Chapter V

CIRCUMSTANCES PRECLUDING WRONGFULNESS

Commentary

(1) Chapter V sets out six circumstances precluding the wrongfulness of conduct that would otherwise not be in conformity with the international obligations of the State concerned. The existence in a given case of a circumstance precluding wrongfulness in accordance with this chapter provides a shield against an otherwise well-founded claim for the breach of an international obligation. The six circumstances are: consent (art. 20), self-defence (art. 21), countermeasures (art. 22), *force majeure* (art. 23), distress (art. 24) and necessity (art. 25). Article 26 makes it clear that none of these circumstances can be relied on if to do so would conflict with a peremptory norm of general international law. Article 27 deals with certain consequences of the invocation of one of these circumstances.

(2) Consistent with the approach of the present articles, the circumstances precluding wrongfulness set out in chapter V are of general application. Unless otherwise provided,[950] [305] they apply to any internationally wrongful act whether it involves the breach by a State of an obligation arising under a rule of general international law, a treaty, a unilateral act or from any other source. They do not annul or terminate the obligation; rather they provide a justification or excuse for non-performance while the circumstance in question subsists. This was emphasized by ICJ in the *Gabčíkovo-Nagymaros Project* case. Hungary sought to argue that the wrongfulness of its conduct in discontinuing work on the Project in breach of its obligations under the Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System was precluded by necessity. In dealing with the Hungarian plea, the Court said:

> The state of necessity claimed by Hungary—supposing it to have been established—thus could not permit of the conclusion that … it had acted in accordance with its obligations under the 1977 Treaty or that those obligations had ceased to be binding upon it. It would only permit the affirmation that, under the circumstances, Hungary would not incur international responsibility by acting as it did.[951] [306]

Thus a distinction must be drawn between the effect of circumstances precluding wrongfulness and the termination of the obligation itself. The circumstances in chapter V operate as a shield rather than a sword. As Fitzmaurice noted, where one of the circumstances precluding wrongfulness applies, "the non-performance is not only justified, but 'looks towards' a resumption of performance so soon as the factors causing and justifying the non-performance are no longer present".[952] [307]

(3) This distinction emerges clearly from the decisions of international tribunals. In the *"Rainbow Warrior"* arbitration, the tribunal held that both the law of treaties and the law of State responsibility had to be applied, the former to determine whether the treaty was still in force, the latter to determine what the consequences were of any breach of the treaty while

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[950] [305] For example, by a treaty to the contrary, which would constitute a *lex specialis* under article 55.

[951] [306] *Gabčíkovo-Nagymaros Project* (footnote [31] 37 above), p. 39, para. 48.

[952] [307] *Yearbook … 1959*, vol. II, p. 41, document A/CN.4/120.

it was in force, including the question whether the wrongfulness of the conduct in question was precluded.[953] [308] In the *Gabčíkovo-Nagymaros Project* case, the Court noted that:

> [E]ven if a state of necessity is found to exist, it is not a ground for the termination of a treaty. It may only be invoked to exonerate from its responsibility a State which has failed to implement a treaty. Even if found justified, it does not terminate a Treaty; the Treaty may be ineffective as long as the condition of necessity continues to exist; it may in fact be dormant, but—unless the parties by mutual agreement terminate the treaty—it continues to exist. As soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives.[954] [309]

(4) While the same facts may amount, for example, to *force majeure* under article 23 and to a supervening impossibility of performance under article 61 of the 1969 Vienna Convention, the two are distinct. *Force majeure* justifies non-performance of the obligation for so long as the circumstance exists; supervening impossibility justifies the termination of the treaty or its suspension in accordance with the conditions laid down in article 61. The former operates in respect of the particular obligation, the latter with respect to the treaty which is the source of that obligation. Just as the scope of application of the two doctrines is different, so is their mode of application. *Force majeure* excuses non-performance for the time being, but a treaty is not automatically terminated by supervening impossibility: at least one of the parties must decide to terminate it.

(5) The concept of circumstances precluding wrongfulness may be traced to the work of the Preparatory Committee of the 1930 Hague Conference. Among its Bases of discussion,[955][310] it listed two "[c]ircumstances under which States can decline their responsibility", self-defence and reprisals.[956] [311] It considered that the extent of a State's responsibility in the context of diplomatic protection could also be affected by the "provocative attitude" adopted by the injured person (Basis of discussion No. 19) and that a State could not be held responsible for damage caused by its armed forces "in the suppression of an insurrection, riot or other disturbance" (Basis of discussion No. 21). However, these issues were not taken to any conclusion.

(6) The category of circumstances precluding wrongfulness was developed by ILC in its work on international responsibility for injuries to aliens[957] [312] and the performance of treaties.[958] [313] In the event, the subject of excuses for the non-performance of treaties was not included within the scope of the 1969 Vienna Convention.[959] [314] It is a matter for the law on State responsibility.

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[953] [308] *"Rainbow Warrior"* (footnote [40] 46 above), pp. 251–252, para. 75.

[954] [309] *Gabčíkovo-Nagymaros Project* (footnote [31] 37 above), p. 63, para. 101; see also *ibid*., page 38, para. 47.

[955] [310] *Yearbook … 1956*, vol. II, pp. 219–225, document A/CN.4/96.

[956] [311] *Ibid*., pp. 224–225. Issues raised by the Calvo clause and the exhaustion of local remedies were dealt with under the same heading.

[957] [312] *Yearbook … 1958*, vol. II, p. 72. For the discussion of the circumstances by Special Rapporteur García Amador, see his first report on State responsibility, *Yearbook … 1956*, vol. II, pp. 203–209, document A/CN.4/96, and his third report on State responsibility, *Yearbook … 1958*, vol. II, pp. 50–55, document A/CN.4/111.

[958] [313] See the fourth report on the law of treaties of Special Rapporteur Fitzmaurice (footnote [952] 307 above), pp. 44–47, and his comments, *ibid*., pp. 63–74.

[959] [314] See article 73 of the Convention.

(7) Circumstances precluding wrongfulness are to be distinguished from other arguments which may have the effect of allowing a State to avoid responsibility. They have nothing to do with questions of the jurisdiction of a court or tribunal over a dispute or the admissibility of a claim. They are to be distinguished from the constituent requirements of the obligation, *i.e.* those elements which have to exist for the issue of wrongfulness to arise in the first place and which are in principle specified by the obligation itself. In this sense the circumstances precluding wrongfulness operate like defences or excuses in internal legal systems, and the circumstances identified in chapter V are recognized by many legal systems, often under the same designation.[960] [315] On the other hand, there is no common approach to these circumstances in internal law, and the conditions and limitations in chapter V have been developed independently.

(8) Just as the articles do not deal with questions of the jurisdiction of courts or tribunals, so they do not deal with issues of evidence or the burden of proof. In a bilateral dispute over State responsibility, the onus of establishing responsibility lies in principle on the claimant State. Where conduct in conflict with an international obligation is attributable to a State and that State seeks to avoid its responsibility by relying on a circumstance under chapter V, however, the position changes and the onus lies on that State to justify or excuse its conduct. Indeed, it is often the case that only that State is fully aware of the facts which might excuse its non-performance.

(9) Chapter V sets out the circumstances precluding wrongfulness presently recognized under general international law.[961] [316] Certain other candidates have been excluded. For example, the exception of non-performance (*exceptio inadimpleti contractus*) is best seen as a specific feature of certain mutual or synallagmatic obligations and not a circumstance precluding wrongfulness.[962] [317] The principle that a State may not benefit from its own wrongful act is capable of generating consequences in the field of State responsibility but it is rather a general principle than a specific circumstance precluding wrongfulness.[963][318] The so-called "clean hands" doctrine has been invoked principally in the context of the admissibility of claims before international courts and tribunals, though rarely applied. It also does not need to be included here.[964] [319]

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[960] [315] See the comparative review by C. von Bar, *The Common European Law of Torts* (Oxford University Press, 2000), vol. 2, pp. 499–592.

[961] [316] For the effect of contribution to the injury by the injured State or other person or entity, see article 39 and commentary. This does not preclude wrongfulness but is relevant in determining the extent and form of reparation.

[962] [317] Cf. *Diversion of Water from the Meuse, Judgment, 1937, P.C.I.J., Series A/B, No. 70,* p. 4, especially at pp. 50 and 77. See also the fourth report on the law of treaties of Special Rapporteur Fitzmaurice (footnote [952] 307 above), pp. 43–47; D. W. Greig, "Reciprocity, proportionality and the law of treaties", *Virginia Journal of International Law,* vol. 34 (1994), p. 295; and for a comparative review, G. H. Treitel, *Remedies for Breach of Contract: A Comparative Account* (Oxford, Clarendon Press, 1988), pp. 245–317. For the relationship between the exception of non-performance and countermeasures, see below, paragraph (5) of commentary to Part Three, chap. II.

[963] [318] See, *e.g.*, *Case concerning the Factory at Chorzów, Jurisdiction* (footnote [28] 34 above), p. 31; cf. *Gabčíkovo-Nagymaros Project* (footnote [31] 37 above), p. 67, para. 110.

[964] [319] See J. J. A. Salmon, "Des 'mains propres' comme condition de recevabilité des réclamations internationales", *Annuaire français de droit international*, vol. 10 (1964), p. 225; A. Miaja de la Muela, "Le rôle de la condition des mains propres de la personne lésée dans les réclamations devant les tribunaux internationaux", *Mélanges offerts à Juraj Andrassy* (The Hague, Martinus Nijhoff, 1968), p. 189, and the

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

International arbitral tribunal

Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair

In its 1990 award in the *Rainbow Warrior* case, the arbitral tribunal observed that France had alleged, "citing the report of the International Law Commission", [that] the reasons which may be invoked to justify non-execution of a treaty are a part of the general subject matter of the international responsibility of States".[965] [137] Having considered that, *inter alia*, the determination of the circumstances that may exclude wrongfulness was a subject that belonged to the customary law of State responsibility, the tribunal referred to the set of rules provisionally adopted by the International Law Commission under the title "circumstances precluding wrongfulness" (draft articles 29 to 35), and in particular to draft articles 31, 32 and 33, which it considered to be relevant to the decision on that case.[966] [138]

[A/62/62, para. 86]

International arbitral tribunal (under Annex VII to the 1982 United Nations Convention on the Law of the Sea)

In the matter of an Arbitration Between Guyana and Suriname

In its 2007 award in the *Guyana* v. *Suriname* case, involving the delimitation of a maritime boundary between the two States, the arbitral tribunal constituted to hear the case considered a challenge by Suriname to the admissibility of the proceedings on the grounds of lack of good faith and clean hands. In dismissing such challenge, the tribunal maintained that "[n]o generally accepted definition of the clean hands doctrine has been elaborated in international law", and noted that "the Commentaries to the ILC Draft Articles on State Responsibility acknowledge that the doctrine has been applied rarely and, when it has been invoked, its expression has come in many forms".[967] [19]

[A/65/76, para. 22]

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dissenting opinion of Judge Schwebel in *Military and Paramilitary Activities in and against Nicaragua* (footnote [30] 36 above), pp. 392–394.

[965] [137] See footnote [40] 46 above, para. 74.

[966] [138] *Ibid*., pp. 251–252, paras. 75–76.

[967] [19] *In the matter of an Arbitration Between Guyana and Suriname*, Award, 17 September 2007, para. 418 (footnote omitted), referring to paragraph (9) of the general commentary to Part One, Chapter V ("Circumstance precluding wrongfulness").

Article 20. Consent

Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.

Commentary

(1) Article 20 reflects the basic international law principle of consent in the particular context of Part One. In accordance with this principle, consent by a State to particular conduct by another State precludes the wrongfulness of that act in relation to the consenting State, provided the consent is valid and to the extent that the conduct remains within the limits of the consent given.

(2) It is a daily occurrence that States consent to conduct of other States which, without such consent, would constitute a breach of an international obligation. Simple examples include transit through the airspace or internal waters of a State, the location of facilities on its territory or the conduct of official investigations or inquiries there. But a distinction must be drawn between consent in relation to a particular situation or a particular course of conduct, and consent in relation to the underlying obligation itself. In the case of a bilateral treaty the States parties can at any time agree to terminate or suspend the treaty, in which case obligations arising from the treaty will be terminated or suspended accordingly.[968] [320] But quite apart from that possibility, States have the right to dispense with the performance of an obligation owed to them individually, or generally to permit conduct to occur which (absent such permission) would be unlawful so far as they are concerned. In such cases, the primary obligation continues to govern the relations between the two States, but it is displaced on the particular occasion or for the purposes of the particular conduct by reason of the consent given.

(3) Consent to the commission of otherwise wrongful conduct may be given by a State in advance or even at the time it is occurring. By contrast, cases of consent given after the conduct has occurred are a form of waiver or acquiescence, leading to loss of the right to invoke responsibility. This is dealt with in article 45.

(4) In order to preclude wrongfulness, consent dispensing with the performance of an obligation in a particular case must be "valid". Whether consent has been validly given is a matter addressed by international law rules outside the framework of State responsibility. Issues include whether the agent or person who gave the consent was authorized to do so on behalf of the State (and if not, whether the lack of that authority was known or ought to have been known to the acting State), or whether the consent was vitiated by coercion or some other factor.[969] [321] Indeed there may be a question whether the State could validly consent at all. The reference to a "valid consent" in article 20 highlights the need to consider these issues in certain cases.

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[968] [320] 1969 Vienna Convention, art. 54 (*b*).

[969] [321] See, *e.g.*, the issue of Austrian consent to the *Anschluss* of 1938, dealt with by the Nuremberg Tribunal. The tribunal denied that Austrian consent had been given; even if it had, it would have been coerced and did not excuse the annexation. See "International Military Tribunal (Nuremberg), judgment and sentences—October 1, 1946: judgment", reprinted in AJIL, vol. 41, No. 1 (January 1947) p. 172, at pp. 192–194.

(5) Whether a particular person or entity had the authority to grant consent in a given case is a separate question from whether the conduct of that person or entity was attributable to the State for the purposes of chapter II. For example, the issue has arisen whether consent expressed by a regional authority could legitimize the sending of foreign troops into the territory of a State, or whether such consent could only be given by the central Government, and such questions are not resolved by saying that the acts of the regional authority are attributable to the State under article 4.[970] [322] In other cases, the "legitimacy" of the Government which has given the consent has been questioned. Sometimes the validity of consent has been questioned because the consent was expressed in violation of relevant provisions of the State's internal law. These questions depend on the rules of international law relating to the expression of the will of the State, as well as rules of internal law to which, in certain cases, international law refers.

(6) Who has authority to consent to a departure from a particular rule may depend on the rule. It is one thing to consent to a search of embassy premises, another to the establishment of a military base on the territory of a State. Different officials or agencies may have authority in different contexts, in accordance with the arrangements made by each State and general principles of actual and ostensible authority. But in any case, certain modalities need to be observed for consent to be considered valid. Consent must be freely given and clearly established. It must be actually expressed by the State rather than merely presumed on the basis that the State would have consented if it had been asked. Consent may be vitiated by error, fraud, corruption or coercion. In this respect, the principles concerning the validity of consent to treaties provide relevant guidance.

(7) Apart from drawing attention to prerequisites to a valid consent, including issues of the authority to consent, the requirement for consent to be valid serves a further function. It points to the existence of cases in which consent may not be validly given at all. This question is discussed in relation to article 26 (compliance with peremptory norms), which applies to chapter V as a whole.[971] [323]

(8) Examples of consent given by a State which has the effect of rendering certain conduct lawful include commissions of inquiry sitting on the territory of another State, the exercise of jurisdiction over visiting forces, humanitarian relief and rescue operations and the arrest or detention of persons on foreign territory. In the *Savarkar* case, the arbitral tribunal considered that the arrest of Savarkar was not a violation of French sovereignty as France had implicitly consented to the arrest through the conduct of its gendarme, who aided the British authorities in the arrest.[972] [324] In considering the application of article 20 to such cases it may be necessary to have regard to the relevant primary rule. For example, only the head of a diplomatic mission can consent to the receiving State's entering the premises of the mission.[973] [325]

(9) Article 20 is concerned with the relations between the two States in question. In circumstances where the consent of a number of States is required, the consent of one State

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[970] [322] This issue arose with respect to the dispatch of Belgian troops to the Republic of the Congo in 1960. See *Official Records of the Security Council, Fifteenth Year*, 873rd meeting, 13–14 July 1960, particularly the statement of the representative of Belgium, paras. 186–188 and 209.

[971] [323] See paragraph (6) of the commentary to article 26.

[972] [324] UNRIAA, vol. XI (Sales No. 61.V.4), p. 243, at pp. 252–255 (1911).

[973] [325] Vienna Convention on Diplomatic Relations, art. 22, para. 1.

will not preclude wrongfulness in relation to another.[974] [326] Furthermore, where consent is relied on to preclude wrongfulness, it will be necessary to show that the conduct fell within the limits of the consent. Consent to overflight by commercial aircraft of another State would not preclude the wrongfulness of overflight by aircraft transporting troops and military equipment. Consent to the stationing of foreign troops for a specific period would not preclude the wrongfulness of the stationing of such troops beyond that period.[975][327] These limitations are indicated by the words "given act" in article 20 as well as by the phrase "within the limits of that consent".

(10) Article 20 envisages only the consent of States to conduct otherwise in breach of an international obligation. International law may also take into account the consent of non-State entities such as corporations or private persons. The extent to which investors can waive the rules of diplomatic protection by agreement in advance has long been controversial, but under the Convention on the Settlement of Investment Disputes between States and Nationals of other States (art. 27, para. 1), consent by an investor to arbitration under the Convention has the effect of suspending the right of diplomatic protection by the investor's national State. The rights conferred by international human rights treaties cannot be waived by their beneficiaries, but the individual's free consent may be relevant to their application.[976] [328] In these cases the particular rule of international law itself allows for the consent in question and deals with its effect. By contrast, article 20 states a general principle so far as enjoyment of the rights and performance of the obligations of States are concerned.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

World Trade Organization Appellate Body

Peru—Additional Duty on Imports of Certain Agricultural Products

In *Peru—Additional Duty on Imports of Certain Agricultural Products*, the Appellate Body of the WTO noted that "without reaching the questions of whether the … ILC Articles 20 and 45 are 'rules of international law applicable in the relations between the parties' within the meaning of Article 31(3)(*c*) of the Vienna Convention …, we disagree with Peru

[974] [326] Austrian consent to the proposed customs union of 1931 would not have precluded its wrongfulness in regard of the obligation to respect Austrian independence owed by Germany to all the parties to the Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles). Likewise, Germany's consent would not have precluded the wrongfulness of the customs union in respect of the obligation of the maintenance of its complete independence imposed on Austria by the Treaty of Peace between the Allied and Associated Powers and Austria (Peace Treaty of Saint-Germain-en-Laye). See *Customs Régime between Germany and Austria, Advisory Opinion, 1931, P.C.I.J., Series A/B, No. 41*, p. 37, at pp. 46 and 49.

