the case in the dispute between Israel and the Palestinians that arose in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, the latest international case where necessity has been an issue. One can certainly

¹⁰ Shaw, 2003, 694; Tomuschat, 1999, 268.

¹¹ Cf. Tomuschat, 1999, 268.

¹² See e.g. the *locus classicus* on the law of reprisals, the *Naulilaa* case, (Portugal v. Germany), (1928) II *RIAA* 1012 at 1026, where reprisals were deemed an effort to effectuate a “return to legality by avoidance of further offences”; see also D. J. Harris, *Cases and Materials on International Law* (Sweet & Maxwell, 2004), 11: “The absence of compulsory international judicial or arbitral remedies and the generally decentralised nature of the international community inevitably mean that self-help is the option that is most likely to be available to a state when faced with a breach of an international law obligation owed to it by another state.”

¹³ In relation to this, see the General Assembly Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (1970), GA Res. 2625 (XXV), concerning to refrain from acts of reprisals involving the use of force, which also has bearing on the discussion regarding self-defence and countermeasures. Cf. Tomuschat, 1999, 269.

argue that certain Palestinian groups are in breach of the obligation to settle issues peacefully as prescribed by the UN Charter, and of the obligation to respect the safety of the civilian population under international humanitarian law.¹⁴ Israel, on the other hand, has through the construction of the wall and the Israeli settlements, step by step acquired what is Palestinian territory under the terms of the 1949 armistice. Necessity concerns itself with the protection of essential interests, which is at the core of the arguments advanced in the advisory opinion on the topic of the safety barrier. The Israeli-Palestinian situation, and the *Construction of A Wall* case, well illustrates the weighting of valid concerns and interests on both sides of a conflict that are often present in situations where necessity may be invoked: the Palestinian claim to self-determination, a state of their own and peaceful existence on the one hand, and on the other the Israeli need to safeguard its population from terrorist attacks.¹⁵ Further, one must keep in mind that every case involving state responsibility in international law is highly individual. A multitude of factors are to be taken into account, such as the burden of proof, the evidentiary situation, estoppels, acquiescence and the existence of intersecting wrongs, and, last but not least, the weight of the different pertinent interests.¹⁶

The existence and extent of a defence of necessity in international law has for a long time been a question of some controversy among scholars and in international case law. Although, as will be shown, the doctrine of necessity stems from an old tradition of the right of a State to exist and function, there has been widespread fear of abuses and worry regarding if such a defence would upset the balance of interests already present and considered in international law.¹⁷ Several writers have expressed their reluctant position in relation to a necessity defence¹⁸; otherwise, limited attention

¹⁴ The issue of Palestinian responsibility for international acts and the prolonged dispute between Israel and the Palestinian people is complicated by the uncertain state as to Palestinian statehood. According to traditional definitions of statehood as formulated in Article 1 of the 1933 Montevideo Convention on Rights and Duties of States, 165 *LNTS* 19 (not in force), there is no entity that can be categorised as a Palestinian State, but cf. J. Crawford, 'Israel (1948-1949) and Palestine (1998-1999): Two Studies in the Creation of States', in G. S. Goodwin-Gill & S. Talmon, *The Reality of International Law: Essays in Honour of Ian Brownlie* (Oxford University Press, 1999) 94-124.

¹⁵ Cf. Brownlie, 2003, 436-8, regarding the status of insurgents and riots in relation to state responsibility.

¹⁶ Cf. Brownlie, 2003, 427.

¹⁷ P. Okowa, 'Defences in the Jurisprudence of International Tribunals', in G. S. Goodwin-Gill and S. Talmon, *The Reality of International Law; Essays in Honour of Ian Brownlie* (Oxford University Press, 1999) 389-411, 398. See further *infra* in sec. 6.2.

¹⁸ Such writers include Brownlie, 2003, 448, who argues that "necessity as an omnibus category probably does not exist, and its availability as a defence is circumscribed by fairly stringent condition". Cf. Brownlie, *Principles of Public International Law*, previous edition from 1998, 468. See especially E. Jiménez de Aréchaga, 'International Responsibility', in M. Sorensen (ed.), *Manual of Public International Law*, (Macmillan, 1968) 531-603, 542-3, who claims that cases where the doctrine of necessity has been invoked are usually concerned with self-defence and that necessity has seldom been invoked in relation to an innocent party. Jiménez' assertion that although States have often failed to repudiate the existence of a necessity doctrine, this is insufficient basis to find a general acceptance of such a plea. Jiménez' views were determinative for the outcome of the *Rainbow Warrior* case in relation to ne-

has until recently been given to the defence in international case law.¹⁹ There has also been a tendency not to regard the state of necessity as a separate and independent category, but as a unique type of self-defence, when danger to a State presents itself not through the use of armed force, but through for instance neglect in relation to shared resources, natural disasters etc. In these types of cases, it has been suggested that preventive acts could be excused all the while it could not be fitted under the rules on self-defence.²⁰ Others, however, have suggested that the codification of necessity may be a way for the international legal system to introduce a constitutional model, which seeks to incorporate emergency powers into the legal system and regulate these powers within a legal framework.²¹

The modern view of necessity as a defence under international law begins with the *Rainbow Warrior* case from 1990²², where the Arbitral Tribunal considered the defences of *force majeure*, distress and necessity. France initially invoked only *force majeure*, but later specified that it did not limit its plea to *force majeure* as this had been defined in the law of state responsibility, but rather referred to the entire theory of circumstances precluding wrongfulness.²³ After consideration of several circumstances precluding wrongfulness and an analysis of the distinction²⁴ between the pleas of distress, *force majeure* and state of necessity as defined by the International Law Commission, the Arbitral Tribunal found that the existence of a general defence of necessity was still controversial and that the formulation of the necessity defence embodied in the ILC Draft Articles on the Responsibility of States did not in fact reflect a rule of general international law.²⁵ It was held that although for instance a vessel in distress could be allowed to seek refuge in a foreign port, even if closed, or a country suffering from famine could have the right to detain a foreign ship proceeding to another port to expropriate its cargo of food supplies, it was not the doctrine of necessity which provided the foundation of such permissions, but humanitarian considerations, which did not apply to the state as a body politic.²⁶

cessity, see *infra*. See also S. Glaser, 'Quelques remarques sur l'état de nécessité en droit international' 32 *Revue de droit pénal et de criminologie* (1952) 570-603, 598 *et seq.* For further references, see Okowa, 1999, 398, fn 35 and *Report of the ILC* (1980), UN Doc. A/35/10, 101, fn 141.

¹⁹ *Cf.* Okowa, 1999, 399.

²⁰ I. Brownlie, *International Law and the Use of Force by States* (Oxford University Press, 1963), 376. *Cf. infra*, sec. 5.2. concerning a return to a view of necessity as a complement to the doctrine of self-defence.

²¹ Gross, 2001, 31.

²² On this case, see further *infra*.

²³ *Rainbow Warrior* case (New Zealand v. France), (1990) XX *RIAA* 217, 252, para. 76.

²⁴ See further sec 2.3, *infra*.

²⁵ *Rainbow Warrior* case, 254, para. 78; Okowa, 1999, 399.

²⁶ Jiménez de Aréchaga, 1968, 543, quoted in the *Rainbow Warrior* case; *cf.* Okowa, 1999, 399.

However, as underlined by the ILC in the codification effort, there are an impressive number of scholars that are in favour of accepting necessity as a circumstance precluding wrongfulness in international law.²⁷ It was remarked that from the time of the provisional adoption on Chapter V of Part One of the 1996 draft of the Articles, the rules relating to circumstances precluding wrongfulness had been heavily relied upon in the literature and in judicial decisions and in commenting on the chapter no government had doubted the need in principle for such a section.²⁸ As regards necessity specifically, it has been invoked in numerous cases of state practice.²⁹ Further, as will be discussed in this essay, earlier case law has dealt extensively with the defence of necessity. In the *Gabčíkovo-Nagymaros Project* case from 1997, the International Court of Justice clearly expressed that the defence of necessity was in fact recognised by customary international law and that it was a ground available to States in order to evade international responsibility for wrongful acts.³⁰ The subsequent approval of the ARSIWA by the General Assembly in combination with this statement of the International Court of Justice and the recent reference to this part of the Articles also in the *Construction of a Wall* case, from July 2004, seems to be a reasonable basis for the conclusion that the defence of necessity today is a valid and accepted plea.

²⁷ See *Report of the ILC* (1980), UN Doc. A/35/10, 102, fn 142, for a listing of writers in favour of state of necessity.

²⁸ B. Simma, 'The Work of the International Law Commission at Its Fifty-First Session (1999)', 68 *Nordic J. Int'l L.* (1999) 293-361, 309.

²⁹ *Report of the ILC* (1980), UN Doc. A/35/10, 72-3, para. 6; Crawford, 2002, 179. Although necessity was not expressly invoked in all cases cited by the International Law Commission, the circumstances were nonetheless such as to be consistent with the definition of necessity given by the ILC, Salmon, 1984, 236-7.

³⁰ *Gabčíkovo-Nagymaros Project* case (Hungary v. Slovakia), *ICJ Rep.* 1997, 7, 40, para. 51; Okowa, 1999, 401. Hungary relied on a state of ecological necessity, *Gabčíkovo-Nagymaros Project* case, 35, para 40, and referred to the case of *Pacific Fur Seals Arbitration* (*Russian Fur Seals case*, or *Sealing Off the Russian Coast case*) (1893) in J. B. Moore, *History and Digest of the International Arbitrations to which the United States Has Been a Party*, I (Washington, DC, 1898) 755-961, 826. Russia had begun taking action against foreign sealing vessels off its coast, arguing that "for the ensuing reason, and pending the adoption of international regulations, Russia would, as a measure of 'legitimate self-defence', prohibit sealing within ten miles of all her coasts, and within thirty miles of the Commander Islands and Robben Island". This case would appear to concern necessity under the modern definition for the same reason as the *Caroline* case, see *infra*.

2 Necessity as a Defence under International Law

2.1 Earlier Concepts of Necessity

States are habitually reluctant to engage in outright war with each other, as this usually carries with it severe diplomatic and political consequences. Instead, it has often been preferred to resort to hostile measures short of war, such as reprisals, blockade and intervention. This hesitation to claim a right to warfare often results in invocation of the rhetoric of self-defence, necessity and self-preservation.³¹

Self-preservation has historically been referred to as a fundamental right to existence, prevailing over other rights, and has been the traditional justification for the priority between two subjective rights.³² The right to self-preservation was considered a subjective right of the invoking State³³ and allowed for a more or less uninhibited use of force in situations where the security of the State was threatened; however, this doctrine has subsequently been rejected by most writers.³⁴ It has traditionally been closely intertwined with the notion of necessity, which has been subsumed under the doctrine of self-preservation.³⁵ However, the modern concept of necessity, as codified by the International Law Commission, is “not indissolubly” linked with the idea of self-

³¹ O. Gross & F. Ni Aolain, ‘Emergency, War and International Law – Another Perspective’, 70 *Nordic J. Int’l L.* (2001) 29-63, 33; I. Brownlie, *International Law and the Use of Force by States* (Oxford University Press, 1963), 41 and 45-6.

³² *Report of the International Law Commission on the Work of Its Thirty-Second Session*, (5 May-25 July 1980), UN Doc. A/35/10, 71 (“droit à la conservation de soi-même”, “droit à l’autoconservation”, “Recht auf Selbsterhaltung”).

³³ J. J. A. Salmon, ‘Faut-il codifier l’état de nécessité en droit international’, in J. Makarczyk, (ed.), *Essays in Honour of Judge Manfred Lachs* (Martinus Nijhoff, 1984) 235-70, 239.

³⁴ In the *Faber case*, *German-Venezuelan Mixed Claim Commission* (1903) X *RIAA* 438, at 466, the Umpire held: “It certainly is a novel proposition that because one may be so situated that the use of the property of another will be of special advantage to him he may on that ground demand such use *as a right*. The rights of an individual are not created or determined by his wants or even his necessities. The starving man who takes the bread of another without right is none the less a thief, legally, although the immorality of the act is so slight as to justify it. Wants or necessities of individuals cannot create legal rights for them, or infringe the existing rights of other...”, quote recounted in B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Stevens & Sons, 1953), 69 and also in Salmon, 1984, 239-40. Cf. Gross & Ni Aolain, 2001, 35, with references to D.W. Greig, *International Law* (Butterworths, 1976), 675; Salmon, 1984, 239; R. Ago, ‘Le délit international’, 68-II *RdC* (1939), 942; A. Verdross, ‘Règles générales du droit international de la paix’, 30-V *RdC* (1929), 430; A. Cavaglieri, ‘Règles générales du droit de la paix’, 26-I *RdC* (1929), 558; L. Le Fur, ‘La Théorie du Droit Naturel Depuis le XVII^e Siècle et la Doctrine Moderne’ 18-II *RdC* (1927) 259, 431; C. de Visscher, *La Responsabilité des États* (Brill, 1924), 111.

³⁵ Gross & Ni Aolain, 2001, 36, with reference to Greig, 1976, 674 and J. Barboza, ‘Necessity (Revisited) in International Law’, in J. Makarczyk (ed.), *Essays in Honour of Judge Manfred Lachs* (Martinus Nijhoff, 1984), 28; R. Boed, ‘State of Necessity as Justification for Internationally Wrongful Conduct’, 3 *Yale Hum. Rts & Development L. J.* (2000) 1-43, 4. Cf. H. Grotius, *De Jure Belli ac Pacis Libri Tres*, vol. II (Translation), Book III (Carnegie Endowment for International Peace, 1925) 599 *et seq.*

preservation.³⁶ Self-preservation is a notion that can only be evoked in cases where the very existence of the State is in danger, which is not the case with necessity.³⁷

Consequently, most writers have objected to the notion of necessity as capable of creating a subjective right for a State. If it were so capable, this would imply the possibility at law to require a certain conduct from another State, since the ‘right of necessity’ as this was defined by writers in the early twentieth century³⁸ must entail that other States owed the fulfilment of an obligation to the State invoking its right of necessity.³⁹ It was considered unacceptable to let one State’s interests override the legitimate interests of other States in such a manner.⁴⁰ The view that necessity knows no law, and that States under certain, vaguely defined conditions, would be free to conduct themselves in accordance with their own self-interest has been replaced by a legalistic perspective on international relations. This implies that modern international law will not yield lightly to unilateral decisions by States – if it did, it would become pointless in the process.⁴¹

Some features of the doctrine of self-preservation have nonetheless survived to be incorporated into the modern doctrine of necessity. In the words of Crawford and Olleson:

A State is not required to sacrifice human life or to suffer inordinate damage to its interests in order to fulfil its international obligations.⁴²

Hence, it is recognized that international law cannot function if it does not consider the particular needs of States when confronted with crises.⁴³ Consequently, some element of a right to ignore international undertakings if sufficiently vital interests are at stake seems to have endured.⁴⁴

³⁶ R. Ago, ‘The Internationally Wrongful Act of the State, Source of International Responsibility’, *Eighth Report on State Responsibility*, Addendum (1980), ILC, 32nd sess., UN Doc. A/CN.4/318/Add.5, 8, para. 8.

³⁷ See further *infra*.

³⁸ See references in Ago, *Report*, 1980, 11, fn 15.

³⁹ Ago, *Report*, 1980, 11.

⁴⁰ de Visscher, 1924, 111, quoted in Salmon, 1984, 239.

⁴¹ Gross & Ni Aolain, 2001, 35. See also the dissenting opinion of Judge Krylov in the *Corfu Channel* case (United Kingdom v. Albania), *ICJ Rep.* 1949, 3, at 77, holding that “[s]ince 1945, i.e. after the coming into force of the Charter, the so-called right of self-help, also known as the law of necessity (*Notrecht*), which used to be upheld by a number of German authors, can no longer be invoked. It must be regarded as obsolete. The employment of force in this way, or of the threat of force, is forbidden by the Charter (para. 4 of Art. 2)”.

⁴² J. Crawford & S. Olleson, ‘The Nature and Forms of International Responsibility’, in M. D. Evans, *International Law* (Oxford University Press, 2003), 446-70, 464.

⁴³ Gross & Ni Aolain, 2001, 35.

⁴⁴ However, it will be argued in this essay that this approach is no longer valid and that in fact necessity confers no right to ignore an undertaking, but merely provides an excuse and an explication of wrongful behaviour, see *infra* in sec. 4. This distinction is usually discussed in terms of authorisation vis-à-vis excuse and I adopt this terminology in this essay.

The *Russian Indemnity* case⁴⁵ was recalled by the ILC as support for the existence of a defence of necessity. In this case, Russia expressly admitted that the obligation of a State to execute treaties could indeed be weakened if the very existence of the State was endangered, i.e. if observation of the international duty was self-destructive. In observance of this agreement between the parties on the principle of necessity, the Permanent Court of Arbitration affirmed the existence of such a defence. It would appear from this that the state of necessity stems from a notion of a balance of concerns demanding that important interests, such as the very right to exist as a State, could have a weakening impact on other obligations of a State, which were of less importance. The reference to the obligation being self-destructive appears quite similar to the idea of self-preservation.⁴⁶

Another case – which illustrates the early interchangeable use of the concepts of self-preservation, self-defence and necessity – is the *Caroline* case⁴⁷ from 1837, where British armed forces attacked and destroyed the vessel *Caroline* in United States territory. The ship, owned by American citizens, was carrying recruits and military material to the Canadian insurgents. In response to the American protests, necessity was invoked by the British, who referred to the “necessity of self-defence and self-preservation”. The American Government responded by stating that

nothing less than a clear and absolute necessity can afford ground of justification [for the commission] of hostile acts within the territory of a Power at Peace⁴⁸

holding the British to prove that the action was caused by

a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation.⁴⁹

This is known as the *Caroline* test. This test has subsequently been taken as referring to what is now categorized under the doctrine of state of necessity: the relevant justification of the *Caroline* case, as it was described by the American Government, was not

⁴⁵ *Russia v. Turkey* (1912) XI *RIAA* 430. Cf. *Report of the ILC* (1980), UN Doc. A/35/10, 73; J. Crawford, *The International Law Commission's Articles on State Responsibility – Introduction, Text and Commentaries* (Cambridge University Press, 2002), 180.

⁴⁶ *Report of the ILC* (1980), UN Doc. A/35/10, 74.

⁴⁷ Not technically a case in an international tribunal, but rather an incident occurring on 29 Dec. 1837, reliance is made on compilations of diplomatic correspondences, referred to e.g. in Crawford, 2002, 179 (references to Manning, W.R. (ed.), *Diplomatic Correspondence of the United States: Canadian Relations 1784-1860* (Washington, Carnegie Endowment for International Peace, 1943), vol. III, p. 422) and in A. D. McNair, (ed.), *International Law Opinions*, vol. II (Cambridge University Press, 1956), 221. See further the *Report of the ILC* (1980), UN Doc. A/35/10, 93.

⁴⁸ Note from American Secretary of State Daniel Webster to Henry Fox, British Minister to Washington, 24 April 1841, reiterated in the report of the *Report of the ILC* (1980), UN Doc. A/35/10, 93, fn 129.

⁴⁹ See in the previous footnote, Webster's letter of 24 April 1841, also reiterated in McNair, 1956, 222.

dependent on the existence of a prior or threatened aggression, or any kind of wrongful act, on behalf of the State whose territory had been violated.⁵⁰ It is also relevant that the Americans were not actively involved in the conflict between Canada and Britain.

2.2 The Modern Concept of Necessity

The necessity concept that has been identified and codified⁵¹ after consideration by the International Law Commission provides the following:

ARTICLE 25⁵²

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 means for the State to safeguard an essential interest against a grave and imminent peril; and
 - b. does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
 - a. The international obligation in question excludes the possibility of invoking necessity; or
 - b. The State has contributed to the situation of necessity.

The formulation of requirements for the defence of necessity to be applicable has been criticised for vagueness and imprecision.⁵³ As will be seen from the discussion in this essay, recent case law and state practice has helped to construe the conditions of a state of necessity and the criteria today appear to be reasonably clear and stringent. Indeed, it seems that international courts and tribunals have interpreted the requisites of the necessity doctrine carefully, the requirements must be cumulatively satisfied and each criterion has been construed quite strictly.

Article 25 of the ARSIWA is cast in negative language to emphasise the exceptional nature of the defence of necessity.⁵⁴ This is based on international practice: in the

⁵⁰ See further *infra* in sec. 2.3.

⁵¹ The circumstances precluding wrongfulness included in Chapter V of the ARSIWA are those that at the adoption of the text were considered to be recognized under general international law, Crawford, 2002, 162, para. 8. As will be discussed later, this may be changed through subsequent state practice and treaty-making.

⁵² The International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts, GA Res. 56/83 (2002), annex.

⁵³ See Salmon, 1984, 263.

⁵⁴ Crawford, 2002, 183; *Report of the ILC* (1980), UN Doc. A/35/10, para 40. *Cf.* S. Rosenne, *Breach of Treaty* (Grotius Publications, 1985); B. Simma, 'The Work of the International Law Commission at Its Fifty-First Session (1999)', 68 *Nordic J. Int'l L.* (1999) 293-361, at 313.

*Pacific Fur Seals Arbitration*⁵⁵, the Russian Government stressed that the action was a provisional measure of absolute necessity, adopted under pressure of exceptional circumstances,⁵⁶ and the exceptional nature of the defence was also stressed in the *Gabčíkovo-Nagymaros Project* case⁵⁷ and in the *Construction of a Wall* case.⁵⁸ In fact, in the process of the work of the ILC, the argument was made that the situations that would qualify for state of necessity would be so exceptional and rare, so as not to justify the inclusion of the defence in the scheme of circumstances precluding wrongfulness. The risk was rather that the provision would entail interpretational difficulties and abuse.⁵⁹

The main concern in relation to the plea of necessity has always been, and most likely still is, the fear of abuse. The wording is thus also intended to warn of excessive exploitation of the doctrine.⁶⁰ Apprehensions regarding abuse have previously led some writers to accept the doctrine of state of necessity only in such cases where the possibilities of abuse are less frequent and less serious, or where the justification under the doctrine serves to protect a humanitarian interest of the population.⁶¹ The fear of abuse is evident also in the writings of those in favour of a plea of state of necessity, but takes its form rather in the focus on the inherent limits to such a plea and the strict conditions for its admissibility. It is thus evident that the threshold for allowing a plea of necessity has always been intended to be very high.

The International Court of Justice in the *Gabčíkovo-Nagymaros Project* case stated that the invoking State cannot be the sole judge of whether the situation is one of necessity.⁶² It is thus not a matter of subjective assessment by the invoking State, but the objective criteria have to be met. The burden of proof of whether the conditions and requirements of necessity are fulfilled in a particular case will be on the State invoking the existence of a state of necessity as a circumstance precluding wrongfulness.

⁵⁵ Cf. fn 30 *supra* for recounts, see also the *Report of the ILC* (1980), UN Doc. A/35/10, 81; P. Okowa, 'Defences in the Jurisprudence of International Tribunals', in G. S. Goodwin-Gill and S. Talmon, *The Reality of International Law: Essays in Honour of Ian Brownlie* (Oxford University Press, 1999) 389-411, 401; Crawford, 2002, 180.

⁵⁶ *Report of the ILC* (1980), UN Doc. A/35/10, 81, with reference to *British and Foreign State Papers*, 1893-1894, London, H.M. Stationery Office, vol. 86, 1899, pp. 219-20, for a letter of 12/24 February 1893 from the Russian Minister for Foreign Affairs to the British Ambassador.

⁵⁷ *Gabčíkovo-Nagymaros Project* case (Hungary v. Slovakia), Judgment, *ICJ Rep.* 1997, 7, 41, para. 52; cf. Okowa, 1999, 402.

⁵⁸ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ, Adv. Op., 9 July 2004.

⁵⁹ See *Report of the ILC* (1980), UN Doc. A/35/10, paras. 33-35.

⁶⁰ Crawford, 2002, 183.

⁶¹ *Report of the ILC* (1980), UN Doc. A/35/10, 103.

⁶² *Gabčíkovo-Nagymaros Project* case, *ICJ Rep.* 1997, 7, at 40, para 51.

ness.⁶³ This is important, as many requirements for a state of necessity to be at hand are issues of fact, the establishment of which thus rests on the invoking State.

This stance may be contrasted with earlier assertions, such as for instance Schachter, writing in 1991, who in the context of rescue actions based on a state of necessity held that “[t]he State whose nationals are in peril must be given latitude to determine whether a rescue action is necessary; there is no international body or third party in a position to make that judgment.”⁶⁴ Undoubtedly, such a position can well be contested against the background of the Court’s pronouncement in the *Gabčíkovo-Nagymaros Project* case. It is submitted that the current position is that the assessment of whether a factual necessity is at hand must indeed be determined by the State, but that such an assessment may be scrutinised by affected parties, the international community as a whole and, as seen from case law, international legal bodies to which the case may be rendered. The very idea behind regime building efforts in the field of state responsibility builds on a desire not to give much latitude to States, as regards the circumstances under which they may deviate from their international undertakings.

The conduct chosen must not only be directed at achieving the ends a State is thriving for when it comes to protection of its vital interest, it must be necessary to achieve these ends.⁶⁵ It is submitted that this implies a condition that the conduct is actually able to bring about the desired result.

The cases of state practice where necessity has been successfully invoked are few, but one thing that these situations appear to have in common is that there has been a significant international, political support of the actions. For instance, the *Torrey Canyon* incident did not evoke protests of either the affected party, the ship owner, or other Governments⁶⁶ and is therefore the case that most authors refer to primarily when accounting for a case where there actually was a state of necessity providing an excuse for internationally wrongful acts.⁶⁷

⁶³ Crawford & Olleson, 2003, 454. See also the *Oscar Chinn* case (United Kingdom v. Belgium), *PCIJ Ser. A/B* (1934) No. 63, Ind. Op. of Judge Anzilotti, 112, cited in Cheng, 1953, 73; E. Davidsson, ‘The UN Security Council’s Obligations of Good Faith’, 15 *Florida J. Int’l L.* (2003) 541-73, 547.

⁶⁴ O. Schachter, *International Law in Theory and Practice* (Martinus Nijhoff Publishers/Kluwer, 1991), 166.

⁶⁵ Salmon, 1984, 246.

⁶⁶ *Report of the ILC* (1980), UN Doc. A/35/10, 82. See also the white paper issued by the United Kingdom Government, *The Torrey Canyon*, Cmnd. 3246, London, H.M. Stationery Office, 1967; Crawford, 2002, 181.

⁶⁷ M. N. Shaw, *International Law* (Oxford University Press, 2003), 712. See further *infra* in relation to balance of interests, sec. 2.4.4.

2.3 Distinction from Other Circumstances Precluding Wrongfulness

In situations where a State invokes the consent of another State to an act that violates an international obligation, alternatively invokes previous breaches of obligations warranting countermeasures or an act of aggression calling for self-defence, the previous conduct of the other State is highly relevant. In fact, the invocation of the pertinent circumstance precluding wrongfulness depends on this behaviour. In contrast, a plea of necessity does not.⁶⁸ In making this distinction, Tomuschat has submitted that a State acting under the doctrines of self-defence, countermeasures and consent is in fact exercising a right enjoyed, either by virtue of authorization by the affected State or under negotiated rules of international law. Conversely, as regards necessity and distress, the implications are that the State in question acts in breach of its obligation without the victim State giving any cause for non-observance of the mutual obligations. Rather, the acting State unilaterally makes a decision not to comply with its international obligations on the basis of a balancing of interests, where the interests of the culpable State are given priority over the interests of other States.⁶⁹

A common feature of the defences of necessity, *force majeure* and distress is thus the irrelevance of the conduct of the State suffering from the breach of obligations; and the focus on compelling external factors, inducing the relevant conduct adopted by the State in breach of its international obligations.⁷⁰ In earlier cases, *force majeure* and state of necessity has even been invoked interchangeably. In the *Société Commerciale de Belgique* case⁷¹, the Greek Government referred to *force majeure*, whilst adding that various schools and writers expressed the same idea with the term ‘state of necessity’.⁷² As construed in the ARSIWA, however, a situation of *force majeure* entails material impossibility to act in conformity with the relevant international obligations, or perhaps even to ascertain whether the conduct is in fact in breach of such obligations.⁷³ This interpretation of the defence of *force majeure* finds support in the *Rainbow Warrior* case, where the Tribunal stated, with reference to the International Law Commission, that *force majeure* under the law of state responsibility im-

⁶⁸ *Report of the ILC* (1980), UN Doc. A/35/10, 69-70.

⁶⁹ Tomuschat (1999) 281 *RdC* 268, at 288. As will be discussed below, this distinction may have important ramifications. See further *infra* in chapter 6.

⁷⁰ *Report of the ILC* (1980), UN Doc. A/35/10, 70.

⁷¹ *Belgium v. Greece*, *PCIJ*, Ser. C (1939) No. 87.

⁷² *Société Commerciale de Belgique* case, *PCIJ*, Ser. C (1939) No. 87, 209 (“*état de nécessité*”). See also Crawford, 2002, 180, and *Report of the ILC* (1980), UN Doc. A/35/10, 76. In particular, in earlier French doctrine, there is a tendency to equate *force majeure* and *nécessité*, see e.g. Le Fur, 1927, 430. Le Fur also holds necessity to justify « le droit, à défaut d’autre moyen, d’employer la force pour se défendre contre une agression injuste », i.e. self-defence – it thus appears that the pre-War notion of necessity did not uphold a strict separation between the different circumstances precluding wrongfulness.

⁷³ Article 23 of ARSIWA; *Report of the ILC* (1980), UN Doc. A/35/10, 70.

plied involuntary acts, or at least unintentional conduct, that was brought about by an irresistible force or an unforeseen external event. That a circumstance rendered performance more difficult or burdensome did not constitute *force majeure*.⁷⁴ The invocation of necessity, on the other hand, logically implies an intentional failure to conform to the State's obligations, and signals perfect awareness of having deliberately chosen to act contrary to these.⁷⁵ The violation of the obligation in question can in other words be deemed theoretically avoidable in a situation where necessity is applicable.⁷⁶

Distress in the law of state responsibility concerns danger to the lives of officers of the State, or other persons whose conduct is attributable to the State, and persons who are entrusted in their care. Distress refers to a situation of extreme peril in which the agent of the State who acts on behalf of the State has, at that particular moment, no means of saving himself or persons entrusted to his care other than to act in a manner not in conformity with the State's obligations.⁷⁷ It is thus not materially impossible to conform to international law, but the fatal threat to the individual who has to make decisions concerning the conduct to be chosen makes that choice utterly artificial; the state of necessity, conversely, does not concern itself with a threat to officials of a State, but with danger to the State itself, or a danger to an essential interest of that State.⁷⁸

To sum up, the doctrine of necessity implies a priority of interests that is unique for this circumstance precluding wrongfulness; on the one hand the compliance with international obligations and on the other the protection of vital interests of the State against a grave and imminent peril. A State invoking it has given priority to its own vital or essential interests, and sacrificed the rights of another State, and, in the process, the principle of *pacta sunt servanda*.⁷⁹ The State organ deciding on a particular course of conduct is not deprived of free will and freedom of choice. Although admittedly their decision may be a very difficult one, due to the peril facing the State, the conduct remains the result of a considered, conscious and deliberate choice.⁸⁰ This characteristic of necessity has been deemed the source of the controversy surrounding the defence:

⁷⁴ *Rainbow Warrior* case (1990) XX *RIAA* 217, 253, para. 77.

⁷⁵ *Report of the ILC* (1980), UN Doc. A/35/10, 70-1; Salmon, 1984, 245.

⁷⁶ Crawford & Olleson, 2003, 464. From this also follows that there are generally no problems related to imputability or questions of fault or due diligence when necessity is concerned, as necessity implies a "guilty plea" on behalf of the State, cf. A. Cassese, *International Law* (Oxford University Press, 2001), 191-2.

⁷⁷ Article 24 of ARSIWA; cf. *Rainbow Warrior* case (1990) XX *RIAA* 217, at 253, para. 78.

⁷⁸ *Report of the ILC* (1980), UN Doc. A/35/10, 71; Crawford & Olleson, 2003, 463.

⁷⁹ Okowa, 1999, 398; Tomuschat, 1999, 287. See further *infra* in chapter 6.

⁸⁰ *Report of the ILC* (1980), UN Doc. A/35/10, 71; Salmon, 1984, 236.

The 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, in distress, what is “involved is a situation 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”.

[...] 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.⁸¹

2.4 The Criteria of the Necessity Defence

2.4.1 Essential Interest

The invocation of necessity, in order to preclude the wrongfulness of conduct contrary to a State’s international obligations, is first of all dependent on the identification of the essential interests of the State allegedly in the wrong.⁸² The extent to which an interest is essential will have to be judged with consideration to the circumstances in the relevant case.⁸³ Hence, there is no fixed catalogue listing the essential interests a State may refer to.⁸⁴

It is a well established view in contemporary international law that the criterion of ‘essential interest’ need not concern the very existence of the State;⁸⁵ and clearly, the defence in principle is not limited to matters of life and death, but also extends to the adequate functioning of the State.⁸⁶ The ILC offered in its commentary on the ARSIWA that interests such as political or economic survival, the maintenance of conditions in which essential services can function, the keeping of internal peace, the survival of part of its population or the ecological preservation of all or some of its territory were interests whose protection could justify divergence from international obligations under the doctrine of necessity.⁸⁷ The ILC based this inclusive view of the concept of ‘essential interest’ on the range of interests for which necessity had been invoked in

⁸¹ *Rainbow Warrior* case (1990) XX *RIAA* 217, 254, para. 78. This distinction seems to rest with the different approach to alternatives in the two doctrines: as noted above, distress presupposes threat to the life of a human being in position of making a choice, which renders that choice a technicality, as no person will make a decision that puts his or her life in danger. Necessity operates on a higher level of abstraction, which according to the Tribunal was sufficient reason to render its existence questionable. This characteristic of necessity is indeed also its most problematic feature in relation to the international rule of law, see chapter 6 *infra*.

⁸² The use of the term was discussed at the 53rd session of the International Law Commission, in relation to the concepts of ‘fundamental interests’ and ‘collective interests’ used elsewhere in the ARSIWA. The concept of ‘essential interests’ was preferred as it allowed a separation of essential and non-essential interests and the wording was retained. B. Simma, ‘The Work of the International Law Commission at Its fifty-Third Session (2001)’, 71 *Nordic J. Int’l L.* (2002) 123-187, at 129.

⁸³ *Report of the ILC* (1980), UN Doc. A/35/10, para. 32; Crawford, 2002, 183; Boed, 2000, 15; Salmon, 1984, 250. The idea that necessity rests on a subjective appreciation of interests, and not on the invocation of an objective right, has been part of the doctrine for a long time, see *Le Fur*, 1927, 430 *et seq.*

⁸⁴ Okowa, 1999, 402, with reference to the *Gabčíkovo-Nagymaros Project* case, *ICJ Rep.* 1997, 7, 41, para. 53.

⁸⁵ Boed, 2000, 15 and 26; *Gabčíkovo-Nagymaros Project* case, *ICJ Rep.* 1997, 7, para. 53.

⁸⁶ *Cf. Ago, Report*, 3, para. 2. *Report of the ILC* (1980), UN Doc. A/35/10, para. 32. Cases where the interest has related to other interests than the existence of the State are actually both more frequent and less controversial.

⁸⁷ *Report of the ILC* (1980) UN Doc. A/35/10, 71.

international case law and state practice up until that point. Thus, the defence has been invoked in order to protect a wide variety of concerns⁸⁸, such as safeguarding the environment and ecological interests⁸⁹, grave financial difficulties⁹⁰, ensuring the safety of a civilian population⁹¹ and concerns for sound state finances and the ability to provide services and shelter to the State's nationals⁹². Although open to interpretation, it would appear that International Tribunal for the Law of the Sea in the *M/V Saiga No. 2* case accepted interest in maximizing tax revenue as 'essential'.⁹³ State practice also provides examples of invocations of quite broad interests worthy of protection, such as the reference of the American Secretary of State to 'peace and prosperity' to justify the occupation of the Spanish island of Amelia in 1817.⁹⁴

The State is not by itself competent to decide what constitutes an essential interest.⁹⁵ The character to be attached to a particular interest also seems to turn on whether there is a general consensus among States that the relevant interest is sufficiently important. Such a method for classifying an interest as 'essential' was used by the ICJ in the *Gabčíkovo-Nagymaros Project* case, where the ILC was quoted stating, with reference to State practice, that ecological concerns over the past decades had evolved into being considered an essential interest.⁹⁶ The Court in this context recalled that it had itself previously declared great value to be attached to this field, and thus found no difficulty in accepting ecological balance as an essential interest of Hungary's.⁹⁷

⁸⁸ Crawford, 2002, 183.

⁸⁹ See e.g. the Pacific Fur Seals Arbitration, the Torrey Canyon incident, and the Gabčíkovo-Nagymaros Project case, *ICJ Rep.* 1997, 7.

⁹⁰ See e.g. *French Company of Venezuela Railroads* case (France v. Venezuela), *French-Venezuelan Mixed Claims Commission* (1902) X *RIAA* 285, 353; *Report of the ILC* (1980), UN Doc. A/35/10, 79.

⁹¹ See e.g. the *Anglo-Portuguese dispute* of 1832, the *1960 Belgian intervention in the Congo* incident and the *Caroline* case.

⁹² See e.g. the case of *Properties of the Bulgarian minorities in Greece* of 1926, the *Russian Indemnity* case of 1912, (Russia v. Turkey), XI *RIAA* 431, and the *Société Commerciale de Belgique* case of 1939, (Belgium v. Greece), *PCLJ*, Ser A/B (1939) No 78.

⁹³ *M/V Saiga No. 2* case, (Saint Vincent and the Grenadines v. Guinea), Admissibility and Merits, *ITLOS* (1999) 120 *ILR* 143, 191-2. Cf. the *Fisheries Jurisdiction* case (United Kingdom v. Iceland), *ICJ Rep.* 1974, 3, where Iceland invoked "vital interests" in terms of its "exceptional dependence ... on its fishing for its existence and economic development", para. 37. This, in combination with the development of fishery technique that risked overexploiting the seas surrounding Iceland, was however not considered sufficient to constitute a change of circumstance as a ground for termination of a treaty under the doctrine of *rebus sic stantibus*. The *rebus sic stantibus* doctrine has been the object of some of the same criticism as the necessity doctrine, see Shaw, 1997, 670.

⁹⁴ Salmon, 1984, 239.

⁹⁵ *Report of the ILC* (1980), UN Doc. A/35/10, para. 36. The ICJ has declared, quoting the *Report of the ILC* (1980), UN Doc. A/35/10, para. 40, that the State is not the sole judge of whether the conditions of necessity have been met, *Gabčíkovo-Nagymaros Project* case, *ICJ Rep.* 1997, 7, 40, para. 51. The conditions must be cumulatively satisfied, which implies that all the criteria concerning necessity should be objectively established. Cf. the *M/V Saiga No. 2* case (1999) 120 *ILR* 143, 191-2, para. 135.

⁹⁶ See the *Report of the ILC* (1980), UN Doc. A/35/10, para. 14. Hungary had argued that the termination of the 1977 treaty which it had concluded with Slovakia was justified because its implementation posed an unacceptable threat to its essential ecological interest. In order to prevent severe damage to its agriculture and silviculture, which was in its turn a threat to the survival of its population, Hungary unilaterally took to abandon the project, *Gabčíkovo-Nagymaros Project* case, *ICJ Rep.* 1997, 7, 41, para. 53.

⁹⁷ *Gabčíkovo-Nagymaros Project* case, *ICJ Rep.* 1997, 7, 41, para. 53. For further commentary see Boed, 2000, 15; R. Lefeber, 'The *Gabčíkovo-Nagymaros Project* and the Law of State Responsibility', 11 *Leiden J. of Int'l L.* (1998)

Some writers have discussed whether military necessity – the object of which is to safeguard the vital interest of achieving success of military operations and victory over the enemy – can be regarded as an essential interest and thereby provide justification of conduct that does not conform to the law of war and the limits on means and methods of conduct of hostilities and warfare that are imposed on belligerents.⁹⁸ That military considerations should constitute an essential interest was however rejected by the ILC. Not to respect the restrictions on methods employed in war would be contradictory to the object and purpose of international humanitarian law, namely to alleviate the suffering of the civilian population and ensure respect for some fundamental values of humanity.⁹⁹ Quoting the ILC:

The purpose of the humanitarian law conventions was to subordinate, in some fields, the interests of a belligerent to a higher interest.¹⁰⁰

The notion of military necessity¹⁰¹ is the core of the legal authority of a belligerent State to resort to actions which meet the needs of the conduct of hostilities, in relation to the enemy or neutral States and their nationals; what the concept however does not denote is a circumstance precluding wrongfulness of an act that would normally not conform to international obligations – military necessity is a criterion for the operation of certain substantive provisions under the law of war and neutrality.¹⁰² Evidently, the concept of military necessity bears little relevance to the discussion of a state of necessity as preclusion of wrongfulness; nevertheless, military necessity is sometimes in-

609-623, 615; K. Wellens, 'The Court's Judgment in the case concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia): some preliminary reflections', in K. Wellens (ed.), *International Law: Theory and Practice; Essays in Honour of Eric Suy* (Martinus Nijhoff Publishers, 1998) 765-799, 781; and Okowa, 1999, 402.

⁹⁸ *Report of the ILC* (1980), UN Doc. A/35/10, 97-8. Here, military necessity is dealt with as an essential interest. Cf. chapter 4, where military necessity as a separate regime under international humanitarian law is discussed.

⁹⁹ *Report of the ILC* (1980), UN Doc. A/35/10, 98.

¹⁰⁰ Some humanitarian law conventions nonetheless themselves provide for exceptions to the duty to meet the obligations they would normally impose, in situations of urgent military necessity, see *infra* chapter 4. However, such exceptions apply only to the instances expressly provided for, whereby it can be implicitly inferred that such exceptions do not warrant the invocation of military necessity as a justification in any other cases than those prescribed for in the derogation clauses, *Report of the ILC* (1980), UN Doc. A/35/10, 99. Furthermore, with the distinction made here between authorisation and excuse, if military necessity was ever to fall under the necessity doctrine under the law of state responsibility, it would merely be excused. The act would still be in contradiction to international law. Additionally, a state of necessity cannot be invoked if it is expressly or implicitly prohibited by the conventional instrument in question. It may be argued that this is the case under international humanitarian law. In addition, the balance of interests seems to preclude military necessity from the necessity doctrine, cf. *Report of the ILC* (1980), UN Doc. A/35/10, 99.

¹⁰¹ See closer for a discussion of the different connotations attached to this notion, Gross & Ni Aolain, 2001, 39. See also A. Imseis, 'Critical Reflections on the International Humanitarian Law Aspects of the ICJ *Construction of a Wall* case, Adv. Op.', 99 *Am. J. Int'l L.* (2005) 102-118, 109. It is noteworthy that the discourse on military necessity uses the term 'state of necessity' as a prerequisite to enable a State to resort to military action, see e.g. Imseis, 2005, 111. However, this type of 'state of necessity' should not be equated with the definition of necessity offered by the ILC in Article 25 of the ARSIWA. Nevertheless, it is lamentable that these concepts are so intertwined: not only are there several locutions associated with the term 'military necessity', but apparently also several connotations to the notion of 'state of necessity'.

¹⁰² *Report of the ILC* (1980), UN Doc. A/35/10, 97; Crawford, 2002, 185.

voked in an integrated argument along the lines of state of necessity.¹⁰³ This confusing interchangeable invocation of military necessity and state of necessity most likely emanates from when the necessity concept was linked to a right of self-preservation. In the earlier German doctrine of *Kriegsraison*¹⁰⁴, the concept of military necessity denoted not as today an element part of the international humanitarian law, but was a concept closely related to today's notion of necessity. Pursuant to the *Kriegsraison* reasoning, a State could disregard the customs of war in situations of “urgent and overwhelming necessity” – a requisite that extended to the preservation of the military units and ensuring the success of military operations.¹⁰⁵ The rule of law was in particularly difficult military decisions replaced by a rule of necessity. This standpoint was however rejected during the second half of the 20th century. It was considered unacceptable that military commanders were given the possibility to overlook the laws of war in any situation where that entailed military advantage.¹⁰⁶ The operation of international humanitarian law is envisaged to come about in extreme situations and apply only where regular norms have been suspended due to crisis or emergency caused by conflict. To allow yet another level of necessity to change this situation would indeed be paradoxical.¹⁰⁷

2.4.2 Grave and Imminent Peril

No matter what kind of interest to be protected, it has to be faced with a threat that amounts to a grave and imminent peril.¹⁰⁸ The determination of gravity and imminence must be determined *in casu* and is highly fact-specific.¹⁰⁹

The criterion of extreme, ‘grave’ peril was adopted by the ILC, drawing on the view of Grotius.¹¹⁰ However, no measure of the gravity of peril was offered. Boed has suggested that any threat likely to destroy the possibility of realising an essential State interest constitutes ‘grave peril’.¹¹¹ One situation where the international community appears to have accepted the peril as sufficiently grave is the *Torrey Canyon* incident in 1967. A Liberian oil tanker went aground off the coast of Cornwall, with a cargo of

¹⁰³ The ILC noted that in some instances States had relied on “necessity of war” to evade international obligations under the laws of war, *Report of the ILC* (1980), UN Doc. A/35/10, 97, para. 27.

¹⁰⁴ Cf. Thomas Erskine Holland, *The Laws on War on Land* (1908), para. 2, cited in Gross & Ni Aolain, 2001, 40.

¹⁰⁵ N. C. H. Dunbar, ‘Military Necessity in War Crimes Trials’, 29 *Brit. YB of Int’l L.* (1952) 442-52, 445, cf. in Gross & Ni Aolain, 2001, 40.

¹⁰⁶ Gross & Ni Aolain, 2001, 40.

¹⁰⁷ *Report of the ILC* (1980), UN Doc. A/35/10, 98-9. See further sec. 2.4.4, 2.5.2 and 6.2 in relation to balance of interests, and whether international law in itself sets out a weighting of different concerns.

¹⁰⁸ Cf. Crawford, 2002, 183; Boed, 2000, 16; Shaw, 2003, 712. For other ways of phrasing a similar condition, see references to Strupp and Leca in Salmon, 1984, 251.

¹⁰⁹ Boed, 2000, 28.

¹¹⁰ Ago, *Report*, 1980, 14, para. 13; *Report of the ILC* (1980), UN Doc. A/35/10, 106, para. 33; Cf. Boed, 2000, 28.

119,000 tons of crude oil. The collision tore a hole in the hull and within two days nearly 30,000 tons of oil leaked out, whereupon the British Government bombed the ship, in order to burn the remaining oil.¹¹² Although the UK never offered a legal justification for its action, the Government emphasised the extreme danger of the situation, and the lack of protests from governments or private parties appear to render support that the situation was indeed of such severity that extraordinary measures were warranted.¹¹³

Early case law suggests that the criterion of ‘imminence’ is deeply rooted in the doctrine of necessity. The *Caroline* test – i.e., danger must be instant, overwhelming and leaving no moment for deliberation – has been invoked and quoted with approval on numerous occasions.¹¹⁴ In the *Anglo-Portuguese Dispute of 1832*, the British expressed that necessity, if urgent, could be accepted as an excuse for the conduct.¹¹⁵ Similarly, Britain had previously accepted an excuse of necessity in the case of the embargo against the *Packet Chichester* in 1829, where the Mexican Government feared an imminent Spanish attack.¹¹⁶ The imminent character of the threat to an essential interest was also emphasised in the *Pacific Fur Seals Arbitration* case, as the hunting season was about to open and the danger of extermination of seals in the area was overwhelming.¹¹⁷ Extraordinary measures taken in the face of imminent danger was also accepted in the case of *Dickson Car Wheel* between the US and Mexico, from 1931.¹¹⁸ Similarly, the parties to the dispute concerning the *Wimbledon*, decided by the Permanent Court of International Justice in 1923, argued along the lines of “immediate and imminent danger”, treating this as a requirement of a plea of necessity.¹¹⁹

¹¹¹ Boed, 2000, 28.

¹¹² *Report of the ILC* (1980), UN Doc. A/35/10, 82 and 106.

¹¹³ *Report of the ILC* (1980), UN Doc. A/35/10, 83. Cf. the *Gabčíkovo-Nagymaros Project* case, *ICJ Rep.* 1997, 7.

¹¹⁴ Crawford, 2002, 179; cf. *Report of the ILC* (1980), UN Doc. A/35/10, 93.

¹¹⁵ See the letter of 22 Nov. 1832 by H. Jenner concerning the British position in this situation, quoted in A. McNair, *International Law Opinions* (Cambridge University Press, 1956) vol. II, 231 *et seq.* Cf. *Report of the ILC* (1980), UN Doc. A/35/10, 84; Crawford, 2002, 179; Salmon, 1984, 251.

¹¹⁶ H. Jenner reported on 31 Oct. 1829 that “[t]he first and paramount duty of every Nation is that of self-preservation, and the Law of Nations will sanction the adoption of any measure, which may be necessary to secure this great object, although it may in some degree infringe upon the rights of others”, quoted in McNair, 1956, 231; cf. Salmon, 1984, 251.

¹¹⁷ *Report of the ILC* (1980), UN Doc. A/35/10, 81, para. 14; Salmon, 1984, 252.

¹¹⁸ *Dickson Car Wheel Company (USA) v. United Mexican States, US-Mexican General Claims Commission* (1931) IV *RIAA* 669, at 681; cf. Salmon, 1984, 252.

¹¹⁹ *Wimbledon* case, *PCIJ*, Ser. C (1923) No. 3, vol. I, 284 *et seq.*, where the Italian agent made observations concerning the *status necessitatis*. The facts of the case were that the British vessel *S.S. Wimbledon*, which carried military material destined for Poland during the Russo-Polish war of 1920-21, was refused passage through the Kiel Canal by the German authorities. Germany claimed that its passage through German waters would be contrary to its neutral position in the conflict, whereas France protested with reference to the terms of article 380 of the Treaty of Versailles. The Permanent Court of International Justice held that the refusal of passage was indeed in breach of the Versailles Treaty and that the terms of article 380 was not in contradiction with Germany’s obligations as a neutral State. Thus, the Court did not rule on whether there was call for a plea of necessity in this case, cf. *Report of the ILC* (1980), UN Doc. A/35/10, 88, para. 21. For the judgment of the *Wimbledon* case, refer to *PCIJ*, Ser. A (1923) No 1.

In a more modern case, urgency was stressed by Canada in the Canadian-Spanish *Fisheries Jurisdiction* case. Canada declared that the straddling stocks of the Grand Bank were threatened by extinction and therefore it asserted the right to take action to prevent further destruction of those stocks and permit their rebuilding; further a Spanish fishing ship was seized on the claim that this arrest was necessary in order to put a stop to the over-fishing of Greenland halibut by Spanish fishermen.¹²⁰ The International Court of Justice never determined the substantive matter, as it found that it had no jurisdiction over the case.¹²¹ However, the Court discussed the issue in the *Gabčíkovo-Nagymaros Project* case, where it declared that the concept of imminence goes far beyond the concept of possibility. A peril must be imminent in the sense of proximate; however, a peril that appears only in the long term may still be imminent at the point in time when it is established that the realisation of that peril is certain and inevitable, *albeit* far away.¹²²

Whether a peril exists must be ascertained by objective standards, and it is up to the State invoking necessity to establish that the objective criteria are fulfilled.¹²³ Also this was raised in the *Gabčíkovo-Nagymaros Project* case, where the ICJ stated that the mere apprehension of peril would not suffice; danger must not be merely contingent.¹²⁴ However, by definition, the peril will not yet have been realised in cases of necessity; hence, some measure of uncertainty about future events does not necessarily disqualify a State from invoking necessity. Regardless, it is required that the invoking State can establish, based on the evidence available at the time, that the threat will at some point inevitably be realised.¹²⁵ It is not enough to show a plausible risk of future harm.¹²⁶ Hungary's contention that a reasonable belief in future harm was sufficient to invoke necessity was thus rejected; the Court holding that the uncertain nature of future damage made the threat against Hungarian interests a putative one.¹²⁷ In the further elaboration of the Articles on State Responsibility, the ILC discussed whether the Article on necessity allowed sufficient room for scientific uncertainty and the precautionary prin-

¹²⁰ *Fisheries Jurisdiction* case (Spain v. Canada), Judgment, *ICJ Rep.* 1998, 431, at 443, para. 20.

¹²¹ *Ibid.*, 467, para. 87. Cf. Crawford, 2002, 182.

¹²² *Gabčíkovo-Nagymaros Project* case (Hungary v. Slovakia), Judgment, *ICJ Rep.* 1997, 7, at 41-2, para. 54; Boed, 2000, 28.

¹²³ Crawford, 2002, 183. Regarding the burden of proof, see sec. 2.2 *supra*.

¹²⁴ *Gabčíkovo-Nagymaros Project* case, *ICJ Rep.* 1997, 7, 41-5, paras. 54-6, cf. Crawford, 2002, 183-4, paras. 15-16. See further the *Neptune* case, where it was said that (in French translation) "la nécessité ne doit pas être imaginaire ... elle doit être réelle et pressant", see quote in Salmon, 1984, 253.

¹²⁵ Crawford, 2002, 184, para. 16, see the *Gabčíkovo-Nagymaros Project* case, 43-5, para. 56.

¹²⁶ Okowa, 1999, 402. Cf. the *Gabčíkovo-Nagymaros Project* case, *supra*, where the Court rejected that the alleged peril was sufficiently certain and therefore "imminent" at the time when Hungary suspended works on the dam in 1989.

¹²⁷ *Gabčíkovo-Nagymaros Project* case, *ICJ Rep.* 1997, 7, at 42-3, paras. 54-5; Okowa, 1999, 402.

ciple.¹²⁸ However, the inclusion of such principles into the doctrine was rejected, as the International Court of Justice had already endorsed the Article in its present form in the *Gabčíkovo-Nagymaros Project* case. Further, it was seen as a sufficient concession that a certain measure of scientific uncertainty did not bar a State from invoking necessity, and in addition, the state of necessity could already be said to be at the outer edge of the tolerance of international law for otherwise wrongful conduct; thus the need to keep the doctrine within tight boundaries was seen as more important.¹²⁹

Conversely, an earlier case where peril was considered sufficiently certain is the *Company General of the Orinoco* case from 1903. A French company had obtained concessions from Venezuela to exploit minerals in an area that was claimed by Colombia, which in fact had grounds for seeing it as part of its territory. Colombia strongly protested to the concessions and demanded the return of the area, whereupon Venezuela – wishing to avert the danger of armed conflict with Colombia that was becoming imminent – felt compelled to rescind the concessions and hand over the area to the neighbouring State. This led to a dispute between the company and the Venezuelan Government. When the French Government sided with the company, the case was referred to the 1903 French-Venezuelan Mixed Claims Commission. The Commission accepted the Venezuelan argument that it had been forced to annul the concessions due to the real danger of war they had created.¹³⁰ Hence, the actions taken by Venezuela were considered lawful under the exceptional circumstances of the case – that the State faced a real threat of war – however, the company was entitled to compensation, because of the detrimental effect to its interests.¹³¹ One can expect that peril emanating from responses by other States is more easily determined, as one can rely on expressions of intentions, whereas future ecological damage is harder to establish, precisely because of the scientific uncertainty and the difficulties to establish cause and effect.

¹²⁸ J. Crawford, *Second Report on State Responsibility*, ILC, 51st sess., UN Doc. A/CN.4/498/Add.2 (1999), 31, paras. 288-9.

¹²⁹ *Ibid.*; cf. Simma, 1999, 314.