[975] [327] The non-observance of a condition placed on the consent will not necessarily take conduct outside of the limits of the consent. For example, consent to a visiting force on the territory of a State may be subject to a requirement to pay rent for the use of facilities. While the non-payment of the rent would no doubt be a wrongful act, it would not transform the visiting force into an army of occupation.

[976] [328] See, *e.g.*, International Covenant on Civil and Political Rights, arts. 7; 8, para. 3; 14, para. 3 (*g*); and 23, para. 3.

that the … ILC Articles 20 and 45 are 'relevant' rules of international law within the meaning of Article 31(3)(*c*)".[977] [126] The Appellate Body thus found that

> [h]aving concluded that the … ILC Articles 20 and 45 are not 'relevant' to the interpretation of Article 4.2 of the Agreement on Agriculture and Article II:1(*b*) of the GATT 1994 within the meaning of Article 31(3)(*c*) of the Vienna Convention …, there is no need for us to address whether the … ILC Articles 20 and 45 are 'rules of international law applicable in the relations between the parties', or the meaning of the term 'parties' in both Article 31(3)(*a*) and (*c*) of the Vienna Convention.[978] [127]

[A/71/80, para. 92]

[The Appellate Body … indicated that "there is no need for us to address whether the … ILC Articles 20 and 45 are 'rules of international law applicable in the relations between the parties', or the meaning of the term 'parties' in both Article 31(3)(*a*) and (*c*) of the Vienna Convention".[979] [234]

[A/71/80, para. 157]]

[Permanent Court of Arbitration (under UNCITRAL Rules)

Venezuela US, S.R.L. v. *Bolivarian Republic of Venezuela*

The arbitral tribunal in *Venezuela US, S.R.L.* v. *Bolivarian Republic of Venezuela* referred to articles 12 and 20 to 25, noting that "[t]here is a breach only when the conduct of a State is not in conformity with what is required of it by an international obligation, provided that there are no circumstances precluding the wrongfulness".[980] [82]

[A/77/74, p. 17]]

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[977] [126] WTO, Appellate Body Report, WT/DS457/AB/R and Add. 1, 20 July 2015, para. 5.104 (as restated in paras. 5.118 and 6.4).

[978] [127] *Ibid*., para. 5.105 (as restated in paras. 5.118 and 6.4).

[979] [234] [WTO, Appellate Body Report, WT/DS457/AB/R and Add. 1, 20 July 2015, para. 5.105 (as restated in paras. 5.118 and 6.4).]

[980] [[82] See footnote [126] 14 above, para. 155.]

Article 21. Self-defence

The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

Commentary

(1) The existence of a general principle admitting self-defence as an exception to the prohibition against the use of force in international relations is undisputed. Article 51 of the Charter of the United Nations preserves a State's "inherent right" of self-defence in the face of an armed attack and forms part of the definition of the obligation to refrain from the threat or use of force laid down in Article 2, paragraph 4. Thus, a State exercising its inherent right of self-defence as referred to in Article 51 of the Charter is not, even potentially, in breach of Article 2, paragraph 4.[981] [329]

(2) Self-defence may justify non-performance of certain obligations other than that under Article 2, paragraph 4, of the Charter of the United Nations, provided that such non-performance is related to the breach of that provision. Traditional international law dealt with these problems by instituting a separate legal regime of war, defining the scope of belligerent rights and suspending most treaties in force between the belligerents on the outbreak of war.[982] [330] In the Charter period, declarations of war are exceptional and military actions proclaimed as self-defence by one or both parties occur between States formally at "peace" with each other.[983] [331] The 1969 Vienna Convention leaves such issues to one side by providing in article 73 that the Convention does not prejudice "any question that may arise in regard to a treaty … from the outbreak of hostilities between States".

(3) This is not to say that self-defence precludes the wrongfulness of conduct in all cases or with respect to all obligations. Examples relate to international humanitarian law and human rights obligations. The Geneva Conventions for the protection of war victims of 12 August 1949 and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) apply equally to all the parties in an international armed conflict, and the same is true of customary international humanitarian law.[984] [332] Human rights treaties contain derogation provisions for times of public emergency, including actions taken in self-defence. As to obligations under international humanitarian law and in relation to non-derogable human rights provisions, self-defence does not preclude the wrongfulness of conduct.

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[981] [329] Cf. *Legality of the Threat or Use of Nuclear Weapons* (footnote [48] 54 above), p. 244, para. 38, and p. 263, para. 96, emphasizing the lawfulness of the use of force in self-defence.

[982] [330] See further Lord McNair and A. D. Watts, *The Legal Effects of War*, 4th ed. (Cambridge University Press, 1966).

[983] [331] In *Oil Platforms, Preliminary Objection* (footnote [750] 208 above), it was not denied that the 1955 Treaty of Amity, Economic Relations and Consular Rights remained in force, despite many actions by United States naval forces against the Islamic Republic of Iran. In that case both parties agreed that to the extent that any such actions were justified by self-defence they would be lawful.

[984] [332] As the Court said of the rules of international humanitarian law in the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* (footnote [48] 54 above), p. 257, para. 79, "they constitute intransgressible principles of international customary law". On the relationship between human rights and humanitarian law in times of armed conflict, see page 240, para. 25.

(4) ICJ in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* provided some guidance on this question. One issue before the Court was whether a use of nuclear weapons would necessarily be a breach of environmental obligations because of the massive and long-term damage such weapons can cause. The Court said:

> [T]he issue is not whether the treaties relating to the protection of the environment are or are not applicable during an armed conflict, but rather whether the obligations stemming from these treaties were intended to be obligations of total restraint during military conflict.
>
> The Court does not consider that the treaties in question could have intended to deprive a State of the exercise of its right of self-defence under international law because of its obligations to protect the environment. Nonetheless, States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.[985] 333

A State acting in self-defence is "totally restrained" by an international obligation if that obligation is expressed or intended to apply as a definitive constraint even to States in armed conflict.[986] 334

(5) The essential effect of article 21 is to preclude the wrongfulness of conduct of a State acting in self-defence *vis-à-vis* an attacking State. But there may be effects *vis-à-vis* third States in certain circumstances. In its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court observed that:

> [A]s in the case of the principles of humanitarian law applicable in armed conflict, international law leaves no doubt that the principle of neutrality, whatever its content, which is of a fundamental character similar to that of the humanitarian principles and rules, is applicable (subject to the relevant provisions of the United Nations Charter), to all international armed conflict, whatever type of weapons might be used.[987] 335

The law of neutrality distinguishes between conduct as against a belligerent and conduct as against a neutral. But neutral States are not unaffected by the existence of a state of war. Article 21 leaves open all issues of the effect of action in self-defence *vis-à-vis* third States.

(6) Thus, article 21 reflects the generally accepted position that self-defence precludes the wrongfulness of the conduct taken within the limits laid down by international law. The reference is to action "taken in conformity with the Charter of the United Nations". In addition, the term "lawful" implies that the action taken respects those obligations of total restraint applicable in international armed conflict, as well as compliance with the requirements of proportionality and of necessity inherent in the notion of self-defence. Article 21 simply reflects the basic principle for the purposes of chapter V, leaving questions of the extent and application of self-defence to the applicable primary rules referred to in the Charter.

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[985] 333 *Ibid.*, p. 242, para. 30.

[986] 334 See, *e.g.*, the Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques.

[987] 335 See footnote [48] 54 above, p. 261, para. 89.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

[Permanent Court of Arbitration (under UNCITRAL Rules)

Venezuela US, S.R.L. v. *Bolivarian Republic of Venezuela*

The arbitral tribunal in *Venezuela US, S.R.L.* v. *Bolivarian Republic of Venezuela* referred to articles 12 and 20 to 25, noting that "[t]here is a breach only when the conduct of a State is not in conformity with what is required of it by an international obligation, provided that there are no circumstances precluding the wrongfulness".[988] [82]

[A/77/74, p. 17]]

[988] [[82] See footnote [126] 14 above, para. 155.]

Article 22. Countermeasures in respect of an internationally wrongful act

The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of Part Three.

Commentary

(1) In certain circumstances, the commission by one State of an internationally wrongful act may justify another State injured by that act in taking non-forcible countermeasures in order to procure its cessation and to achieve reparation for the injury. Article 22 deals with this situation from the perspective of circumstances precluding wrongfulness. Chapter II of Part Three regulates countermeasures in further detail.

(2) Judicial decisions, State practice and doctrine confirm the proposition that countermeasures meeting certain substantive and procedural conditions may be legitimate. In the *Gabčíkovo-Nagymaros Project* case, ICJ clearly accepted that countermeasures might justify otherwise unlawful conduct "taken in response to a previous international wrongful act of another State and … directed against that State",[989] [336] provided certain conditions are met. Similar recognition of the legitimacy of measures of this kind in certain cases can be found in arbitral decisions, in particular the *"Naulilaa"*,[990] [337] *"Cysne"*,[991] [338] and *Air Service Agreement*[992] [339] awards.

(3) In the literature concerning countermeasures, reference is sometimes made to the application of a "sanction", or to a "reaction" to a prior internationally wrongful act; historically the more usual terminology was that of "legitimate reprisals" or, more generally, measures of "self-protection" or "self-help". The term "sanctions" has been used for measures taken in accordance with the constituent instrument of some international organization, in particular under Chapter VII of the Charter of the United Nations—despite the fact that the Charter uses the term "measures", not "sanctions". The term "reprisals" is now no longer widely used in the present context, because of its association with the law of belligerent reprisals involving the use of force. At least since the *Air Service Agreement* arbitration,[993] [340] the term "countermeasures" has been preferred, and it has been adopted for the purposes of the present articles.

(4) Where countermeasures are taken in accordance with article 22, the underlying obligation is not suspended, still less terminated; the wrongfulness of the conduct in question is precluded for the time being by reason of its character as a countermeasure, but only provided that and for so long as the necessary conditions for taking countermeasures are satisfied. These conditions are set out in Part Three, chapter II, to which article 22 refers. As a response to internationally wrongful conduct of another State countermeasures may be justified only in relation to that State. This is emphasized by the phrases "if and to the

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[989] [336] *Gabčíkovo-Nagymaros Project* (see footnote [31] 37 above), p. 55, para. 83.

[990] [337] *Portuguese Colonies* case (Naulilaa incident), UNRIAA, vol. II (Sales No. 1949.V.1), p. 1011, at pp. 1025–1026 (1928).

[991] [338] *Ibid*., p. 1035, at p. 1052 (1930).

[992] [[339] *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France*, decision of 9 December 1978, UNRIAA, vol. XVIII (Sales No. E/F.80.V.7), p. 415.]

[993] [340] *Ibid*., especially pp. 443–446, paras. 80–98.

extent" and "countermeasures taken against" the responsible State. An act directed against a third State would not fit this definition and could not be justified as a countermeasure. On the other hand, indirect or consequential effects of countermeasures on third parties, which do not involve an independent breach of any obligation to those third parties, will not take a countermeasure outside the scope of article 22.

(5) Countermeasures may only preclude wrongfulness in the relations between an injured State and the State which has committed the internationally wrongful act. The principle is clearly expressed in the *"Cysne"* case, where the tribunal stressed that:

> reprisals, which constitute an act in principle contrary to the law of nations, are defensible only insofar as they were *provoked* by some other act likewise contrary to that law. *Only reprisals taken against the provoking State are permissible.* Admittedly, it can happen that legitimate reprisals taken against an offending State may affect the nationals of an innocent State. But that would be an indirect and unintentional consequence which, in practice, the injured State will always endeavour to avoid or to limit as far as possible.[994] 341

Accordingly, the wrongfulness of Germany's conduct *vis-à-vis* Portugal was not precluded. Since it involved the use of armed force, this decision concerned belligerent reprisals rather than countermeasures in the sense of article 22. But the same principle applies to countermeasures, as the Court confirmed in the *Gabčíkovo-Nagymaros Project* case when it stressed that the measure in question must be "directed against" the responsible State.[995] 342

(6) If article 22 had stood alone, it would have been necessary to spell out other conditions for the legitimacy of countermeasures, including in particular the requirement of proportionality, the temporary or reversible character of countermeasures and the status of certain fundamental obligations which may not be subject to countermeasures. Since these conditions are dealt with in Part Three, chapter II, it is sufficient to make a cross reference to them here. Article 22 covers any action which qualifies as a countermeasure in accordance with those conditions. One issue is whether countermeasures may be taken by third States which are not themselves individually injured by the internationally wrongful act in question, although they are owed the obligation which has been breached.[996] 343 For example, in the case of an obligation owed to the international community as a whole ICJ has affirmed that all States have a legal interest in compliance.[997] 344 Article 54 leaves open the question whether any State may take measures to ensure compliance with certain international obligations in the general interest as distinct from its own individual interest as an injured State. While article 22 does not cover measures taken in such a case to the extent that these do not qualify as countermeasures, neither does it exclude that possibility.

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[994] 341 *"Cysne"* (footnote [991] 338 above), pp. 1056–1057.

[995] 342 *Gabčíkovo-Nagymaros Project* (footnote [31] 37 above), p. 55, para. 83.

[996] 343 For the distinction between injured States and other States entitled to invoke State responsibility, see articles 42 and 48 and commentaries.

[997] 344 *Barcelona Traction* (footnote [46] 52 above), p. 32, para. 33.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

International arbitral tribunal (under the ICSID Additional Facility Rules)

Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. *the United Mexican States*

In its 2007 award, the tribunal established to hear the case of *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc.* v. *Mexico* cited article 22 of the State responsibility articles in support of its assertion that:

> Countermeasures may constitute a valid defence against a breach of Chapter Eleven [of NAFTA] insofar as the Respondent State proves that the measure in question meets each of the conditions required by customary international law, as applied to the facts of the case.[998] 20

The tribunal provided further that

> [it] took as an authoritative statement of customary international law on countermeasures the position of the International Court of Justice [in the *Gabčíkovo-Nagymaros* case], as confirmed by [articles 22 and 49 of] the ILC Articles.[999] 21

[A/65/76, para. 23]

International arbitral tribunal (under the ICSID Additional Facility Rules)

Corn Products International Inc. v. *The United Mexican States*

In its 2008 Decision on Responsibility, the tribunal established to hear the case of *Corn Products International Inc.* v. *Mexico* held that adverse rulings by a WTO panel and Appellate Body did not preclude the respondent from raising the defence of the taking of lawful countermeasures in the case before it which involved alleged violations of obligations under NAFTA. The tribunal explained that

> … the fact that the tax violated Mexico's obligations under the GATT [did not] mean that it could not constitute a countermeasure which operated to preclude wrongfulness under the NAFTA. It is a feature of countermeasures that they may operate to preclude wrongfulness in respect of one obligation of the State which takes them, while not affecting another obligation of that State. This is apparent from the text of Article 50 of the ILC Articles on State Responsibility … [which] appears to contemplate that a measure which is contrary to one of [the obligations referred to in article 50, paragraph 1,] will entail a breach of *that* obligation by the State which undertakes it but may nevertheless preclude the wrongfulness in relation to another obligation of the State which does not fall within paragraphs (*a*) to (*d*).[1000] 22

Nonetheless, the tribunal subsequently held that, since NAFTA conferred upon investors substantive rights separate and distinct from those of the State of which they are nationals, a countermeasure ostensibly taken against the United States could not deprive investors of such rights, and accordingly could not be raised as a circumstance precluding

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[998] 20 See footnote [3] 4 above, para. 121.

[999] 21 *Ibid*., para. 125.

[1000] 22 See footnote [4] 5 above, para. 158, emphasis in the original.

wrongfulness in relation to a violation of the investor's rights.[1001] [23] The tribunal also held that the defence of the taking of lawful countermeasures could not be upheld because the Respondent had failed to establish the existence of a prior breach of international law by the United States, in response to which the Respondent was taking the countermeasure. As the United States was not a party to the proceedings, the tribunal held that it did not have the jurisdiction to evaluate such a claim. [1002] [24]

[A/65/76, para. 24]

International Court of Justice

Application of the Interim Accord of 13 September 1995 (the Former Yugoslav Republic of Macedonia v. *Greece)*

In its judgment in the *Application of the Interim Accord of 13 September 1995 (the Former Yugoslav Republic of Macedonia* v. *Greece)*, the International Court of Justice referred to the State responsibility articles when rejecting the respondent's claim that "its objection could be justified as a countermeasure precluding the wrongfulness of the Respondent's objection to the Applicant's admission to NATO".[1003] [121]

[A/68/72, para. 88]

[Permanent Court of Arbitration (under UNCITRAL Rules)

Venezuela US, S.R.L. v. *Bolivarian Republic of Venezuela*

The arbitral tribunal in *Venezuela US, S.R.L.* v. *Bolivarian Republic of Venezuela* referred to articles 12 and 20 to 25, noting that "[t]here is a breach only when the conduct of a State is not in conformity with what is required of it by an international obligation, provided that there are no circumstances precluding the wrongfulness".[1004] [82]

[A/77/74, p. 17]]

[1001] [23] *Ibid*., paras. 167 and 176. See also article 49.

[1002] [24] *Ibid*., paras. 182–189. See also article 49.

[1003] [121] ICJ, Judgment, 5 December 2011, *I.C.J. Reports 2011*, p. 644, at p. 692, para. 164.

[1004] [82 See footnote [126] 14 above, para. 155.]

Article 23. Force majeure

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to *force majeure*, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.

2. Paragraph 1 does not apply if:

(*a*) the situation of *force majeure* is due, either alone or in combination with other factors, to the conduct of the State invoking it; or

(*b*) the State has assumed the risk of that situation occurring.

Commentary

(1) *Force majeure* is quite often invoked as a ground for precluding the wrongfulness of an act of a State.[1005] [345] It involves a situation where the State in question is in effect compelled to act in a manner not in conformity with the requirements of an international obligation incumbent upon it. *Force majeure* differs from a situation of distress (art. 24) or necessity (art. 25) because the conduct of the State which would otherwise be internationally wrongful is involuntary or at least involves no element of free choice.

(2) A situation of *force majeure* precluding wrongfulness only arises where three elements are met: (*a*) the act in question must be brought about by an irresistible force or an unforeseen event; (*b*) which is beyond the control of the State concerned; and (*c*) which makes it materially impossible in the circumstances to perform the obligation. The adjective "irresistible" qualifying the word "force" emphasizes that there must be a constraint which the State was unable to avoid or oppose by its own means. To have been "unforeseen" the event must have been neither foreseen nor of an easily foreseeable kind. Further the "irresistible force" or "unforeseen event" must be causally linked to the situation of material impossibility, as indicated by the words "due to *force majeure* … making it materially impossible". Subject to paragraph 2, where these elements are met, the wrongfulness of the State's conduct is precluded for so long as the situation of *force majeure* subsists.