¹³⁰ *Company General of the Orinoco* case (France v. Venezuela), *French-Venezuelan Mixed Claims Commission* (1902) X *RIAA* 184, at 281. The Umpire stated that “[n]otwithstanding the pending litigation over the boundary, the Company General of Orinoco was permitted to enter into unquestioned and absolute possession of these litigated areas. From the view point of nations the respondent Government had been led into grave error. This error it must repair. It could only repair by receding. It could only recede by compromise with the company or by annulment. Everyday that the contract was continued it was more or less a menace to the peaceful relations then existing between those two countries. That which had been held a valued enterprise, a boon to Venezuela, for the reasons stated had become a source of serious national danger”. Cf. *Report of the ILC* (1980), UN Doc. A/35/10, 84.

¹³¹ *Company General of the Orinoco* case, (1902) X *RIAA* 184, 280 *et seq.*; *Report of the ILC* (1980), UN Doc. A/35/10, 84.

2.4.3 Only Means to Safeguard Interest

The plea of necessity is excluded if there are other, lawful, means available to safeguard the essential interest of the State¹³², a requirement that can be regarded as a function of the exceptional character of the plea of necessity.¹³³ The rule applies even if such alternative means are more costly or less convenient¹³⁴, additional costs are not in any way allowed to be a determinative factor in deciding on whether other means were available to the State.¹³⁵ ‘Means’ also implies not only unilateral action, but also cooperative efforts taken together with other States.¹³⁶

Evidently, this criterion is one that is particularly difficult to fulfil, and consequently, a large part of the cases concerning necessity that exist in international law has turned on the issue of the availability of alternative means. Yet, it is hard to identify the principal differences of circumstances between the cases where a plea was accepted, and consequently no alternative means were thought to be present and situations where a plea was not accepted, because the State was considered to have other means at its disposal.

In the *Pacific Fur Seals Arbitration*, an incident occurring already in 1893, where the validity of the plea of necessity in international law was affirmed, the impossibility of averting this danger with other means was emphasised by the Russian Government in its justification for issuing a decree prohibiting sealing in an area which was indisputably part of the high seas.¹³⁷ Similarly, in the *Torrey Canyon* incident, the British Government underlined that all other means, such as attempts to salvage the vessel and the use of detergents in efforts to disperse the oil, had been exhausted.¹³⁸ This fact may have had a strong influence on the international community’s lack of protest against the action. Also, the plea of necessity was accepted in the *Company General of the Orinoco* case, where the Mixed Claims Commission accepted that the

¹³² Crawford, 2002, 184; Shaw, 2003, 712; Salmon, 1984, 245.

¹³³ Boed, 2000, 16-7.

¹³⁴ Crawford, 2002, 184; Boed, 2000, 17.

¹³⁵ See *Gabčíkovo-Nagymaros Project* case, *ICJ Rep.* 1997, 7; *Report of the ILC* (1980), UN Doc. A/35/10, para. 33; Salmon, 1984, 245. This is in line with a logical argument with regard to the stability of international law. The argument could be advanced that States should, and indeed do, make assessments relating to the economic consequences of commitments under international law before, as opposed to after, other States have come to rely on them. See further chapter 6.

¹³⁶ Simma, 1999, 314.

¹³⁷ *Report of the ILC* (1980), UN Doc. A/35/10, 82. The arbitrators appeared to accept that there existed a right to self-protection under international law, but concluded that the US, to which the Russian rights had been transferred, did not have any special rights of property or protection of the seals, J. B. Moore, *History and Digest of International Arbitrations to which the U.S. Has Been a Party*, I (Washington, DC, 1898), 919-20.

¹³⁸ Crawford, 2002, 181; *Report of the ILC* (1980), UN Doc. A/35/10, 82; Shaw, 2003, 712. See also the white paper issued by the United Kingdom Government, *The Torrey Canyon*, Cmnd. 3246, London, H.M. Stationery Office, 1967. It may be noted that although all means were considered to be exhausted in the *Torrey Canyon* incident, technological advances may give that the same conduct would not be acceptable today. Naturally, the availability of other means must be judged *in casu* with reference to the alternatives present at the time.

annulment of the concessions were the best, if not the only, means to avert the danger they had created, in terms of risk of war with Venezuela.¹³⁹

It would however appear that the acceptance of a contention that no other means are available is decreasing over time in the development of international law. There are few modern cases where such a position has been accepted. The International Court of Justice in the *Gabčíkovo-Nagymaros Project* case remained unconvinced that the unilateral suspension and abandonment of the dam project was the only course of action open to Hungary in the circumstances; in making this assessment the Court took special notice of the amount of work and money already spent on the project and the possibility of remedying any problems that might arise by other means.¹⁴⁰ Here the Court also validated the position of the International Law Commission that the cost of possible alternatives to internationally wrongful conduct was not a determinative factor in evaluating whether the unlawful conduct was the only means open to the State to protect its interests.¹⁴¹ The Court did not elaborate on whether there could be limits to the costs a State must bear to abide by international law; it has however been submitted that the State should not have to bear costs that are so large as to pose a threat in itself to the essential interests of the State.¹⁴² Further, in the *M/V Saiga No. 2* case, the ITLOS found that there was not sufficient evidence of the essential interests of Guinea being threatened by a grave and imminent peril in order for necessity to be applicable, but more important still the interests of Guinea could have been safeguarded through other means than those taken to.¹⁴³

This development regarding what alternative action plans a State must investigate appears to have been increasingly verbalised in case law from the first half of the

¹³⁹ *Report of the ILC* (1980), UN Doc. A/35/10, 84. See further the *Faber* case, referred to in Salmon, 1984, 245, and the *Neptune* case, Salmon, 1984, 246.

¹⁴⁰ *Gabčíkovo-Nagymaros Project* case (Hungary v. Slovakia), *ICJ Rep.* 1997, 7, at 42-3, para. 55. Crawford, 2002, 184.

¹⁴¹ *Gabčíkovo-Nagymaros Project*, *ICJ Rep.* 1997, 7, at 43, para. 55; Boed, 2000, 17.

¹⁴² Boed, 2000, 18. This seems to follow logically from the balance of interests that is inherent in the doctrine of necessity.

¹⁴³ *M/V Saiga No. 2* case (1999) 120 *ILR* 143, 191-2. The Tribunal stated that it was necessary to distinguish between, on the one hand, the notion of public interest or self-protection and, on the other, state of necessity. Guinea had invoked both these concepts in order to justify its application of its customs laws to the exclusive economic zone. According to the Tribunal, the public interest claimed by Guinea, "considerable fiscal losses a developing country like Guinea is suffering from illegal off-shore bunkering in its exclusive economic zone", was not sufficiently important to be allowed to curtail the rights of other States in the exclusive economic zone. See more regarding this discussion below in connection to the matter of the balance already set out in international law. The Tribunal, referring to the *Gabčíkovo-Nagymaros Project* case, failed to see that any evidence had been presented that could establish a grave and imminent peril threatening the essential interest of Guinea, and stated that "however essential Guinea's interest in maximizing its tax revenue from the sale of gas oil to fishing vessels, it cannot be suggested that the only means of safeguarding that interest was to extend its customs laws to parts of the exclusive economic zone", thus the case turned on the issue of alternative means. *Cf.* Shaw, 2003, 713.

20th century and onwards. A landmark in this respect is the *Oscar Chinn* case¹⁴⁴ of 1934, where Judge Anzilotti in his separate opinion, while noting that the Belgian Government indeed had limited choice in adopting its measures, stated that this was incompatible with a plea of necessity, which “by definition, implies the impossibility of proceeding by any other method than the one contrary to law.” Necessity was excluded as a defence, since the Belgian Government chose out of several possible measures that which it regarded as the most appropriate in the circumstances.¹⁴⁵

The importance of the criterion of ‘only means’ was reaffirmed recently in the *Construction of a Wall* case, where the Court concluded, with reference to its reliance in the *Gabčíkovo-Nagymaros Project* case on the International Law Commission’s codification of the doctrine in Article 25 of the ARSIWA, that

[i]n light of the material before it, the Court is not convinced that the construction of the wall along the route chosen was the only means to safeguard the interests of Israel against the peril which it has invoked as justification for that construction.¹⁴⁶

2.4.4 Balance of Interests: Bilaterally, Multilaterally, and in Relation to the International Community as a Whole

Finally, in order for an action to be justified under necessity, it is required that the action does not seriously impair an essential interest of another State.¹⁴⁷ The state of necessity, as outlined above, necessarily implies a balance of interests between a clearly vital interest of the acting State and the interest of the victim State of having obligations owed to that State honoured.¹⁴⁸ Thus, a plea of necessity can be accepted only when the interest protected by the violated obligation – or, for that matter, the general interest of being able to rely on the adherence to the obligation, i.e. some general inter-

¹⁴⁴ *Oscar Chinn* case (United Kingdom v. Belgium), *PCIJ*, Ser. A/B (1934) No. 63. The Government of Belgium adopted measures concerning fluvial transport, which were designed to benefit a Belgian company, creating a *de facto* monopoly that was detrimental to freedom of navigation and trade and to equality of treatment as provided for under the Convention of Saint-Germain-en-Laye. The Permanent Court of International Justice did not consider the monopoly to be in breach of the convention and so did not dwell on the issue of state of necessity.

¹⁴⁵ *Oscar Chinn* case, *PCIJ*, Ser. A/B (1934) No. 63, Ind. Op. of Judge Anzilotti, 112-14.

¹⁴⁶ *Construction of a Wall* case, Adv. Op., 9 July 2004, p. 56, para. 140. See further G. R. Watson, ‘The Wall Decisions in Legal and Political Context’, 99 *Am. J. Int’l L.* (2005) 6-26, 15. Notably, the Israeli Supreme Court has ordered the re-examination of the route chosen in certain areas, following petitions from local residents, see e.g. *Mara’abe v. The Prime Minister of Israel*, H CJ 7957/04, 15 Sep. 2005. The Supreme Court noted the determination of the Advisory Opinion regarding the illegality of the wall, *Mara’abe* case, para. 55; however, the Supreme Court found the factual basis on which the ICJ had based its decision inadequate and not sufficiently aware of the security-military considerations to be made along certain parts of the wall, para. 65. Noting that a balance had to be struck between such considerations and the impingement of the rights of residents, the Supreme Court held that the ICJ Advisory Opinion was not *res judicata* and did not require the Supreme Court to declare every segment of the wall a violation of international law, para. 74. However, the damage done to residents in this particular case was not considered proportional: Palestinians were enclaved on the Israeli side of the fence, i.e. the objective of separation for security reasons was not obtained, and in addition, an alternative route could prove sufficient for Israeli security objectives. The Government was thus ordered to reconsider the alternative routes in order to find one less injurious to the fabric of life, para. 110 *et seq.*

¹⁴⁷ Shaw, 2003, 712; Crawford, 2002, 184. This was confirmed in the *Gabčíkovo-Nagymaros Project* case, *ICJ Rep.* 1997, 7, at 46, para. 58. See also Salmon, 1984, 254, quoting Samuel Pufendorf, writing in 1752.

est inherent in the law of treaties and in the principles of *pacta sunt servanda* and legal certainty – is of less significance than the essential interest invoked by the State at fault.¹⁴⁹ The necessity may not lead to setting aside an interest that is comparable and equally essential to the victim State, an assessment that has to be made on the basis of the relation between the two, and not by deeming one interest as generally of minor importance.¹⁵⁰

One may offer the *Torrey Canyon* incident as an example of a situation where the interest of preventing serious pollution was indisputably higher than the ship owner's subjective rights or the interest of other States that no State engages in actions of this kind outside its territorial waters.¹⁵¹ Another example is the *Company General of Orinoco* case where one had to weigh the risk of war against the financial interests of a company and the upholding of the principle of *pacta sunt servanda*.¹⁵² Further, the Court in the *Corfu Channel* case in a sense reaffirmed the principle of sovereignty and international order, allowing this to outweigh the need for action in an instant case. The Court thus held that the United Kingdom could not rely on any defences of self-protection or self-help, since “[b]etween independent States, respect for territorial sovereignty is an essential foundation of international relations.” Thus, the Court admittedly recognized that the Albanian Government's complete failure to carry out its duties was a mitigating circumstance for the actions of the UK Government. However, its primary duty being to ensure respect for international law, the Court had to declare that the British actions violated Albanian sovereignty.¹⁵³ According to Salmon, this case has been invoked by some scholars as an example of the Court not accepting a state of necessity excuse.¹⁵⁴ It could indeed be seen as an indication that a necessity plea is still unlikely to succeed in relation to more intrusive breaches of territorial sovereignty.¹⁵⁵

In early readings, the balancing requirement in current Article 25 was criticised for not giving enough consideration to the creation of the concept of obligations *erga omnes* and the multilateral regimes of human rights and humanitarian law. The balance

¹⁴⁸ Salmon, 1984, 255, with reference to Ago, *Report*, 1980.

¹⁴⁹ *Report of the ILC* (1980), UN Doc. A/35/10, para. 35. This was considered particularly important in relation to the fact that the essential interest need not concern the existence of the State, see *supra* sec. 2.4.1.

¹⁵⁰ Boed, 2000, 18; Ago, *Report*, 15, para. 15.

¹⁵¹ See *Yearbook of the ILC*, 1980, vol. I, 1618th meeting, 182-3, para. 41, cited in Salmon, 1984, 256; *cf.* Ago, *Report*, 1980, 32, para. 35.

¹⁵² See fn 130 *supra*, and Salmon, 1984, 257.

¹⁵³ *ICJ Rep.* 1949, 3, at 35, cited by Salmon.

¹⁵⁴ Salmon, 1984, 259, with reference to C. de Visscher.

¹⁵⁵ Also according to Salmon, the General Assembly Declaration on Principles of International law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (1970), GA Res. 2625 (XXV), leaves no room for the notion of necessity; further, Article 5 of the Definition of Aggression (1974), GA Res. 3314 (XXIX), allows for no consideration to justify acts of aggression, *cf.* Salmon, 1984, 259 and see *infra*.

of interests in a way presupposes that one has to do with a bilateral relationship with two opposing interests and the provisions did not, according to its critics, leave enough scope for the interests of the world community in creating and upholding certain fundamental standards.¹⁵⁶ The term ‘international community’ is increasingly used to “denote the repository of interests that transcend those of individual states *ut singuli*”, which entails that the concept is not fully “comprehensible within the classic bilateralist paradigm”.¹⁵⁷ In response to this, it was added to the final draft of this paragraph that action could be justified under necessity only if it did not seriously impair an essential interest of the international community as a whole.¹⁵⁸ This may also have repercussions for the balance of interests in bilateral relationships: Salmon has argued that the weight of the relevant interest, and the conduct adopted by the State in protection of it, can never be judged out of the social context of the international community. It is necessary that the priority of interests is supported by some substantial part of the international community, as for instance the case was in the situation concerning the *Torrey Canyon* incident.¹⁵⁹

The notion of obligations *erga omnes* is now well supported in international law.¹⁶⁰ Certain obligations are by their very nature such that all States have an interest in their up-keeping and “in view of the importance of the rights involved, all States can be held to have a legal interest in their protection”.¹⁶¹ The International Court of Justice has in the context of obligations *erga omnes* mentioned the rules outlawing acts of aggression, principles and rules concerning the basic rights of the human person and rights of protection that are conferred by international instruments of a universal character.¹⁶²

¹⁵⁶ See Boed, 2000, 19.

¹⁵⁷ B. Simma & A. L. Paulus, ‘The “International Community”: Facing the Challenge of Globalization’, 9 *European J. Int’l L.* (1998) 266-277, 268.

¹⁵⁸ Shaw, 2003, 712. See also Crawford, 2002, 184: “individual or collective”. It was preferred to refer to the “international community as a whole”, rather than to the “international community of States”, Simma, 2002, 129. It was noted that the Vienna Convention on the Law of Treaties refers to the “international community of States as a whole”, but this was seen by the ILC as a token of the paramount role of States in making international law, and it was not considered justified to retain the same restriction in relation to state responsibility, as obligations may exist towards other entities besides States, Simma, 2002, 130.

¹⁵⁹ Salmon, 1984, 269.

¹⁶⁰ See the International Court of Justice in the *Barcelona Traction, Light and Power Company, Ltd* case (Belgium v. Spain), *ICJ Rep.* 1970, 3, at 32; B. Simma, ‘Bilateralism and Community Interest in the Law of State Responsibility’, in Y. Dinstein (ed.), *International Law at a Time of Perplexity* (Kluwer Academic Publishers, 1989) 821-844, 825; Tahvanainen, 2002, 61.

¹⁶¹ *Barcelona Traction, Light and Power Company, Ltd* case (Belgium v. Spain), *ICJ Rep.* 1970, 3, 32.

¹⁶² *Ibid.* See also Tahvanainen, 2002, 62; M. Ragazzi, *The Concept of International Obligations Erga Omnes* (Clarendon, 1997), 74. For a closer characterisation of *erga omnes* obligations, see Tahvanainen, 2002, 63. The discussion on obligations *erga omnes* has covered whether an obligation *erga omnes* is defined by its significant content, similarly to *jus cogens* norms, or if it, as Arangio-Ruiz have held, is a matter of whether the rights conferred through such obligations are indivisible.

In the *Construction of a Wall* case, it was asserted that certain violations of Israel's international obligations were violations of obligations *erga omnes*. Such obligations included, according to the Court, the right of the Palestinian people to self-determination¹⁶³ and obligations relating to international humanitarian law¹⁶⁴. The Court based the assertion that the right of self-determination is an obligation *erga omnes* on the view expressed in the *East Timor* case.¹⁶⁵ In affirming that international humanitarian law rules were essentially of an *erga omnes* character¹⁶⁶, the Court referred to its finding in the *Legality of the Threat or Use of Nuclear Weapons*, where the Court stated that international humanitarian law protected such elementary considerations of humanity so that they should be observed by all States as being customary international law.¹⁶⁷

Okowa has submitted that the balance of interest criterion entails that the content of the substantive rules, and the values they seek to protect, are factors to be considered when deciding whether a State is entitled to rely on a circumstance precluding wrongfulness.¹⁶⁸ If these values are of a fundamental character, it may dictate that they cannot be sacrificed whatever circumstances confronting a State, such as may be the case with human rights obligations, humanitarian law and environmental protection.¹⁶⁹ International courts and tribunals have also shown a tendency to examine the matter of availability of defences under the doctrine of circumstances precluding wrongfulness in light of the specific norm and the issues of principle underpinning it.¹⁷⁰

¹⁶³ The principle of self-determination applies to non-self-governing territories, and the reference to sacred trust, that is used in the language of mandates, relates to this principle, *Construction of a Wall* case, Adv. Op. para. 88; *1971 South West Africa* case, Adv. Op., ICJ Rep. 1971, 31, paras. 52-3; *Western Sahara* case, Adv. Op., ICJ Rep. 1975, 12, at 68, para. 162.

¹⁶⁴ *Construction of a Wall* case, Adv. Op., paras. 88 and 155.

¹⁶⁵ *Portugal v. Australia*, ICJ Rep. 1995, 90 at 102, para 29.

¹⁶⁶ *Construction of a Wall* case, Adv. Op., para. 157.

¹⁶⁷ *Legality of the Threat or Use of Nuclear Weapons*, Adv. Op., ICJ Rep. 1996, 226, at 257, para 79.

¹⁶⁸ Okowa, 1999, 390.

¹⁶⁹ O. Schachter, *International Law in Theory and Practice* (Martinus Nijhoff Publishers/Kluwer, 1991), 194. It has been submitted that countermeasures in response to prior breach may not be taken, if it entails violating such obligations *erga omnes*, and the same should be the case for necessity, in light of the reference to the interests of the international community as a whole, cf. Okowa, 1999, 390.

¹⁷⁰ Okowa, 1999, 391.

2.5 Limits to the Invocation of Necessity

2.5.1 Peremptory Norms

Necessity may not be invoked to excuse non-compliance with rules of a *jus cogens* character.¹⁷¹ Such peremptory rules are defined, according to the International Law Commission, as “norms accepted and recognized by the international community of States as a whole as norms from which no derogation is permitted and which can be modified only by subsequent norms of general international law having the same character”.¹⁷² Since consent by the affected State is not enough to make violations of peremptory norms lawful, a state of necessity – where the affected State without fault suffers the consequences of the acting State’s priority of its own interests – cannot be allowed to operate in relation to *jus cogens* law.¹⁷³ Hence, the predominance of peremptory norms is provided for by Article 26 of the ARSIWA.

This rule was introduced at the fifty-first session of the ILC, in relation to the rules on *jus cogens* present in the Vienna Convention on the Law of Treaties. It was contended that usually *jus cogens* breaches occur incidentally, as conditions surrounding the treaty obligation change, whereby the breach of peremptory norms is rarely invoked in treaty context.¹⁷⁴ It was feared that the fact that only the parties to the treaty could invoke the *jus cogens* breach in relation to the treaty, could lead to a perception that the parties had the choice to give primacy to the treaty text over the peremptory norm.¹⁷⁵ To clarify that this was not the case in relation to issues on state responsibility, the rule on the predominance of peremptory norms was introduced, even though the situation was deemed less likely to occur.¹⁷⁶

No comprehensive enumeration of peremptory rules has been offered by the ILC, but it was noted that provisions of such character include the prohibition of the use of force against the territorial integrity or political independence of another State, genocide and the killing of prisoners of war.¹⁷⁷ Moreover, it could be added that the status of the prohibition of genocide, the prohibition of the threat or use of force and

¹⁷¹ Articles 25 and 26 ARSIWA; Ago, *Report*, 20 *et seq.*, para. 16, and 37-9, para. 55; Crawford, 2002, 187-8; Boed, 2000, 32; Ragazzi, 1997, 81; Salmon, 1984, 258.

¹⁷² *Report of the ILC* (1980), UN Doc. A/35/10, para 37.

¹⁷³ *Ibid.*

¹⁷⁴ Simma, 1999, 310.

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*

¹⁷⁷ *Report of the ILC* (1980), UN Doc. A/35/10, para. 37.

certain rules for the protection of human rights, such as the prohibition of torture, as *jus cogens* norms, is usually not contested.¹⁷⁸

The contemporary view is that any use of armed force constituting assault on the sovereignty of another State indisputably comes within the meaning of the term aggression and as such is prohibited under Article 2(4) of the UN Charter. This provision, at least to the extent that it is coextensive with the concept of aggression, enjoys the status of *jus cogens*.¹⁷⁹ As such, Article 2(4) renders null and void any agreement that is contrary to it, and consequently, necessity cannot be invoked to excuse illegal use of force, when this is of an aggressive nature.¹⁸⁰ However, the fact that it is not the use of force in all cases, but the use of aggressive force, that is prohibited by a peremptory norm, has prompted some criticism in relation to necessity. If not all uses of force are prohibited by *jus cogens*, that would imply that some uses of force could be excused by necessity – the defence, it has been submitted, may thus render legitimacy to humanitarian intervention, pursuit etc., which some would hold makes the doctrine susceptible to abuse.¹⁸¹

In the *Construction of a Wall* case, the prohibition of the use of force was an issue. The Palestinian representative did not accept the wall as a strict security measure, but held that it was a means to move, step by step, the border between the two regions. The ICJ conducted a thorough inquiry into the history of the dispute between Israel and Palestine and came to the conclusion that the relevant territory, on which the wall was being built, was in fact Palestinian territory, occupied by Israel. Acquisition of territory through war has been declared inadmissible by the Security Council, which has previously called for the withdrawal of Israeli armed forces from territories occupied in the conflict and the termination of all claims or states of belligerency.¹⁸² The

¹⁷⁸ Tahvanainen, 2002, 55. These norms coincide with the provisions listed by the International Court of Justice in the *Barcelona Traction, Light and Power Company, Ltd* case (Belgium v. Spain), *ICJ Rep.* 1970, 3, as being obligations *erga omnes*, see above.

¹⁷⁹ The peremptory character of the principle of non-use of force was emphasised in the *Nicaragua* case (Nicaragua v. United States), *ICJ Rep.* 1986, 14, at 153, Sep. Op. of President Nagendra Singh. Cf. Ago, *Report*, 1980, UN Doc A/CN.4/318/Add. 5, characterising aggression that is prohibited under *jus cogens* as a more narrow concept than the prohibition of the use of force, incumbent on UN Member States by way of treaty pursuant to the UN Charter 2(4), while still acknowledging that there was “an imperative rule imposing on all States the duty to refrain from all recourse to armed force in their reciprocal relations”, see quote in Ragazzi, 1997, 77, fn 13. Cf. *Report of the ILC* (1980), UN Doc. A/35/10, 91. See also A. Laursen, ‘The Use of Force and (the State of) Necessity’, 37 *Vanderbilt J. Transnational L.* (2004) 485-526, at 509 *et seq.*, discussing the distinction between more and less grave uses of force.

¹⁸⁰ *Report of the ILC* (1980), UN Doc. A/35/10, 92. Cf. Article 5 of the Definition of Aggression (1974), GA Res. 3314 (XXIX), which provides in para. 1 that “[n]o consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression.”

¹⁸¹ Salmon, 1984, 263-4. See further on this topic *infra* in sec. 5.1.

¹⁸² SC Res. 242(1967), quoted in the *Construction of a Wall* case, Adv. Op., para. 74. As Israel after 1967 took a number of measures aimed at changing the status of the City of Jerusalem, the Security Council has again recalled on a number of occasions that acquisition of territory by military conquest is inadmissible and the measure taken by Israel have been condemned, SC Res. 298 (1971), quoted in the *Construction of a Wall* case, Adv. Op., para. 75.

Palestinian agent¹⁸³ declared that the wall was more than a mere physical structure; rather, it was a whole regime, encircling entire communities and walling-in most of the Palestinian population. In addition, there was an alleged connection between the route of the wall and Israel's policies and practices with regard to East Jerusalem, which according to Palestine was under Israeli occupation, without recognition from the international community. The Palestinian representative stated that the "wall is not about security: it is about entrenching the occupation and the *de facto* annexation of large areas of Palestinian land" and added that the wall, if completed, would leave the Palestinian people with only half of the West Bank within isolated, non-contiguous, walled enclaves – it would render the two-State solution to the Israeli-Palestinian conflict practically impossible.¹⁸⁴ The Court agreed that the construction of the wall was accompanied by the introduction of an administrative regime, which rendered the part of the West Bank that lies between the Green Line and the wall a closed area.¹⁸⁵ Residents in the area, or other persons who wish to enter it, need a permit issued by the Israeli authorities, a permit that in most cases has been issued only for a limited period.¹⁸⁶ The only way to access the area are through gates, that open infrequently and for short periods.¹⁸⁷ However, Israeli citizens and persons eligible to immigrate to Israel under the Law of Return are permitted to move freely and remain in the area without permit.¹⁸⁸ The Court discussed the question of whether the wall was to be considered a *de facto* annexation:

Whilst the Court notes the assurance given by Israel that the construction of the wall does not amount to annexation and that the wall is of temporary nature, it nevertheless cannot remain indifferent to certain fears expressed to it that the route of the wall will prejudice the future frontier between Israel and Palestine, and the fear that Israel may integrate the settlements and their means of access. The Court considers that the construction of the wall and its associated regime create a "fait accompli" on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to *de facto* annexation.¹⁸⁹

The resolution states that "all legislative and administrative actions taken by Israel to change the status of the City of Jerusalem, including expropriation of land and properties, transfer of populations and legislation aimed at the incorporation of the occupied section are totally invalid and cannot change that status", quoted in the *Construction of a Wall* case, para. 75. After Israel proclaimed the "complete and united" City of Jerusalem as its capital, the Council once more declared that all such measures were null and void, SC Res. 478 (1980), quoted in the *Construction of a Wall* case, para. 75.

¹⁸³ Cf. the Palestinian written statement, paras. 271-29.

¹⁸⁴ CR 2004/01, 18.

¹⁸⁵ *Construction of a Wall* case, Adv. Op., para. 85.

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*

¹⁸⁸ *Construction of a Wall* case, Adv. Op., para. 85. For a general account of Israeli practices as regards expropriation of Palestinian land, see G. J. Boling, "'Absentees' Property" Laws and Israel's Confiscation of Palestinian Property: A Violation of UN General Assembly Resolution 194 and International Law', XI *Palestine YB Int'l L.* (2000/01) 73-130.

¹⁸⁹ *Construction of a Wall* case, Adv. Op., para. 121.

Citing its finding from the *Nicaragua* case that the principles of the use of force incorporated in the UN Charter reflects customary international law¹⁹⁰, the Court declared that also the corollary entailing the illegality of territorial acquisition resulting from the threat or use of force was part of customary international law.¹⁹¹

It is submitted here that it indeed appears logical that the illegality of forceful territorial acquisition, if this is a corollary of the prohibition of the use of force, should also enjoy the status of *jus cogens* that is undoubtedly attached to Article 2(4) of the UN Charter.¹⁹² In general, it is hard to imagine that any annexation is of such limited nature that it should fall outside the concept of aggression. Most cases of annexation should thus not be defensible under necessity.

Ago in his work on the Articles had proposed a refined view of grading different uses of force, ranging from peremptory prohibitions of aggression, to less aggravated uses of force that were prohibited under Article 2(4) of the UN Charter, but were not outlawed by *jus cogens*.¹⁹³ Certain actions by States in the territory of other States, *albeit* of a coercive nature, do not necessarily carry the traits of acts of aggression, due to a more limited intention and purpose underpinning the conduct.¹⁹⁴ The prohibition of the use of force does not refer to aggression, which may suggest that not all forms of illegal use of force amount to aggression.¹⁹⁵ It can thus be argued that there is a difference of degree between different uses of force, where some may be prohibited by peremptory norms whereas others may be simply prohibited by conventional or customary international law, and the wrongfulness of the latter may perhaps be precluded by a state of necessity.

The ILC offered as an example of such acts, which are not tantamount to aggression, incursions into foreign territory to forestall harmful operations by armed groups preparing to attack the territory of the State.¹⁹⁶ Other situations, which are not to be

¹⁹⁰ *Military and Paramilitary Activities in and against Nicaragua* case (Nicaragua v. United States), *ICJ Rep.* 1986, 14, at 98-101, paras. 187-190.

¹⁹¹ *Construction of a Wall* case, *Adv. Op.*, para. 87.

¹⁹² The Court recalled the prohibition of the use of force under the Article 2(4) of the UN Charter, which states that all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, *Construction of a Wall* case, para. 87. The Court also noted the Declaration on Principles of International Law concerning Friendly Relations and Co-operation Among States, GA Res 2625 (XXV), which emphasises that no territorial acquisition resulting from the threat or use of force shall be recognised as legal.

¹⁹³ B. Simma, 'The Work of the International Law Commission at Its Fifty-First Session (1999)', 68 *Nordic J. Int'l L.* (1999) 293-361, 314. But *cf.* writings of Crawford and of Laursen, both discussed in sec. 5.2, *infra*.

¹⁹⁴ *Report of the ILC* (1980), UN Doc. A/35/10, 92. *Cf.* the discussion above in relation to the Israeli motif in the *Construction of a Wall* case.

¹⁹⁵ Ragazzi, 1997, 75. See also the Definition of Aggression, adopted by the United Nations General Assembly in 1974, giving mention to the "most serious and dangerous form of the illegal use of force", also indicating that there may be aggravated use of force.

¹⁹⁶ *Report of the ILC* (1980), UN Doc. A/35/10, 92. This reasoning appears to lie in the intersection between the doctrine of state of necessity and the doctrine of self-defence.

characterised as aggression according to the ILC, are pursuit of armed bands or criminals who have crossed the frontier or perhaps have their bases there, acts in protection of nationals and other persons when attacked or detained by hostile groups not under the control or authority of the State, or attempts to eliminate or neutralise a source of troubles, which threaten to spread across the frontier.¹⁹⁷ The common feature of such situations would appear to be the existence of a grave and imminent danger to the State, to its nationals or others, where the territory of the foreign State is either the theatre or the place of origin of that danger and the State is either unwilling or unable to fulfil its duty to avert such threat. Further, the actions in such situations are often fairly limited as regards duration and the means employed, the objective being restricted to eliminating the perceived danger.¹⁹⁸

In the view of the Commission, these kinds of cases were suitably handled under the doctrine of necessity, as this concept was defined in the codification effort. It referred to the existence of a multitude of cases where necessity had been invoked to justify military incursions into the territory of other States, for instance the *Caroline* case. The act in that case was not triggered by a prior or threatened American aggression or any kind of wrongful act on behalf of the United States, and is therefore interpreted as a case of necessity, rather than self-defence.¹⁹⁹

It is however interesting to note that as of today, these types of interventions would include the majority of the uses of force. One can speculate as to whether this is a turn of events that the ILC could not foresee, when making the determination that these cases could be subsumed under the exceptional necessity defence.

While limited interventions are becoming more frequent, the condemnation of the use of force is however becoming more strict. Laursen observes that although international law undoubtedly recognises gradation of the use of force, the 1987 Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations underlined that “[n]o consideration of whatever nature may be invoked to warrant resorting to threat or use of force in violation of the Charter”.²⁰⁰ Crawford in his later commentary on Ago’s distinctions between peremptory and non-peremptory prohibitions on the use of force observed that this raised more complicated issues than the regime of state responsibility was equipped to handle. Crawford’s solution was thus to stress the distinction between the

¹⁹⁷ *Report of the ILC* (1980), UN Doc. A/35/10, 92.

¹⁹⁸ *Ibid.*, 93.

¹⁹⁹ *Ibid.*, fn 129.

primary and secondary norms: the law of state responsibility was not to define the contents of the prohibition of the use of force.²⁰¹

As regards the current legal status, following the *Construction of a Wall* case, much is yet unresolved. The Court understandably chose not to explore some of the more politically sensitive issues, wherefore some question marks linger when it comes to how to handle infringements tantamount to violations of peremptory norms, as for instance in the question of whether the act to construct a wall in the disputed areas constituted an act of aggression. If that was the case, the Court should have examined Article 26, which is the crux in relation to the application of the necessity doctrine to uses of force. Regardless of the stance in relation to the gradation of uses of force, even when no great deal of force is used, e.g. because overwhelming military power makes it redundant, the international community may characterise the act as ‘aggression’, and this has been the case in several cases of annexation, such as the German *Anschluss* of Austria and the annexation of Namibia by South Africa.²⁰²

To make matters more complicated, the Palestinian contention that the wall constituted infringement of sovereignty, and as such was a violation of a peremptory norm against which no defence is available, turns on whether Palestine is a sovereign State. On this matter, there are divergent views. The most coherent interpretation of the Court’s *dictum* with regard to the wall as tantamount to annexation²⁰³ is thus that the construction of the wall was seen as an infringement of sovereignty-to-be, in that the route of the wall could risk prejudging the division of a territory in a future two-State solution. However pragmatic a stance, the Court may have added to the confusion surrounding the necessity doctrine and its boundaries, by first indicating that the wall most likely implied violation of a *jus cogens* norm, while at the same time itself raise the defence of necessity, and discard this not with reference to Article 26 of ARSIWA, but on the ground that other means of protecting its interests were available to Israel.²⁰⁴

In practice, however, it would appear that justifications such as consent and self-defence are more heavily relied on than necessity in relation to temporary incursions, where the purpose of the intervention is described as humanitarian. Ago notes an in-

²⁰⁰ Laursen, 2004, 511.

²⁰¹ J. Crawford, *Second report on State responsibility*, ILC, 51st sess. (1999) UN Doc. A/CN.4/498/Add.2, 24; Laursen, 2004, 511-12.

²⁰² See M. Ragazzi, *The Concept of International Obligations Erga Omnes* (Clarendon, 1997), 75, with reference to B. V. A. Röling, ‘The 1974 UN Definition of Aggression’, in A. Cassese (ed.), *The Current Legal Regulation of the Use of Force* (Martinus Nijhoff Publishers, 1986) 413-421, at 413 *et seq.*

²⁰³ See the quote from the *Construction of a Wall* case, para. 121, *supra*.

²⁰⁴ See the *Construction of a Wall* case, Adv. Op., paras. 140-142 and see the discussion below on the relationship between the law of treaties and the law of state responsibility.

creasing reluctance in relation to the invocation of necessity as a justification of the use of force, as the prohibition of force becomes more established in international law.²⁰⁵ This tendency could be underpinned by a desire to underline the non-innocence of the State against which the act is taken, by reluctance on behalf of the acting State to admit that its action was in fact unlawful²⁰⁶, as well as a belief that the stringent criteria of a state of necessity cannot be met in the specific case²⁰⁷. However, there are instances where necessity has been expressly invoked to justify temporary incursions into foreign territory when the objective was humanitarian, e.g. when Belgium in 1960 sent parachutists to the Congo in order to protect the lives of Belgians and other European nationals, who allegedly were being held hostage by army mutineers and insurgents.²⁰⁸

As concerns non-derogable human rights and humanitarian norms, these represent interests that often clash with interests in internal and international security. In addition, the respect for human rights has often been described as an interest of the community as a whole, referring to attempts to build humane international regimes. One matter, where these different interests intersect – and which has in international and comparative criminal law been given some attention, especially in light of the global war on terror – is whether necessity is available as a defence for torture in the interrogation of suspected terrorists.²⁰⁹ This discussion notably takes place on a criminal law level, and not on a state responsibility law level. In international criminal law, one must distinguish between human rights law, directed against States, and the defence of necessity, being available at the individual level. The case is different within the scheme of the law of state responsibility. The International Law Commission accordingly were of the view that peremptory rules are so essential for the life of the international community that a State should not be allowed to breach such obligations, however acute a state of necessity it faced.²¹⁰

2.5.2 Non-Derogation Expressed in the Relevant Treaty

The reason for the inclusion of Article 25, paragraph 2(a) is self-evident. It would be absurd to allow a State to evade its obligations by invoking a state of necessity, in situations where the primary obligation itself expressly states that no derogation is permit-

²⁰⁵ Ago, *Report*, 1980, 53, fn 94.

²⁰⁶ *Cf.* sec. 4.

²⁰⁷ *Report of the ILC* (1980), UN Doc. A/35/10, 96.

²⁰⁸ *Report of the ILC* (1980), UN Doc. A/35/10, 95. See further sec. 5.2 and 5.3.

²⁰⁹ See P. Gaeta, 'May Necessity Be Available as a Defence for Torture in the Interrogation of Suspected Terrorists?', 2 *J. Int'l Crim'l Justice* (2004) 785-794.

²¹⁰ *Report of the ILC* (1980), UN Doc. A/35/10, 107, para. 37.

ted, under any circumstances whatsoever. This exception concerns e.g. certain humanitarian conventions applicable to armed conflict.²¹¹ When excluding that any consideration be given to military necessity when asserting a State's obligations in wartime, the authors of such documents have indisputably set the balance between the interests concerned – on the one hand, the protection of the population and on the other, military reality. The same principle has then to apply in relation to the plea of necessity under the law of state responsibility.²¹²

Further, the ILC argued that necessity must also be excluded as a defence, where it can be inferred from the text of the treaty that the use of necessity as a circumstance precluding wrongfulness would be in contradiction to the object and purpose of the treaty.²¹³ As will be discussed later, necessity may not be invoked in situations where the instrument regulating substantive law has already taken account of the abnormality of the situation. Again, this is the case in many humanitarian conventions: a belligerent power may not invoke necessity to evade the obligations imposed on it by international humanitarian law.²¹⁴ Such rules are in general envisaged to apply only in wartime and under exceptional circumstances; to suspend such provisions due to extreme circumstances would thus fail the entire purpose of their existence.²¹⁵

2.5.3 Contribution to the State of Necessity

Pursuant to Article 25, paragraph 2(b), necessity may not be invoked by a State as a ground for precluding wrongfulness if the State has contributed to the situation of necessity or provoked, either deliberately or by negligence, the situation to come about.²¹⁶ The contribution to the situation of necessity must not be merely incidental, but must imply sufficient substantial impact on the turn of events.²¹⁷ This limit to the invocation of necessity was an issue in the *Gabčíkovo-Nagymaros Project* case, where the ICJ concluded that Hungary had helped, by act or omission, to bring about the situation of alleged necessity, wherefore it could not now rely on that situation as a circumstance precluding wrongfulness.²¹⁸ Contribution to a state of necessity as a hindrance to the invocation of such a defence has also been applied in a case before the European Court

²¹¹ Crawford, 2002, 185; *Report of the ILC* (1980), UN Doc. A/35/10, 108, para. 38.

²¹² See Crawford, 2002, 185, para. 19, for the basis of this argument. See also sec. 6.2.

²¹³ *Report of the ILC* (1980), UN Doc. A/35/10, para. 38.

²¹⁴ Crawford, 2002, 185; Salmon, 1984, 261, quoting J.-P.-A. François, 'Règles générales du droit de la paix', 66-IV *RdC* (1938) 1-294, at 183.

²¹⁵ Crawford, 2002, 185, para. 19.

²¹⁶ Article 25(2)(b) ARSIWA; *Report of the ILC* (1980), UN Doc. A/35/10, 106, para. 34 ; Salmon, 1984, 262.

²¹⁷ Crawford, 2002, 185, para. 20.

²¹⁸ *Gabčíkovo-Nagymaros Project case*, *ICJ Rep.* 1997, 7, at 46, para. 57; Crawford, 2002, 185.

of Justice.²¹⁹ Similarly, it has been submitted that the notion of contribution to the state of necessity, at least analogically, could have been applied to the *Construction of a Wall* case.²²⁰ This would be a similar approach to the situation of intersecting wrongs that the Court took in the *Gabčíkovo-Nagyymaros Project* case; however, the Court never extended its examination of the plea of necessity that far in the case concerning the *Wall*.

The notion that contribution to the state of necessity should bar the State from invoking necessity as a defence has however been contested by Salmon, who believes that State organs will always be involved at some stage of decision-making that can be said to have some causative relation with the chain of events, so that in fact it would always bar the use of the plea.²²¹ This, taken in combination with the requisite that States are required to go to some length to find lawful means, including such that involve joint efforts with other States, makes it quite unlikely that the necessity doctrine, if strictly applied, will be of much use to States. However, as I shall return to in chapter 6, this may spur international cooperation, treaty stability and joined problem-solving, and inhibit unilateral protection measures which may impact adversely on third parties.

²¹⁹ *SpA Ferriera Valsabbia and others v. Commission of the European Communities*, ECJ, 18 March 1980, 154/78, Recueil 1980, 907, at 1023, para. 144, cited in Salmon, 1984, 262, fn 102: “En ce qui concerne l’entreprise Stefana Antonio qui s’est trouvée dans une situation financière particulièrement difficile, il faut noter que cette situation est due au choix du moment de la modification de ses structures et donc de son appréciation erronée d’une conjoncture défavorable connue de tous ; ce comportement personnel ne lui permet pas d’évoquer l’état de nécessité”.

²²⁰ I. Scobbie, ‘Words My Mother Never Taught Me – In Defense of the International Court’, 99 *Am. J. Int’l L.* (2005) 76-88, 84.

²²¹ Salmon, 1984, 270.

3 The Availability of the Plea of Necessity

Matters relating to state responsibility may partly affect the operation of the law of treaties, as clearly the two sets of laws have a common goal: in Reuter's words, to contain as far as possible the effects of the anarchical structure of international society.²²² Treaty law and state responsibility law both regulate the relationships between States. Under the theories concerning state responsibility, a distinction is made between primary and secondary norms, where primary norms are said to constitute the source of international obligation, whereas the law of State responsibility itself is a set of secondary norms, which come into play as the primary norms are breached.²²³ No more than the law on state responsibility, is the law of treaties the source of obligation²²⁴, apart from the general duty to adhere to treaties entered into and upkeep these in good faith. Thus, it can be inferred that aspects of and problems relating to primary norms – that in themselves are capable of actually conferring obligations upon States – are regulated in both of the two regimes. Whereas the law of treaties deal with the validity and operation of the instruments conferring substantial obligations, the law of state responsibility deal with the consequences incurred when substantial obligations are breached.²²⁵

Refusal to fulfil treaty obligations clearly results in the incurrance of State responsibility.²²⁶ The same goes for breaches of customary international law, as the law on state responsibility makes no distinction between contractual and tortious obligations.²²⁷ Appropriate remedies for the injured party and the determination of circumstances precluding wrongfulness are generally subjects that belong to the law of state responsibility.²²⁸

²²² P. Reuter, *Introduction to the Law of Treaties* (Pinter Publishers, 1989), 150; see also K. Wellens, 'The Court's Judgment in the case concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia): some preliminary reflections', in K. Wellens (ed.), *International Law: Theory and Practice; Essays in Honour of Eric Suy* (Martinus Nijhoff Publishers, 1998) 765-799, 793.

²²³ A. Cassese, *International Law* (Oxford University Press, 2005), 244. Tahvanainen, 2002, 5; C. Tomuschat, 'International Responsibility and Liability', 281 *RdC* (1999) 268-303, 272; Wellens, 1998, 793.

²²⁴ S. Rosenne, *Breach of Treaty* (Grotius Publications, 1985), 3-4.

²²⁵ J. Crawford, *First Report on State Responsibility* (1998), ILC, 50th sess., UN Doc. A/CN.4/490, 4, paras. 12-18; Tahvanainen, 2002, 19.

²²⁶ Tahvanainen, 2002, 19. *Interpretation of Peace Treaties* case, Adv. Op., *ICJ Rep.* 1950, 221, at 228.

²²⁷ *Rainbow Warrior* case (New Zealand v. France), (1990) XX *RIAA* 217, 251, para. 75. Cf. I. Brownlie, *Principles of Public International Law* (Oxford University Press, 2003), 421.

²²⁸ *Rainbow Warrior* case, 251, para. 75. M. N. Shaw, *International Law* (Oxford University Press, 2003), 695.

There are however exceptions: as already mentioned, the circumstances precluding wrongfulness under the law of state responsibility are not intended to apply to conduct, which is in principle regulated by the primary obligation itself.²²⁹ Thus, where primary sources, such as conventions, treaties or customary international law, regulate circumstances of a necessity nature, the situation is to be resolved pursuant to what is prescribed in those sources. This follows from the separate field of application of primary and secondary norms, and entail that Article 25 on necessity does not cover situations concerning military necessity under international humanitarian law, nor humanitarian intervention under the UN Charter.²³⁰ Nevertheless, it is not uncommon for States to argue justifications under both primary and secondary rules when their conduct is accused of not conforming to their international obligations. Necessity has for instance been invoked in combination with reliance on the right to self-defence, to justify humanitarian interventions or in connection with military considerations.²³¹ Evidently, there is a blurred distinction between these concepts²³², however now somewhat clarified by the ILC codification. Probable reasons for this may be the apparent overlap between the law of treaties and the law of state responsibility; the risk of confusing concepts that are linguistically close, such as military necessity, necessity under the doctrine of self-defence and the state of necessity as defined in the ARSIWA; or a desire to cover as many defences as possible in one short communiqué to the international community.²³³ The point of departure, however, must be that the law of state responsibility is separate from the law of treaties, *albeit* the two sets of norms to some degree regulate the same fields and the same situations. The two doctrines are different in na-

²²⁹ Cf. sec 2.5.2.

²³⁰ J. Crawford, *The International Law Commission's Articles on State Responsibility – Introduction, Text and Commentaries* (Cambridge University Press, 2002), 185 *et seq.*; cf. Laursen, 2004, 512. Further, the law of treaties provide a range of remedies for breaches of treaty obligations, such as cessation of wrongful conduct, assurances and guarantees of non-repetition, satisfaction, restitution and compensation, see A. Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 2000), 300 *et seq.* These remedies go hand in hand with what is required under the state of necessity: that the non-compliance with international obligations endure only for the time absolutely called for by the pressing circumstances, that the defence is used only in those exceptional situations where all the conditions are met and that the State is willing to compensate the State breached against for the inconvenience. In accordance with the international case law dealt with in this essay, however, regulation of temporary suspension under the law of treaties does not preclude application of the circumstances precluding wrongfulness. The reason ought to be that 1969 VCLT is in part primary (e.g. Articles 23 and 26) and in part in essence secondary norms (e.g. Articles 60-61). See further *supra* sec. 2.4.1.

²³¹ See e.g. the *Gabčíkovo-Nagymaros Project* case (Hungary v. Slovakia), Judgment, *ICJ Rep.* 1997, 7; the 1960 *Belgian Intervention in the Congo* incident, cf. *infra* sec. 5.3; and the *Caroline* case, *supra* sec. 2.1. See further Crawford, 2002, 185.

²³² See *infra* sec. 5.2, in relation to Davidsson, who seems to argue that necessity may be applied to clarify Chapter VII and to qualify the concept of 'threat to the peace'. In my view, this is a clear case of confusing the contents of substantive treaty provisions with the secondary law on state responsibility, which cannot be used as an aid to understanding the meaning of conventional law providing an exception. See also chapter 4 *infra*, on the effects of invocations of necessity.

²³³ See e.g. the *Caroline* test cited *supra* and the submissions of Israel relating to the *Construction of a Wall* case.

ture and have different scopes of application, which has been confirmed by the International Court of Justice.²³⁴

Nevertheless, international practice has confirmed that whenever state responsibility is incurred, the State has a right to invoke the circumstances precluding wrongfulness, as well as defences under the law of treaties. The question of availability of defences under the law of state responsibility arose in the *Rainbow Warrior* case²³⁵, from 1996. Instead of confining its argument with regard to the alleged breach of the bilateral Agreement of 9 July 1986 (which France had entered into with New Zealand) to the grounds justifying termination or suspension under the Vienna Convention on the Law of Treaties²³⁶, France also argued that there were circumstances under the customary law of state responsibility which warranted its actions.²³⁷

New Zealand opposed this attempt to shift the matter out of the law of treaties, and held that the question of whether France was in breach had to be decided entirely pursuant to the law of treaties, as treaties had primacy over customary rules. New Zealand also contested the French reliance on circumstances precluding wrongfulness, under which France claimed to have acted due to “determining factors beyond France’s control, such as humanitarian reasons of extreme urgency making the action necessary”. New Zealand did not consider it a “credible proposition” to have a number of grounds for termination or suspension under the law of treaties and yet hold that there existed other excuses under which a State could evade its international obligations and responsibilities.²³⁸

France for its part claimed that the rules governing breach of treaty should be sought exclusively in the law of state responsibility, evident from the fact that the Vienna Convention expressly excluded matters concerning state responsibility from its area of operation. Further, it was underlined that breaches of treaty obligations did not hold any special place in this doctrine. Therefore France held that the assessment of its actions – whether these conformed to its obligations and whether the circumstances were such as to exonerate France, should the actions be considered unlawful – had to be made not solely under Articles 60 and 61 of the VCLT.²³⁹

²³⁴ *Gabčíkovo-Nagymaros Project case*, ICJ Rep. 1997, 7, para. 47; Wellens, 1998, 793.

²³⁵ *Rainbow Warrior case* (New Zealand v. France), (1990) XX RIAA 217.

²³⁶ See the 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331, Part V, Sec. 3, and in particular Articles 60, 61, 62 and 64, concerning termination or suspension as a result of breach of treaty, supervening impossibility of performance, fundamental change of circumstances and the emergence of *jus cogens* norms contrasting the treaty.

²³⁷ Cf. D. W. Bowett, ‘Treaties and State Responsibility’, in Mélanges M. Virally : *Le Droit international au service de la paix, de la justice et du développement* (Éditions A. Pedone, 1991), 137-45, at 137.

²³⁸ *Rainbow Warrior case* (1990) XX RIAA 217, at 250, para. 73.

²³⁹ *Ibid.*, 251, para. 74.

The Tribunal found that in the present case, both normative systems were relevant and applicable. The content and precise definition of treaty obligations was thus to be ascertained under the law of treaties, such as Article 26 on the principle of *pacta sunt servanda* and Articles 60 and 70, defining breach and expiration of treaty. Yet, the defences under the law of state responsibility were available to France, and could, if the criteria were met, excuse its conduct.²⁴⁰

The French contention in relation to Article 73 of the Vienna Convention – which expressly provides that the VCLT does not prejudice any question that may arise from the international responsibility of a State, and which according to France entailed that defences under the law of state responsibility were not forfeited when dealing with a breach of treaty – is now accepted. The structure of the Vienna Convention indeed implies that matters concerning state responsibility should arise if the State is shown to have breached its international obligations.²⁴¹ The VCLT, however, does not regulate such matters; the wording of Article 73 thus seems to imply that the ILC in its draft on the law of treaties realised that it was further advanced in relation to matters concerning treaty law, and that it wished to leave state responsibility matters relating to this open for further consideration.²⁴² For these reasons, it would seem correct to come to the conclusion that the law of treaties contains a gateway leading into the law on state responsibility, thus making the pleas of circumstances precluding wrongfulness available, independently of the determination made under the law of treaties.

Such a conclusion was confirmed by the International Court of Justice in the *Gabčíkovo-Nagymaros Project* case. A party, regardless of whether treaty law contained regulations on how to handle violations, had the right to invoke the more extensive defences found in the scheme of circumstances precluding wrongfulness under the law of state responsibility.²⁴³ This can be interpreted as a sign of the distinct operative areas that the Court afforded the two regimes. While the matter of whether a convention was in force or not was a matter for the law of treaties, the extent to which a deviation from that treaty gave rise to international responsibility for a State was to be assessed under the law of state responsibility, which logically entailed that the defences

²⁴⁰ *Rainbow Warrior* case (1990) XX *RIAA* 217, 251, para. 75.

²⁴¹ Cf. e.g. Articles 30(5) and 61(2), containing references to breaches of international obligations. Both provisions appear to transfer such situations out of the law of treaties, by stating that the relevant provision of the 1969 Vienna Convention does not apply to such cases. Although no explicit reference is made to the law on state responsibility, this may perhaps be inferred.

²⁴² Bowett, 1991, 138. See also Reuter, 1989, 150. Laursen, 2004, 513, has submitted that the ILC took a similar view in relation to difficult questions concerning humanitarian intervention: the issue was, so to speak, put on hold for further consideration.

²⁴³ *Gabčíkovo-Nagymaros Project* case, *ICJ Rep.* 1997, 7, para. 51; Tahvanainen, 2002, 20 *et seq.*

es under this scheme had to be available to the State.²⁴⁴ The circumstances precluding wrongfulness could not logically be precluded by the existence of provisions concerning termination, suspension or impossibility of performance, as such mitigating circumstances cancelled not the operation of the treaty, but the liability for what was unquestionably illegal conduct.

However, some have expressed regrets that the International Court of Justice did not in more detail examine the question of the relationship between the law of treaties and the law of state responsibility in the *Gabčíkovo-Nagymaros Project* case. The litigation strategy adopted by both parties, invoking a combination of mixed arguments, was according to Wellens an invitation to the Court to assume an integrated and comprehensive approach to these different branches of international law, something which Wellens considers to be needed.²⁴⁵ It appears that several important questions regarding the complicated overlaps between the law of treaties and the law of state responsibility remain unanswered.

²⁴⁴ *Gabčíkovo-Nagymaros Project* case, *ICJ Rep.* 1997, 7, 38; Shaw, 2003, 695.

²⁴⁵ Wellens, 1998, 793. But *cf.* R. Lefeber, 'The *Gabčíkovo-Nagymaros Project* and the Law of State Responsibility', 11 *Leiden J. of Int'l L.* (1998) 609-623, who was less pleased with the integrated argumentation of the parties in this case.

4 The Effect of the Invocation of Necessity

Apparently, the ILC intended the grounds justifying termination or suspension of a treaty to be defined exclusively within the law of treaties and in terms stricter or narrower than those to be used for the grounds excluding liability under the law of state responsibility.²⁴⁶ The commentary to what is presently Article 42 of the Vienna Convention provides that the termination, denunciation or suspension of the operation of a treaty, or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the Vienna Convention:

The Commission accordingly considered it desirable, as a safeguard for the stability of treaties, to underline in a general provision in the beginning of this part that the validity and continuance in force of a treaty is the normal state of things which may be set aside only on the grounds and under the conditions provided for in the present articles.²⁴⁷

The law of treaties, however, provides for two situations where suspension of a treaty can occur in situations that resemble that of a state of necessity or other circumstances precluding wrongfulness. The first concerns supervening impossibility of performance pursuant to Article 61 of the VCLT. The provision is restrictive, allowing a party to invoke impossibility of performance as a ground for termination or withdrawal only if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked merely as a ground for suspension of operation.²⁴⁸ The Commission decided to narrow the field of excuses under the law of treaties, aiming at a material impossibility,²⁴⁹ contrasting the tradition of excuses²⁴⁹ that have been accounted for above, including necessity, self-preservation and *force majeure* as used in the wider sense in which it seems to have been applied in earlier cases.²⁵⁰ It was thus understood that cases of *force majeure* or necessity could be pleaded as a defence exonerating a party only

²⁴⁶ D. W. Bowett, 'Treaties and State Responsibility', in *Mélanges M. Virally : Le Droit international au service de la paix, de la justice et du développement* (Éditions A. Pedone, 1991), 137-45, 138.