(3) Material impossibility of performance giving rise to *force majeure* may be due to a natural or physical event (*e.g.* stress of weather which may divert State aircraft into the territory of another State, earthquakes, floods or drought) or to human intervention (*e.g.* loss of control over a portion of the State's territory as a result of an insurrection or devastation of an area by military operations carried out by a third State), or some combination of the two. Certain situations of duress or coercion involving force imposed on the State may also amount to *force majeure* if they meet the various requirements of article 23. In particular, the situation must be irresistible, so that the State concerned has no real possibility of escaping its effects. *Force majeure* does not include circumstances in which performance of an obligation has become more difficult, for example due to some political or economic

[1005] [345] "'*Force majeure*' and 'fortuitous event' as circumstances precluding wrongfulness: survey of State practice, international judicial decisions and doctrine", study prepared by the Secretariat (*Yearbook … 1978*, vol. II (Part One), p. 61, document A/CN.4/315).

crisis. Nor does it cover situations brought about by the neglect or default of the State concerned,[1006] [346] even if the resulting injury itself was accidental and unintended.[1007] [347]

(4) In drafting what became article 61 of the 1969 Vienna Convention, ILC took the view that *force majeure* was a circumstance precluding wrongfulness in relation to treaty performance, just as supervening impossibility of performance was a ground for termination of a treaty.[1008] [348] The same view was taken at the United Nations Conference on the Law of Treaties.[1009] [349] But in the interests of the stability of treaties, the Conference insisted on a narrow formulation of article 61 so far as treaty termination is concerned. The degree of difficulty associated with *force majeure* as a circumstance precluding wrongfulness, though considerable, is less than is required by article 61 for termination of a treaty on grounds of supervening impossibility, as ICJ pointed out in the *Gabčíkovo-Nagymaros Project* case:

> Article 61, paragraph 1, requires the "permanent disappearance or destruction of an object indispensable for the execution" of the treaty to justify the termination of a treaty on grounds of impossibility of performance. During the conference, a proposal was made to extend the scope of the article by including in it cases such as the impossibility to make certain payments because of serious financial difficulties … Although it was recognized that such situations could lead to a preclusion of the wrongfulness of non-performance by a party of its treaty obligations, the participating States were not prepared to consider such situations to be a ground for terminating or suspending a treaty, and preferred to limit themselves to a narrower concept.[1010] [350]

(5) In practice, many of the cases where "impossibility" has been relied upon have not involved actual impossibility as distinct from increased difficulty of performance and the plea of *force majeure* has accordingly failed. But cases of material impossibility have occurred, *e.g.* where a State aircraft is forced, due to damage or loss of control of the aircraft

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[1006] [346] For example, in relation to occurrences such as the bombing of La Chaux-de-Fonds by German airmen on 17 October 1915, and of Porrentruy by a French airman on 26 April 1917, ascribed to negligence on the part of the airmen, the belligerent undertook to punish the offenders and make reparation for the damage suffered (study prepared by the Secretariat, *ibid*., paras. 255–256).

[1007] [347] For example, in 1906 an American officer on the USS *Chattanooga* was mortally wounded by a bullet from a French warship as his ship entered the Chinese harbour of Chefoo. The United States Government obtained reparation, having maintained that:

> "While the killing of Lieutenant England can only be viewed as an accident, it cannot be regarded as belonging to the unavoidable class whereby no responsibility is entailed. Indeed, it is not conceivable how it could have occurred without the contributory element of lack of proper precaution on the part of those officers of the *Dupetit Thouars* who were in responsible charge of the rifle firing practice and who failed to stop firing when the *Chattanooga*, in the course of her regular passage through the public channel, came into the line of fire."

M. M. Whiteman, *Damages in International Law* (Washington, D. C., United States Government Printing Office, 1937), vol. I, p. 221. See also the study prepared by the Secretariat (footnote [1005] 345 above), para. 130.

[1008] [348] *Yearbook … 1966*, vol. II, p. 255.

[1009] [349] See, *e.g.*, the proposal of the representative of Mexico, *United Nations Conference on the Law of Treaties, First and second sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), Report of the Committee of the Whole on its work at the first session of the Conference, document A/CONF.39/14, p. 182, para. 531 (*a*).

[1010] [350] *Gabčíkovo-Nagymaros Project* (footnote [31] 37 above), p. 63, para. 102.

owing to weather, into the airspace of another State without the latter's authorization. In such cases the principle that wrongfulness is precluded has been accepted.[1011] 351

(6) Apart from aerial incidents, the principle in article 23 is also recognized in relation to ships in innocent passage by article 14, paragraph 3, of the Convention on the Territorial Sea and the Contiguous Zone (the United Nations Convention on the Law of the Sea, art. 18, para. 2), as well as in article 7, paragraph 1, of the Convention on Transit Trade of Land-locked States. In these provisions, *force majeure* is incorporated as a constituent element of the relevant primary rule; nonetheless, its acceptance in these cases helps to confirm the existence of a general principle of international law to similar effect.

(7) The principle has also been accepted by international tribunals. Mixed claims commissions have frequently cited the unforeseeability of attacks by rebels in denying the responsibility of the territorial State for resulting damage suffered by foreigners.[1012] 352 In the *Lighthouses* arbitration, a lighthouse owned by a French company had been requisitioned by the Government of Greece in 1915 and was subsequently destroyed by enemy action. The arbitral tribunal denied the French claim for restoration of the lighthouse on grounds of *force majeure*.[1013] 353 In the *Russian Indemnity* case, the principle was accepted but the plea of *force majeure* failed because the payment of the debt was not materially impossible.[1014] 354 *Force majeure* was acknowledged as a general principle of law (though again the plea was rejected on the facts of the case) by PCIJ in the *Serbian Loans* and *Brazilian Loans* cases.[1015] 355 More recently, in the *"Rainbow Warrior"* arbitration, France relied on *force majeure* as a circumstance precluding the wrongfulness of its conduct in removing the officers from Hao and not returning them following medical treatment. The tribunal dealt with the point briefly:

[1011] 351 See, *e.g.*, the cases of accidental intrusion into airspace attributable to weather, and the cases of accidental bombing of neutral territory attributable to navigational errors during the First World War discussed in the study prepared by the Secretariat (footnote [1005] 345 above), paras. 250–256. See also the exchanges of correspondence between the States concerned in the incidents involving United States military aircraft entering the airspace of Yugoslavia in 1946, United States of America, *Department of State Bulletin* (Washington, D. C.), vol. XV, No. 376 (15 September 1946), p. 502, reproduced in the study prepared by the Secretariat, para. 144, and the incident provoking the application to ICJ in 1954, *I.C.J. Pleadings, Treatment in Hungary of Aircraft and Crew of the United States of America*, p. 14 (note to the Hungarian Government of 17 March 1953). It is not always clear whether these cases are based on distress or *force majeure*.

[1012] 352 See, *e.g.*, the decision of the American-British Claims Commission in the *Saint Albans Raid* case, Moore, *History and Digest*, vol. IV, p. 4042 (1873), and the study prepared by the Secretariat (footnote [1005] 345 above), para. 339; the decisions of the United States-Venezuela Claims Commission in the *Wipperman* case, Moore, *History and Digest*, vol. III, p. 3039, and the study prepared by the Secretariat, paras. 349–350; *De Brissot and others* case (footnote [234] 117 above), and the study prepared by the Secretariat, para. 352; and the decision of the British-Mexican Claims Commission in the *Gill* case, UNRIAA, vol. V (Sales No. 1952.V.3), p. 157 (1931), and the study prepared by the Secretariat, para. 463.

[1013] 353 *Lighthouses* arbitration (footnote [702] 182 above), pp. 219–220.

[1014] 354 UNRIAA, vol. XI (Sales No. 61.V.4), p. 421, at p. 443 (1912).

[1015] 355 *Serbian Loans, Judgment No. 14, 1929, P.C.I.J., Series A, No. 20*, pp. 39–40; *Brazilian Loans, Judgment No. 15, ibid., No. 21*, p. 120.

New Zealand is right in asserting that the excuse of *force majeure* is not of relevance in this case because the test of its applicability is of absolute and material impossibility, and because a circumstance rendering performance more difficult or burdensome does not constitute a case of *force majeure*.[1016] 356

(8) In addition to its application in inter-State cases as a matter of public international law, *force majeure* has substantial currency in the field of international commercial arbitration, and may qualify as a general principle of law.[1017] 357

(9) A State may not invoke *force majeure* if it has caused or induced the situation in question. In *Libyan Arab Foreign Investment Company and The Republic of Burundi*, the arbitral tribunal rejected a plea of *force majeure* because "the alleged impossibility [was] not the result of an irresistible force or an unforeseen external event beyond the control of Burundi. In fact, the impossibility is the result of a unilateral decision of that State … "[1018]358 Under the equivalent ground for termination of a treaty in article 61 of the 1969 Vienna Convention, material impossibility cannot be invoked "if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty". By analogy with this provision, paragraph 2 (*a*) excludes the plea in circumstances where *force majeure* is due, either alone or in combination with other factors, to the conduct of the State invoking it. For paragraph 2 (*a*) to apply it is not enough that the State invoking *force majeure* has contributed to the situation of material impossibility; the situation of *force majeure* must be "due" to the conduct of the State invoking it. This allows for *force majeure* to be invoked in situations in which a State may have unwittingly contributed to the occurrence of material impossibility by something which, in hindsight, might have been done differently but which was done in good faith and did not itself make the event any less unforeseen. Paragraph 2 (*a*) requires that the State's role in the occurrence of *force majeure* must be substantial.

(10) Paragraph 2 (*b*) deals with situations in which the State has already accepted the risk of the occurrence of *force majeure*, whether it has done so in terms of the obligation itself or by its conduct or by virtue of some unilateral act. This reflects the principle that *force majeure* should not excuse performance if the State has undertaken to prevent the particular situation arising or has otherwise assumed that risk.[1019] 359 Once a State accepts the responsibility for a particular risk it cannot then claim *force majeure* to avoid responsibility. But the assumption of risk must be unequivocal and directed towards those to whom the obligation is owed.

[1016] 356 *"Rainbow Warrior"* (footnote [40] 46 above), p. 253.

[1017] 357 On *force majeure* in the case law of the Iran-United States Claims Tribunal, see G. H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (Oxford, Clarendon Press, 1996), pp. 306–320. *Force majeure* has also been recognized as a general principle of law by the European Court of Justice: see, *e.g.*, case 145/85, *Denkavit* v. *Belgium*, *Eur. Court H.R., Reports* 1987–2, p. 565; case 101/84, *Commission of the European Communities* v. *Italian Republic*, *ibid*., *Reports* 1985–6, p. 2629. See also article 79 of the United Nations Convention on Contracts for the International Sale of Goods; P. Schlechtriem, ed., *Commentary on the UN Convention on the International Sale of Goods*, 2nd ed. (trans. G. Thomas) (Oxford, Clarendon Press, 1998), pp. 600–626; and article 7.1.7 of the UNIDROIT Principles, *Principles of International Commercial Contracts* (Rome, Unidroit, 1994), pp. 169–171.

[1018] 358 ILR, vol. 96 (1994), p. 318, para. 55.

[1019] 359 As the study prepared by the Secretariat (footnote [1005] 345 above), para. 31, points out, States may renounce the right to rely on *force majeure* by agreement. The most common way of doing so would be by an agreement or obligation assuming in advance the risk of the particular *force majeure* event.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

International arbitral tribunal

Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair

In its 1990 award in the *Rainbow Warrior* case, the arbitral tribunal referred to the text of draft article 31 provisionally adopted by the International Law Commission,[1020] [139] as well as to the commentary thereto, and concluded that France could not invoke the excuse of *force majeure* to preclude the wrongfulness of the removal of Major Mafart from the island of Hao for health reasons, in violation of the agreement between the Parties. Having quoted paragraph 1 of draft article 31, the tribunal stated the following:

In the light of this provision, there are several reasons for excluding the applicability of the excuse of *force majeure* in this case. As pointed out in the report of the International Law Commission, article 31 refers to "a situation facing the subject taking the action, which leads it, as it were, *despite itself*, to act in a manner not in conformity with the requirements of an international obligation incumbent on it" (*Yearbook … 1979*, vol. II, p. 122, para. 2, emphasis in the original). *Force majeure* is "generally invoked to justify *involuntary*, or at least unintentional conduct", it refers "to an irresistible force or an unforeseen external event against which it has no remedy and which makes it 'materially impossible' for it to act in conformity with the obligation", since "no person is required to do the impossible" (*ibid*., p. 123, para. 4).

The report of the International Law Commission insists on the strict meaning of article 31, in the following terms:

> the wording of paragraph 1 emphasizes, by the use of the adjective "irresistible" qualifying the word "force", that there must, in the case in point, be a constraint which the State was unable to avoid or to oppose by its own means … The event must be an act which occurs and produces its effect without the State being able to do anything which might rectify the event or might avert its consequences. The adverb "materially" preceding the word "impossible" is intended to show that, for the purposes of the article, it would not suffice for the "irresistible force" or the "unforeseen external event" to have made it *very difficult* for the State to act in conformity with the obligation … the Commission has sought to emphasize that the State must not have had any option in that regard (*Yearbook … 1979*, vol. II, p. 133, para. 40, emphasis in the original).

In conclusion, New Zealand is right in asserting that the excuse of *force majeure* is not of relevance in this case because the test of its applicability is of absolute and material impossibility, and because

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[1020] [139] The part of this provision concerning *force majeure* was amended and incorporated in article 23 finally adopted by the International Law Commission in 2001. Draft article 31 provisionally adopted read as follows:

> Article 31
> *Force majeure* and fortuitous event
>
> 1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act was due to an irresistible force or to an unforeseen external event beyond its control which made it materially impossible for the State to act in conformity with that obligation or to know that its conduct was not in conformity with that obligation.
>
> 2. Paragraph 1 shall not apply if the State in question has contributed to the occurrence of the situation of material impossibility. (*Yearbook … 1980*, vol. II (Part Two), para. 34.)

a circumstance rendering performance more difficult or burdensome does not constitute a case of *force majeure*. Consequently, this excuse is of no relevance in the present case.[1021] 140

[A/62/62, para. 87]

International arbitral tribunal

Libyan Arab Foreign Investment Company (LAFICO) and the Republic of Burundi

In its 1991 award, the arbitral tribunal established to hear the *LAFICO-Burundi* case stated that the defence by Burundi according to which it was objectively impossible for the shareholder, Libyan Arab Foreign Investment company (LAFICO), to continue to participate in the management of the Libyan Arab Republic-Burundi Holding Company (HALB)[1022] 141 was to be appraised in light of "certain circumstances precluding wrongfulness which the International Law Commission has sought to codify in its draft articles on State responsibility". The tribunal first referred to the exception of *force majeure*, and in this regard quoted in extenso draft article 31 provisionally adopted by the International Law Commission. The tribunal found that it was "not possible to apply this provision to the case … because the alleged impossibility [was] not the result of an irresistible force or an unforeseen external event beyond the control of Burundi".[1023] 142

[A/62/62, para. 88]

International arbitral tribunal (under the ICSID Convention)

Autopista Concesionada de Venezuela, C.A. ("Aucoven") v. *Bolivarian Republic of Venezuela*

In its 2003 award, the arbitral tribunal constituted to hear the *Aucoven* v. *Venezuela* case, in examining whether Venezuela's failure to increase the toll rates (as provided by the relevant concession agreement) was excused by the civil unrest existing in the country in 1997, considered that *force majeure* was "a valid excuse for the non-performance of a contractual obligation in both Venezuelan and international law".[1024] 143 It then referred, *inter alia*, to the International Law Commission articles on State responsibility in general (and implicitly to article 23 finally adopted in 2001) to support its finding that international law did not impose a standard which would displace the application of Venezuela's national law referring to *force majeure*:

… the Arbitral Tribunal is not satisfied that international law imposes a different standard which would be called to displace the application of national law. The Tribunal reaches this conclusion on the basis of a review of the decisions issued under international law to which the parties have referred (see in particular *General Dynamics Telephone Sys. Ctr.* v. *The Islamic Republic of Iran*,

[1021] 140 See footnote [40] 46 above, pp. 252–253.

[1022] 141 In this case, LAFICO had contended that the expulsion from Burundi of Libyan managers of HALB and one of its subsidiaries, and the prohibition against LAFICO carrying out any activities in Burundi constituted an infringement by Burundi of its shareholder rights and had prevented HALB from realizing its objectives (*i.e.* to invest in companies operating within certain sectors of the Burundi economy), thereby violating *inter alia* the 1973 Technical and Economic Cooperation Agreement between the Libyan Arab Republic and the Republic of Burundi.

[1023] 142 See footnote [824] 127, para. 55 (English version in: *International Law Reports*, vol. 96, p. 318).

[1024] 143 ICSID, Case No. ARB/00/5, Award, 23 September 2003, para. 108.

Award No. 192–285–2 (4 Oct. 1985), 9 Iran-U.S. Cl. Trib. Rep. 153, 160, Resp. Auth. 18. See also *Gould Marketing, Inc.* v. *Ministry of Defense of Iran*, Award No. ITL 24–49–2 (27 July 1983), 3 Iran-US Cl. Trib. Rep. 147, Cl. Auth. 23, and *Sylvania Tech. Sys., Inc.* v. *Iran*, Award No. 180–64–1 (27 June 1985), 8 Iran-U.S. Cl. Trib. Rep. 298, Cl. Auth. 32.), as well as on the basis of the draft articles on State Responsibility of the International Law Commission, and the legal arguments of the parties.[1025] 144

[A/62/62, para. 89]

Sempra Energy International v. Argentine Republic

In its 2007 award, the arbitral tribunal constituted to hear the *Sempra Energy International* v. *Argentina* case, which arose under the 1991 bilateral investment treaty between the United States and Argentina, was faced with a claim arising out of changes in the regulatory framework for private investments made in the wake of the economic crisis in Argentina in the late 1990s. The tribunal was presented, *inter alia*, with an argument on the part of the respondent that "the theory of 'imprévision' has been incorporated into Argentine law", to which the tribunal responded:

Insofar as the theory of 'imprévision' is expressed in the concept of *force majeure*, this other concept requires, under Article 23 of the Articles on State Responsibility, that the situation involve the occurrence of an irresistible force, beyond the control of the State, making it materially impossible under the circumstances to perform the obligation. In the commentary to this article, it is stated that '[*f*]*orce majeure* does not include circumstances in which performance of an obligation has become more difficult, for example due to some political or economic crisis'.[1026] 25

[A/65/76, para. 25]

Ad hoc committee (under the ICSID Convention)

Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. *The Argentine Republic*

In *Enron Creditors Recovery Corp. and Ponderosa Assets, L.P.* v. *The Argentine Republic*, the *ad hoc* committee upheld the arbitral tribunal's rejection of the applicability of the principle of "*imprevisión*" under Argentine law, as well as the tribunal's comparison with article 23 of the State responsibility articles, made in support of its decision, to the extent that "the theory of 'imprevisión' is expressed in the concept of *force majeure*".[1027] 122

[A/68/72, para. 89]

[Permanent Court of Arbitration (under UNCITRAL Rules)

Venezuela US, S.R.L. v. *Bolivarian Republic of Venezuela*

The arbitral tribunal in *Venezuela US, S.R.L.* v. *Bolivarian Republic of Venezuela* referred to articles 12 and 20 to 25, noting that "[t]here is a breach only when the conduct

[1025] 144 *Ibid.*, para. 123.

[1026] 25 ICSID, Case No. ARB/02/16, Award, 28 September 2007, para. 246.

[1027] 122 ICSID, Case No. ARB/01/13, Decision on the Application for Annulment of the Argentine Republic, 30 July 2010, para. 287.

of a State is not in conformity with what is required of it by an international obligation, provided that there are no circumstances precluding the wrongfulness".[1028] [82]

[A/77/74, p. 17]]

International arbitral tribunal (under the ICSID Convention)

(DS)2, S.A., Peter de Sutter and Kristof de Sutter v. *Republic of Madagascar*

The arbitral tribunal in *(DS)2, S.A., Peter de Sutter and Kristof de Sutter* v. *Republic of Madagascar* cited article 23, indicating that "under the law, *force majeure* occurs when a wrongful act is due to 'the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation'."[1029] [108] However, the tribunal concluded that in the facts of the case, there was nothing to indicate that it had been materially impossible for the State to perform its obligation.

[A/77/74, p. 21]

[1028] [[82] See footnote [126] 14 above, para. 155.]

[1029] [108] ICSID, Case No. ARB/17/18, Award, 17 April 2020, para. 347.

Article 24. Distress

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

2. Paragraph 1 does not apply if:

(*a*) the situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it; or

(*b*) the act in question is likely to create a comparable or greater peril.

Commentary

(1) Article 24 deals with the specific case where an individual whose acts are attributable to the State is in a situation of peril, either personally or in relation to persons under his or her care. The article precludes the wrongfulness of conduct adopted by the State agent in circumstances where the agent had no other reasonable way of saving life. Unlike situations of *force majeure* dealt with in article 23, a person acting under distress is not acting involuntarily, even though the choice is effectively nullified by the situation of peril.[1030] [360] Nor is it a case of choosing between compliance with international law and other legitimate interests of the State, such as characterize situations of necessity under article 25. The interest concerned is the immediate one of saving people's lives, irrespective of their nationality.

(2) In practice, cases of distress have mostly involved aircraft or ships entering State territory under stress of weather or following mechanical or navigational failure.[1031] [361] An example is the entry of United States military aircraft into Yugoslavia's airspace in 1946. On two occasions, United States military aircraft entered Yugoslav airspace without authorization and were attacked by Yugoslav air defences. The United States Government protested the Yugoslav action on the basis that the aircraft had entered Yugoslav airspace solely in order to escape extreme danger. The Yugoslav Government responded by denouncing the systematic violation of its airspace, which it claimed could only be intentional in view of its frequency. A later note from the Yugoslav chargé d'affaires informed the United States Department of State that Marshal Tito had forbidden any firing on aircraft which flew over Yugoslav territory without authorization, presuming that, for its part, the United States Government "would undertake the steps necessary to prevent these flights, except in the case of emergency or bad weather, for which arrangements could be made by agreement between American and Yugoslav authorities".[1032] [362] The reply of the United States Acting Secretary of State reiterated the assertion that no United States planes had flown over Yugoslavia intentionally without prior authorization from Yugoslav authorities "unless forced to do so in an emergency". However, the Acting Secretary of State added:

[1030] [360] For this reason, writers who have considered this situation have often defined it as one of "relative impossibility" of complying with the international obligation. See, *e.g.*, O. J. Lissitzyn, "The treatment of aerial intruders in recent practice and international law", AJIL, vol. 47, No. 4 (October 1953), p. 588.

[1031] [361] See the study prepared by the Secretariat (footnote [1005] 345 above), paras. 141–142 and 252.

[1032] [362] United States of America, *Department of State Bulletin* (footnote [1011] 351 above), reproduced in the study prepared by the Secretariat (footnote [1005] 345 above), para. 144.

I presume that the Government of Yugoslavia recognizes that *in case a plane and its occupants are jeopardized, the aircraft may change its course so as to seek safety, even though such action may result in flying over Yugoslav territory without prior clearance*.[1033] [363]

(3) Claims of distress have also been made in cases of violation of maritime boundaries. For example, in December 1975, after British naval vessels entered Icelandic territorial waters, the British Government claimed that the vessels in question had done so in search of "shelter from severe weather, as they have the right to do under customary international law".[1034] [364] Iceland maintained that British vessels were in its waters for the sole purpose of provoking an incident, but did not contest the point that if the British vessels had been in a situation of distress, they could enter Icelandic territorial waters.

(4) Although historically practice has focused on cases involving ships and aircraft, article 24 is not limited to such cases.[1035] [365] The *"Rainbow Warrior"* arbitration involved a plea of distress as a circumstance precluding wrongfulness outside the context of ships or aircraft. France sought to justify its conduct in removing the two officers from the island of Hao on the ground of "circumstances of distress in a case of extreme urgency involving elementary humanitarian considerations affecting the acting organs of the State".[1036] [366] The tribunal unanimously accepted that this plea was admissible in principle, and by majority that it was applicable to the facts of one of the two cases. As to the principle, the tribunal required France to show three things:

(1) The existence of very exceptional circumstances of extreme urgency involving medical or other considerations of an elementary nature, provided always that a prompt recognition of the existence of those exceptional circumstances is subsequently obtained from the other interested party or is clearly demonstrated.

(2) The reestablishment of the original situation of compliance with the assignment in Hao as soon as the reasons of emergency invoked to justify the repatriation had disappeared.

(3) The existence of a good faith effort to try to obtain the consent of New Zealand in terms of the 1986 Agreement.[1037] [367]

In fact the danger to one of the officers, though perhaps not life-threatening, was real and might have been imminent, and it was not denied by the New Zealand physician who subsequently examined him. By contrast, in the case of the second officer, the justifications given (the need for medical examination on grounds of pregnancy and the desire to see a dying father) did not justify emergency action. The lives of the agent and the child were at no stage threatened and there were excellent medical facilities nearby. The tribunal held that:

[1033] [363] Study prepared by the Secretariat (footnote [1005] 345 above), para. 145. The same argument is found in the Memorial of 2 December 1958 submitted by the United States Government to ICJ in relation to another aerial incident (*I.C.J. Pleadings, Aerial Incident of 27 July 1955*, pp. 358–359).

[1034] [364] *Official Records of the Security Council, Thirtieth Year*, 1866th meeting, 16 December 1975, para. 24; see the study prepared by the Secretariat (footnote [1005] 345 above), para. 136.

[1035] [365] There have also been cases involving the violation of a land frontier in order to save the life of a person in danger. See, *e.g.*, the case of violation of the Austrian border by Italian soldiers in 1862, study prepared by the Secretariat (footnote [1005] 345 above), para. 121.

[1036] [366] *"Rainbow Warrior"* (footnote [40] 46 above), pp. 254–255, para. 78.

[1037] [367] *Ibid*., p. 255, para. 79.

[C]learly these circumstances entirely fail to justify France's responsibility for the removal of Captain Prieur and from the breach of its obligations resulting from the failure to return the two officers to Hao (in the case of Major Mafart once the reasons for their removal had disappeared). There was here a clear breach of its obligations.[1038] [368]

(5) The plea of distress is also accepted in many treaties as a circumstance justifying conduct which would otherwise be wrongful. Article 14, paragraph 3, of the Convention on the Territorial Sea and the Contiguous Zone permits stopping and anchoring by ships during their passage through foreign territorial seas insofar as this conduct is rendered necessary by distress. This provision is repeated in much the same terms in article 18, paragraph 2, of the United Nations Convention on the Law of the Sea.[1039] [369] Similar provisions appear in the international conventions on the prevention of pollution at sea.[1040] [370]

(6) Article 24 is limited to cases where human life is at stake. The tribunal in the *"Rainbow Warrior"* arbitration appeared to take a broader view of the circumstances justifying a plea of distress, apparently accepting that a serious health risk would suffice. The problem with extending article 24 to less than life-threatening situations is where to place any lower limit. In situations of distress involving aircraft there will usually be no difficulty in establishing that there is a threat to life, but other cases present a wide range of possibilities. Given the context of chapter V and the likelihood that there will be other solutions available for cases which are not apparently life-threatening, it does not seem necessary to extend the scope of distress beyond threats to life itself. In situations in which a State agent is in distress and has to act to save lives, there should however be a certain degree of flexibility in the assessment of the conditions of distress. The "no other reasonable way" criterion in article 24 seeks to strike a balance between the desire to provide some flexibility regarding the choices of action by the agent in saving lives and need to confine the scope of the plea having regard to its exceptional character.

(7) Distress may only be invoked as a circumstance precluding wrongfulness in cases where a State agent has acted to save his or her own life or where there exists a special relationship between the State organ or agent and the persons in danger. It does not extend to more general cases of emergencies, which are more a matter of necessity than distress.

(8) Article 24 only precludes the wrongfulness of conduct so far as it is necessary to avoid the life-threatening situation. Thus, it does not exempt the State or its agent from complying with other requirements (national or international), *e.g.* the requirement to notify

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[1038] [368] *Ibid.*, p. 263, para. 99.

[1039] [369] See also articles 39, paragraph 1 (*c*), 98 and 109, of the Convention.

[1040] [370] See, *e.g.*, the International Convention for the Prevention of Pollution of the Sea by Oil, article IV, paragraph 1 (*a*), of which provides that the prohibition on the discharge of oil into the sea does not apply if the discharge takes place "for the purpose of securing the safety of the ship, preventing damage to the ship or cargo, or saving life at sea". See also the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, article V, paragraph 1, of which provides that the prohibition on dumping of wastes does not apply when it is "necessary to secure the safety of human life or of vessels, aircraft, platforms or other man-made structures at sea … in any case which constitutes a danger to human life or a real threat to vessels, aircraft, platforms or other man-made structures at sea, if dumping appears to be the only way of averting the threat." See also the Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft (art. 8, para. 1); and the International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL Convention), annex I, regulation 11 (*a*).

arrival to the relevant authorities, or to give relevant information about the voyage, the passengers or the cargo.[1041] 371

(9) As in the case of *force majeure*, a situation which has been caused or induced by the invoking State is not one of distress. In many cases the State invoking distress may well have contributed, even if indirectly, to the situation. Priority should be given to necessary life-saving measures, however, and under paragraph 2 (*a*), distress is only excluded if the situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it. This is the same formula as that adopted in respect of article 23, paragraph 2 (*a*).[1042] 372

(10) Distress can only preclude wrongfulness where the interests sought to be protected (*e.g.* the lives of passengers or crew) clearly outweigh the other interests at stake in the circumstances. If the conduct sought to be excused endangers more lives than it may save or is otherwise likely to create a greater peril it will not be covered by the plea of distress. For instance, a military aircraft carrying explosives might cause a disaster by making an emergency landing, or a nuclear submarine with a serious breakdown might cause radioactive contamination to a port in which it sought refuge. Paragraph 2 (*b*) stipulates that distress does not apply if the act in question is likely to create a comparable or greater peril. This is consistent with paragraph 1, which in asking whether the agent had "no other reasonable way" to save life establishes an objective test. The words "comparable or greater peril" must be assessed in the context of the overall purpose of saving lives.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

International arbitral tribunal

Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair

In its 1990 award in the *Rainbow Warrior* case, the arbitral tribunal referred to draft article 32 provisionally adopted by the International Law Commission,[1043] 145 as well as to the

[1041] 371 See *Cashin and Lewis* v. *The King*, *Canada Law Reports* (1935), p. 103 (even if a vessel enters a port in distress, it is not exempted from the requirement to report on its voyage). See also the *"Rebecca"*, Mexico-United States General Claims Commission, AJIL, vol. 23, No. 4 (October 1929), p. 860 (vessel entered port in distress; merchandise seized for customs offence: held, entry reasonably necessary in the circumstances and not a mere matter of convenience; seizure therefore unlawful); the *"May"* v. *The King*, *Canada Law Reports* (1931), p. 374; the *"Queen City"* v. *The King*, *ibid*., p. 387; and *Rex* v. *Flahaut*, *Dominion Law Reports* (1935), p. 685 (test of "real and irresistible distress" applied).

[1042] 372 See paragraph (9) of the commentary to article 23.

[1043] 145 This provision was amended and incorporated in article 24 finally adopted by the International Law Commission in 2001. Draft article 32 provisionally adopted read as follows:

> Article 32
> Distress
>
> 1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the conduct which constitutes the act of

commentary thereto, to determine whether the wrongfulness of France's behaviour could be excluded on the basis of distress. The tribunal also clarified, in this context, the difference between this ground of justification and, first, that of *force majeure*, and, second, that of state of necessity, dealt with under draft article 33 provisionally adopted by the Commission:[1044] 146

> Article 32 of the articles drafted by the International Law Commission deals with another circumstance which may preclude wrongfulness in international law, namely, that of the 'distress' of the author of the conduct which constitutes the act of State whose wrongfulness is in question.
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> …
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> The commentary of the International Law Commission explains that '"distress" means a situation of extreme peril in which the organ of the State which adopts that conduct 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 requirements of the obligation in question' (*Yearbook … 1979*, p. 133, para. 1).
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> The report adds that in international practice distress, as a circumstance capable of precluding the wrongfulness of an otherwise wrongful act of the State, 'has been invoked and recognized primarily in cases involving the violation of a frontier of another State, particularly its airspace and its sea—for example, when the captain of a State vessel in distress seeks refuge from storm in a foreign port without authorization, or when the pilot of a State aircraft lands without authorization on foreign soil to avoid an otherwise inevitable disaster' (*ibid*., p. 134, para. 4). Yet the Commission found that 'the ratio of the actual principle suggests that it is applicable, if only by analogy, to other comparable cases' (*ibid*., p. 135, para. 8).
>
> The report points out the difference between this ground for precluding wrongfulness and that of *force majeure*: 'in these circumstances, the State organ admittedly has a choice, even if it is only between conduct not in conformity with an international obligation and conduct which is in conformity with the obligation but involves a sacrifice that it is unreasonable to demand' (*Yearbook … 1979*, p. 122, para. 3). But 'this choice is not a "real choice" or "free choice" as to the decision to be taken, since the person acting on behalf of the State knows that if he adopts the conduct required by the international obligation, he, and the persons entrusted to his care, will almost inevitably perish. In such circumstances, the "possibility" of acting in conformity with the international obligation is therefore only apparent. In practice it is nullified by the situation of extreme peril which, as we have just said, characterizes situations of distress' (*Yearbook … 1979*, p. 133, para. 2).
>
> The report adds that the situation of distress 'may at most include a situation of serious danger, but not necessarily one that jeopardizes the very existence of the person concerned. The protection of something other than life, particularly where the physical integrity of a person is still involved, may admittedly represent an interest that is capable of severely restricting an individual's freedom of decision and induce him to act in a manner that is justifiable, although not in conformity with an international obligation of the State' (*Yearbook … 1979*, p. 135, para. 10). Thus, this circumstance may also apply to safeguard other essential rights of human beings such as the physical integrity of a person.

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that State had no other means, in a situation of extreme distress, of saving his life or that of persons entrusted to his care.

2. Paragraph 1 shall not apply if the State in question has contributed to the occurrence of the situation of extreme distress or if the conduct in question was likely to create a comparable or greater peril. (*Yearbook … 1980*, vol. II (Part Two), para. 34.)

[1044] 146 This provision was amended and incorporated in article 25 finally adopted in 2001. The text of that provision was identical to that of draft article 33 adopted on first reading (see *Yearbook … 1996*, vol. II (Part Two), para. 65) and is contained in the passage of the judgement of the ICJ in the *Gabčíkovo-Nagymaros Project* case reproduced [on pp. 278–280] below.

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, on distress, what is 'involved is situations of necessity' with respect to the actual person of the State organs or of persons entrusted to his care, 'and not any real "necessity" of the State'.

On the other hand, article 33, which allegedly authorizes a State to take unlawful action invoking a state of necessity, refers to situations of grave and imminent danger to the State as such and to its vital interests.

This distinction between the two grounds justifies the general acceptance of article 32 and at the same time the controversial character of the proposal in article 33 on state of necessity.

It has been stated in this connection that there is no general principle allowing the defence of necessity. There are particular rules of international law making allowance for varying degrees of necessity, but these cases have a meaning and a scope entirely outside the traditional doctrine of state of necessity. Thus, for instance, vessels in distress are allowed to seek refuge in a foreign port, even if it is closed … in the case of famine in a country, a foreign ship proceeding to another port may be detained and its cargo expropriated … In these cases—in which adequate compensation must be paid—it is not the doctrine of the state of necessity which provides the foundation of the particular rules, but humanitarian considerations, which do not apply to the State as a body politic but are designed to protect essential rights of human beings in a situation of distress. (*Manual of Public International Law*, ed. Soerensen, p. 543.)

The question therefore is to determine whether the circumstances of distress in a case of extreme urgency involving elementary humanitarian considerations affecting the acting organs of the State may exclude wrongfulness in this case.[1045] 147

The arbitral tribunal then examined France's behaviour in accordance with these legal considerations. It concluded that

the circumstances of distress, of extreme urgency and the humanitarian considerations invoked by France may have been circumstances excluding responsibility for the unilateral removal of Major Mafart [from the island of Hao] without obtaining New Zealand's consent [as provided for by the agreement between the Parties], but clearly these circumstances entirely fail to justify France's responsibility for the removal of Captain Prieur and from the breach of its obligations resulting from the failure to return the two officers to Hao (in the case of Major Mafart once the reasons for their removal had disappeared).[1046] 148

[A/62/62, para. 90]

[Permanent Court of Arbitration (under UNCITRAL Rules)

Venezuela US, S.R.L. v. *Bolivarian Republic of Venezuela*

The arbitral tribunal in *Venezuela US, S.R.L.* v. *Bolivarian Republic of Venezuela* referred to articles 12 and 20 to 25, noting that "[t]here is a breach only when the conduct of a State is not in conformity with what is required of it by an international obligation, provided that there are no circumstances precluding the wrongfulness".[1047] 82

[A/77/74, p. 17]]

[1045] 147 See footnote [40] 46 above.