²⁴⁷ *Yearbook of the ILC*, 1966, vol. II, UN Doc. A/CN.4/SER/1966/Add.1, 236; cf. Bowett, 1991, 139.

²⁴⁸ Bowett, 1991, 139.

²⁴⁹ Cf. the distinction made concerning *force majeure* above, sec. 2.3; see the *Société Commerciale de Belgique* case.

²⁵⁰ Bowett, 1991, 139. Cf. above, concerning the interchangeable use of *force majeure* and necessity.

from the liability that resulted from non-performance of the treaty.²⁵¹ The second ground concerns a fundamental change of circumstances pursuant to Article 62 of the VCLT. Where the circumstances that were present at the time of the conclusion of the treaty, and that were essential to the parties in the decision with regard to the treaty, have changed in a manner that was not foreseen, and the change radically transforms the extent of the obligation, the parties may terminate, withdraw from or suspend the operation of the treaty.²⁵² This provision is intended to apply only in exceptional cases and cannot excuse non-compliance with inconvenient treaty obligations.²⁵³ The notion of fundamental change of circumstances as found in the Vienna Convention is, it was stated at the fifty-first session of the ILC, not dissimilar to the notion of state of necessity.²⁵⁴

The net effect of invocation of circumstances precluding wrongfulness is thus not annulment or termination of the obligation *per se*.²⁵⁵ In fact, necessity has no effect on the obligation incumbent on the State. Although most writers have agreed on this, the reasoning leading up to that conclusion may differ. For instance, some have argued that there is a trend towards diversification of the regimes of international responsibility, basing this on a tendency to establish liability types customised for the set of rules they are meant to sanction.²⁵⁶ Thus, there is no reason to suppose that responsibility under one regime is the same as the responsibility incurred under another; consequently, a State presumably cannot avoid responsibility for a breach of treaty obligations by invoking that the wrongfulness of the conduct would be precluded under the law of state responsibility.²⁵⁷ A clearer way to express the same point is however the distinction, so often emphasised by the ILC, between primary and secondary norms.²⁵⁸ The defences under the law of state responsibility speak only of liability, not of legality. This entails that the act is not made lawful by the invocation of necessity. The exist-

²⁵¹ The ILC noted that grounds invoked to justify non-compliance with a treaty formed part of the law of international responsibility and was thus to be dealt with separately, *Yearbook of the ILC*, 1966, vol. II, UN Doc. A/CN.4/SER/1966/Add.1, 177; cf. Bowett, 1991, 139.

²⁵² Article 62 of the VCLT.

²⁵³ P. Sevastik, *The Binding Force of Treaties Under International Law – Handbook for Government Lawyers and Human Rights Advocates* (Iustus, 1997), 76.

²⁵⁴ B. Simma, 'The Work of the International Law Commission at Its Fifty-First Session (1999)', 68 *Nordic J. of Int'l L.* (1999) 293-361, 313.

²⁵⁵ J. Crawford, *The International Law Commission's Articles on State Responsibility – Introduction, Text and Commentaries* (Cambridge University Press, 2002), 160.

²⁵⁶ P. Reuter, *Introduction to the Law of Treaties* (Pinter Publishers, 1989), 153. See also below concerning the development of a legalistic, rule of law tradition in international law.

²⁵⁷ Bowett, 1991, 141-2.

²⁵⁸ Cf. A. Cassese, *International Law* (Oxford University Press, 2005), 244.

ence of such a circumstance merely provides a justification²⁵⁹ or excuse for non-performance for the time that the circumstance in question subsists.²⁶⁰

This issue was raised in the *Société Commerciale de Belgique* case.²⁶¹ Greece invoked a general principle of necessity, as a circumstance precluding the wrongfulness of State conduct not in conformity with an international financial obligation.²⁶² So far as recognition of that principle was concerned, the Belgian Government was in full agreement²⁶³; however, Belgium sought to establish that even if the Greek economy was found to be in such a state as to justify suspension of payment, the wrongfulness would cease to be precluded once the situation of necessity no longer existed. Similar positions of both the parties to the case, and in addition of the Permanent Court of International Justice, can be observed in the case concerning the *Payment of Various Serbian Loans Issued in France*, from 1929.²⁶⁴ The necessarily temporary nature of measures taken in response to imminent danger was also underlined in the *Pacific Fur Seals Arbitration*, from 1893.²⁶⁵ In more modern cases, international courts have kept to the same line of reasoning. The separation of the law of treaties and the law on state responsibility upheld in the *Rainbow Warrior* case implies that even if a circumstance precluding wrongfulness is at hand, the validity of the obligation must be determined in accordance with the law of treaties.²⁶⁶

²⁵⁹ This term is somewhat controversial: for instance, P. Allott, 'State Responsibility and the Unmaking of International Law', 29 *Harvard Int'l L. J.* (1988) 1-26, considers a 'justification' to be a term which renders the conduct lawful, whereas the International Law Commission seems to have a different interpretation, contrasting the word excuse rather with the term authorisation. For an illuminating discussion of justification vis-à-vis excuse, quite useful for the purpose of understanding the distinction between unlawfulness and wrongfulness, see N. Jareborg, 'Justification and Excuse in Swedish Criminal Law', *Essays in Criminal Law* (Iustus, 1988), 11-27. Note however that there is no perfect analogy between necessity under domestic criminal legal systems and under international law, due to the abstraction of the State, see discussion in sec. 2.3. Necessity in Swedish criminal law is more related to distress. Cf. also Lowe and Tomuschat, cited *infra*, and I. Johnstone, 'The Plea of Necessity in International Legal Discourse: Humanitarian Intervention and Counter-Terrorism', 43 *Columbia J. Transnational L.* (2005) 337-88, 349 *et seq.*

²⁶⁰ Crawford, 2002, 160. See more *infra* concerning whether to classify the justification as an excuse or as an authorisation. However, on a side note, the law on state responsibility provides for countermeasures under which a State who is the victim of another State's violation of international law may suspend the operation of reciprocal obligations in order to force the violating party to resume observance of the commitment. In such a situation, the first violating party is likely to challenge the legitimacy of the countermeasures, and may come to take measures of its own. The result can be a spread of non-performance of the treaty, which may lead to the invalidation of the treaty, if nobody any longer adheres to it; thus, the primary norm disappears altogether, see Reuter, 1989, 151.

²⁶¹ *Belgium v. Greece*, PCIJ, Ser. A/B (1939) No. 160 and PCIJ, Ser. C (1939) No. 87. Cf. Crawford, 2002, 180. The Permanent Court of International Justice noted that the question fell outside its mandate, *Société Commerciale de Belgique* case, PCIJ Ser. A/B (1939) 160, at 174, but in observing that it could make a declaration regarding the case only after having verified the Greek financial situation and the effect the execution of the award would have, see at 178 of the *Société Commerciale de Belgique* case, the Court seemed to implicitly accept the joint position of the parties that under certain circumstances the honouring of international undertakings was impossible, cf. *Report of the ILC* (1980), UN Doc. A/35/10, 78-9.

²⁶² *Société Commerciale de Belgique* case, PCIJ, Ser. C (1939) No. 87, 209.

²⁶³ *Ibid.*, 236. Cf. *Report of the ILC* (1980), UN Doc. A/35/10, 78, para. 11.

²⁶⁴ *France v. Kingdom of the Serbs, Croates and Slovenes*, PCIJ, Ser. A/B (1929) No. 20; cf. *ibid.*, para. 12, fn 109.

²⁶⁵ Cf. Crawford, 2002, 180; *Report of the ILC* (1980), UN Doc. A/35/10, 82; P. Okowa, 'Defences in the Jurisprudence of International Tribunals', in G. S. Goodwin-Gill and S. Talmon, *The Reality of International Law; Essays in Honour of Ian Brownlie* (Oxford University Press, 1999) 389-411, 401.

²⁶⁶ *Rainbow Warrior* case (1990) XX RIAA 217, 251-2, para. 75.

As a corollary, necessity and other circumstances precluding wrongfulness cannot establish a right for a State to act inconsistently with its obligations; the presence of necessity does not alter the substantive obligations owed to other States. In the *Gabčíkovo-Nagymaros Project* case, the International Court of Justice held that

the state of necessity claimed by Hungary – supposing it to have been established – thus could not permit of the conclusion that ... it had acted in accordance with its obligation under the 1977 Treaty or that those obligations had ceased to be binding upon it. It would only permit the affirmation that, under the circumstances, Hungary would not incur international responsibility by acting as it did.²⁶⁷

Thus, one must distinguish between an excuse provided by a circumstance precluding wrongfulness and termination of the primary obligation.²⁶⁸ Fitzmaurice upheld such a distinction in his 1959 report on the work on the law of treaties: where a circumstance precluding wrongfulness applies, the non-performance is justified, but looks towards a resumption of performance as soon as the factors causing and justifying the non-performance are no longer present.²⁶⁹

Admittedly, one can speculate as to whether necessity is sometimes invoked in a manner that suggests that the violating State believes the provided excuse to render its behaviour lawful, and that it can indeed continue acting in the same manner more or less indefinitely. In a case such as the *Gabčíkovo-Nagymaros Project* case, one may ask how the ecological concerns about the dam project would ever be satisfied as long as Hungary and Slovakia continued the work in accordance with the 1977 Treaty. Thus, resumption of obligations under that particular agreement seemed unlikely in any event. A similar situation would be at hand in relation to necessity as complementing the doctrine of self-defence²⁷⁰ – if one imagines necessity as a part of a global war on terror, it may transform into a legitimisation of actions until a point where that “war” is won, whenever that may be. Because it is feared that States will employ necessity in a way that implicitly suggests that obligations are unlikely ever to be resumed, the nature and character of the doctrine of necessity is even more controversial than the question of its existence.²⁷¹ The balance of interest criterion appears to have contributed to the scepticism.

²⁶⁷ *Gabčíkovo-Nagymaros Project* case (Hungary v. Slovakia), Judgment, *ICJ Rep.* 1997, 7, at 39, para. 48.

²⁶⁸ Crawford, 2002, 160.

²⁶⁹ *Yearbook of the ILC*, 1959, vol. II, UN Doc. A/CN.4/SER.A/1959/Add.1, 41, para. 8.

²⁷⁰ See sec. 5.2, *infra*.

²⁷¹ See for instance Jiménez de Aréchaga, ‘International Responsibility’ in M. Sorensen (ed.), *Manual of Public International Law* (London, 1968), 531-603 at 543, referred to in the *Rainbow Warrior* case (1990) XX *RIAA* 217, where the ambiguous character of necessity and the fact that it was a deliberate, considered, breach of obligations tipped the balance against allowing a necessity defence, see *supra* in section 2.3.

It has however been argued, and in my opinion correctly so, that necessity ought never to be regarded as an authorisation *ex ante*, nor as a ground of defence rendering the behaviour lawful, but as an excuse – a mitigating circumstance explaining, rather than authorising, the indisputably wrongful conduct.²⁷² On several occasions, the ILC has underlined that the necessity excuse can never serve as an authorisation to act outside the boundaries of one's international obligations, but only as such an excuse *ex post facto*, and with the implied admission that the act in itself was illegal.²⁷³ The ICJ also observed in the *Gabčíkovo-Nagymaros Project* case that the fact that when Hungary

invoked the state of necessity in an effort to justify that conduct, Hungary chose to place itself from the outset within the ambit of the law of State responsibility, thereby implying that, in the absence of such a circumstance, its conduct would have been unlawful.²⁷⁴

Necessity involves a balance of *per se* legitimate concerns and implies that one State prioritises certain interests, with possible detrimental effects to other States, which are in principle innocent of any wrongdoing. This calls for a cautious approach. Lowe has argued that whilst the creation of obligations may in most cases be considered a bilateral issue, the violation of obligations is not, and so, exculpations, as opposed to excuse, by invocation of e.g. necessity, may come to impede the creation of a public order in international law.²⁷⁵ The sensible interpretation is thus – given the explanations offered in the different commentaries provided by the ILC – that the term 'wrongful' is given a different, more morally and less legally tuned connotation than 'lawful'.²⁷⁶

Further support for the conclusion that necessity does not change the lawfulness of an act can be found in the fact that preclusion of wrongfulness does not mean that a State escapes the financial consequences of its unlawful behaviour. Even if a state of necessity is successfully invoked, the State will not be rid of its obligation to compensate for material loss caused by its actions.²⁷⁷ In several cases where a state of necessity was argued, the parties agreed that the obligation to pay compensation would be unaffected, whatever the judgment with regard to the circumstance precluding wrongful-

²⁷² C. Tomuschat, 'International Responsibility and Liability', 281 *RdC* (1999) 268-303, 288-9, with reference to V. Lowe, 'Precluding Wrongfulness of Responsibility: A Plea for Excuses', 10 *European J. Int'l L.* (1999) 405-11; cf. Allott, 1988.

²⁷³ Cf. A. Laursen, 'The Use of Force and (the State of) Necessity', 37 *Vanderbilt J. Transnat'l L.* (2004) 485-526, at 512, dealing with this in relation to an examination on the necessity defence and humanitarian intervention. J. Crawford, *Second Report on State Responsibility*, ILC, 51st sess., UN Doc. A/CN.4/498/Add.2 (1999) 24 *et seq.*, para. 276.

²⁷⁴ *Gabčíkovo-Nagymaros Project* case (Hungary v. Slovakia), *ICJ Rep.* 1997, 7, para. 48.

²⁷⁵ Lowe, 1999, 409.

²⁷⁶ But cf. Allott, 1988, 17, who has interpreted the circumstances mentioned in Chapter V "precluding wrongfulness" as providing a justification indicating that the conduct is alleviated of its unlawfulness.

²⁷⁷ Article 27(2) ARSIWA; Crawford, 2002, 189.

ness. Hungary agreed for instance to, under any circumstance, compensate Slovakia for losses incurred in the *Gabčíkovo-Nagymaros Project* case²⁷⁸, and although accepting the need for measures in the case of *Properties of the Bulgarian minorities in Greece*²⁷⁹, the League of Nations Commission of Enquiry proposed that the Greek Government should compensate the Bulgarian nationals who had been deprived of their property.²⁸⁰ Bulgaria endorsed the proposal and recognised that the application of articles 3 and 4 of the Treaty of Sèvres had been rendered impossible by the events of the case.²⁸¹ Concerning compensation, it would however appear that state practice is more easily assessed than the judicial technicalities. Lowe raises the issue of whether, if an act under e.g. necessity is not wrongful, compensation will have to be rendered under a regime of injurious consequences for arising out of acts not prohibited under international law.²⁸² However, the existence and contents of such a regime is yet somewhat uncertain, which is yet another reason for regarding the circumstances precluding wrongfulness as not exculpatory, but merely as excuses.²⁸³

This brings us to the matter of what the difference in principle is in situations when the plea is accepted as opposed to rejected. When necessity is established, the resumption of obligations is postponed: for as long as a circumstance precluding wrongfulness is deemed to subsist, the State may continue to be in violation. When a necessity plea is rejected the wronging State is however encouraged to cease its measures immediately, rather than when the acute threat is subdued – thus, the main difference is temporal. An illuminating example is the *Construction of a Wall* case, where the Court did not accept that Israel was in a state of necessity, or in any other circumstance that could justify the wrongfulness of its behaviour. Therefore, Israel in the Court's view incurred state responsibility for its actions, which had the implications that Israel was obliged to comply with its international obligations with regard to the Palestinian right to self-determination, international humanitarian law, international human rights and to ensure freedom and access to holy places.²⁸⁴ However, even if the plea had been accepted, the State must in the long run always return to compliance as

²⁷⁸ *Gabčíkovo-Nagymaros Project* case (Hungary v. Slovakia), *ICJ Rep.* 1997, 7, para. 48.

²⁷⁹ *Report of the Commission of Enquiry into the Incidents on the Frontier between Bulgaria and Greece*, League of Nations, Official Journal, 7th year, No. 2 (1926), annex 815, cited in *Report of the ILC* (1980), UN Doc. A/35/10, 80, fn 110.

²⁸⁰ *Report of the ILC* (1980), UN Doc. A/35/10, 80.

²⁸¹ *Report of the Commission of Enquiry into the Incidents on the Frontier between Bulgaria and Greece*, p. 111; *Report of the ILC* (1980), UN Doc. A/35/10, 80.

²⁸² Cf. *Yearbook of the ILC*, 1981, vol. II, UN Doc. A/CN.4/346. See further in relation to this G. Lysén, *State Responsibility and International Liability for Lawful Acts: A Discussion of Principles* (Iustus, 1997).

²⁸³ Lowe, 1999, 410, cf. I. Johnstone, 'The Plea of Necessity in International Legal Discourse: Humanitarian Intervention and Counter-Terrorism', 43 *Columbia J. Transnational L.* (2005) 337-88, 249 *et seq.*

²⁸⁴ See generally the *Construction of a Wall* case, *Adv. Op.*, 9 July 2004.

soon as the obstacle is removed. In a case such as the *Construction of a Wall* case, where the rights protected were of a quite serious nature, concerning human and religious rights, the time allowed for returning to compliance will surely have been set short, even in the face of emergency. Furthermore, as noted above, the obligation to compensate remains unaffected. It would appear that the most significant effect of the invocation of necessity is diplomatic: the State in question, through a legal process, is enabled to receive an international approval, or at least acceptance or sympathy, with regard to its behaviour. This is also inherent in the character of necessity as an excuse rather than as an authorisation.

One must thus accept that a plea of necessity has no effect on the existence of the obligation itself. To parallel this, the existence of derogation clauses in a treaty, i.e. conditions stipulated in the primary norm, should obviously not be allowed to increase the likelihood of an invocation of a circumstance precluding wrongfulness being accepted. This argument flows from the strict separation between primary norm level and secondary norm level, that I believe is crucial, if the circumstances precluding wrongfulness are to maintain their nature as dealing with the consequences of breaches only, and not with defining whether a violation has been committed. For instance, some human rights documents, such as the International Covenant on Civil and Political Rights contain provisions that States can invoke in order to derogate, under certain conditions, from the obligations conferred upon them.²⁸⁵ Where such conditions are at hand, the conduct is not to be considered unlawful; however, should such requirements not be fulfilled, the very fact that the treaty foresees that its own operation is unreasonable in certain situations should not be offered as an argument for a more lenient stance towards a plea of necessity. In this respect, I believe that the ICJ in the *Construction of a Wall* case contributed to the confusion and did not uphold the separation that it had subscribed to in earlier cases.²⁸⁶

In the *Construction of a Wall* case, Israel had made use of the possibility to derogate from the ICCPR, through a communication to the Secretary-General of the UN. The reasons stated for the derogation was that Israel since its establishment had “been the victim of continuous threats and attacks on its very existence as well as on life and property of its citizens”. These threats had articulated themselves in “the form of threats of war, actual armed attacks and campaigns of terrorism resulting in the murder

²⁸⁵ *Construction of a Wall* case, para. 136. See further G. R. Watson, ‘The Wall Decisions in Legal and Political Context’, 99 *Am. J. Int’l L.* (2005) 6-26, 15; D. Kretzmer, ‘The Advisory Opinion: The Light Treatment of International Humanitarian Law’, 99 *Am. J. Int’l L.* (2005) 88-102.

of and injury to human beings”. For these reasons, the State of Emergency proclaimed in May 1948 had remained in force ever since and Israel asserted that the situation constituted “a public emergency within the meaning of article 4(1) of the ICCPR”. Referring to “the exigencies of the situation, for the defence of the State and for the protection of life and property” and asserting the right “to take measures to the extent strictly required ... including the exercise of powers of arrest and detention”, Israel invoked the right to derogate from its obligations under Article 9 – relating to the right to freedom and security of person – should the measures taken be found to be contrary to these.²⁸⁷

When judging the legality of Israel’s actions, the Court noted this derogation from Article 9, which was allowed under the primary norms; however, no such derogation had been made in relation to other relevant provisions, such as restrictions of liberty of movement under the administrative regime of the wall, which was deemed inconsistent with ICCPR Article 12(3); and Article 4 of the International Covenant on Economic Social and Cultural Rights, that document also containing a derogation clause. The conditions stipulated in the primary norms were deemed not to be fulfilled in these cases, as the Court remained unconvinced “that the specific course Israel has chosen for the wall was necessary to attain its security objectives” and could not be justified “by military exigencies or by the requirements of national security or public order”.²⁸⁸ The Court, however, went on to say:

In this regard the Court is bound to note that some of the conventions at issue in the present instance include qualifying clauses of the rights guaranteed or provisions for derogation *Since those treaties already address considerations of this kind within their own provisions, it might be asked whether a state of necessity as recognized in customary international law could be invoked with regard to those treaties as a ground for precluding the wrongfulness of the measures or decisions being challenged.*²⁸⁹

However, if there is a provision allowing for the suspension of humanitarian law in cases of military necessity or public emergency, the action is illegal only when such circumstances are absent. Only then can a circumstance precluding the wrongfulness of it come into operation.²⁹⁰ Thus, it is submitted that one has little to do with the other and the very fact that the primary norms allow for derogations should have no bearing on the liability if the State has failed to meet the requirements. It could thus be that this

²⁸⁶ Cf. Kretzmer, 2005, 99

²⁸⁷ The communication is quoted in the *Construction of a Wall* case, para. 127.

²⁸⁸ *Construction of a Wall* case, para. 136-7, with reference to the Human Rights Committee, CCPR/C/21/Rev.1/Add.9.

²⁸⁹ *Construction of a Wall* case, para. 140 (*emphasis added*).

²⁹⁰ Cf. Kretzmer, 2005, 99.

is merely an unfortunate turn of phrase, and that what the Court intended to express was nothing more than that the existence of derogation clauses could be an indication recognising that situations governed by the treaty could become problematic from a balance of interest perspective. As derogation under primary norms precludes unlawfulness while excusing a violating act under a circumstance precluding wrongfulness under secondary norms precludes merely wrongfulness, the argument could be that even if a difficult position of choice and balance of interests is not sufficient to render an act lawful, it could excuse it under the law of state responsibility.

However, should the Court mean to imply that the fact that a treaty contains a derogation clause makes it more susceptible to evasion through pleas concerning circumstances precluding wrongfulness, such as necessity, it is in my view a questionable conclusion. In fact, it seems more reasonable to assume that a state of necessity should be more difficult to establish on the facts in cases where derogation is possible, but where the circumstances under which derogation is allowed are not present. If necessity is, as is argued here, best employed as a safety valve to be applied in situations not foreseen by treaty makers, the fact that consideration to extraordinary circumstances has already been made in the treaty itself implies that States are deemed capable of honouring its obligations in all other circumstances. I will return to discuss this in the last section, in relation to the principle of the rule of law.

5 Applications of the Necessity Doctrine to Use of Force

5.1 Necessity as an Alternative or Complement to Self-Defence

Some authors have discussed whether the necessity doctrine could present a complement, or an alternative, to the doctrine of self-defence, as self-defence in its classical form in some aspects has become obsolete and is considered not to correspond to the threats of the age of international terrorism.²⁹¹ Necessity has indeed been invoked in certain cases to justify violations of the sovereignty of other States.²⁹² In light of the uncertain state as regards peremptory and non-peremptory prohibition of the use of force, however, it appears highly in doubt whether one can identify uses of force – outside what is provided for under the UN Charter – that with sufficient certainty can be said not to violate *jus cogens*. Consequently, it is *de lege lata* difficult at best to employ the necessity doctrine as a complement or an alternative to the doctrine of self-defence.²⁹³

Having said this, some scholars consider that the need for a complement is noticeable. As most scholars contend that the UN Charter does not allow for pre-emptive measures to deal with more diffuse, yet very real, threats of international terror attacks, it has been proposed that necessity could provide the well-needed safety valve in this situation.²⁹⁴ The limited scope of Article 51 of the UN Charter has indeed presented a problem as regards how to deal with terrorist groups. The ICJ has construed ‘armed attack’ under the terms of Article 51 to exclude state financing of terrorist activity, and terrorist factions are not considered subjects in relation to which a right to self-defence

²⁹¹ J.-A. Romano, ‘Combating Terrorism and Weapons of Mass Destruction: Reviving the Doctrine of a State of Necessity’, 87 *Georgetown L. J.* (1999) 1023-57, see specifically at 1045-46; cf. W. C. Bradford, ‘“The Duty to Defend Them”: A Natural Law Justification for the Bush Doctrine of Preventive War’, 79 *Notre Dame L. Rev.* (2004) 1365-1492, 1395, fn 102. See also in general writings on the topic by Oscar Schachter.

²⁹² See for instance the case of the occupation of Luxembourg and Belgium by Germany in 1914, where Germany argued a necessity to forestall an attack emanating from France through these two countries, *Report of the ILC* (1980), UN Doc. A/35/10, 91, fn 126.

²⁹³ See the discussion in sec. 2.5.1, *supra*.

²⁹⁴ Romano, 1999, 1023. Cf. however I. Johnstone, ‘The Plea of Necessity in International Legal Discourse: Humanitarian Intervention and Counter-Terrorism’, 43 *Columbia J. Transnational L.* (2005) 337-88, 366 *et seq.*, who argues that self-defence can terrorism can be dealt with under the rubric of self-defence, and that the invocation of necessity will only lead to confusion as to the law in this field.

can be argued.²⁹⁵ Further, in contrast to Article 51 of the UN Charter, prescribing the availability of self-defence only where an armed attack from another State is imminent, necessity would excuse actions towards nations from where terrorists operate even where their cooperation with such hostile groups cannot be established. Several authors have forwarded the very valid argument that it would be preferred to excuse certain necessary acts of precaution on behalf of States, which are the target of terrorist attacks, rather than expanding the doctrine of self-defence.²⁹⁶ Reliance on necessity would add flexibility, and – since the violation of sovereignty is not lawful as such – in fact reaffirm the principle of sovereignty and the legitimacy of the international legal order.²⁹⁷ The State threatened by international terrorism would not have an inherent right to act under necessity, as it would under an expanded doctrine of self-defence. Thus, if necessity is invoked, the acting State will not be in the same morally elevated position and would not act under an entitlement derived from any inherent right.²⁹⁸ Additionally, the necessity doctrine would relieve the threatened State of the burden to present the difficult evidentiary link between terrorist groups and the host State, which is necessary if self-defence is invoked.²⁹⁹

If one separates the different issues relevant here, and begins with a survey of the technical requirements of Article 25, it in no way appears unfeasible that terrorist threats would fit under the necessity plea. It has been quite firmly established that protection of the civilian population of a nation constitutes an essential interest of the State. Terrorist acts would take lives, disrupt internal order or interfere with essential services or otherwise threaten an essential interest of the State.³⁰⁰ As noted above, the weight which the international community affords to a certain matter appears to have a

²⁹⁵ *Nicaragua case* (Nicaragua v. United States), *ICJ Rep.* 1986, 14, 103-4, para. 195. According to the Court, the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries which carry out acts of armed force against another State of such gravity that, should the acts have been carried out by regular forces, it would be considered an armed attack and not merely a frontier incident, the prohibition of armed attack could apply and thus the right of self-defence be available. However, assistance to rebels through e.g. the provision of weapons or logistics could not be included in the concept of 'armed attack'. Cf. Romano, 1999, 1025. But cf. also M. N. Shaw, *International Law* (Oxford University Press, 1997), 806, who takes the view that a "major terrorist attack mounted or supported by one state against another will justify measures under the rubric of self-defence, provided that the necessary requirements as to, for example, proportionality are observed", whereas minor, isolated, acts of terror will not do so. The Court in the Nicaragua case, however, considered support of terror to rather constitute threat or use of force or intervention in the external or internal affairs of the affected State, para. 195, i.e. acts impermissible under international law, but not necessarily to give rise to right of action under Article 51 of the UN Charter.

²⁹⁶ Romano, 1999, 1025 and 1053. The need for flexibility in extreme circumstances not foreseen by the UN Charter has been raised by T. M. Franck, 'The Use of Force in International Law', 11 *Tulane J. Int'l L.* (2003) 7-19, 13; cf. Bradford, 2004, 1395, fn 102.

²⁹⁷ See Johnstone, 2005, 387.

²⁹⁸ Romano, 1999, 1052.

²⁹⁹ *Ibid.*, 1051 *et seq.*

³⁰⁰ R. Boed, 'State of Necessity as a Justification for Internationally Wrongful Conduct', 3 *Yale Hum. Rts. & Dev. L. J.* (2000) 1-43, 15; O. Schachter, *International Law in Theory and Practice* (Martinus Nijhoff Publishers, 1991), 171. Cf. also O. Schachter, 'The Extraterritorial Use of Force against Terrorist Bases', 11 *Houston J. Int'l L.* (1989) 309-16, however dealing with the issue primarily from a self-defence perspective.

certain influence on the categorisation of an interest as essential, wherefore time could come to strengthen such an assertion. The war on terrorism may be regarded as enjoying ambivalent support today, but it is not inconceivable that in time it will grow to be more accepted. Already, there is evidence of States returning to a priority of national security issues over the rights of individuals.³⁰¹ Seeing that a state of necessity is directed towards ‘danger’, i.e. an apprehension that has not yet been realised, Romano has argued that necessity may provide sufficient leeway to allow for pre-emptive strike, especially where fears arise that terrorists could gain access to weapons of mass destruction.³⁰² Going through the criteria enumerated in the ARSIWA, Romano argues that terrorist attacks involving WMDs would constitute a grave and imminent threat to an essential interest of the State, and that in a situation where traditional law enforcement is unable – and the host State unable or unwilling – to control the situation, the requirement of ‘only means’ would be fulfilled. While it is possible that complications may arise as to the balance of interests if the terrorist facilities would be located in a densely populated area, making military attacks more difficult and thus rendering the interests of the host State equal to those of the threatened State, this would more provide a constraint on possible actions, according to Romano.³⁰³

Looking to state practice and case law, the efforts to replace self-defence pleas with necessity pleas in situations involving terrorist groups are illustrated in the *Construction of a Wall* case. Israel in fact in this case invoked no legal justifications, as it deemed the ICJ to lack jurisdiction over the case.³⁰⁴ However, although the legal consequences of the substantive issue was not addressed, Israel forwarded what it referred to as “factual material on the nature and scale of the Palestinian terrorist threat to Israel” that would “assist the Court properly to exercise its discretion under Article 65(1) of the Statute and decide whether or not to answer the question referred to it.” Israel thus underlined the ongoing terrorist threat it was faced with, which it characterized as being of the gravest proportions.³⁰⁵ Although it was stressed that the details set out on these issues were for the purposes of Israel’s submissions on jurisdiction and propriety only³⁰⁶, Israel contended, in arguments that evoke the defences of countermeasures and

³⁰¹ Just naming one example, one may advance the quite extensive rights given to British law enforcement after the bombings of the London underground trains in July 2005.

³⁰² Romano, 1999, 1049 *et seq.*

³⁰³ *Ibid.* One should however note in relation to this that the State wanting to invoke necessity must satisfy all conditions of Article 25, i.e. the State may not invoke necessity if it may be regarded as having contributed to the situation of necessity.

³⁰⁴ Israeli Written Statement, para. 0.5.

³⁰⁵ *Ibid.*, para. 0.1.

³⁰⁶ *Ibid.*, para. 3.54.

self-defence³⁰⁷, that “these acts of terrorism violate all established rules of customary and conventional international law”, and addressed the fact that responsibility for and legal consequences of these attacks were not part of the request for an opinion from the Court.³⁰⁸ Also, the issue of responsibility of Palestine for the actions of Palestinian groups was addressed, and Israel noted that

[i]n a different forum with a different procedure on a question that sought fairly to address the reality of the Israeli-Palestinian conflict, Israel would have no hesitation in presenting its case.³⁰⁹

Israel argued that there was a real and ever present threat to Israel from mega-terrorist attacks³¹⁰, and further presented statistics regarding attacks before and after the launch of the wall, claiming that the number of attacks had declined since the beginning of the construction, and that the wall was a significant factor in this.³¹¹ In addition, arguments pertaining to a balance of legitimate interests were introduced.

[Israel] is acutely aware, and regrets, the suffering of innocent Palestinians on the other side of this conflict. It is concerned to alleviate fabric of life constraints that result from the fence or from any other action taken by Israel in the protection of its citizens. On the scales, however, weighing heavily when it comes to address these issues, are the lives of its citizens.³¹²

Thus, in light of the information submitted by Israel, the Court *ex officio* made several observations regarding the possible defences.³¹³ The Court observed, with regard to self-defence as justification for the conduct of Israel pertaining to the building of a security barrier in the occupied Palestinian territory, that Israel did not claim that the attacks against it were imputable to a foreign State, thus self-defence was not available as justification.³¹⁴ The Court then went on to examine whether a state of necessity was applicable instead.³¹⁵ Indeed, the pleas of necessity and self-defence have a common area of application, in particular when the threatened interest is that of defending civilian lives or preventing the annihilation and disappearance of the State itself. The interrelation can also be observed in earlier cases, such as the *Caroline* case, which is often

³⁰⁷ For a commentary on the Israeli wall in connection with the doctrine of self-defence, see R. Wedgwood, ‘The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defence’, 99 *Am. J. Int’l L.* (2005) 52-16.

³⁰⁸ Israeli Written Statement, para. 0.4.

³⁰⁹ Israeli Written Statement, para. 3.76.

³¹⁰ *Ibid.*, para. 3.75.

³¹¹ *Ibid.*, para. 2.66.

³¹² *Ibid.*, para. 3.79.

³¹³ The Court has subsequently been heavily criticised for this, see e.g. M. Pomerance, ‘The ICJ’s Advisory Jurisdiction and the Crumbling Wall Between the Political and the Judicial’, 99 *Am. J. Int’l L.* (2005) 26-42.

³¹⁴ *Construction of a Wall* case, Adv. Op., ICJ, 9 July 2004, para. 139.

³¹⁵ *Ibid.*, para. 140.

referred to as the *locus classicus* of the self-defence doctrine³¹⁶, while at the same time being categorised as a case where a state of necessity, in the sense used by the ILC, was invoked.³¹⁷ This mutual basis of concepts, it has been submitted, may serve as grounds for analogical reliance on necessity in certain cases, as the Court did in the *Construction of a Wall* case.³¹⁸

The Court observed that “[t]he fact remains that Israel has to face numerous indiscriminate and deadly acts of violence against its civilian population” and reaffirmed that the State had “the right, and indeed the duty, to respond in order to protect the life of its citizens”.³¹⁹ Still, the Court remarked, such acts had to remain in conformity with applicable international law. As other, lawful, means were deemed to be available, the Court pronounced that Israel could not rely on a state of necessity in order to preclude the wrongfulness of the construction of the wall.³²⁰

It would thus appear, as regards the discussion on necessity as a legal basis for interventions against terrorist networks in other countries and other similar incursions short of war into the sovereign territory of another State, that although the facts of such cases in some extreme circumstances may point towards the necessity doctrine, it will rarely be successfully invoked. First of all, it is clear that necessity can never operate as an authority to act: it is only an excuse after the fact. This, combined with the fact that the State admits to the unlawfulness of its behaviour through invoking necessity, may deter States from relying on necessity.

Secondly, if in theory consent to carry out required measures in response to threats could be obtained by the host State, it would appear that the criterion of ‘only means’ has not been fulfilled. This possibility must be exhausted first. Furthermore, it is not quite clear how far the obligation to seek lawful ways to handle the threat reaches. Perhaps, in relation to terrorist networks, one can speculate as to whether the threatened State would have to attempt action through the Security Council, invoking a threat to international peace and security, before being allowed to take unilateral action. At least in situations where the threat is more diffuse, i.e. where there is insufficient intelligence to reveal concrete attacks scheduled to be carried out in a reasonably

³¹⁶ O. Gross & F. Ni Aolain, ‘Emergency, War and International Law – Another Perspective’, 70 *Nordic J. of Int’l L.* (2001) 29-63, 36.

³¹⁷ *Report of the ILC* (1980), UN Doc. A/35/10, 93, para. 24.

³¹⁸ See Scobbie’s commentary on the *Construction of a Wall* case, I. Scobbie, ‘Words My Mother Never Taught Me – In Defense of the International Court’, 99 *Am. J. Int’l L.* (2005) 76-88, 84.

³¹⁹ *Construction of a Wall* case, para. 141.

³²⁰ *Ibid.* For criticism of the Court’s view with regard to the security needs of Israel, see S. D. Murphy, ‘Self-defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?’, 99 *Am. J. Int’l L.* (2005) 62-76, at 66-7 and 72; cf. the Decl. of Judge Beurgenthal in the *Construction of a Wall* case.

near future, it may be difficult to assert that there is a state of necessity which cannot be addressed through international institutions and other cooperative remedies.³²¹ The difficulty in meeting the requirement of ‘only means’ in situations involving terrorist networks is illustrated by the *Construction of a Wall* case.³²²

Thirdly, imminence may be an issue. Some writers have contended that when terrorist attacks form part of a pattern this must be seen as adding to the situation of necessity.³²³ On the other hand, it has been submitted that whereas many small attacks according to some commentators can build up to constitute ‘armed attack’ under the doctrine of self-defence, there is nothing in Article 25 suggesting that a series of attacks will increase the emergency of the situation.³²⁴ Necessity is directed towards crisis and urgency. If held up to the *Caroline* test, a pattern of events ranging over a long period of time would rather weaken than strengthen the assertion that the State had “no moment for deliberation”.

5.2 Necessity in Relation to Humanitarian Intervention

On a few occasions, a state of necessity has been invoked to legitimise limited military operations in other States, specifically under claims of humanitarian intervention.³²⁵ Some States also submitted that a provision concerning humanitarian intervention should be included among the circumstances precluding wrongfulness.³²⁶ Article 25 concerning the plea of necessity, however, does not add to the discussion on the lawfulness of forcible humanitarian intervention, not sanctioned by the United Nations Security Council acting under Chapter VII or VIII.³²⁷

Pursuant to Ago’s separation of peremptory and non-peremptory uses of force, humanitarian intervention could be fitted under doctrine of necessity. However, Crawford commented that this raised issues that were too complicated to be dealt with in

³²¹ Cf. Schachter, 1989, 313-14, stating that in relation to the US bombings in Libya, both the US and the UK held that there were ample evidence of definite planned attacks.

³²² Cf. *Construction of a Wall* case, Adv. Op., para. 140.

³²³ Schachter 1989, 313.

³²⁴ Laursen, 2004, 522.

³²⁵ Some writers regard the *1960 Belgian intervention in the Congo* incident, *infra*, sec. 5.3, as a case concerning humanitarian intervention. I have however chosen to make a distinction between humanitarian interventions of a more general nature, and cases involving the rescue of nationals. The reason for this is that the latter is more closely connected to self-defence, as some States have argued that the attack on their nationals abroad constitutes an attack on the State, especially when the attack is the result of a general political antagonism, J. Raby, ‘The State of Necessity and the Use of Force to Protect Nationals’, 26 *Canadian YB of Int’l L.* (1988) 253-72, 255. Another case is the Belgian invocation of necessity in the NATO intervention in former Yugoslavia, see *infra*.

³²⁶ See e.g. comments of the Netherlands, *State Responsibility: Comments and observations received from Governments*, ILC, 53rd sess., UN Doc. A/CN.4/515 (19 Mar. 2001), 30.

³²⁷ Laursen, 2004, 512 *et seq.*; J. Crawford, *Second Report on State Responsibility*, ILC, 51st sess., UN Doc. A/CN.4/498/Add.2 (1999), 30, paras. 286-7.

relation to the law of state responsibility.³²⁸ Instead, the ILC confirmed its view on this issue on its fifty-first session, affirming that the rules governing humanitarian intervention were part of the primary norms relating to the use of force, as regulated in the UN Charter, and were not part of the secondary norms on state responsibility.³²⁹ Further the Commission considered the controversy surrounding humanitarian intervention to be a compelling reason for the Commission not to get involved in this while drafting its Articles on the secondary norms of state responsibility.³³⁰ Nevertheless, Crawford, all the while emphasising the separation between primary and secondary norms, held that “[c]ases not otherwise provided for may be dealt with in accordance with the criteria in article 26 (necessity) [now Article 25]”³³¹. Both Laursen and Johnstone has interpreted this as meaning that the ILC did not want to speak decisively on the topic of humanitarian intervention, but that, if the criteria were met in a specific case, it was not impossible to subsume an action under a state of necessity, thus excusing it *ex post facto*.³³²

Crawford also noted that, according to the commentaries to what is now Article 25, necessity was hardly ever relied on in relation to humanitarian intervention. The only case up until 1980 was the Belgian invocation in relation to the *1960 Intervention in the Congo*.³³³ Interestingly enough, Belgium has once again invoked necessity in relation to humanitarian intervention since. In the situation concerning its participation in the NATO intervention in former Yugoslavia, Belgium contended that the action was legal under the UN Charter and compatible with the prohibition of force in Article 2(4), but in the alternative raised the defence of necessity, should the Court not find favourably on the issue of legality.³³⁴ Belgium in its pleading before the Court in the context of the Yugoslavian request for provisional measures referred to Article 33 of the Draft Articles, currently Article 25, in the display of its defences and justifications. This is thus one of the most recent instances where a state of necessity has been expressly invoked before the Court. Belgium however offered its own interpretation of the content of the necessity excuse, holding the state of necessity to be the cause, which justifies the violation of a binding rule in order to safeguard, in face of grave

³²⁸ Crawford, *Second Report*, 1999, 30, paras. 286-7.

³²⁹ Simma, 1999, 314.

³³⁰ Simma, 1999, 314.

³³¹ J. Crawford, *Fourth Report on State Responsibility*, ILC, 53rd sess., UN Doc. A/CN.4/517/Add.1 (2001), 4.

³³² Laursen, 2004, 513; Johnstone, 2005, 348.

³³³ Crawford, *Second Report*, 1999, 26, para. 279. As already stated, I have categorized the 1960 intervention under rescue of nationals, see *infra*.

³³⁴ See Laursen, 2004, 518 *et seq.*, with references to Transcript of Belgium’s Oral Proceedings, CR 99/15, 10 May 1999. Regarding Belgium’s stance on these issues, see further *infra* in relation to rescue of nationals, sec. 5.3.

and imminent danger, values which are higher than those protected by the rule which has been breached.³³⁵

Belgium did not address the modalities of different courses of action or the cumulative conditions set up in Article 25, nor did it touch on the differentiation between different levels of force and incursions in another State's territory that Ago maintained in his commentary to the 1980 reading of the Articles. The argument enhances only the condition of balance of interests and the weighting against rules that are *jus cogens* or of community concern. Reference was thus made to the safeguarding of the population in the region, the enforcement of its rights that were at the time being violated and the collective security of the region.³³⁶

Despite the few occasions on which necessity has been invoked in relation to humanitarian intervention, several scholars have engaged in academic discussion on its availability as a defence in this regard. According to Rytter, necessity is not the solution to the dilemma of humanitarian intervention, since intervention would impair the essential interest of the affected State of having its territorial integrity respected; in addition, Rytter considers the application of Article 26 and the *jus cogens* character of most uses of force to bar the invocation of necessity for humanitarian intervention. Also, he argues that the UN Charter could be considered a document which implicitly cannot allow for necessity as a ground for derogation, since the object of the Charter is to strictly regulate the use of force between independent States.³³⁷ Advancing that one should perhaps not attempt to justify humanitarian intervention on legal grounds at all, Rytter invokes a concept of an *ad hoc* humanitarian necessity, a legal-political concept derived from the customary concept of necessity, rather than from the elaborated version formulated by the ILC. Spierman in criticism of Rytter has however pointed out that humanitarian interests may well prevail over the interest of territorial sovereignty, since it is the relation between the interests affected that is relevant.³³⁸ Spierman is thus of the opinion that necessity is in fact the one way in which the doctrine of necessity may find a space in international law.³³⁹ However, he is capable of reaching this con-

³³⁵ Johnstone, 2005, 362-3; cf. Laursen, 2004, 518 *et seq.*

³³⁶ Laursen, 2004, 518 *et seq.* The Court found that it did not have jurisdiction to entertain the dispute, and so, the case will not be heard on the merits, *Case concerning Legality of Use of Force* (Serbia and Montenegro v. Belgium), Preliminary Objections, ICJ, 15 Dec. 2004. One can note in relation to this situation, that the Kosovo Commission found the intervention to be legitimate but not legal, which is a reasoning in line with the necessity doctrine; however, the general reference to legitimacy is open to abuse if considered a precedent, see Johnstone, 2005, 365.

³³⁷ J. E. Rytter, 'Humanitarian Intervention without the Security Council: From San Francisco to Kosovo – and Beyond', 70 *Nordic J. of Int'l L.* (2001) 121-60, 133 *et seq.*

³³⁸ O. Spierman, 'Humanitarian Intervention as a Necessity and the Threat or Use of *Jus Cogens*', 71 *Nordic J. of Int'l L.* (2002) 523-43, 530

³³⁹ *Ibid.*, 543.

clusion only after denying Article 2(4) the status of *jus cogens*, thus aligning with Ago in distinguishing between more or less grave uses of force, an assumption that appears to receive ambivalent support in international law.³⁴⁰ It could perhaps be concluded that necessity as a defence for humanitarian intervention is at present little more than a notion *de lege ferenda*, and that more invocations in state practice is required before one can speak with any certainty about the application of the doctrine to this field. As will be discussed later, it is however doubtful whether States regard necessity as an attractive alternative when it comes to justifying their actions pertaining to humanitarian intervention.

A related matter concerns the Security Council action in relation to threat to international peace.³⁴¹ Davidsson has argued that in analogy with the necessity doctrine, the burden of proof that the threat to international peace is of a certain and imminent nature and not merely hypothetical must rest with the SC.³⁴² However, according to Davidsson, the boundaries of the notion ‘threat to international peace and security’ has been pushed ever further in practice, as the SC has widened the concept to comprise situations of purely internal strife and more consideration has been given to humanitarian concerns. Davidsson argues that the SC, acting in *lieu* of UN Member States, must intervene only when a threat to the peace is grave and imminent, and he uses the concept of necessity to qualify the situations where “circumstances arise in the world that threaten gravely and imminently the existence of the international community or the international order”.³⁴³ He thus appears to apply the necessity conditions to interpret the meaning of ‘threat to the peace’.

However, although there may be similarities in the ideological groundwork underlying these regimes, one can hardly equate one with the other. Necessity is shaped specifically with States in mind, and relates to the resources available to States. The effects of its application are different when the means and resources concerned are the combined forces of the international community, thus upsetting the balance of interest and proportionality aspects of the doctrine. Davidsson’s argument also seems to overlook the distinction between the primary and secondary norms, which is essential to the character of the circumstances precluding wrongfulness. The UN Security Council,

³⁴⁰ Cf. the discussion above, and the position of Crawford that these are matters to be dealt with on a primary norm level, and not within the ambit of the law of state responsibility.

³⁴¹ For an discussion on the development of the Security Council’s interpretation of Article 39 of the UN Charter, see I. Österdahl, *Threat to the Peace – The Interpretation by the Security Council of Article 39 of the UN Charter* (Iustus, 1998), in particular chapter 4.

³⁴² E. Davidsson, ‘The UN Security Council’s Obligations of Good Faith’, 15 *Florida J. Int’l L.* (2005) 541-73, 547.

³⁴³ *Ibid.*

when acting under Chapter VII of the UN Charter, has been given a specific mandate which arguably cannot be equated with the sum of the rights of States. Furthermore, under the conventional terms of the Charter, the SC is given the right to act in situations where there is a threat to the peace; hence, pursuant to the primacy of primary rules, the Council may legitimise its actions under these treaty provisions. Invocation of necessity would therefore only be needed in situations where the Council clearly stepped outside its mandate under the Charter and intervened in situations not foreseen by Chapter VII, as necessity may only be invoked to excuse conduct which is not in conformity with international law. When the treaty itself provides for a certain course of actions in certain well depicted, although extreme, circumstances, there is no wrongfulness to preclude through the invocation of necessity.³⁴⁴

5.3 Rescuing Nationals Abroad

Not unrelated to the situation concerning necessity and humanitarian considerations, it has been contended that necessity may provide an excuse for armed rescue actions to safeguard the lives of nationals abroad. Generally, extraterritorial use of force in another State, which in itself is not the source of threat, for instance where nationals are held hostage by terrorists, does not fit well under Article 51 of the UN Charter.³⁴⁵ As follows from the *Nicaragua* case, the ICJ construed the scope of Article 51 of the UN Charter as limited to armed attacks, and the position of the Court has been interpreted as implying that only attacks emanating from the State itself can give rise to a right of legitimate self-defence under the Charter.³⁴⁶

However, States often have no choice but to interfere when nationals are in danger abroad.³⁴⁷ Raby has argued that necessity is better relied upon for rescue of nationals than “an otherwise overburdened theory of self-defence”. Indeed, the protection of lives of the population is an essential interest of States, and if sufficient information is available, one could perceive that there would be grave and imminent peril in for instance a hostage situation.

Further, Raby argues convincingly that the values breached by a short-term and limited incursion into sovereign territory is outweighed by the interest to save human

³⁴⁴ R. Ago, ‘The Internationally Wrongful Act of the State, Source of International Responsibility’, *Eighth Report on State Responsibility*, Addendum (1980), ILC, 32nd sess., UN Doc. A/CN.4/318/Add.5, 16-17, para. 17.

³⁴⁵ O. Schachter, *International Law in Theory and Practice* (Martinus Nijhoff Publishers, 1991) 165; Raby, 1988, 254 *et seq.*

³⁴⁶ Schachter, 1991, 164, with reference to *Nicaragua* case, *ICJ Rep.* 1986, 14, 103, para. 195.

³⁴⁷ Raby, 1988, 271.

lives as one of the most important values of all.³⁴⁸ The limited and temporary nature of such an incursion also entails that it could fall outside the ambit of aggression. If so, rescue missions would not constitute breaches of *jus cogens*. Raby observes here that too many States have made statements or acted in favour of a right to intervene to rescue nationals, so that it could not be prohibited by a peremptory norm.³⁴⁹ Such an argument could find support in the distinction between more and less aggravated uses of force identified by the Ago.³⁵⁰

In state practice, varying justifications have however been offered, such as self-defence or a self-standing right of intervention in this particular kind of situation. For instance, the Israeli rescue actions in Entebbe, Uganda, in 1976 were deemed by the United States as “flowing from the right to self-defence”.³⁵¹ The Netherlands, on the other hand, characterised the same situation as warranted by “a state of emergency”.³⁵²

Belgium invoked, at least indirectly, the excuse of necessity to justify its *1960 Intervention in the Congo*.³⁵³ Belgium sent parachutists to the Congo in order to protect the lives of Belgian and other European citizens. The Belgian Government claimed to have found itself in a situation of absolute necessity. Before the Security Council, it repeated that it had been “forced by necessity” in its sending of troops to the Congo and emphasised the humanitarian, temporary nature of the action, that was limited in scope by its objective.³⁵⁴ The Belgian view, it would appear, was that this was consistent with a less grave form of force that could be acceptable under necessity. It may be noted that in the international reactions and the subsequent debate in the Security Council, there was no denial of the principle of the plea of necessity as such, and – despite what has later been added by the International Law Commission on the inappropriateness of using the necessity excuse for international humanitarian interventions – the discussion regarding the Belgian intervention circled around the facts of the situation, which could be taken as an indicative that there was acceptance of the availability of the excuse for a similar situation. The Congolese government however contended that the justification offered by the Belgian Government was little more than a

³⁴⁸ Raby, 1988, 266.

³⁴⁹ *Ibid.*, 267.

³⁵⁰ But *cf.* the discussion on this *supra* in sec. 2.5.1.

³⁵¹ Schachter 1991, 165, with reference to the statement of Ambassador Scranton, US Representative to the United Nations, in the 1976 *Digest of U.S. Practice in International Law*, 150-151.

³⁵² Raby, 1988, 270, with references.

³⁵³ UN SCOR, 873rd meeting, 13/14 July 1960, UN Doc S/PV.873, 35-36; *cf.* UN SCOR, 879th meeting, 21/22 July 1960, UN Doc. S/PV.879, para. 151: “we have brought troops to the Congo against our wishes, forced by necessity”. See also Ago, *Report*, 1980, 62, para. 64. *Cf.* Raby, 1988, 269;

³⁵⁴ UN SCOR, 879th meeting, 21/22 July 1960, UN Doc. S/PV.879, para. 151; *cf.* UN SCOR, 873rd meeting, paras. 182 *et seq.* and 192 *et seq.*; UN SCOR, 877th meeting, 20/21 July 1960, UN Doc. S/PV.877, para. 142.

pretext, covering the real objective of secession of the Congo, *ergo* an act of aggression.³⁵⁵ However, due to the limited discussion, very little can be deduced from this case concerning the possibility of invoking necessity in relation to humanitarian missions and rescue operations, and no determination was made regarding the accusation advanced by the Congo.³⁵⁶

When the United States in 1980 attempted rescue of nationals who were held hostage in Tehran, emphasis was placed on the imminent peril and threat to the hostages and the necessity of immediate action. Article 51 was not explicitly invoked. Schachter has discussed the *Tehran Hostages*³⁵⁷ situation in terms of necessity, and argued that although the United States had not exhausted all peaceful means before taking military action, the threat to the hostages' security was such as to warrant action nevertheless. This argument builds on an assumption that, firstly, the existence of remedies which are not likely to be successful are not to prevent a State from taking action, and secondly, that "the State whose nationals are in peril must be given latitude to determine whether a rescue action is necessary".³⁵⁸ It seems clear, however, that the current legal position is slightly different. Not only has the ICJ declared that the State is not the single judge of whether the situation it faces amounts to necessity³⁵⁹, but it is also a reasonable conclusion that the State has a quite far-reaching obligation to seek remedies within the framework of its international obligations, before it can be allowed to step outside the boundaries set by these.³⁶⁰ Indeed, the argument for necessity in this situation requires that consent to carry out the rescue mission cannot be obtained, since the possibility to receive consent of the State whose territorial integrity is breached would imply that other means were available to safeguard the essential interest of protecting the lives of the nationals.³⁶¹

In conclusion, the language used by commentators and scholars to explain the basis of a right to rescue seems to have shifted during the later half of the 20th century, from considering the right of rescue as an aspect of self-defence to regarding it as "justified by sheer necessity of instant action", without reference to Article 51.³⁶² However,

³⁵⁵ UN SCOR, 873rd meeting, paras. 31 *et seq.*

³⁵⁶ *Report of the ILC* (1980), UN Doc. A/35/10, 96.

³⁵⁷ *US Diplomatic and Consular Staff in Tehran* case (US v. Iran), ICJ Rep. 1980, 3.

³⁵⁸ Schachter, 1991, 166.

³⁵⁹ See the *Gabčíkovo-Nagymaros Project* case (Hungary v. Slovakia), ICJ Rep. 1997, 7, 40, para. 51; see *supra* sec. 2.2.

³⁶⁰ See *supra* sec. 2.4.3.

³⁶¹ Raby, 1988, 265.