[1046] 148 *Ibid*., p. 263, para. 99.

[1047] [82 See footnote [126] 14 above, para. 155.]

International arbitral tribunal (under the ICSID Convention)

(DS)2, S.A., Peter de Sutter and Kristof de Sutter v. *Republic of Madagascar*

In *(DS)2, S.A., Peter de Sutter and Kristof de Sutter* v. *Republic of Madagascar*, the arbitral tribunal quoted article 24, noting that, in a situation of distress, "the author of a wrongful act … 'has no other reasonable way … of saving the author's life or the lives of other persons entrusted to the author's care.' Again, as already indicated, it is not clear how inaction by law enforcement could have been the only way to save lives".[1048] [109]

[A/77/74, p. 21]

[1048] [109] [ICSID, Case No. ARB/17/18, Award, 17 April 2020], para. 349.

Article 25. Necessity

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

(*a*) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and

(*b*) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

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

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

Commentary

(1) The term "necessity" (*état de nécessité*) is used to denote those exceptional cases where the only way a State can safeguard an essential interest threatened by a grave and imminent peril is, for the time being, not to perform some other international obligation of lesser weight or urgency. Under conditions narrowly defined in article 25, such a plea is recognized as a circumstance precluding wrongfulness.

(2) The plea of necessity is exceptional in a number of respects. Unlike consent (art. 20), self-defence (art. 21) or countermeasures (art. 22), it is not dependent on the prior conduct of the injured State. Unlike *force majeure* (art. 23), it does not involve conduct which is involuntary or coerced. Unlike distress (art. 24), necessity consists not in danger to the lives of individuals in the charge of a State official but in a grave danger either to the essential interests of the State or of the international community as a whole. It arises where there is an irreconcilable conflict between an essential interest on the one hand and an obligation of the State invoking necessity on the other. These special features mean that necessity will only rarely be available to excuse non-performance of an obligation and that it is subject to strict limitations to safeguard against possible abuse.[1049]373

(3) There is substantial authority in support of the existence of necessity as a circumstance precluding wrongfulness. It has been invoked by States and has been dealt with by a number of international tribunals. In these cases the plea of necessity has been accepted in principle, or at least not rejected.

(4) In an Anglo-Portuguese dispute of 1832, the Portuguese Government argued that the pressing necessity of providing for the subsistence of certain contingents of troops engaged

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[1049] 373 Perhaps the classic case of such an abuse was the occupation of Luxembourg and Belgium by Germany in 1914, which Germany sought to justify on the ground of necessity. See, in particular, the note presented on 2 August 1914 by the German Minister in Brussels to the Belgian Minister for Foreign Affairs, in J. B. Scott, ed., *Diplomatic Documents relating to the Outbreak of the European War* (New York, Oxford University Press, 1916), part I, pp. 749–750, and the speech in the Reichstag by the German Chancellor von Bethmann-Hollweg, on 4 August 1914, containing the well-known words: *wir sind jetzt in der Notwehr; und Not kennt kein Gebot!* (we are in a state of self-defence and necessity knows no law), *Jahrbuch des Völkerrechts*, vol. III (1916), p. 728.

in quelling internal disturbances had justified its appropriation of property owned by British subjects, notwithstanding a treaty stipulation. The British Government was advised that:

> the Treaties between this Country and Portugal are [not] of so stubborn and unbending a nature, as to be incapable of modification under any circumstances whatever, or that their stipulations ought to be so strictly adhered to, as to deprive the Government of Portugal of the right of using those means, which may be absolutely and indispensably necessary to the safety, and even to the very existence of the State.
>
> The extent of the necessity, which will justify such an appropriation of the Property of British Subjects, must depend upon the circumstances of the particular case, but it must be imminent and urgent.[1050] 374

(5) The *"Caroline"* incident of 1837, though frequently referred to as an instance of self-defence, really involved the plea of necessity at a time when the law concerning the use of force had a quite different basis than it has at present. In that case, British armed forces entered United States territory and attacked and destroyed a vessel owned by United States citizens which was carrying recruits and military and other material to Canadian insurgents. In response to the protests by the United States, the British Minister in Washington, Fox, referred to the "necessity of self-defence and self-preservation"; the same point was made by counsel consulted by the British Government, who stated that "the conduct of the British Authorities" was justified because it was "absolutely necessary as a measure of precaution".[1051]375 Secretary of State Webster replied to Minister Fox 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 Peace", and observed that the British Government must prove that the action of its forces had really been caused by "a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation".[1052] 376 In his message to Congress of 7 December 1841, President Tyler reiterated that:

> This Government can never concede to any foreign Government the power, except in a case of the most urgent and extreme necessity, of invading its territory, either to arrest the persons or destroy the property of those who may have violated the municipal laws of such foreign Government."[1053] 377

The incident was not closed until 1842, with an exchange of letters in which the two Governments agreed that "a strong overpowering necessity may arise when this great principle may and must be suspended". "It must be so", added Lord Ashburton, the British Government's *ad hoc* envoy to Washington, "for the shortest possible period during the continuance of an admitted overruling necessity, and strictly confined within the narrowest limits imposed by that necessity."[1054] 378

[1050] 374 Lord McNair, ed., *International Law Opinions* (Cambridge University Press, 1956), vol. II, *Peace*, p. 232.

[1051] 375 See respectively W. R. Manning, ed., *Diplomatic Correspondence of the United States: Canadian Relations 1784–1860* (Washington, D. C., Carnegie Endowment for International Peace, 1943), vol. III, p. 422; and Lord McNair, ed., *International Law Opinions* (footnote [1050] 374 above), p. 221, at p. 228.

[1052] 376 *British and Foreign State Papers, 1840–1841* (London, Ridgway, 1857), vol. 29, p. 1129.

[1053] 377 *Ibid.*, 1841–1842, vol. 30, p. 194.

[1054] 378 *Ibid.*, p. 195. See Secretary of State Webster's reply on page 201.

(6) In the *Russian Fur Seals* controversy of 1893, the "essential interest" to be safeguarded against a "grave and imminent peril" was the natural environment in an area not subject to the jurisdiction of any State or to any international regulation. Facing the danger of extermination of a fur seal population by unrestricted hunting, the Russian Government issued a decree prohibiting sealing in an area of the high seas. In a letter to the British Ambassador dated 12 February (24 February) 1893, the Russian Minister for Foreign Affairs explained that the action had been taken because of the "absolute necessity of immediate provisional measures" in view of the imminence of the hunting season. He "emphasize[d] the essentially precautionary character of the above-mentioned measures, which were taken under the pressure of exceptional circumstances"[1055] [379] and declared his willingness to conclude an agreement with the British Government with a view to a longer-term settlement of the question of sealing in the area.

(7) In the *Russian Indemnity* case, the Government of the Ottoman Empire, to justify its delay in paying its debt to the Russian Government, invoked among other reasons the fact that it had been in an extremely difficult financial situation, which it described as *"force majeure"* but which was more like a state of necessity. The arbitral tribunal accepted the plea in principle:

> *The exception of force majeure*, invoked in the first place, is arguable in international public law, as well as in private law; international law must adapt itself to political exigencies. The Imperial Russian Government expressly admits … that the obligation for a State to execute treaties may be weakened "if the very existence of the State is endangered, if observation of the international duty is … *self-destructive*".[1056] [380]

It considered, however, that:

> It would be a manifest exaggeration to admit that the payment (or the contracting of a loan for the payment) of the relatively small sum of 6 million francs due to the Russian claimants would have imperilled the existence of the Ottoman Empire or seriously endangered its internal or external situation.[1057] [381]

In its view, compliance with an international obligation must be "self-destructive" for the wrongfulness of the conduct not in conformity with the obligation to be precluded.[1058] [382]

(8) In *Société commerciale de Belgique*,[1059] [383] the Greek Government owed money to a Belgian company under two arbitral awards. Belgium applied to PCIJ for a declaration that the Greek Government, in refusing to carry out the awards, was in breach of its inter-

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[1055] [379] *Ibid., 1893–1894* (London, H. M. Stationery Office, 1899), vol. 86, p. 220; and the study prepared by the Secretariat (footnote [1005] 345 above), para. 155.

[1056] [380] See footnote [1014] 354 above; see also the study prepared by the Secretariat (footnote [1005] 345 above), para. 394.

[1057] [381] *Ibid.*

[1058] [382] A case in which the parties to the dispute agreed that very serious financial difficulties could justify a different mode of discharging the obligation other than that originally provided for arose in connection with the enforcement of the arbitral award in *Forests of Central Rhodopia*, UNRIAA, vol. III (Sales No. 1949.V.2), p. 1405 (1933); see League of Nations, *Official Journal*, 15th Year, No. 11 (part I) (November 1934), p. 1432.

[1059] [383] *Société commerciale de Belgique, Judgment, 1939, P.C.I.J., Series A/B, No. 78,* p. 160.

national obligations. The Greek Government pleaded the country's serious budgetary and monetary situation.[1060] [384] The Court noted that it was not within its mandate to declare whether the Greek Government was justified in not executing the arbitral awards. However, the Court implicitly accepted the basic principle, on which the two parties were in agreement.[1061] [385]

(9) In March 1967 the Liberian oil tanker *Torrey Canyon* went aground on submerged rocks off the coast of Cornwall outside British territorial waters, spilling large amounts of oil which threatened the English coastline. After various remedial attempts had failed, the British Government decided to bomb the ship to burn the remaining oil. This operation was carried out successfully. The British Government did not advance any legal justification for its conduct, but stressed the existence of a situation of extreme danger and claimed that the decision to bomb the ship had been taken only after all other means had failed.[1062] [386] No international protest resulted. A convention was subsequently concluded to cover future cases where intervention might prove necessary to avert serious oil pollution.[1063] [387]

(10) In the *"Rainbow Warrior"* arbitration, the arbitral tribunal expressed doubt as to the existence of the excuse of necessity. It noted that the Commission's draft article "allegedly authorizes a State to take unlawful action invoking a state of necessity" and described the Commission's proposal as "controversial".[1064] [388]

(11) By contrast, in the *Gabčíkovo-Nagymaros Project* case, ICJ carefully considered an argument based on the Commission's draft article (now article 25), expressly accepting the principle while at the same time rejecting its invocation in the circumstances of that case. As to the principle itself, the Court noted that the parties had both relied on the Commission's draft article as an appropriate formulation, and continued:

> The Court considers … that the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation. It observes moreover that such ground for precluding wrongfulness can only be accepted on an exceptional basis. The International Law Commission was of the same opinion when it explained that it had opted for a negative form of words …

[1060] [384] *P.C.I.J., Series C, No. 87*, pp. 141 and 190; study prepared by the Secretariat (footnote [1005] 345 above), para. 278. See generally paragraphs 276–287 for the Greek arguments relative to the state of necessity.

[1061] [385] See footnote [1059] 383 above; and the study prepared by the Secretariat (footnote [1005] 345 above), para. 288. See also the *Serbian Loans* case, where the positions of the parties and the Court on the point were very similar (footnote [1015] 355 above); the *French Company of Venezuelan Railroads* case (footnote [692] 178 above) p. 353; and the study prepared by the Secretariat (footnote [1005] 345 above), paras. 263–268 and 385–386. In his separate opinion in the *Oscar Chinn* case, Judge Anzilotti accepted the principle that "necessity may excuse the non-observance of international obligations", but denied its applicability on the facts (*Judgment, 1934, P.C.I.J., Series A/B, No. 63*, p. 65, at pp. 112–114).

[1062] [386] *The "Torrey Canyon"*, Cmnd. 3246 (London, H. M. Stationery Office, 1967).

[1063] [387] International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties.

[1064] [388] *"Rainbow Warrior"* (footnote [40] 46 above), p. 254. In *Libyan Arab Foreign Investment Company and The Republic of Burundi* (footnote [1018] 358 above), p. 319, the tribunal declined to comment on the appropriateness of codifying the doctrine of necessity, noting that the measures taken by Burundi did not appear to have been the only means of safeguarding an essential interest "against a grave and imminent peril".

Thus, according to the Commission, the state of necessity can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met.

… In the present case, the following basic conditions … are relevant: it must have been occasioned by an "essential interest" of the State which is the author of the act conflicting with one of its international obligations; that interest must have been threatened by a "grave and imminent peril"; the act being challenged must have been the "only means" of safeguarding that interest; that act must not have "seriously impair[ed] an essential interest" of the State towards which the obligation existed; and the State which is the author of that act must not have "contributed to the occurrence of the state of necessity". Those conditions reflect customary international law. [1065] 389

(12) The plea of necessity was apparently an issue in the *Fisheries Jurisdiction* case.[1066] 390 Regulatory measures taken to conserve straddling stocks had been taken by the Northwest Atlantic Fisheries Organization (NAFO) but had, in Canada's opinion, proved ineffective for various reasons. By the Coastal Fisheries Protection Act 1994, Canada declared that the straddling stocks of the Grand Banks were "threatened with extinction", and asserted that the purpose of the Act and regulations was "to enable Canada to take urgent action necessary to prevent further destruction of those stocks and to permit their rebuilding". Canadian officials subsequently boarded and seized a Spanish fishing ship, the *Estai*, on the high seas, leading to a conflict with the European Union and with Spain. The Spanish Government denied that the arrest could be justified by concerns as to conservation "since it violates the established provisions of the NAFO Convention [Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries] to which Canada is a party".[1067] 391 Canada disagreed, asserting that "the arrest of the *Estai* was necessary in order to put a stop to the overfishing of Greenland halibut by Spanish fishermen".[1068] 392 The Court held that it had no jurisdiction over the case.[1069] 393

(13) The existence and limits of a plea of necessity have given rise to a long-standing controversy among writers. It was for the most part explicitly accepted by the early writers,

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[1065] 389 *Gabčíkovo-Nagymaros Project* (footnote [31] 37 above), pp. 40–41, paras. 51–52.

[1066] 390 *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 432.

[1067] 391 *Ibid*., p. 443, para. 20. For the European Community protest of 10 March 1995, asserting that the arrest "cannot be justified by any means", see Memorial of Spain (Jurisdiction of the Court), *I.C.J. Pleadings, Fisheries Jurisdiction (Spain* v. *Canada)*, p. 17, at p. 38, para. 15.

[1068] 392 *Fisheries Jurisdiction* (footnote [1066] 390 above), p. 443, para. 20. See also the Canadian Counter-Memorial (29 February 1996), *I.C.J. Pleadings* (footnote [1067] 391 above), paras. 17–45.

[1069] 393 By an Agreed Minute between Canada and the European Community, Canada undertook to repeal the regulations applying the 1994 Act to Spanish and Portuguese vessels in the NAFO area and to release the *Estai*. The parties expressly maintained "their respective positions on the conformity of the amendment of 25 May 1994 to Canada's Coastal Fisheries Protection Act, and subsequent regulations, with customary international law and the NAFO Convention" and reserved "their ability to preserve and defend their rights in conformity with international law". See Canada-European Community: Agreed Minute on the Conservation and Management of Fish Stocks (Brussels, 20 April 1995), ILM, vol. 34, No. 5 (September 1995), p. 1260. See also the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.

subject to strict conditions.[1070] [394] In the nineteenth century, abuses of necessity associated with the idea of "fundamental rights of States" led to a reaction against the doctrine. During the twentieth century, the number of writers opposed to the concept of state of necessity in international law increased, but the balance of doctrine has continued to favour the existence of the plea.[1071] [395]

(14) On balance, State practice and judicial decisions support the view that necessity may constitute a circumstance precluding wrongfulness under certain very limited conditions, and this view is embodied in article 25. The cases show that necessity has been invoked to preclude the wrongfulness of acts contrary to a broad range of obligations, whether customary or conventional in origin.[1072] [396] It has been invoked to protect a wide variety of interests, including safeguarding the environment, preserving the very existence of the State and its people in time of public emergency, or ensuring the safety of a civilian population. But stringent conditions are imposed before any such plea is allowed. This is reflected in article 25. In particular, to emphasize the exceptional nature of necessity and concerns about its possible abuse, article 25 is cast in negative language ("Necessity may not be invoked … unless").[1073] [397] In this respect it mirrors the language of article 62 of the 1969 Vienna Convention dealing with fundamental change of circumstances. It also mirrors that language in establishing, in paragraph 1, two conditions without which necessity may not be invoked and excluding, in paragraph 2, two situations entirely from the scope of the excuse of necessity.[1074] [398]

(15) The first condition, set out in paragraph 1 (*a*), is that necessity may only be invoked to safeguard an essential interest from a grave and imminent peril. The extent to which a given interest is "essential" depends on all the circumstances, and cannot be prejudged. It extends to particular interests of the State and its people, as well as of the international community as a whole. Whatever the interest may be, however, it is only when it is threatened by a grave and imminent peril that this condition is satisfied. The peril has to be objectively established and not merely apprehended as possible. In addition to being grave,

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[1070] [394] See B. Ayala, *De jure et officiis bellicis et disciplina militari, libri tres* (1582) (Washington, D. C., Carnegie Institution, 1912), vol. II, p. 135; A. Gentili, *De iure belli, libri tres* (1612) (Oxford, Clarendon Press, 1933), vol. II, p. 351; H. Grotius, *De jure belli ac pacis, libri tres* (1646) (Oxford, Clarendon Press, 1925), vol. II, pp. 193 *et seq.*; S. Pufendorf, *De jure naturae et gentium, libri octo* (1688) (Oxford, Clarendon Press, 1934), vol. II, pp. 295–296; C. Wolff, *Jus gentium methodo scientifica pertractatum* (1764) (Oxford, Clarendon Press, 1934), pp. 173–174; and E. de Vattel, *The Law of Nations or the Principles of Natural Law* (1758) (Washington, D. C., Carnegie Institution, 1916), vol. III, p. 149.

[1071] [395] For a review of the earlier doctrine, see *Yearbook … 1980*, vol. II (Part Two), pp. 47–49; see also P. A. Pillitu, *Lo stato di necessità nel diritto internazionale* (University of Perugia/Editrice Licosa, 1981); J. Barboza, "Necessity (revisited) in international law", *Essays in International Law in Honour of Judge Manfred Lachs*, J. Makarczyk, ed. (The Hague, Martinus Nijhoff, 1984), p. 27; and R. Boed, "State of necessity as a justification for internationally wrongful conduct", *Yale Human Rights and Development Law Journal*, vol. 3 (2000), p. 1.

[1072] [396] Generally on the irrelevance of the source of the obligation breached, see article 12 and commentary.

[1073] [397] This negative formulation was referred to by ICJ in the *Gabčíkovo-Nagymaros Project* case (footnote [31] 37 above), p. 40, para. 51.