³⁶² Schachter, 1991, 165, compares H. Waldock, 'The Regulation of the Use of Force by Individual States in International Law' 81-II *RdC* (1952) 451-517, at 467, to H. Waldock, 'General Course on Public International Law', 110-II *RdC* (1962) 1-251, at 240. The quote is from Waldock, 1962.

it is difficult to discern the position of scholars writing before the doctrine of necessity was given the connotation it has today.³⁶³ The opposition against stretching the doctrine of self-defence and the more frequent discussion on necessity in international tribunals indicate that the significance of necessity in this particular field of application is likely to increase, also in the invocations of States.

5.4 Combating International Crime: the Air Bridge Denial Program

In a recent article, Major Huskinsson, Chief of Space Law, United States Strategic Command, has suggested that a state of necessity could be invoked to justify the shooting down of civil aircraft in the fight against drug trafficking under the Air Bridge Denial Program (ABDP).³⁶⁴ The use of weapons against civil aircraft in flight is prohibited by the Chicago Convention on International Civil Aviation.³⁶⁵ Nevertheless, the program, which was established in the early 1990's, was resumed in 2003, in cooperation with Colombia, and potentially in the future also with Peru and Brazil.

The argument advanced is that drug trafficking poses a threat to internal order, as “drugs are the mother’s milk of terrorism and insurgency in South America” and the drug trade has consequently been classified as a threat to American national security. The protection of order and security, according to Huskinsson, could constitute an essential interest, that is threatened by the grave and imminent peril of drug-fuelled terrorism and internal unrest in South American neighbours and thus bring about a potential application of the doctrine of necessity. Although other means could be available, such as forcing the aircraft to land, or conducting raids at the points of embarkation and arrival, these means have proven ineffective to halt drug trafficking. Pilots may choose not to comply with orders to land, and coca production in South America often clusters in areas with poor infrastructure, where land control is difficult. For these reasons, Huskinsson forwards that the view that in the specific situation of the ABDP, shooting down of uncooperative aircraft that is suspected of ferrying drugs could be accepted under the doctrine of necessity. The interests protected go beyond the interests related to the drug trade’s effects in the production and destination countries: as

³⁶³ In Waldock, 1952, reference is made to the Caroline case, at that time by most scholars considered a self-defence case, but the idea seems quite near the necessity doctrine, and Waldock refers to both ‘self-protection’ and ‘absolute necessity’. In Waldock, 1962, 240-1, the focus on necessity is however more clear, and mention is made on the requirement to exhaust other means, such as obtaining the consent of the State in question, or effectuating UN action.

³⁶⁴ D. C. Huskinsson, ‘The Air Bridge Denial Program and the Shootdown of Civil Aircraft Under International Law’, 56 *Air Force L. R.* (2005) 109-66, at 158 *et seq.* Under the Chicago Convention

³⁶⁵ See the 1944 Chicago Convention on International Civil Aviation, 15 *UNTS* 295, Article 3 *bis* (a).

aircraft carrying drugs are usually unmarked, uncontrolled and clandestine, aviation would be made safer if such aircraft were deterred by more hard-line measures. Larger, commercial-style planes would however not come into question, as the risk is too high for accidentally shooting down innocents aircraft and such acts would not meet the balancing of interests requirement.³⁶⁶

In my view, it is questionable whether necessity could be invoked in relation to the ABDP. Firstly, in light of the continuing nature of the drug trafficking problem, it is unlikely that one could establish the criterion of urgency that is needed for the drug trade to be described as a 'grave and imminent peril'. Secondly, although this is a point of fact to be considered *in casu*, it is hard to imagine that no effective measure could be taken, short of shooting down the aircraft. This rather appears to be the more convenient way, preferred to operations in the territories of the drug lords by those who will otherwise have to conduct such excursions. Under the Chicago Convention, a State is entitled to resort to any appropriate means, consistent with relevant rules of international law, to require the landing at some designated airport of an aircraft lacking authority to fly above its territory or where there are reasonable grounds to conclude that the aircraft is being used for a purpose that is inconsistent with the aims of the Convention. This entails that even if conceivably the situation would appear to fall under the necessity doctrine, the State may thus employ certain actions permissible under international law, which may be regarded as alternative means which must then be exhausted before necessity can be invoked to allow the shooting down of the plane. Thirdly, it is doubtful whether the balancing requirement is met: engaging in hostile acts towards foreign aircraft over foreign territory, with the potential loss of life, seems to warrant a high degree of certainty of the facts. To accidentally shoot down a plane in a case where sufficient information is unavailable would indeed be so tragic as to warrant the highest caution.

It is nevertheless difficult to speak with certainty of the possible effects of acquiescence in this case. Huskinsson claims that the international community, while generally opposed to shooting down civil aircrafts, have been surprisingly silent on the case of the ABDP, where this type of operation has allegedly been employed by the US since 1995.³⁶⁷ Huskinsson offers that the answer to the question of the legitimacy of such acts could affect the view of shooting down civil aircraft also in the war on ter-

³⁶⁶ Huskinsson, 2005, 162.

³⁶⁷ *Ibid.*, 110.

ror.³⁶⁸ However, again, one must keep in mind the distinction between wrongfulness and lawfulness, where invocation of necessity is only a temporary defence. Should other means become available, for instance through a higher degree of cooperation with other States, such a defence would become inoperative.

³⁶⁸ Huskinsson, 2005, 110.

6 Necessity and the Rule of Law in International Law

6.1 The Development of a Rule of Law in International Law

Classical international law is concerned with States rather than with people and it tends to guard order rather than justice.³⁶⁹ The firmly established principle of sovereignty of States has led to international law traditionally holding a rather weak position in that its creation and enforcement is regarded as being dependent on the consent of States.³⁷⁰ Over the past couple of decades, one has however been able to observe a tendency towards establishing an affirmative international law, directed towards a society of peoples rather than a society of sovereign States, *although* such a situation is not yet a reality.³⁷¹ Undoubtedly, the regime of state responsibility forms part of this movement. In particular, the separation between primary and secondary norms mirrors domestic legal systems and may thus help to create an overriding international legal order.³⁷² The development of and primacy given to concepts such as *jus cogens* and obligations *erga omnes* also illustrate this point, as these notions have been endowed with the power to negate even the fundamental positivist principle of the pre-eminence and binding nature of treaties.³⁷³ The State is no longer the sole judge of whether its actions are justified or not, but the international community as a whole is to an increasing extent being offered opportunities to protest, and to vest its protests in legal form.³⁷⁴

The theories of pre-commitment and international relations have helped to advance the understanding of mechanisms underlying the building of regimes in international law.³⁷⁵ In the process, hopes have been revitalized that international law can serve to spread and internalise values and promote international relations. The view of international law has thus moved far from the *dictum* in the *Lotus* case from 1927 –

³⁶⁹ D. Armstrong, 'Law, Justice and the Idea of a World Society', 75 *Int'l Affairs* (1999) 547-561, 547.

³⁷⁰ *Ibid.*

³⁷¹ Armstrong, 1999, 547-8; cf. Allott, 1988.

³⁷² M. Koskenniemi, 'Solidarity Measures: State Responsibility as a New International Order?', 72 *British YB Int'l L.* (2001), 337-56, 337-9.

³⁷³ Armstrong, 1999, 554.

³⁷⁴ See T. M. Franck, 'The Use of Force in International Law', 11 *Tulane J.Int'l L.* (2003) 7-19, 14 *et seq.*, who speaks of a "jurying function" exercised by other States.

³⁷⁵ Cf. S. R. Ratner, 'Overcoming Temptations to Violate Human Dignity in Times of Crisis: On the Possibilities for Meaningful Self-Restraint', 5 *Theoretical Inquires L.* (2004) 81-109, 109.

where it was stated that restrictions upon the independence of States cannot be presumed – to the declaration in the *Legality of the Threat or Use of Nuclear Weapons* case³⁷⁶, where the President of the Court held:

Despite the still modest breakthrough of ‘supra-nationalism’, the progress made in terms of institutionalization, not to say integration and ‘globalization’ of international society is undeniable.... The resolutely positivist, voluntarist approach of international law still current at the beginning of the century ... has been replaced by an objective conception of international law, a law more readily seeking to reflect a collective juridical conscience and respond to the social necessities of States organized as a community.³⁷⁷

The ICJ has thus had a decisive role in the development of world law and of the view of international society. It is submitted that a collective legal regime is being established, where ever more issues are the subject of international adjudication. As an illuminative example serves a comparison between the *1966 South West Africa* case – where the Court considered that humanitarian considerations were not in themselves sufficient to generate legal rights and duties, and thus a court of law could not take account of such moral principles disguised in legal form – and the view taken in the advisory opinion on the same topic in 1971, where the Court took a more liberal and progressivist view and held that it could indeed take account of the evolution in thinking about issues such as colonialism.³⁷⁸

At the same time, some judges of the ICJ have in some instances refused to take account of more progressivist arguments, such as those relating to social and economic needs, which may be seen as involving “global resource policies, or basic problems of world politics which not only could not have been solved by the judicial organ of the world community but stray well beyond equity as a norm of law into the realm of social organization”.³⁷⁹ Hence, there appears to be limits to international legalism, and most of international life is still reserved for politics. Later developments in the *Construction of a Wall* case however show that this distinction is becoming increasingly blurred, as the Court took a quite liberal view of its powers to pronounce on international political affairs.³⁸⁰ Further, in that case, relating to the discussion here on the establishment of a more objective international law, the Court in its persistent rejection

³⁷⁶ Cf. B. Simma, and A. L. Paulus, ‘The “international community”: facing the challenge of globalization’, 9 *European J. of Int’l L.* (1998) 266.

³⁷⁷ *Legality of the Threat or Use of Nuclear Weapons*, Adv. Op., Decl. of President Bedjaoui, *ICJ Rep.* 1996, 226 at 270, para. 13.

³⁷⁸ See Armstrong, 1999, 553.

³⁷⁹ *Continental Shelf (Tunisia v. Libya)* case, *ICJ Rep.* 1982, 18, Diss. Op. of Judge Oda, 256, para. 157; cf. Armstrong, 1999, 555.

³⁸⁰ Cf. for instance M. Pomerance, ‘The ICJ’s Advisory Jurisdiction and the Crumbling Wall Between the Political and the Judicial’, 99 *Am. J. Int’l L.* (2005) 26-42. Other authors looked more favourably on this stance, see R. A. Falk, ‘Toward Authoritativeness: The ICJ Ruling on Israel’s Security Wall’, 99 *Am. J. Int’l L.* (2005) 42-52.

of any kind of subjective argument on Israel's behalf indicates a strong watchfulness of any dissipation of what has already been achieved in terms of world law. Thus, it could be argued that international affairs are becoming increasingly dominated by law and legal arguments, which in its turn demands more of legal regimes governing issues such as state responsibility and legal defences for acts the legitimacy of which is questionable.

Nevertheless, despite the creation of international legal regimes, one has to question the effectiveness of international legal norms in the face of empirical evidence. While undoubtedly credible commitments of international cooperation in different fields stabilise international society, the absence of enforcing bodies is still undeniable. The survey of international incidents presented in this thesis indeed indicate that under some circumstances, States are inclined to sacrifice international obligations when their interests so require.³⁸¹

The fact that governments are traditionally regarded as the unique subjects as well as the creators of international law gives excuses for wrongful acts, such as necessity, some specific traits. Allott has submitted that such justification doctrines pose a threat to the rule of law in international society, and constitute a destabilizing factor in international law, allowing governments to regard themselves as above the law and to set aside the rights of individuals if they can display a collective interest and convincingly argue that it is essential.³⁸² Indeed, some treaty regimes vulnerable to violations under necessity conditions may ultimately be aimed at protecting individuals, such as human rights treaties or international humanitarian law. Allott speaks of the invocation of circumstances precluding wrongfulness as a phenomenon contributing to the unmaking of international law, and especially attacks the doctrine of necessity: "Among the clearest lessons of our collective experience is that the concept of state necessity is the most persistent and formidable enemy of a truly human society."³⁸³ Having suggested above that although necessity is an exceptional defence that is difficult to work with for States and international lawyers alike, it may perhaps be useful to address new challenges of international security and safeguarding common values, this chapter will thus be devoted to discussion of whether necessity will come to erode international law.

³⁸¹ See also B. A. Leeds, 'Alliance Reliability in Times of War: Explaining State Decisions to Violate Treaties', 57 *International Organization* (2003) 801-27, 823.

³⁸² P. Allott, 'State Responsibility and the Unmaking of International Law', 29 *Harvard Int'l L. J.* (1988) 1-26, 18. Allott holds that the philosophy of international law has failed at convincing governments that there is any rule of law principle in international society.

³⁸³ Allott, 1988, 17.

6.2 Upholding the Stability of Treaty Regimes: Shaping the Defences under the Law of State Responsibility

The finding of the International Court of Justice in the *Gabčíkovo-Nagymaros Project* case – that the VCLT catalogue of circumstances under which a treaty can be rendered inoperative is exhaustive, and thus adopting a quite restrictive regime for the denunciation or suspension of treaty obligations falling under the framework of the Convention – has been interpreted as a deliberate affirmation of the stability of treaty regimes.³⁸⁴ The same conclusion can be deduced from the commentaries of the ILC.³⁸⁵ It was intended that the Vienna Convention would adopt narrowly defined grounds for non-compliance with a treaty. Against this background it has been submitted that “it would seem to defeat that intention to allow a State to evade these strict provisions by invoking the looser and wider concepts” offered by the law on state responsibility.³⁸⁶ There thus appears to be a *prima facie* lack of correspondence between the object and purpose of the law of treaties and the law of state responsibility.³⁸⁷

However, the Court in the *Gabčíkovo-Nagymaros Project* case considered the separate regimes of treaty law and state responsibility law undeniably linked and saw them as complementing each other: a State party whose act of termination is incompatible with the law of treaties may still escape responsibility if it can rely on any of the general excuses under the law of state responsibility.³⁸⁸ It has been submitted that this calls for a certain restrictiveness in relation to the defences under the regime of state responsibility: it would be paradoxical to enforce a strict regime for denunciation of treaties under the Vienna Convention, if a State can nonetheless ignore its obligation under a treaty by invoking one or several more broadly defined circumstances precluding wrongfulness under the Articles on the Responsibility of States.³⁸⁹ There seems to be little point in maintaining strict conditions for the termination or suspension under the law of treaties, if the defences of state responsibility undo what treaty law tried to establish, namely stability.³⁹⁰

³⁸⁴ P. Okowa, ‘Defences in the Jurisprudence of International Tribunals’, in G. S. Goodwin-Gill and S. Talmon, *The Reality of International Law; Essays in Honour of Ian Brownlie* (Oxford University Press, 1999) 389-411, 393; cf. Bowett, 1991, 140; I. Sinclair, *The Vienna Convention on the Law of Treaties*, Manchester University Press, 1973, 162-3. Cf. also the *Gabčíkovo-Nagymaros Project* case, *ICJ Rep.* 1997, 7, paras. 46-7.

³⁸⁵ *Yearbook of the ILC*, 1966, UN Doc. A/CN.4/SER/1966/Add.1, 236, see *supra* sec. 4.

³⁸⁶ D. W. Bowett, ‘Treaties and State Responsibility’, in Mélange M. Virally : *Le Droit international au service de la paix, de la justice et du développement* (Éditions A. Pedone, 1991), 142.

³⁸⁷ S. Rosenne, *Breach of Treaty* (Grotius Publications, 1985), 72.

³⁸⁸ *Gabčíkovo-Nagymaros Project* case, *ICJ Rep.* 1997, 7, para. 47; Okowa, 1999, 393-4.

³⁸⁹ Cf. Allott, 1988, 2, who argues that the codification of the articles on state responsibility in fact does not limit the power of governments, but only establishes the power of governments.

³⁹⁰ Sinclair, 1973, 162-3; cf. Okowa, 1999, 393.

Nevertheless, the reasoning of the Court in the *Gabčíkovo-Nagymaros Project* case and of the Tribunal in the *Rainbow Warrior* case lays down that the application of circumstances precluding wrongfulness does not render the treaty inoperative. The obligation is maintained and the act remains unlawful.³⁹¹ However, the unlawfulness can be explained and even excused by compelling reasons going to the existence and maintenance of a functioning State. Nonetheless, in effect, it could be submitted that the critics offer a very valid point when flagging that the net result will be the same in the isolated case: the State will be able to evade its international obligations and give primacy to self-interest and unilateral action. Some writers, such as Okowa and Sinclair, has discussed whether the Court in the *Gabčíkovo-Nagymaros Project* case did not sufficiently consider the question of treaty regime stability, sought by the ILC through the restrictive catalogue in the VCLT, when it definitely opened up for defences under the law of state responsibility for breaches of treaty.³⁹² However, the response to this lies in what is argued here, namely that the defences under the ARSIWA are conceptually different from defences under the VCLT. The distinction between the primary and secondary norms should serve to lay these fears to rest. The solution thus lies in that the international community interprets the circumstance precluding wrongfulness as a justification only on the level of secondary norms, and not as legitimising the act in relation to substantive law.

The potentially detrimental effects of the necessity doctrine – in terms of evasion of commitments and the subsequent possible erosion of the binding character of international law³⁹³ – may be illuminated by the reasons for entering into treaties, which may range from a rationalist position, attempting to provide incentives for other actors to behave a certain way, to a normative position, aimed at creating a shared legal community reflective of common values. The relevance of this discussion concerns the temptations of States to violate treaties in real or putative emergency situations, where vital interests appear threatened, and whether a legal scheme such as necessity may help them in doing so.

The conventional way of understanding States' accession to treaties is no doubt based on a bilateral, reciprocal, interest-based model, but treaty-making can also be an effort of a pre-commitment or self-binding type, where a State makes arrangements to

³⁹¹ O. Spierman, 'Humanitarian Intervention as a Necessity and the Threat or Use of *Jus Cogens*', 71 *Nordic J. of Int'l L.* (2002) 523-43, 524.

³⁹² See Okowa, 1999, 393, with references.

³⁹³ C. Tomuschat, 'International Responsibility and Liability', 281 *RdC* (1999) 268-303, 287; cf. Allott, 1988.

decrease temptations that it will act in a less desirable way.³⁹⁴ Under the pre-commitment theory, Ratner has identified four categories of motivations for committing to treaty regimes. First, some States enter into treaties to score propaganda points or because they see some non-related benefit coming in return for commitment to a certain ideal, such as trade arrangements for protection of human rights. Second, some States will want to effectuate a certain behaviour with others, but are not particularly concerned that they themselves will be tempted to violate the treaty. Third, some States will also not worry about their own violations, but rather than tying the hands of one particular party, they hope to build a legal regime protecting the specific interest. Fourth, some States will have an Ulyssean approach, aimed at self-restraint – through commitment to an international regime they will make future violations more costly and so hope to avoid certain behaviour.³⁹⁵

The very essence of state responsibility is to exact accountability for violations, hence making such behaviour less attractive. Needless to say, the rate at which States comply with obligations will be dependant on the form of defences and excuses available if violations do occur. Compliance must be seen in the same context as the motivations present in the commitment process.³⁹⁶ A broad necessity defence will thus be particularly unfortunate in cases where States attempt to bind their own future behaviour, as they stand the risk to once again be overwhelmed by national self-interest and act accordingly. In this light, it is reassuring that international courts and tribunals have emphasised that all legitimate means must be exhausted before the necessity excuse is available. It is also essential that necessity is correctly defined in diplomacy, adjudication and doctrine as an excuse, that does not create a right to act inconsistently with one's obligations, nor that it alleviates the unlawfulness of the behaviour.³⁹⁷

The necessity plea, being based on a balance of interests made after concluding a treaty, in a sense suspends the principle of *pacta sunt servanda*³⁹⁸ and caution is in order; the interests that should be allowed to override this fundamental principle of law should be very essential indeed, and it is upon the violating State to show the existence

³⁹⁴ See Ratner, 2004, 81.

³⁹⁵ *Ibid.*, 89-93. This last category may e.g. be relevant where there are different interest groups at the national level, and one fears that the majority will be tempted to set aside the rights of a minority. Another case may be where the State's executive organ in a future situation assumes too much power in order to handle a certain situation, at the expense of individual liberties.

³⁹⁶ Ratner, 2004, 94.

³⁹⁷ However, one should consider to what degree the international community can excuse an act that it has declared illegal, without undermining the protected value derogated from, such as the prohibition of the use of force, cf. I. Johnstone, 'The Plea of Necessity in International Legal Discourse: Humanitarian Intervention and Counter-Terrorism', 43 *Columbia J. Transnational L.* (2005) 337-88, 340.

³⁹⁸ See Article 26 of the 1969 Vienna Convention on the Law of Treaties: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." Cf. Tomuschat, 1999, 287.

of such an imperative interest. One could also argue that the very objective of international law is to bring about a carefully weighted balance of different interests – this is what conventional substantive law is trying to achieve and codify for reasons of legal certainty. It may consequently be argued that the defence of necessity upsets such a balance already existing by making rights relative and conditional.³⁹⁹ Some scholars have therefore declared themselves not in agreement with a defence of necessity, since it is to be seen as incompatible with the objective character of international law.⁴⁰⁰ The balancing test of the doctrine of necessity, according to the opposing scholars, becomes a review of what was already agreed upon after careful consideration; a review, which should not be permitted.⁴⁰¹ On the other hand, one may argue that there are inherent imbalances⁴⁰² in international law and that sometimes values that are considered of less importance will have to yield to what is considered more important interests.⁴⁰³ It would be absurd to claim that an obviously important interest should be sacrificed in order to ensure compliance with a minor obligation.⁴⁰⁴

6.3 The Risks Connected with Application of the Necessity Plea: Will Fears be Realised?

In a time where the only remaining superpower occupies a position arguably labelled as hegemonic, and with a tendency on behalf of the American administration to move away from time-consuming cooperation within international institutions⁴⁰⁵, the matter of building lasting legal regimes in the international arena is more pressing than ever. International law must be able to match the power exerted from powerful States, and set boundaries on international conduct that hold for extreme situations. It could be argued that the necessity defence could be detrimental to such international regime building. In the words of Davidsson:

³⁹⁹ Okowa, 1999, 398.

⁴⁰⁰ For instance I. Brownlie, *Principles of Public International Law* (Oxford University Press, 1998), 468; E. Jiménez de Aréchaga, 'International Responsibility', in M. Sorensen (ed.), *Manual of Public International Law* (Macmillan, 1968) 531-603, 543; for earlier writings, see Guggenheim, de Visscher, Hall and Brierly, see Okowa, 1999, 398, fn 35.

⁴⁰¹ Okowa, 1999, 398.

⁴⁰² Imbalances in international law could be explained in different ways. Firstly, there is no impartial international legislator. International law, conventional and customary, is created by way of negotiation and acquiescence, where careful consideration of future relationships may sometimes have to yield to sheer power. Secondly, there are great cultural differences concerning which interests are to be seen as imperative, e.g. the Western hemisphere tend to focus on civil and political rights, whereas socialist and post-communist States argue for stronger protection for social and economic rights. Thirdly, time is a factor – conventional law will inevitably grow old.

⁴⁰³ Okowa, 1999, 398-9.

⁴⁰⁴ B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Stevens & Son, 1953), 74-5. Cheng refers to the "necessity of self-preservation", thus he deals with an older concept of necessity. It however seems that the description of the balancing requirement holds, see Okowa, 1999, 399.

A common approach by rulers to avoid accountability is to claim that each situation they face requires a unique approach that precludes their use of guidelines or norms or the invocation of precedents, with are essential elements for mounting a legal challenge to conduct. Such an approach is essentially the institutionalization of discretionary rule.⁴⁰⁵

To invoke necessity is indeed to attach to the relevant situation such a character of uniqueness, and should invocations of the necessity plea become regular, there would be precious little left for the international legal system to regulate. Reliance on a defence of necessity in this manner bars other members of the international community to cast their protests against desirable behaviour in legal form, leaving them to rely on means of power exclusively. Evidently, this has little, if any, effect on supreme powers. Thus, in an age of hegemony – or indeed in any other situation where a State is substantially more powerful than others in relation to it – to impede legal confrontations under the principles of international law may present a risk to stability, balance of power, legal certainty and mutual respect in the international arena. This argument concerns an international political aspect of the problem of asserting responsibility in the international sphere.

A more philosophical argument has been maintained by Allott, who considers the ‘circumstances precluding wrongfulness’ to be a concept that negates the very rule of law. Advancing an analogy to a situation where the government of a State is not in any way bound by law in its dealings with its citizens, Allott argues that in allowing for necessity and other defences, international law is in fact disempowering people, for it is individuals who will suffer in the end.⁴⁰⁷ Interesting as this may be, it is however quite far from the realities of international relations.

In more concrete terms, it is conceivable that if a principle such as necessity is put to too extensive use to derogate from international obligations it could affect the belief of States in the effectiveness of international legal regimes. In its pleading in the *Gabčíkovo-Nagymaros Project* case, Slovakia advanced this argument, contending that a defence of necessity would contribute to establishing a broad range of excuses for the non-performance of treaty obligations, and thus seriously undermine the stability of treaty regimes.⁴⁰⁸ If States do not dare to put their trust in their neighbours observing their undertakings and fulfil their obligations, the possible effect could be a decline in the use of legal agreements to regulate international relations.

⁴⁰⁵ See the quote by John Bolton in E. Davidsson, *The U.N. Security Council’s Obligations of Good Faith*, 15 *Florida J. Int’l L.* (2003) 541-73, 564, fn 87.

⁴⁰⁶ Davidsson, 2003, 564.

⁴⁰⁷ In fact, Allott does not seem to be in agreement with the very idea of state responsibility, holding it to be an notion that allows responsible individuals to hide behind the abstraction of a ‘State’, see Allott, 1988, 14 *et seq.*

⁴⁰⁸ Okowa, 1999, 401, with reference to the arguments advanced by Slovakia before the ICJ, CR 97/15, 54.

The fact that necessity requires a balance of interest, and thus a certain measure of discretion *in casu*, has also been the object of criticism. The *Construction of a Wall* case has been harshly criticised for leniency in relation to violence on behalf of the Palestinian liberation movement and for turning a blind eye to threats posed to the Israeli State.⁴⁰⁹ In this way, one may speculate as to whether necessity risks affording general principles of admittedly great importance, such as the principle of self-determination, too much consideration at the expense of well-established and well-deliberated conventional law. It must be remembered that the law set aside may serve to protect interest which also cannot be ignored, such as obligations to refrain from attacks on civilians.

However, the principle of necessity in its present form is not likely to lead to such drastic effects as erosion of the reliance on international law. The shape in which modern necessity is presented is distinguished from the concept of national interest and thus denotes more pressing reasons for non-compliance than difficulties in the performance of an obligation, however grave.⁴¹⁰ As it would appear from the practice of international courts and tribunals in modern times – with reference in particular to the *Rainbow Warrior* case, the *Gabčíkovo-Nagymaros Project* case and the *Construction of a Wall* case – the conditions set up for the state of necessity seem sufficiently high not to endanger the stability of treaties. On the contrary, it seems that international judiciaries are prepared to go to some length to ensure the up-keeping of international regimes.⁴¹¹

By exempting peremptory norms and obligations *erga omnes* from the plea of necessity, making this defence unavailable as excuse for violations of such norms, safeguards are created, which ensure that the fundamental values of the international legal order are protected. Although some have asserted that the upheaval of rules to this standard is *per se* a perversion of the normative structure of international law, many consider this a welcome achievement, favouring globally common interests over self-serving, reciprocal bilateralism.⁴¹² Conceivably – although most invocations of

⁴⁰⁹ Cf. Pomerance, 2005, 37.

⁴¹⁰ *Oscar Chinn* case (UK v. Belgium), *PCIJ*, Ser. A/B (1934) No. 63 at 112, Ind. Op. by Judge Anzilotti: “International law would be merely an empty phrase if it sufficed for a State to invoke the public interest in order to evade the fulfilment of its engagements.”; quoted in Cheng, 1953, 73.

⁴¹¹ Cf. Pomerance, 2005, 31-2, who is very sceptical of the Court’s decision to rule on the substantive issue in the *Construction of a Wall* case, despite the fact that Israel was not prepared to argue that point as it contested the Court’s jurisdiction; and the rather cursory manner in which the Court dealt with the issue of state of necessity, in the absence of any Israeli argumentation on the matter. One can suspect that the Court was motivated by concern for the building and maintenance of international law.

⁴¹² B. Simma, ‘Bilateralism and Community Interest in the Law of State Responsibility’, in Y. Dinstein (ed.), *International Law at a Time of Perplexity* (Kluwer Academic Publishers, 1989) 821-844, 828.

necessity are likely to be made on the basis of national self-interest – necessity may in some instances be invoked to evade bilateral or multilateral obligations and giving priority to interests of a more general nature, such as those that underpin several common *jus cogens* or *erga omnes* rules.⁴¹³ In such cases, necessity may create an opportunity to escape obligations that are inconsistent with more general, higher, interests, such as *inter alia* protection of the environment as in the *Torrey Canyon* incident, or in the *Gabčíkovo-Nagymaros Project* case.

However, one may suspect that where such community values are at stake, States will argue that the lesser obligations they are deterring from are in conflict with norms of *jus cogens*.⁴¹⁴ It is thus more likely that States will try to safeguard community values through the invocation of Article 64 of the VCLT, which also has the advantage over the necessity doctrine in that the obligation is terminated.

Further, it is clear that States during treaty-making cannot foresee every possible turn of events and extraordinary subsequent incidents must in some situations be allowed to alter the content of treaty obligations. Such a view was expressed e.g. in the *Anglo-Portuguese Dispute of 1832*, where the British Government, upon Portuguese breach of certain obligations with regard to property of British subjects in Portugal, could admit that in certain cases strict observance of a Treaty would be “incompatible with the paramount duty which a Nation owes to itself”. This was, according to Britain “tacitly and necessarily expected in the Treaty” and the Government recognised that the treaties signed by itself and Portugal was not of “so stubborn and unbending a nature, as to be incapable of modification under any circumstances whatever”.⁴¹⁵ Although modern treaties attempt to build in flexibility, it may be advisable to have a provision for the urgent, exceptional and unexpected. It is argued that necessity is best reserved for that purpose, and not as a scheme to carry some of the weight of an overburdened doctrine of self-defence.

Arguably, a defence of necessity may in fact contribute to the stability of treaty regimes and the international legal order, due to its character of only postponing compliance with international obligations. A major difference lies between the refutation of the doctrine of self-preservation, which purported to confer a right to take a certain

⁴¹³ Tomuschat, 1999, 287-8; Johnstone, 2005, 340.

⁴¹⁴ Cf. for instance the European Commission for Democracy Through Law (Venice Commission), *Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners*, Op. No. 363/2005, 17-18 March 2006, para. 159(n).

⁴¹⁵ *Report of the ILC* (1980), UN Doc. A/35/10, 84; J. Crawford, *The International Law Commission's Articles on State Responsibility – Introduction, Text and Commentaries* (Cambridge University Press, 2002), 179. Cf. discussion above regarding the requirements of necessity.

course of action, and the criticism of necessity. In relation to the former, Brierly offered that a right of “last resort” to self-preservation “would destroy the imperative character of any system of law in which it applied, for it makes all obligation to obey the law merely conditional”.⁴¹⁶ However, when relying on the plea of necessity to defend a violation of international law, the State is not relieved of its obligations in future relationships, nor of the consequences as regards monetary compensation, and the act is still to be regarded as a breach, *albeit* one that must be excused. Should the alternative be that a State in a pressing situation will decide to ignore international law altogether, attempts to offer an explanation in legal terms through the necessity doctrine is surely preferable – if nothing else, because it may aid establishing peaceful communication and a forum for discussion on points of contention. To invoke necessity implies a chance for the State to exonerate itself – if not legally, so morally and diplomatically – in relation to actions which would otherwise be condemned.

It could be argued that as the invocation of necessity as an excuse is also a recognition that the act itself is not permitted under substantive provisions, for instance the doctrine of self-defence, it may therefore prove to be of less interest to States suffering from e.g. terrorist threats than an expanded catalogue of permitted actions under Article 51 of the UN Charter, as it may have an impact on that State’s “victim status”. Nevertheless, a pluralist approach to these issues is probably to be preferred. The catalogue of defences present in the ARSIWA is not a complete and comprehensive enumeration, but is complemented by specified defence catalogues in substantive law documents, which provide for derogation from those particular provisions.⁴¹⁷ It is also up to the treaty-making States to modify the customary international law in this field, as identified and codified by the International Law Commission in the ARSIWA, through the terms of treaties laying down substantive norms.⁴¹⁸ Thus, a treaty may limit or extend the law of state responsibility by for instance establishing a separate system of remedies.⁴¹⁹ Furthermore, it is conceivable that States dread an expansion of derogation opportunities under substantive norms, such as the self-defence doctrine, since the principle of reciprocity, ever present in international law, may lead to others adopting the same strategy. This in its turn could bring about less stable international relations.⁴²⁰

⁴¹⁶ J. L. Brierly, *The Law of Nations* (Oxford University Press, 1963), 404.

⁴¹⁷ Okowa, 1999, 391.

⁴¹⁸ *Ibid.*

⁴¹⁹ *Rainbow Warrior* case, 251, para. 75.

⁴²⁰ Romano, 1999, 1053.

To sum up, one may assume that the state of necessity will not come to erode international law through widespread abuse. The practical application of the doctrine is quite strict, the cumulative criteria many, the burden of proof substantial and further, the State will have to admit its own wrongdoing in order to invoke necessity.⁴²¹ Although necessity as a doctrine introduces yet another exception to the prohibition of the use of force, it is one to be preferred to for instance an expansion of the right to self-defence.⁴²²

⁴²¹ *Gabčíkovo-Nagymaros Project* case, *ICJ Rep.* 1997, 7, para. 48.

⁴²² Romano, 1999, 1055.

7 Conclusion

The existence of a necessity defence in international law seems today fairly established. Its content is more clearly defined after the finalisation of the Articles on the Responsibility of States. However, the character, object, purpose and application of the doctrine is still ambivalent, and some of the traits afforded to the necessity plea renders it unlikely that international adjudication will have many chances to develop the doctrine further in case law. States will probably remain reluctant to invoke the doctrine. Its main effects are diplomatic, in terms of evoking the understanding of the international community for a certain course of action that would otherwise be criticised; however, since the doctrine implies admitting wrongfulness, States may see invocation of necessity as a lose-lose situation in diplomatic terms.

The relationship between substantive law and the law of state responsibility is not adequately explored in international jurisprudence and there are serious objections to the doctrine of necessity, based on fear of abuse, to consider. Still, between a rock and a hard place, there is undoubtedly a strong basis for the argument that necessity is to be preferred to an expanded doctrine of self-defence, or, for that matter, other instances where States may choose to ignore international law. The ability of the necessity doctrine to affirm the binding nature of international law, while at the same time allowing for divergence *in casu*, is indeed ingenious.

It however seems crucial to stress the separation between primary and secondary rules in order for the scheme of circumstances precluding wrongfulness to develop appropriately. The necessity scheme should not be used to interpret the meaning of substantive provisions conferring obligations and rights, nor should the existence of derogation clauses in substantive law documents be a reason to view invocations of necessity more favourably. It is advisable to treat issues of obligations, rights, and circumstances precluding wrongfulness in a two-tier test. The first question is whether there has been a violation of international obligations, and only if this question concerning *legality* is answered in the affirmative, meaning that substantive law provided no justification and responsibility is incurred, one should ask the second question: whether the *liability* can be precluded on the grounds of for instance necessity. If the second question is answered in the negative, the act is unlawful and in addition wrong-

ful, i.e. there is no understanding on behalf of the international community for the action taken. If answered in the affirmative, the act is certainly understandable, but not defensible in the sense that it becomes lawful. It is still in contradiction to international law, and the State is urged to resume compliance as soon as possible. An assessment that there is a situation of necessity in a certain case must thus not be misconstrued to mean that the action is lawful. To distinguish between precluding unlawfulness and precluding wrongfulness also solves, at least to a certain degree, the apparent discrepancy between the strict provisions on termination and suspension under the law of treaties, and the wider defences under the law of state responsibility, that some writers have expressed concerns over.

As regards the requisites of the doctrine, the generous construction of the criterion of 'essential interest' may be interpreted as recognition that international law and international relations is not just a question of survival. States must be allowed a certain margin within which proper State functions can be maintained, and the safety of the population, clean environment and sufficient funds to keep the State apparatus going should indeed be recognised as essential interests. In response to Allott's criticism, it can be forwarded that a State which may not act to ensure that it can provide for its citizens, even if this means to for instance suspend payments owed to other States, will also have adverse effects on the people, which ultimately form (international) society. This inclusive approach concerning what interests a State is allowed to safeguard, is sufficiently balanced and contrasted by the restrictive construction of the criterion of 'other means'. The fact that States are obliged to incur increased costs and even to seek the help of others in order to tackle a problem within the boundaries of international law, rather than stepping outside of it, is undoubtedly a step towards a more cooperative world order. It also brings the modern necessity doctrine further from the older notion of self-preservation, from which necessity is thought to emanate.

Thus, in light of the applications of the necessity doctrine accounted for in this essay, one may draw the conclusion that necessity is unlikely to be employed in such a way as to erode international law. Any legal system, including an international one, needs a safety valve and the strict interpretation of the requirements that has been seen so far is reassuring. Perhaps it could also be a positive thing that scholars and courts disagree as to its existence and usefulness, as it provides a healthy scepticism, which may prevent abuse. In short, States are expected to provide extensive evidence that there was absolutely no other way out. The necessity defence is exceptional and must be regarded as such when applying it, but also when evaluating it. It is a provision to

handle the situations that were not thought of in advance and can never provide a right, an authorisation or a justification *ex ante*. Necessity thus plays a quite different role than self-defence, and it can be asked how useful it may be in relation to uses of force, considering the controversy surrounding the concepts of ‘aggression’, ‘armed attack’, preventive wars and the necessity doctrine itself. It is my impression that one should not expect frequent invocations of necessity, and it will thus be a doctrine that evolves very slowly over time.

To briefly discuss future developments of the doctrine, I however wish to note the idea that necessity could be invoked to safeguard interests and values associated with international obligations *erga omnes*, when these contrast with the bilateral obligations of a State. That is certainly an intriguing notion. Although it may not appear fully realistic that States would act in such a manner at this stage, it is submitted that it is in situations such as these that necessity may prove to be most beneficial. It would then provide States with a legal opportunity to act in accordance to a balance of interests of a global nature – one that is otherwise often not on the agenda.

8 References

Cases and international incidents

Anglo-Portuguese Dispute of 1832, in A. D. McNair, (ed.), *International Law Opinions*, vol. II (Cambridge University Press, 1956)

Barcelona Traction, Light and Power Company, Ltd case (Belgium v. Spain), *ICJ Rep.* 1970, 3

Caroline case, in A. D. McNair, (ed.), *International Law Opinions*, vol. II (Cambridge University Press, 1956)

Case concerning Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections, *ICJ*, 15 Dec. 2004

Case concerning Payment of Various Serbian Loans Issued in France (France v. Kingdom of the Serbs, Croats and Slovenes), *PCIJ*, Ser. A/B (1929) No. 20

Chorzów Factory case (Germany v. Poland), Jurisdiction, *PCIJ*, Ser. A (1927) No. 9

Company General of the Orinoco case (France v. Venezuela), French-Venezuelan Mixed Claims Commission (1902) X *RI-AA* 184

Construction of a Wall case (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*), *ICJ*, Adv. Op., 9 July 2004

Continental Shelf (Tunisia v. Libya) case, *ICJ Rep.* 1982, 18

Corfu Channel case (United Kingdom v. Albania), Judgment, *ICJ Rep.* 1949, 3

Dickson Car Wheel case (Dickson Car Wheel Company (U.S.A.) v. Mexican United States), *U.S.-Mexican General Claims Commission* (1931) IV *RIAA* 669

East Timor case (Portugal v. Australia), *ICJ Rep.* 1995, 90

Faber case (Germany v. Venezuela), German-Venezuelan Mixed Claims Commission (1903) X *RIAA* 438

Fisheries Jurisdiction case (Spain v. Canada), *ICJ Rep.* 1998, 431

French Company of Venezuela Railroads case (France v. Venezuela), French-Venezuelan Mixed Claims Commission (1902) X *RIAA* 285

Gabčíkovo-Nagymaros Project case (Hungary v. Slovakia), Judgment, *ICJ Rep.* 1997, 7

Interpretation of Peace Treaties case, Adv. Op., *ICJ Rep.* 1950, 221

Legality of the Threat or Use of Nuclear Weapons, Adv. Op., *ICJ Rep.* 1996, 226

M/V Saiga No. 2 case (Saint Vincent and the Grenadines v. Guinea), Admissibility and Merits, *ITLOS* (1999) 120 *ILR* 143

Mara'abe v. The Prime Minister of Israel, Supreme Court of Israel, HCJ 7957/04, 15 Sep. 2005

Military and Paramilitary Activities in and against Nicaragua case (Nicaragua v. United States), *ICJ Rep.* 1986, 14

Naulilaa case, (Portugal v. Germany), (1928) II *RIAA* 1012

Neptune case, in A. D. McNair, (ed.), *International Law Opinions*, vol. II (Cambridge University Press, 1956)

Oscar Chinn case (United Kingdom v. Belgium), *PCIJ*, Ser A/B (1934) No. 63

Pacific Fur Seals Arbitration (Russian Fur Seals case, or Sealing Off the Russian Coast case) (1893) (J. B. Moore, *History and Digest of the International Arbitrations to which the United States Has Been a Party*, I (Washington, DC, 1898) 755-961)

Packet Chichester case, in A. D. McNair, (ed.), *International Law Opinions*, vol. II (Cambridge University Press, 1956)

Properties of the Bulgarian minorities in Greece, Report of the Commission of Enquiry into the Incidents on the Frontier between Bulgaria and Greece, League of Nations, Official Journal, 7th year, No. 2 (1926), annex 815

Rainbow Warrior case (Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements on 9 July 1986 between the two states and which related to the problems arising from the Rainbow Warrior affair, 30 April 1990) (New Zealand v. France), (1990) XX RIAA 217; 82 ILR 499

Russian Indemnity case (Russia v. Turkey), (1912) XI RIAA 431

Société Commerciale de Belgique case (Belgium v. Greece), PCIJ, Ser A/B (1939) No 78; Ser. C (1939) No. 87.

South West Africa case (Ethiopia v. South Africa; Liberia v. South Africa), ICJ Rep. 1966, 6

South West Africa case (Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)), Adv. Op., ICJ Rep. 1971, 16

Spanish Zone of Morocco Claims (Great Britain v. Spain), (1925) II RIAA 615

Western Sahara case, Adv. Op., ICJ Rep. 1975, 12

Wimbledon case (Britain, France, Italy and Japan v. Germany), PCIJ, Ser. A (1923) No. 1; PCIJ, Ser. C (1923) No. 3, vol. I

Monographs

Aust, A., *Modern Treaty Law and Practice* (Cambridge University Press, 2000)

Brierly, J. L., *The Law of Nations* (Oxford University Press, 1963)

Brownlie, I., *International Law and the Use of Force by States* (Oxford University Press, 1963)

Brownlie, I., *Principles of Public International Law* (Oxford University Press, 2003)

Brownlie, I., *Principles of Public International Law* (Oxford University Press, 1998)

Cassese, A., *International Law* (Oxford University Press, 2001)

Cassese, A., *International Law* (Oxford University Press, 2005)

Cheng, B., *General Principles of Law as Applied by International Courts and Tribunals* (Stevens & Sons, 1953)

Crawford, J., *The International Law Commission's Articles on State Responsibility – Introduction, Text and Commentaries* (Cambridge University Press, 2002)

Greig, D. W., *International Law* (Butterworths, 1976)

Grotius, H., *De Jure Belli ac Pacis Libri Tres*, vol. II (Translation), Book III (Carnegie Endowment for International Peace, 1925)

Harris, D. J., *Cases and Materials on International Law* (Sweet & Maxwell, 2004)

Jareborg, N., *Essays in Criminal Law* (Iustus, 1988)

Lysén, G., *State Responsibility and International Liability for Lawful Acts: A Discussion of Principles* (Iustus, 1997)

Manning, W.R. (ed.), *Diplomatic Correspondence of the United States: Canadian Relations 1784-1860* (Washington, Carnegie Endowment for International Peace, 1943), vol. III

McNair, A. D. (ed.), *International Law Opinions*, vol. II (Cambridge University Press, 1956)

Moore, J. B., *History and Digest of the International Arbitrations to which the United States Has Been a Party*, vol. I (Washington, DC, 1898)

Ragazzi, M., *The Concept of International Obligations Erga Omnes* (Clarendon, 1997)

Reuter, P., *Introduction to the Law of Treaties* (Pinter Publishers, 1989)

Rosenne, S., *Breach of Treaty* (Grotius Publications, 1985)

Schachter, O., *International Law in Theory and Practice* (Martinus Nijhoff Publishers, 1991)

Sevastik, P., *The Binding Force of Treaties Under International Law – Handbook for Government Lawyers and Human Rights Advocates* (Iustus, 1997)

Shaw, M. N., *International Law* (Cambridge University Press, 2003)

Shaw, M. N., *International Law* (Cambridge University Press, 1997)

Sinclair, I., *The Vienna Convention on the Law of Treaties* (Manchester University Press, 1973)

Tahvanainen, A., *Statsansvar för allvarliga förbrytelse gentemot det internationella samfundet i sin helhet* (Åbo akademi, 2002)

Visscher, C. de, *La Responsabilité des États* (Brill, 1924)

Österdahl, I., *Threat to the Peace – The Interpretation by the Security Council of Article 39 of the UN Charter* (Iustus, 1998)

Anthologies

B. V. A. Röling, 'The 1974 UN Definition of Aggression', in A. Cassese (ed.), *The Current Legal Regulation of the Use of Force* (Martinus Nijhoff Publishers, 1986) 413-21

Barboza, J., 'Necessity (Revisited) in International Law', in J. Makarczyk (ed.), *Essays in Honour of Judge Manfred Lachs* (Martinus Nijhoff, 1984) 27-43

Bowett, D. W., 'Treaties and State Responsibility', in Mélanges M. Virally : *Le Droit international au service de la paix, de la justice et du développement* (Éditions A. Pedone, 1991) 137-45

Crawford, J., 'Israel (1948-1949) and Palestine (1998-1999): Two Studies in the Creation of States', in G. S. Goodwin-Gill & S. Talmon, *The Reality of International Law: Essays in Honour of Ian Brownlie* (Oxford University Press, 1999) 94-124

Crawford, J. & Olleson, S., 'The Nature and Forms of International Responsibility', in M. D. Evans, *International Law* (Oxford University Press, 2003) 446-70

Jiménez de Aréchaga, E., 'International Responsibility', in M. Sorensen (ed.), *Manual of Public International Law*, (Macmillan, 1968) 531-603

Okowa, P., 'Defences in the Jurisprudence of International Tribunals', in G. S. Goodwin-Gill and S. Talmon, *The Reality of International Law; Essays in Honour of Ian Brownlie* (Oxford University Press, 1999) 389-411

Salmon, J. J. A., 'Faut-il codifier l'état de nécessité en droit international', in J. Makarczyk, (ed.), *Essays in Honour of Judge Manfred Lachs* (Martinus Nijhoff, 1984) 235-70

Simma, B., 'Bilateralism and Community Interest in the Law of State Responsibility', in Y. Dinstein (ed.), *International Law at a Time of Perplexity* (Kluwer Academic Publishers, 1989) 821-44

Wellens, K., 'The Court's Judgment in the case concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia): some preliminary reflections', in K. Wellens (ed.), *International Law: Theory and Practice; Essays in Honour of Eric Suy* (Martinus Nijhoff Publishers, 1998) 765-99

Journals

Ago, R., 'Le délit international', 68-II *RdC* (1939) 415-554

Allott, P., 'State Responsibility and the Unmaking of International Law', 29 *Harvard Int'l L. J.* (1988) 1-26

Armstrong, D., 'Law, Justice and the Idea of a World Society', 75 *Int'l Affairs* (1999) 547-561

Boed, R., 'State of Necessity as Justification for Internationally Wrongful Conduct', 3 *Yale Hum. Rts & Development L. J.* (2000) 1-43

Boling, G. J., “Absentees’ Property” Laws and Israel’s Confiscation of Palestinian Property: A Violation of U.N. General Assembly Resolution 194 and International Law’, XI *Palestine YB Int’l L.* (2000/01) 73-130

Bradford, W. C., “The Duty to Defend Them”: A Natural Law Justification for the Bush Doctrine of Preventive War’, 79 *Notre Dame L. Rev.* (2004) 1365-1492

Cavaglieri, A., ‘Règles générales du droit de la paix’, 26-I *RdC* (1929) 311-585

Davidsson, E., The U.N. Security Council’s Obligations of Good Faith’, 15 *Florida J. Int’l L.* (2003) 541-73

Dunbar, N. C. H., ‘Military Necessity in War Crimes Trials’, 29 *Brit. YB of Int’l L.* (1952) 442-52

Falk, R. A., ‘Toward Authoritativeness: The ICJ Ruling on Israel’s Security Wall’, 99 *Am. J. Int’l L.* (2005) 42-52

Franck, T. M., ‘The Use of Force in International Law’, 11 *Tulane J. Int’l L.* (2003) 7-19

François, J.-P.-A., ‘Règles générales du droit de la paix’, 66-IV *RdC* (1938) 1-294

Gaeta, P., ‘May Necessity be Available as a Defence for Torture in the Interrogation of Suspected Terrorists?’, 2 *J. of Int’l Criminal Justice* (2004) 785-94

Glaser, S., ‘Quelques remarques sure l’état de nécessité en droit international’, 32 *Revue de droit pénal et de criminologie* (1952) 570-603

Gross, O. & Ni Aolain, F., ‘Emergency, War and International Law – Another Perspective’, 70 *Nordic J. of Int’l L.* (2001) 29-63

Huskinsson, D. C., ‘The Air Bridge Denial Program and the Shootdown of Civil Aircraft Under International Law’, 56 *Air Force L. R.* (2005) 109-66

Imseis, A., ‘Critical Reflections on the International Humanitarian Law Aspects of the ICJ Wall Advisory Opinion’, 99 *Am. J. Int’l L.* (2005) 102-18

Johnstone, I., 'The Plea of Necessity in International Legal Discourse: Humanitarian Intervention and Counter-Terrorism', 43 *Columbia J. Transnational L.* (2005) 337-88

Koskeniemi, M., 'Solidarity Measures: State Responsibility as a New International Order?', 72 *British YB Int'l L.* (2001), 337-56

Kretzmer, D., 'The Advisory Opinion: The Light Treatment of International Humanitarian Law', 99 *Am. J. Int'l L.* (2005) 88-102

Laursen, A., 'The Use of Force and (the State of) Necessity', 37 *Vanderbilt J. Transnat'l L.* (2004) 485-526

Leeds, B. A., 'Alliance Reliability in Times of War: Explaining State Decisions to Violate Treaties', 57 *International Organization* (2003) 801-27

Lefeber, R., 'The *Gabčíkovo-Nagymaros Project* and the Law of State Responsibility', 11 *Leiden J. of Int'l L.* (1998) 609-623

Lowe, V., 'Precluding Wrongfulness of Responsibility: A Plea for Excuses', 10 *European J. Int'l L.* (1999) 405-11

Murphy, S. D., 'Self-defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?', 99 *Am. J. Int'l L.* (2005) 62-76

Pomerance, M., 'The ICJ's Advisory Jurisdiction and the Crumbling Wall Between the Political and the Judicial', 99 *Am. J. Int'l L.* (2005) 26-42

Raby, J., 'The State of Necessity and the Use of Force to Protect Nationals', 26 *Canadian YB of Int'l L.* (1988) 253-72

Ratner, S. R., 'Overcoming Temptations to Violate Human Dignity in Times of Crisis: On the Possibilities for Meaningful Self-Restraint', 5 *Theoretical Inquires L.* (2004) 81-109

Romano, J.-A., 'Combating Terrorism and Weapons of Mass Destruction: Reviving the Doctrine of a State of Necessity', 87 *Georgetown L. J.* (1999) 1023-57

Rytter, J. E., 'Humanitarian Intervention without the Security Council: From San Fransisco to Kosovo – and Beyond', 70 *Nordic J. of Int'l L.* (2001) 121-60

Schachter, O., 'The Extraterritorial Use of Force against Terrorist Bases', 11 *Houston J. Int'l L.* (1989) 309-16

Scobbie, I., 'Words My Mother Never Taught Me – In Defense of the International Court', 99 *Am. J. Int'l L.* (2005) 76-88

Simma, B. & Paulus, A. L., 'The "International Community": Facing the Challenge of Globalization', 9 *European J. Int'l L.* (1998) 266-277

Simma, B., 'The Work of the International Law Commission at Its Fifty-First Session (1999)', 68 *Nordic J. of Int'l L.* (1999) 293-361

Simma, B., 'The Work of the International Law Commission at Its fifty-Third Session (2001)', 71 *Nordic J. of Int'l L.* (2002) 123-187

Spierman, O., 'Humanitarian Intervention as a Necessity and the Threat or Use of *Jus Cogens*', 71 *Nordic J. of Int'l L.* (2002) 523-43

Tomuschat, C., 'International Responsibility and Liability', 281 *RdC* (1999) 268-303

Verdross, A., 'Règles générales du droit international de la paix', 30-V *RdC* (1929) 251-517

Waldock, H., 'General Course on Public International Law', 110-II *RdC* (1962) 1-251

Waldock, H., 'The Regulation of the Use of Force by Individual States in International Law' 81-II *RdC* (1952) 451-517

Watson, G. R., 'The Wall Decisions in Legal and Political Context', 99 *Am. J. Int'l L.* (2005) 6-26

R. Wedgwood, 'The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defence', 99 *Am. J. Int'l L.* (2005) 52-16

Documentation of the
International Law
Commission

Ago, R., 'The Internationally Wrongful Act of the State, Source of International Responsibility', *Eighth Report on State Responsibility*, Addendum (1980), ILC, 32nd sess., UN Doc. A/CN.4/318/Add.5

Crawford, J., *First Report on State Responsibility* (1998), ILC, 50th sess., UN Doc. A/CN.4/490

Crawford, J., *Second Report on State Responsibility*, Addendum (1999), ILC, 51st sess., UN Doc. A/CN.4/498/Add.2

Crawford, J., *Fourth Report on State Responsibility*, Addendum (2001), ILC, 53rd sess., UN Doc. A/CN.4/517/Add.1

Report of the International Law Commission on the Work of Its Thirty-Second Session (5 May-25 July 1980), UN Doc. A/35/10

The International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts, 12 Dec. 2001, annexed to General Assembly Resolution 56/83 (2002)

Yearbook of the ILC, 1959, vol. II, UN Doc. A/CN.4/SER.A/1959/Add.1

Yearbook of the ILC, 1966, vol. II, UN Doc. A/CN.4/SER/1966/Add.1

Yearbook of the ILC, 1980, vol. I, UN Doc. A/CN.4/SER.A/1980

Documentation of the
United Nations

Definition of Aggression (1974), General Assembly Resolution 3314 (XXIX)

General Assembly Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (1970), GA Res. 2625 (XXV)

General Assembly Resolution 56/83, Responsibility of State for Internationally Wrongful Acts (28 Jan. 2002)

Security Council Resolution 242, *The Situation in the Middle East* (22 Nov. 1967)

Security Council Resolution 298, *The Situation in the Middle East* (25 Sep. 1971)

Security Council Resolution 478, *Territories Occupied by Israel* (20 Aug. 1980)

United Nations Security Council Official Records, 873rd meeting, 13/14 July 1960, UN Doc S/PV.873

United Nations Security Council Official Records, 877th meeting, 20/21 July 1960, UN Doc S/PV.877

United Nations Security Council Official Records, 879th meeting, 21/22 July 1960, UN Doc S/PV.879

Other Documentation

European Commission for Democracy Through Law (Venice Commission), *Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners*, Op. No. 363/2005, 17-18 March 2006

The Torrey Canyon, white paper issued by the United Kingdom Government, Cmnd. 3246, London, H.M. Stationery Office, 1967