[1074] [398] A further exclusion, common to all the circumstances precluding wrongfulness, concerns peremptory norms (see article 26 and commentary).

the peril has to be imminent in the sense of proximate. However, as the Court in the *Gabčíkovo-Nagymaros Project* case said:

> That does not exclude … that a "peril" appearing in the long term might be held to be "imminent" as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable.[1075] 399

Moreover, the course of action taken must be the "only way" available to safeguard that interest. The plea is excluded if there are other (otherwise lawful) means available, even if they may be more costly or less convenient. Thus, in the *Gabčíkovo-Nagymaros Project* case, the Court was not convinced that the unilateral suspension and abandonment of the Project was the only course open in the circumstances, having regard in particular to the amount of work already done and the money expended on it, and the possibility of remedying any problems by other means.[1076] 400 The word "ways" in paragraph 1 (*a*) is not limited to unilateral action but may also comprise other forms of conduct available through cooperative action with other States or through international organizations (for example, conservation measures for a fishery taken through the competent regional fisheries agency). Moreover, the requirement of necessity is inherent in the plea: any conduct going beyond what is strictly necessary for the purpose will not be covered.

(16) It is not sufficient for the purposes of paragraph 1 (*a*) that the peril is merely apprehended or contingent. It is true that in questions relating, for example, to conservation and the environment or to the safety of large structures, there will often be issues of scientific uncertainty and different views may be taken by informed experts on whether there is a peril, how grave or imminent it is and whether the means proposed are the only ones available in the circumstances. By definition, in cases of necessity the peril will not yet have occurred. In the *Gabčíkovo-Nagymaros Project* case the Court noted that the invoking State could not be the sole judge of the necessity,[1077] 401 but a measure of uncertainty about the future does not necessarily disqualify a State from invoking necessity, if the peril is clearly established on the basis of the evidence reasonably available at the time.

(17) The second condition for invoking necessity, set out in paragraph 1 (*b*), is that the conduct in question must not seriously impair an essential interest of the other State or States concerned, or of the international community as a whole (see paragraph (18) below). In other words, the interest relied on must outweigh all other considerations, not merely from the point of view of the acting State but on a reasonable assessment of the competing interests, whether these are individual or collective.[1078] 402

(18) As a matter of terminology, it is sufficient to use the phrase "international community as a whole" rather than "international community of States as a whole", which is used in the specific context of article 53 of the 1969 Vienna Convention. The insertion of the words "of States" in article 53 of the Convention was intended to stress the paramountcy that States have over the making of international law, including especially the establishment of

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[1075] 399 *Gabčíkovo-Nagymaros Project* (footnote [31] 37 above), p. 42, para. 54.

[1076] 400 *Ibid.*, pp. 42–43, para. 55.

[1077] 401 *Ibid.*, p. 40, para. 51.

[1078] 402 In the *Gabčíkovo-Nagymaros Project* case ICJ affirmed the need to take into account any countervailing interest of the other State concerned (footnote [31] 37 above), p. 46, para. 58.

norms of a peremptory character. On the other hand, ICJ used the phrase "international community as a whole" in the *Barcelona Traction* case,[1079] [403] and it is frequently used in treaties and other international instruments in the same sense as in paragraph 1(*b*).[1080] [404]

(19) Over and above the conditions in paragraph 1, paragraph 2 lays down two general limits to any invocation of necessity. This is made clear by the use of the words "in any case". Paragraph 2 (*a*) concerns cases where the international obligation in question explicitly or implicitly excludes reliance on necessity. Thus, certain humanitarian conventions applicable to armed conflict expressly exclude reliance on military necessity. Others while not explicitly excluding necessity are intended to apply in abnormal situations of peril for the responsible State and plainly engage its essential interests. In such a case the non-availability of the plea of necessity emerges clearly from the object and the purpose of the rule.

(20) According to paragraph 2 (*b*), necessity may not be relied on if the responsible State has contributed to the situation of necessity. Thus in the *Gabčíkovo-Nagymaros Project* case, ICJ considered that because Hungary had "helped, by act or omission to bring about" the situation of alleged necessity, it could not then rely on that situation as a circumstance precluding wrongfulness.[1081] [405] For a plea of necessity to be precluded under paragraph 2 (*b*), the contribution to the situation of necessity must be sufficiently substantial and not merely incidental or peripheral. Paragraph 2 (*b*) is phrased in more categorical terms than articles 23, paragraph 2 (*a*), and 24, paragraph 2 (*a*), because necessity needs to be more narrowly confined.

(21) As embodied in article 25, the plea of necessity is not intended to cover conduct which is in principle regulated by the primary obligations. This has a particular importance in relation to the rules relating to the use of force in international relations and to the question of "military necessity". It is true that in a few cases, the plea of necessity has been invoked to excuse military action abroad, in particular in the context of claims to humanitarian intervention.[1082] [406] The question whether measures of forcible humanitarian intervention, not sanctioned pursuant to Chapters VII or VIII of the Charter of the United Nations, may be lawful under modern international law is not covered by article 25.[1083] [407]

[1079] [403] *Barcelona Traction* (footnote [46] 52 above), p. 32, para. 33.

[1080] [404] See, *e.g.*, third preambular paragraph of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; fourth preambular paragraph of the International Convention Against the Taking of Hostages,; fifth preambular paragraph of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; third preambular paragraph of the Convention on the Safety of United Nations and Associated Personnel; tenth preambular paragraph of the International Convention for the Suppression of Terrorist Bombings; ninth preambular paragraph of the Rome Statute of the International Criminal Court; and ninth preambular paragraph of the International Convention for the Suppression of the Financing of Terrorism.

[1081] [405] *Gabčíkovo-Nagymaros Project* (footnote [31] 37 above), p. 46, para. 57.

[1082] [406] For example, in 1960 Belgium invoked necessity to justify its military intervention in the Congo. The matter was discussed in the Security Council but not in terms of the plea of necessity as such. See *Official Records of the Security Council, Fifteenth Year,* 873rd meeting, 13–14 July 1960, paras. 144, 182 and 192; 877th meeting, 20–21 July 1960, paras. 31 *et seq.* and para. 142; 878th meeting, 21 July 1960, paras. 23 and 65; 879th meeting, 21–22 July 1960, paras. 80 *et seq.* and paras. 118 and 151. For the *"Caroline"* incident, see above, paragraph (5).

[1083] [407] See also article 26 and commentary for the general exclusion of the scope of circumstances precluding wrongfulness of conduct in breach of a peremptory norm.

The same thing is true of the doctrine of "military necessity" which is, in the first place, the underlying criterion for a series of substantive rules of the law of war and neutrality, as well as being included in terms in a number of treaty provisions in the field of international humanitarian law.[1084] [408] In both respects, while considerations akin to those underlying article 25 may have a role, they are taken into account in the context of the formulation and interpretation of the primary obligations.[1085] [409]

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

International arbitral tribunal

Libyan Arab Foreign Investment Company (LAFICO) and the Republic of Burundi

In its 1991 award, the arbitral tribunal established to hear the *LAFICO-Burundi* case stated that the defence by Burundi according to which it was objectively impossible for the shareholder LAFICO to continue to participate in the management of the Libyan Arab Republic-Burundi Holding Company (HALB)[1086] [149] was to be appraised in light of "certain circumstances precluding wrongfulness which the International Law Commission has sought to codify in its draft articles on State responsibility".[1087] [150] The tribunal, after excluding the exception of *force majeure*, then considered "whether it [was] possible to apply the notion of 'state of necessity' elaborated in article 33 of the draft articles", as provisionally adopted by the International Law Commission. After having quoted in extenso the said provision, the tribunal stated:

> It is not desired here to express a view on the appropriateness of seeking to codify rules on "state of necessity" and the adequacy of the concrete proposals made by the International Law Commission, which has been a matter of debate in the doctrine.[1088] [151]

[1084] [408] See, *e.g.*, article 23 (*g*) of the Regulations respecting the Laws and Customs of War on Land (annexed to the Hague Conventions II of 1899 and IV of 1907), which prohibits the destruction of enemy property "unless such destruction or seizure be imperatively demanded by the necessities of war". Similarly, article 54, paragraph 5, of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), appears to permit attacks on objects indispensable to the survival of the civilian population if "imperative military necessity" so requires.

[1085] [409] See, *e.g.*, M. Huber, "Die Kriegsrechtlichen Verträge und die Kriegsraison", *Zeitschrift für Völkerrecht*, vol. VII (1913), p. 351; D. Anzilotti, *Corso di diritto internazionale* (Rome, Athenaeum, 1915), vol. III, p. 207; C. De Visscher, "Les lois de la guerre et la théorie de la nécessité", RGDIP, vol. 24 (1917), p. 74; N. C. H. Dunbar, "Military necessity in war crimes trials", BYBIL, *1952*, vol. 29, p. 442; C. Greenwood, "Historical development and legal basis", *The Handbook of Humanitarian Law in Armed Conflicts*, D. Fleck, ed. (Oxford University Press, 1995), p. 1, at pp. 30–33; and Y. Dinstein, "Military necessity", *Encyclopedia of Public International Law*, R. Bernhardt, ed. (Amsterdam, Elsevier, 1997), vol. 3, pp. 395–397.

[1086] [149] See footnote [1023] 142 above.

[1087] [150] See footnote [824] 127 above, para. 55.

[1088] [151] *Ibid.*, p. 319, para. 56.

The tribunal found that "the various measures taken by [Burundi] against the rights of the shareholder LAFICO [did] not appear to the Tribunal to have been the only means of safeguarding an essential interest of Burundi against a grave and imminent peril".[1089] [152]

[A/62/62, para. 91]

International Court of Justice

Gabčíkovo-Nagymaros Project (Hungary/Slovakia)

In its 1997 judgment in the *Gabčíkovo-Nagymaros Project* case, the Court examined "the question of whether there was, in 1989, a state of necessity which would have permitted Hungary, without incurring international responsibility, to suspend and abandon works that it was committed to perform in accordance with the 1977 Treaty and related instruments".[1090] [153] In this respect, relying on draft article 33 (State of necessity) as adopted by the International Law Commission on first reading, which it quoted, it considered that "the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation":

50. In the present case, the Parties are in agreement in considering that the existence of a state of necessity must be evaluated in the light of the criteria laid down by the International Law Commission in article 33 of the draft articles on the international responsibility of States that it adopted on first reading. That provision is worded as follows:

> Article 33. State of necessity
>
> 1. A state of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that State not in conformity with an international obligation of the State unless:
>
> (*a*) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and
>
> (*b*) the act did not seriously impair an essential interest of the State towards which the obligation existed.
>
> 2. In any case, a state of necessity may not be invoked by a State as a ground for precluding wrongfulness:
>
> (*a*) if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law; or
>
> (*b*) if the international obligation with which the act of the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation; or
>
> (*c*) if the State in question has contributed to the occurrence of the state of necessity. (*Yearbook of the International Law Commission, 1980*, vol. II, Part Two, p. 34.)

[1089] [152] *Ibid.*

[1090] [153] ICJ, Judgment, *I.C.J. Reports 1997*, p. 39, para. 49.

In its Commentary, the Commission defined the 'state of necessity' as being

> 'the situation of a State whose sole means of safeguarding an essential interest threatened by a grave and imminent peril is to adopt conduct not in conformity with what is required of it by an international obligation to another State' (*ibid*., para. 1).

It concluded that 'the notion of state of necessity is … deeply rooted in general legal thinking' (*ibid*., p. 49, para. 31).

51. The Court considers, first of all, that the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation. It observes moreover that such ground for precluding wrongfulness can only be accepted on an exceptional basis. The International Law Commission was of the same opinion when it explained that it had opted for a negative form of words in article 33 of its draft

> 'in order to show, by this formal means also, that the case of invocation of a state of necessity as a justification must be considered as really constituting an exception—and one even more rarely admissible than is the case with the other circumstances precluding wrongfulness … ' (*ibid*., p. 51, para. 40).

Thus, according to the Commission, the state of necessity can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met.[1091] [154]

The Court later referred to the commentary by the International Law Commission when examining the meaning given to some terms used in the said draft provision. With regard to the expression "essential interest", the Court noted:

The Commission, in its Commentary, indicated that one should not, in that context, reduce an 'essential interest' to a matter only of the 'existence' of the State, and that the whole question was, ultimately, to be judged in the light of the particular case (see *Yearbook of the International Law Commission*, *1980*, vol. II, Part Two, p. 49, para. 32); at the same time, it included among the situations that could occasion a state of necessity, 'a grave danger to … the ecological preservation of all or some of [the] territory [of a State]' (*ibid*., p. 35, para. 3); and specified, with reference to State practice, that 'It is primarily in the last two decades that safeguarding the ecological balance has come to be considered an "essential interest" of all States.' (*ibid*., p. 39, para. 14).[1092] [155]

With regard to the terms "grave and imminent peril", the Court stated that:

As the International Law Commission emphasized in its commentary, the 'extremely grave and imminent' peril must 'have been a threat to the interest at the actual time' (*Yearbook of the International Law Commission*, *1980*, vol. II, Part Two, p. 49, para. 33). That does not exclude, in the view of the Court, that a 'peril' appearing in the long term might be held to be 'imminent' as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable.[1093] [156]

In its conclusion on the issue of the existence of a "state of necessity", the Court referred again to the commentary of the International Law Commission:

[1091] [154] *Ibid*., pp. 39–40, paras. 50–51.

[1092] [155] *Ibid*., p. 41, para. 53.

[1093] [156] *Ibid*., p. 42, para. 54.

The Court concludes from the foregoing that, with respect to both Nagymaros and Gabcíkovo, the perils invoked by Hungary, without prejudging their possible gravity, were not sufficiently established in 1989, nor were they 'imminent'; and that Hungary had available to it at that time means of responding to these perceived perils other than the suspension and abandonment of works with which it had been entrusted. What is more, negotiations were under way which might have led to a review of the Project and the extension of some of its time-limits, without there being need to abandon it. The Court infers from this that the respect by Hungary, in 1989, of its obligations under the terms of the 1977 Treaty would not have resulted in a situation 'characterized so aptly by the maxim *summum jus summa injuria*' (*Yearbook of the International Law Commission*, *1980*, vol. II, Part Two, p. 49, para. 31).[1094] 157

[A/62/62, para. 92]

International Tribunal for the Law of the Sea

The M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines v. *Guinea)*

In its 1999 judgment in the *M/V "SAIGA" (No. 2)* case, the Tribunal referred to draft article 33 adopted by the International Law Commission on first reading, as well as to the earlier judgment of the International Court of Justice in the *Gabčíkovo-Nagymaros Project* case,[1095] 158 to identify the conditions for the defence based on the "state of necessity" under customary international law. In the context of its examination of the issue whether the otherwise wrongful application by Guinea of its customs laws to the exclusive economic zone could be justified under general international law by Guinea's appeal to "state of necessity",[1096] 159 the Tribunal stated the following:

133. In the Case Concerning the *Gabčíkovo-Nagymaros Project (Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, pp. 40 and 41, paras. 51 and 52), the International Court of Justice noted with approval two conditions for the defence based on 'state of necessity' which in general international law justifies an otherwise wrongful act. These conditions, as set out in article 33, paragraph 1, of the International Law Commission's draft articles on State responsibility, are:

(*a*) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and

(*b*) the act did not seriously impair an essential interest of the State towards which the obligation existed.

134. In endorsing these conditions, the Court stated that they 'must be cumulatively satisfied' and that they 'reflect customary international law'.[1097] 160

[A/62/62, para. 93]

International Court of Justice

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory

In its 2004 advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court reaffirmed its earlier finding in the

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[1094] 157 *Ibid.*, p. 45, para. 57.

[1095] 158 See above [pp. 278–280].

[1096] 159 ITLOS, Judgment, *ITLOS Reports*, p. 65, para. 170 (1999), para. 132.

[1097] 160 *Ibid.*, paras. 133–134.

Gabčíkovo-Nagymaros Project case on the state of necessity (see [pages 278–280] above), by reference to article 25 finally adopted by the International Law Commission in 2001:

The Court has … considered whether Israel could rely on a state of necessity which would preclude the wrongfulness of the construction of the wall. In this regard the Court is bound to note that some of the conventions at issue in the present instance [*i.e.* conventions on international humanitarian law and human rights law] 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. However, the Court will not need to consider that question. As the Court observed in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, "the state of necessity is a ground recognized by customary international law" that "can only be accepted on an exceptional basis"; it "can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met" (*I.C.J. Reports 1997*, p. 40, para. 51). One of those conditions was stated by the Court in terms used by the International Law Commission, in a text which in its present form requires that the act being challenged be "the only way for the State to safeguard an essential interest against a grave and imminent peril" (article 25 of the International Law Commission's articles on responsibility of States for internationally wrongful acts; see also former article 33 of the draft articles on the international responsibility of States, with slightly different wording in the English text). In the light of the material before it, the Court is not convinced that the construction of the wall along the route chosen was the only means to safeguard the interests of Israel against the peril which it has invoked as justification for that construction.[1098] 161

[A/62/62, para. 94]

International arbitral tribunal (under the ICSID Convention)

CMS Gas Transmission Company v. *Argentine Republic*

In its 2005 award, the arbitral tribunal constituted to hear the *CMS Gas Transmission Company* v. *Argentina* case[1099] 162 examined the respondent's subsidiary argument according to which Argentina should be exempted from liability for its alleged breach of the 1991 bilateral investment treaty between the United States of America and the Argentine Republic in light of the existence of a state of necessity or state of emergency due to the severe economic, social and political crisis in the country as of 2000. Argentina having based its argument on article 25 finally adopted by the International Law Commission in 2001 and the pronouncement of the International Court of Justice in the *Gabčíkovo-Nagymaros Project* case (see [pages 278–280] above), the tribunal noted in particular that the said provision "adequately reflect[ed] the state of customary international law on the question of necessity":

315. The Tribunal, like the parties themselves, considers that article 25 of the articles on State responsibility adequately reflects the state of customary international law on the question of necessity. This article, in turn, is based on a number of relevant historical cases discussed in the Commentary, with particular reference to the *Caroline*, the *Russian Indemnity, Société Commerciale de Belgique*, the *Torrey Canyon* and the *Gabcíkovo-Nagymaros* cases.

[1098] 161 ICJ, Advisory Opinion, 9 July 2004, p. 136, para. 140.

[1099] 162 It should be noted that, on 8 September 2005, Argentina filed an application requesting the annulment of this award on the grounds that the tribunal had allegedly manifestly exceeded its powers and that the award had allegedly failed to state the reasons on which it is based. […]

316. Article 25 reads as follows:

…

317. While the existence of necessity as a ground for precluding wrongfulness under international law is no longer disputed, there is also consensus to the effect that this ground is an exceptional one and has to be addressed in a prudent manner to avoid abuse. The very opening of the article to the effect that necessity 'may not be invoked' unless strict conditions are met, is indicative of this restrictive approach of international law. Case law, state practice and scholarly writings amply support this restrictive approach to the operation of necessity. The reason is not difficult to understand. If strict and demanding conditions are not required or are loosely applied, any State could invoke necessity to elude its international obligations. This would certainly be contrary to the stability and predictability of the law.

318. The Tribunal must now undertake the very difficult task of finding whether the Argentine crisis meets the requirements of article 25, a task not rendered easier by the wide variety of views expressed on the matter and their heavy politicization. Again here the Tribunal is not called upon to pass judgement on the measures adopted in that connection but simply to establish whether the breach of the Treaty provisions discussed is devoid of legal consequences by the preclusion of wrongfulness.

…

324. The International Law Commission's comment to the effect that the plea of necessity is 'excluded if there are other (otherwise lawful) means available, even if they may be more costly or less convenient,' is persuasive in assisting this Tribunal in concluding that the measures adopted were not the only steps available.

325. A different condition for the admission of necessity relates to the requirement that the measures adopted do not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole. As the specific obligations towards another State are embodied in the Treaty, this question will be examined in the context of the applicable treaty provisions. It does not appear, however, that the essential interest of the international community as a whole was affected in any relevant way, nor that a peremptory norm of international law might have been compromised, a situation governed by article 26 of the articles.

326. In addition to the basic conditions set out under paragraph 1 of article 25, there are two other limits to the operation of necessity arising from paragraph 2. As noted in the commentary, the use of the expression 'in any case' in the opening of the text means that each of these limits must be considered over and above the conditions of paragraph 1.

327. The first such limit arises when the international obligation excludes necessity, a matter which again will be considered in the context of the Treaty.

328. The second limit is the requirement for the State not to have contributed to the situation of necessity. The commentary clarifies that this contribution must be 'sufficiently substantial and not merely incidental or peripheral'. In spite of the view of the parties claiming that all factors contributing to the crisis were either endogenous or exogenous, the Tribunal is again persuaded that similar to what is the case in most crises of this kind the roots extend both ways and include a number of domestic as well as international dimensions. This is the unavoidable consequence of the operation of a global economy where domestic and international factors interact.

329. The issue, however, is whether the contribution to the crisis by Argentina has or has not been sufficiently substantial. The Tribunal, when reviewing the circumstances of the present dispute, must conclude that this was the case. The crisis was not of the making of one particular administra-

tion and found its roots in the earlier crisis of the 1980s and evolving governmental policies of the 1990s that reached a zenith in 2002 and thereafter. Therefore, the Tribunal observes that government policies and their shortcomings significantly contributed to the crisis and the emergency and while exogenous factors did fuel additional difficulties they do not exempt the Respondent from its responsibility in the matter.

330. There is yet another important element which the Tribunal must take into account. The International Court of Justice has in the *Gabcíkovo-Nagymaros* case convincingly referred to the International Law Commission's view that all the conditions governing necessity must be 'cumulatively' satisfied.

331. In the present case there are, as concluded, elements of necessity partially present here and there but when the various elements, conditions and limits are examined as a whole it cannot be concluded that all such elements meet the cumulative test. This in itself leads to the inevitable conclusion that the requirements of necessity under customary international law have not been fully met so as to preclude the wrongfulness of the acts."[1100] 163

The tribunal then turned to the discussion on necessity and emergency under article XI of the bilateral treaty[1101] 164 and noted *inter alia* in this context that the consequences stemming from Argentina's economic crisis "while not excusing liability or precluding wrongfulness from the legal point of view … ought nevertheless to be considered by the Tribunal when determining compensation".[1102] 165

[A/62/62, para. 95]

LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. *Argentine Republic*

In its 2006 decision on liability, the arbitral tribunal constituted to hear the *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc.* v. *Argentina* found that Argentina was excused, under article XI of the 1991 bilateral investment treaty between the United States of America and the Argentine Republic, from liability for any breaches of that treaty between 1 December 2001 and 26 April 2003, given that it was under a state of necessity. The tribunal then underlined that its conclusion was supported by "the state of necessity standard as it exists in international law (reflected in article 25 of the International Law Commission's draft articles on State responsibility)" and gave a lengthy commentary on the conditions thereon:

245. … The concept of excusing a State for the responsibility for violation of its international obligations during what is called a 'state of necessity' or 'state of emergency' also exists in international law. While the Tribunal considers that the protections afforded by article XI have been triggered in this case, and are sufficient to excuse Argentina's liability, the Tribunal recognizes that satisfaction of the state of necessity standard as it exists in international law (reflected in article 25 of the International Law Commission's draft articles on State responsibility) supports the Tribunal's conclusion.

246. In international law, a state of necessity is marked by certain characteristics that must be present in order for a State to invoke this defense. As articulated by Roberto Ago, one of the mentors of the draft articles on State responsibility, a state of necessity is identified by those conditions in which

[1100] 163 ICSID, Case No. ARB/01/8, Award, 12 May 2005, paras. 315–331 (footnotes omitted).

[1101] 164 The said provision read as follows: "This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests."

[1102] 165 See footnote [1100] 163 above, para. 356.

a State is threatened by a serious danger to its existence, to its political or economic survival, to the possibility of maintaining its essential services in operation, to the preservation of its internal peace, or to the survival of part of its territory. In other words, the State must be dealing with interests that are essential or particularly important.

247. The United Nations Organization has understood that the invocation of a state of necessity depends on the concurrent existence of three circumstances, namely: a danger to the survival of the State, and not for its interests, is necessary; that danger must not have been created by the acting State; finally, the danger should be serious and imminent, so that there are no other means of avoiding it.

248. The concept of state of necessity and the requirements for its admissibility lead to the idea of prevention: the State covers itself against the risk of suffering certain damages. Hence, the possibility of alleging the state of necessity is closely bound by the requirement that there should be a serious and imminent threat and no means to avoid it. Such circumstances, in principle, have been left to the State's subjective appreciation, a conclusion accepted by the International Law Commission. Nevertheless, the Commission was well aware of the fact that this exception, requiring admissibility, has been frequently abused by States, thus opening up a very easy opportunity to violate the international law with impunity. The Commission has set in its draft articles on State responsibility very restrictive conditions to account for its admissibility, reducing such subjectivity.

…

250. Taking each element in turn, article 25 requires first that the act must be the only means available to the State in order to protect an interest …

251. The interest subject to protection also must be essential for the State. What qualifies as an 'essential' interest is not limited to those interests referring to the State's existence. As evidence demonstrates, economic, financial or those interests related to the protection of the State against any danger seriously compromising its internal or external situation, are also considered essential interests …

…

253. The interest must be threatened by a serious and imminent danger …

254. The action taken by the State may not seriously impair another State's interest. In this respect, the Commission has observed that the interest sacrificed for the sake of necessity must be, evidently, less important than the interest sought to be preserved through the action. The idea is to prevent against the possibility of invoking the state of necessity only for the safeguard of a non-essential interest.

255. The international obligation at issue must allow invocation of the state of necessity. The inclusion of an article authorizing the state of necessity in a bilateral investment treaty constitutes the acceptance, in the relations between States, of the possibility that one of them may invoke the state of necessity.

…

258. While this analysis concerning article 25 of the draft articles on State responsibility alone does not establish Argentina's defence, it supports the Tribunal's analysis with regard to the meaning of article XI's requirement that the measures implemented by Argentina had to have been necessary either for the maintenance of public order or the protection of its own essential security interests.

259. Having found that the requirements for invoking the state of necessity were satisfied, the Tribunal considers that it is the factor excluding the State from its liability *vis-à-vis* the damage caused as a result of the measures adopted by Argentina in response to the severe crisis suffered by the country.

…

261. Following this interpretation the Tribunal considers that article XI establishes the state of necessity as a ground for exclusion from wrongfulness of an act of the State, and therefore, the State is exempted from liability. This exception is appropriate only in emergency situations; and once the situation has been overcome, *i.e.* certain degree of stability has been recovered; the State is no longer exempted from responsibility for any violation of its obligations under the international law and shall reassume them immediately."[1103] [166]

[A/62/62, para. 96]

Sempra Energy International v. *Argentine Republic*

The arbitral tribunal constituted to hear the *Sempra Energy International* v. *Argentine Republic* case, in its 2007 award, dealt with a plea, raised by the respondent, of the existence of a state of necessity. In considering the assertions of the parties as to the customary international law status of article 25 of the State responsibility articles, the tribunal

… share[d] the parties' understanding of Article 25 of the Articles on State Responsibility as reflecting the state of customary international law on the matter. This is not to say that the Articles are a treaty or even themselves a part of customary law. They are simply the learned and systematic expression of the law on state of necessity developed by courts, tribunals and other sources over a long period of time.

…

345. There is no disagreement either about the fact that a state of necessity is a most exceptional remedy that is subject to very strict conditions because otherwise it would open the door to States to elude compliance with any international obligation. Article 25 accordingly begins by cautioning that the state of necessity 'may not be invoked' unless such conditions are met … [1104] [27]

In applying article 25, the tribunal held that while the economic crisis which Argentina faced in the late 1990s was severe, it nonetheless did not find the argument that such a situation compromised the very existence of the State and its independence, and thereby qualified as one involving an essential State interest, to be convincing.[1105] [28] Furthermore, the tribunal referred to the requirement in article 25 that the State cannot invoke necessity if it has contributed to the situation giving rise to a state of necessity, which it understood to be a mere "expression of a general principle of law devised to prevent a party from taking legal advantage of its own fault".[1106] [29] On an analysis of the facts, the tribunal held that there had to some extent been a substantial contribution of the State to the situation giving rise to the state of necessity, and that it therefore could not be claimed that the burden fell entirely on exogenous factors.[1107] [30] Finally, the tribunal recalled the decision of the International Court of Justice in the *Gabčíkovo-Nagymaros* case[1108] [31] in which the Court referred to the work of the International Law Commission and held that the conditions in the predecessor provision to article 25 were to be cumulatively met. Since that was not

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[1103] [166] ICSID, Case No. ARB/02/1, Decision on Liability, 3 October 2006, paras. 245–259 and 261 (footnotes omitted).

[1104] [27] See footnote [1026] 25 above, paras. 344 and 345.

[1105] [28] *Ibid*., para. 348.

[1106] [29] *Ibid*., para. 353.

[1107] [30] *Ibid*., para. 354.

[1108] [31] See footnote [31] 37 above, p. 7.

the case on the facts before it, the tribunal concluded that "the requirements for a state of necessity under customary international law ha[d] not been fully met".[1109] [32] The tribunal further considered the interplay between the State responsibility articles, operating at the level of secondary rules, and the bilateral treaty between the parties in the context of an invocation by the respondent of the state of necessity under article XI of the treaty, which envisaged either party taking measures for the "protection of its own essential security interests". In considering what was meant by "essential security interest", the tribunal explained that "the requirements for a state of necessity under customary international law, as outlined … in connection with their expression in Article 25 of the State responsibility articles, become relevant to the matter of establishing whether the necessary conditions have been met for its invocation under the Treaty. Different might have been the case if the Treaty had defined this concept and the conditions for its exercise, but this was not the case."[1110] [33] Furthermore, the tribunal confirmed that it did not "believe that because Article XI did not make an express reference to customary law, this source of rights and obligations becomes inapplicable. International law is not a fragmented body of law as far as basic principles are concerned and necessity is no doubt one such basic principle."[1111] [34] As the Tribunal found that the crisis invoked did not meet the customary law requirements of Article 25, it likewise concluded that it was not necessary to undertake further judicial review under Article XI given that the article did not set out conditions different from customary law.[1112] [35]

[A/65/76, para. 26]

Special Court for Sierra Leone

Prosecutor v. *Fofana and Kondewa (CDF Case)*

A Trial Chamber of the Special Court for Sierra Leone, in *Prosecutor* v. *Fofana and Kondewa (CDF Case)*, Case No. SCSL-04–14-T, in a judgment handed down on 2 August 2007, made an indirect reference, at para. 84, to the predecessor article to draft article 25 of the 2001 articles on responsibility of States for internationally wrongful acts (namely, draft article 33, as adopted on first reading) by referring to the 1997 judgment of the International Court of Justice in the *Gabčíkovo-Nagymaros Project* case, as "clearly express[ing] the view that the defence of necessity was in fact recognised by customary international law and it was a ground available to States in order to evade international responsibility for wrongful acts".

[A/65/76, footnote 26]

[1109] [32] See footnote [1026] 25 above, para. 355.

[1110] [33] *Ibid*., para. 375.

[1111] [34] *Ibid*., para. 378.

[1112] [35] *Ibid*., para. 388.

Ad hoc committee (under the ICSID Convention)

Sempra Energy International v. *Argentine Republic*

The *ad hoc* committee in *Sempra Energy International* v. *Argentine Republic*, while acknowledging the customary international law status of article 25, indicated that "[i]t does not follow, however, that customary law … establishes a peremptory 'definition of necessity and the conditions for its operation'. While some norms of customary law are peremptory (*jus cogens*), others are not, and States may contract otherwise … ".[1113] [123]

The committee highlighted the differences between article 25 and article XI of the bilateral investment treaty in question, in the following terms:

> 200. … Article 25 is concerned with the invocation by a State Party of necessity 'as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State'. Article 25 presupposes that an act has been committed that is incompatible with the State's international obligations and is therefore 'wrongful'. Article XI, on the other hand, provides that 'This Treaty shall not preclude' certain measures so that, where Article XI applies, the taking of such measures is not incompatible with the State's international obligations and is not therefore 'wrongful'. Article 25 and Article XI therefore deal with quite different situations. Article 25 cannot therefore be assumed to 'define necessity and the conditions for its operation' for the purpose of interpreting Article XI, still less to do so as a mandatory norm of international law.[1114] [124]

[A/68/72, paras. 90–91]

Ad hoc committee (under the ICSID Convention)

Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. *The Argentine Republic*

The *ad hoc* committee in *Enron Creditors Recovery Corp. and Ponderosa Assets, L.P.* v. *The Argentine Republic* treated article 25 as reflecting the "principle of necessity under customary international law".[1115] [125] Following an in-depth analysis[1116] [126] of the "only way" requirement in article 25, paragraph 1(*a*), the committee observed that the arbitral tribunal had been required "to determine whether, on the proper construction of Article 25(1)(*a*) of the ILC Articles, the 'only way' requirement in that provision was satisfied, and not merely whether, from an economic perspective, there were other options available for dealing with the economic crisis".[1117] [127] It concluded that "the Tribunal did not in fact apply Article 25(1)(*a*) of the ILC Articles (or more precisely, customary international law as reflected in that provision), but instead applied an expert opinion on an economic issue".[1118] [128] The committee further found the tribunal's treatment of the requirement that the measures adopted by Argentina "seriously impair[ed] an essential interest of the State or States towards which the obligation exists, or of the international community as a

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[1113] [123] See footnote [6] 4 above, para. 197.

[1114] [124] *Ibid*., para. 200.

[1115] [125] See footnote [1027] 122 above, para. 349.

[1116] [126] *Ibid*., paras. 368–376.

[1117] [127] *Ibid*., para. 377.

[1118] [128] *Ibid*.

whole",[1119] [129] within the meaning of paragraph 1(*b*), to be obscure.[1120] [130] The committee also analysed, and found shortcomings with, the tribunal's consideration of the aspect of "contribution to the situation of necessity", in paragraph 2(*b*).[1121] [131] The committee found fault with the tribunal's reliance on an expert opinion on an economic issue. It held that:

> [t]he Tribunal's process of reasoning should have been as follows. First, the Tribunal should have found the relevant facts based on all of the evidence before it, including the [expert opinion]. Secondly, the Tribunal should have applied the legal elements of the Article 25(2)(*b*) to the facts as found (having if necessary made legal findings as to what those legal elements are). Thirdly, in the light of the first two steps, the Tribunal should have concluded whether or not Argentina had "*contributed to the situation of necessity*" within the meaning of Article 25(2)(*b*). For the Tribunal to leap from the first step to the third without undertaking the second amount[ed] in the Committee's view to a failure to apply the applicable law.[1122] [132]

[A/68/72, para. 92]

International arbitral tribunal (under the ICSID Convention)

Suez, Sociedad General de Aguas de Barcelona S.A. & InterAgua Servicios Integrales del Agua S.A. v. *The Argentine Republic*

In *Suez, Sociedad General de Aguas de Barcelona S.A. & InterAgua Servicios Integrales del Agua S.A.* v. *The Argentine Republic*, the arbitral tribunal, upon consideration of the plea of necessity raised by the respondent, noted that:

> [t]he severity of a crisis, no matter the degree, is not sufficient to allow a plea of necessity to relieve a state of its treaty obligations. The customary international law, as restated by Article 25 of the ILC Articles … imposes additional strict conditions. The reason of course is that given the frequency of crises and emergencies that nations, large and small, face from time to time, to allow them to escape their treaty obligations would threaten the very fabric of international law and indeed the stability of the system of international relations … .[1123] [133]

[A/68/72, para. 93]

Total S.A. v. *Argentine Republic*

The arbitral tribunal in *Total S.A.* v. *Argentine Republic* "recall[ed] that customary international law impose[d] strict conditions in order for a State to successfully avail itself of the defence of necessity" and continued that "Article 25 of the ILC Articles on State Responsibility [was] generally considered as having codified customary international law in the matter … ".[1124] [134]

[A/68/72, para. 94]

[1119] [129] *Ibid*., para. 379 (emphasis omitted).

[1120] [130] *Ibid*. paras. 380–384.

[1121] [131] *Ibid*., paras. 385–392.

[1122] [132] *Ibid*., para. 393.

[1123] [133] ICSID, Case No. ARB/03/17, Decision on Liability, 30 July 2010, para. 236.

[1124] [134] See footnote [164] 29 above, para. 220.

Impregilo S.p.A. v. *Argentine Republic*

In *Impregilo S.p.A.* v. *Argentine Republic*, the arbitral tribunal, in considering a case arising from the 2001 Argentine financial crisis, evaluated *in extenso*,

> … Argentina's necessity plea under the standard set by customary international law, which the Parties agree has been codified in Article 25 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts", and determined that the applicable standard "by definition is stringent and difficult to satisfy.[1125] 135

[A/68/72, para. 95]

Ad hoc committee (under the ICSID Convention)

Continental Casualty Company v. *The Argentine Republic*

The *ad hoc* committee in *Continental Casualty Company* v. *The Argentine Republic* rejected the applicant's claim that the arbitral tribunal had failed to address its arguments in connection with "continuing post-'state of necessity' period loss" on the basis that it had not been a major argument in the proceedings before the tribunal.[1126] 136 In reaching such conclusion, the committee recalled the "differences between Article XI of the BIT and the principle of necessity".[1127] 137

[A/68/72, para. 96]

International arbitral tribunal (under the ICSID Convention)

El Paso Energy International Company v. *The Argentine Republic*

In *El Paso Energy International Company* v. *The Argentine Republic*, the arbitral tribunal analysed the differences between article XI of the treaty in question (which it deemed to be the *lex specialis*), and article 25 of the State responsibility articles (the *lex generalis*),[1128] 138 and referred to the reasoning of the Decision on Annulment in *Continental Casualty Company* v. *The Argentine Republic*.[1129] 139 Notwithstanding such differences, it considered, *inter alia*, the rule on "contributory behaviour", contained in article 25(2)(*b*), to be a "rule of general international law[] applicable between the Parties to the BIT and, hence, a rule which may be used to interpret Article XI of the [BIT]".[1130] 140

[A/68/72, para. 97]

[1125] 135 ICSID, Case No. ARB/07/17, Award, 21 June 2011, paras. 344, 345–359.

[1126] 136 ICSID, Case No. ARB/03/9, Decision on the Application for Partial Annulment of Continental Casualty Company and the Application for Partial Annulment of the Argentine Republic, 16 September 2011, para. 128.

[1127] 137 *Ibid*., paras. 116, 117–124.

[1128] 138 See footnote [56] 16 above, paras. 553–555.

[1129] 139 See footnote [1126] 136 above.

[1130] 140 See footnote [56] 16 above, para. 621.

EDF International S.A. et al. v. *Argentine Republic*

The arbitral tribunal in *EDF International S.A. et al.* v. *Argentine Republic*, upon considering the state of necessity defence as articulated in the State responsibility articles, found that the respondent had failed to meet its burden to demonstrate certain key elements as required by article 25, particularly that the wrongful act had been the only way to safeguard its essential interest, and that the respondent had not contributed to the situation of necessity. The Tribunal concluded that "[n]ecessity must be construed strictly and objectively, not as an easy escape hatch for host states wishing to avoid treaty obligations which prove difficult".[1131] [141]

[A/68/72, para. 98]

Ad hoc committee (under the ICSID Convention)

Impregilo S.p.A. v. *Argentine Republic*

In *Impregilo S.p.A.* v. *Argentine Republic*, the *ad hoc* committee constituted to hear Argentina's application for annulment of the award found that, in considering, *inter alia*, article 25 of the State responsibility articles, the arbitral tribunal had "based its decision on several solid sources".[1132] [128]

[A/71/80, para. 93]

El Paso Energy International Company v. *The Argentine Republic*

The *ad hoc* committee in *El Paso Energy International Company* v. *The Argentine Republic*, noted that "[i]n paragraphs 621 to 623 [the arbitral tribunal] stated what other rules of the ILC's Draft Articles and the Unidroit Principles provide on the exclusion of liability and the degree of contribution to a state of necessity",[1133] [129] and concluded that the arbitral tribunal's analysis "was clear …; it stated reasons and explained amply the decisions taken on this issue".[1134] [130]

[A/71/80, para. 94]

International arbitral tribunal (under the ICSID Convention)

Bernhard von Pezold and others v. *Republic of Zimbabwe*

In *Bernhard von Pezold and others* v. *Republic of Zimbabwe*, the arbitral tribunal stated that "the international law analysis [under Article 25 of the ILC Articles] is not affected by the domestic test which gives rise to a state of emergency. Accordingly, a domestic declaration of a state of emergency can only serve as evidence of a state of emergency that may give rise to a necessity defence under international law".[1135] [131]

[A/71/80, para. 95]

[1131] [141] See footnote [167] 31 above, para. 1171.

[1132] [128] ICSID, Case No. ARB/07/17, Decision of the *ad hoc* Committee on the Application for Annulment, 24 January 2014, para. 203.

[1133] [129] See footnote [874] 123 above, para. 254 (emphasis omitted).

[1134] [130] *Ibid*., para. 256.

[1135] [131] See footnote [114] 24 above, para. 624.

Ad hoc committee (under the ICSID Convention)

Total S.A. v. *Argentine Republic*

In *Total S.A.* v. *Argentine Republic*, the *ad hoc* committee constituted to hear Argentina's application for annulment of the award considered, *inter alia*, article 25 of the State responsibility articles when concluding that "Argentina is not correct in claiming that the Tribunal never specified the legal standards to be met in relation to the necessity of protection of essential interest and the 'only way' requirement".[1136] 136

[A/74/83, p. 25]

EDF International SA and ors v. *Argentina*

The *ad hoc* committee constituted to decide on the annulment of the award in *EDF International SA and ors* v. *Argentina*, did:

> not consider that the Tribunal can be faulted for having taken the provisions of ILC Article 25 as its point of reference. It is true that Argentina questioned whether all of the detail of Article 25 reflected customary international law and disputed what it described as the Claimants' propensity to 'refer to each of the paragraphs of Article 25 as though it were the final text of a treaty in full force and effect'. At no point, however, did Argentina indicate what aspects of Article 25 it considered did not reflect customary international law. Nor, more importantly, did it at any stage advance a positive case in favour of a standard of necessity materially different from that set out in Article 25.

The committee "therefore conclude[d] that the Tribunal was correct in stating that 'neither side has argued for application of a standard more favourable to host states than the norms of Article 25' and committed no annullable error in treating Article 25 as a statement of the applicable customary international law".[1137] 137

[A/74/83, p. 25]

Permanent Court of Arbitration (under UNCITRAL Rules)

CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v. *The Republic of India*

In *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited* v. *The Republic of India*, the arbitral tribunal, referring to article 25 of the State responsibility articles, determined "that the conditions attached to the state of necessity defence under customary international law are not applicable in the present situation".[1138] 138

[A/74/83, p. 26]

[1136] 136 ICSID, Case No. ARB/04/01, Decision on Annulment, 1 February 2016, para. 238.

[1137] 137 ICSID, Case No. ARB/03/23, Decision on Annulment, 5 February 2016, para. 319.

[1138] 138 PCA, Case No. 2013–09, Award on Jurisdiction and the Merits, 25 July 2016, para. 256.

Ad hoc committee (under the ICSID Convention)

Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. *Argentine Republic*

The *ad hoc* committee constituted to decide on the annulment of the award in *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A.* v. *Argentine Republic* determined that, although both the "only way" and the "noncontribution" requirements under article 25 were "susceptible to a certain degree of interpretation",[1139] 139 "[r]egardless of the merits of the interpretation adopted by the Tribunal, which is not for this Committee to re-consider, the Committee is of the view that the Tribunal thereby sufficiently established the standard it was going to apply to the facts of the case".[1140] 140

[A/74/83, p. 26]

International arbitral tribunal (under the ICSID Convention)

Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. *The Argentine Republic*

The arbitral tribunal in *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A.* v. *The Argentine Republic* found that "it is not necessary for the Tribunal to consider Respondent's defense of necessity or Claimants' specific arguments opposing that defense" under article 25 of the State responsibility articles because it had previously dismissed the claims that the defendant had breached the relevant obligations.[1141] 141

[A/74/83, p. 26]

Unión Fenosa Gas, S.A. v. *Arab Republic of Egypt*

In *Unión Fenosa Gas, S.A.* v. *Arab Republic of Egypt*, the tribunal, while addressing the defence of necessity under customary international law,[1142] 142 quoted article 25 and:

> decide[d] that the Respondent bears the legal burden of proving its defence of 'necessity' under customary international law, as a positive allegation. Moreover, the elements of that defence, as listed in Article 25 of the ILC Articles, are cumulative. In other words, it is for the Respondent to prove each of the relevant elements and not for the Claimant to disprove any of them. That is clear from the negative formulation of Article 25(1) and 25(2) ('may not be invoked', 'unless' and 'if"), together with elements that fall almost exclusively within the actual knowledge of the State invoking the defence of 'necessity.' This approach also accords with the ILC's Commentary applicable to Article 25 of the ILC Articles.[1143] 143

[A/74/83, p. 26]

[1139] 139 ICSID, Case No. ARB/03/19, Decision on Argentina's Application for Annulment, 5 May 2017, para. 290.

[1140] 140 *Ibid*., para. 295.

[1141] 141 See footnote [355] 45 above, paras. 1045–1046.

[1142] 142 ICSID, Case No. ARB/14/4, Award, 31 August 2018, paras. 8.2–8.3.

[1143] 143 *Ibid*., paras. 8.38 *et seq*.

Ad hoc committee (under the ICSID Convention)

Bernhard Friedrich Arnd Rüdiger von Pezold et al. v. *Republic of Zimbabwe*

In *Bernhard Friedrich Arnd Rüdiger von Pezold et al.* v. *Republic of Zimbabwe*, the *ad hoc* committee constituted to hear Zimbabwe's application for annulment of the award noted that:

> Zimbabwe raised its necessity defense in the arbitration proceedings primarily in terms of Article 25 of the ILC Articles, and that the Tribunal devoted a significant part of the Award to this issue. Having analyzed the issue extensively, the Tribunal eventually dismissed the defense, concluding that Zimbabwe had not satisfied the requirements of Article 25. Consequently, the Tribunal did apply international law rather than Zimbabwean law when determining Zimbabwe's necessity defense.[1144] 144

[A/74/83, p. 27]

Suez, Sociedad General De Aguas De Barcelona S.A. and Interagua Servicios Integrales De Agua S.A. v. *Argentine Republic*

In *Suez, Sociedad General De Aguas De Barcelona S.A. and Interagua Servicios Integrales De Agua S.A.* v. *Argentine Republic*, the *ad hoc* committee, discussing the arbitral tribunals application of article 25, found that the tribunal had not manifestly exceeded its powers or failed to state reasons when applying the necessity defence under article 25 of the State responsibility articles.[1145] 145

[A/74/83, p. 27]

[International arbitral tribunal (under the ICSID Convention)

Urbaser S.A. and Consorcio De Aguas Bilbao Bizkaia, Bilbao Bizkaia UR Partzuergoa v. *the Argentine Republic*

In *Urbaser S.A. and Consorcio De Aguas Bilbao Bizkaia, Bilbao Bizkaia UR Partzuergoa* v. *the Argentine Republic*, the arbitral tribunal recognized articles 25 and 27 of the State responsibility articles as reflecting "in large part general principles of international law".[1146] 148

[A/74/83, p. 27]]

[Permanent Court of Arbitration (under UNCITRAL Rules)

Venezuela US, S.R.L. v. *Bolivarian Republic of Venezuela*

The arbitral tribunal in *Venezuela US, S.R.L.* v. *Bolivarian Republic of Venezuela* referred to articles 12 and 20 to 25, noting that "[t]here is a breach only when the conduct

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[1144] 144 ICSID, Case No. ARB/10/15, Decision on Annulment, 21 November 2018, paras. 278–279.

[1145] 145 ICSID, Case No. ARB/03/17, Decision on Annulment, 14 December 2018, paras. 182–190.

[1146] [148 ICSID, Case No. ARB/07/26, Award, 8 December 2016, para. 709.]

of a State is not in conformity with what is required of it by an international obligation, provided that there are no circumstances precluding the wrongfulness".[1147] [82]

[A/77/74, p. 17]]

International arbitral tribunal (under the ICSID Convention)

(DS)2, S.A., Peter de Sutter and Kristof de Sutter v. *Republic of Madagascar*

In *(DS)2, S.A., Peter de Sutter and Kristof de Sutter* v. *Republic of Madagascar*, the arbitral tribunal referred to article 25, explaining that, in a situation of necessity,

> a State is exempted from its responsibility for acting contrary to its international obligations if its conduct is 'the only way for the State to safeguard an essential interest against a grave and imminent peril'. This means that, in this case, the inaction of Malagasy law enforcement on the ground … would have had to be this 'only way'. It is sufficient to articulate the hypothesis to see that it has no basis.[1148] [110]

[A/77/74, p. 21]

[1147] [[82] See footnote [126] 14 above, para. 155.]

[1148] [110] [ICSID, Case No. ARB/17/18, Award, 17 April 2020], para. 348.

Article 26. Compliance with peremptory norms

Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.

Commentary

(1) In accordance with article 53 of the 1969 Vienna Convention, a treaty which conflicts with a peremptory norm of general international law is void. Under article 64, an earlier treaty which conflicts with a new peremptory norm becomes void and terminates.[1149] [410] The question is what implications these provisions may have for the matters dealt with in chapter V.

(2) Sir Gerald Fitzmaurice as Special Rapporteur on the Law of Treaties treated this question on the basis of an implied condition of "continued compatibility with international law", noting that:

> A treaty obligation the observance of which is incompatible with a new rule or prohibition of international law in the nature of *jus cogens* will justify (and require) non-observance of any treaty obligation involving such incompatibility …
>
> The same principle is applicable where circumstances arise subsequent to the conclusion of a treaty, bringing into play an existing rule of international law which was not relevant to the situation as it existed at the time of the conclusion of the treaty.[1150] [411]

The Commission did not, however, propose any specific articles on this question, apart from articles 53 and 64 themselves.

(3) Where there is an apparent conflict between primary obligations, one of which arises for a State directly under a peremptory norm of general international law, it is evident that such an obligation must prevail. The processes of interpretation and application should resolve such questions without any need to resort to the secondary rules of State responsibility. In theory, one might envisage a conflict arising on a subsequent occasion between a treaty obligation, apparently lawful on its face and innocent in its purpose, and a peremptory norm. If such a case were to arise it would be too much to invalidate the treaty as a whole merely because its application in the given case was not foreseen. But in practice such situations seem not to have occurred.[1151] [412] Even if they were to arise, peremptory norms of general international law generate strong interpretative principles which will resolve all or most apparent conflicts.

(4) It is, however, desirable to make it clear that the circumstances precluding wrongfulness in chapter V of Part One do not authorize or excuse any derogation from a peremptory norm of general international law. For example, a State taking countermeasures may not

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[1149] [410] See also article 44, paragraph 5, which provides that in cases falling under article 53, no separation of the provisions of the treaty is permitted.

[1150] [411] Fourth report on the law of treaties, *Yearbook … 1959* (footnote [952] 307 above), p. 46. See also S. Rosenne, *Breach of Treaty* (Cambridge, Grotius, 1985), p. 63.

[1151] [412] For a possible analogy, see the remarks of Judge *ad hoc* Lauterpacht in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p. 325, at pp. 439–441. ICJ did not address these issues in its order.

derogate from such a norm: for example, a genocide cannot justify a counter-genocide.[1152]413 The plea of necessity likewise cannot excuse the breach of a peremptory norm. It would be possible to incorporate this principle expressly in each of the articles of chapter V, but it is both more economical and more in keeping with the overriding character of this class of norms to deal with the basic principle separately. Hence, article 26 provides that nothing in chapter V can preclude the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.[1153] 414

(5) The criteria for identifying peremptory norms of general international law are stringent. Article 53 of the 1969 Vienna Convention requires not merely that the norm in question should meet all the criteria for recognition as a norm of general international law, binding as such, but further that it should be recognized as having a peremptory character by the international community of States as a whole. So far, relatively few peremptory norms have been recognized as such. But various tribunals, national and international, have affirmed the idea of peremptory norms in contexts not limited to the validity of treaties.[1154] 415 Those peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination.[1155] 416

(6) In accordance with article 26, circumstances precluding wrongfulness cannot justify or excuse a breach of a State's obligations under a peremptory rule of general international law. Article 26 does not address the prior issue whether there has been such a breach in any given case. This has particular relevance to certain articles in chapter V. One State cannot dispense another from the obligation to comply with a peremptory norm, *e.g.* in relation to genocide or torture, whether by treaty or otherwise.[1156] 417 But in applying some peremptory norms the consent of a particular State may be relevant. For example, a State may validly consent to a foreign military presence on its territory for a lawful purpose. Determining in which circumstances consent has been validly given is again a matter for other rules of international law and not for the secondary rules of State responsibility.[1157] 418

[1152] 413 As ICJ noted in its decision in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, "in no case could one breach of the Convention serve as an excuse for another" (*Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 243, at p. 258, para. 35).

[1153] 414 For convenience, this limitation is spelled out again in the context of countermeasures in Part Three, chapter II. See article 50 and commentary, paras. (9) and (10).

[1154] 415 See, *e.g.*, the decisions of the International Tribunal for the Former Yugoslavia in case IT-95–17/1-T, *Prosecutor* v. *Furundzija*, judgement of 10 December 1998; ILM, vol. 38, No. 2 (March 1999), p. 317, and of the British House of Lords in *Regina* v. *Bow Street Metropolitan Stipendiary Magistrate and Others,* ex parte *Pinochet Ugarte (No. 3)*, ILR, vol. 119. Cf. *Legality of the Threat or Use of Nuclear Weapons* (footnote [48] 54 above), p. 257, para. 79.

[1155] 416 Cf. *East Timor* (footnote [48] 54 above).

[1156] 417 See paragraph (4) of the commentary to article 45.

[1157] 418 See paragraphs (4) to (7) of the commentary to article 20.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

International arbitral tribunal (under the ICSID Convention)

CMS Gas Transmission Company v. *Argentine Republic*

In its 2005 award, the arbitral tribunal constituted to hear the *CMS Gas Transmission Company* v. *Argentina* case,[1158] [167] in the context of its examination of Argentina's defence based on state of necessity,[1159] [168] made incidental reference to article 26, as finally adopted by the International Law Commission in 2001, noting that there did not appear "that a peremptory norm of international law might have been compromised [by Argentina's conduct], a situation governed by article 26 of the articles".[1160] [169]

[A/62/62, para. 97]

Bernhard von Pezold and others v. *Republic of Zimbabwe*

In *Bernhard von Pezold and others* v. *Republic of Zimbabwe*, the arbitral tribunal found that "Zimbabwe's violation of its obligation *erga omnes* means that it has breached ILC Article 26 and is therefore precluded from raising the necessity defence in relation to any events upon which the FTLRP [Fast Track Land Reform Programme] policy touches".[1161] [132]

[A/71/80, para. 96]

European Court of Human Rights

Al-Dulimi and Montana Management Inc. Switzerland

In *Al-Dulimi and Montana Management Inc. Switzerland*, the European Court of Human Rights referred to article 26 and the commentary thereto as relevant international law.[1162] [146]

[A/74/83, p. 27]

Inter-American Court of Human Rights

Herzog et al. v. *Brazil*

In *Herzog et al.* v. *Brazil*, the Inter-American Court of Human Rights, citing the commentary to article 26 of the State responsibility articles, recalled that the Commission had confirmed that the prohibition on crimes against humanity was clearly accepted and recognized as a peremptory norm of international law.[1163] [147]

[A/74/83, p. 27]

[1158] [167] See footnote [1100] 163 above.

[1159] [168] See [pp. 281–283] above.

[1160] [169] See footnote [1100] 163 above, para. 325.

[1161] [132] See footnote [114] 24 above, para. 657.

[1162] [146] ECHR, Grand Chamber, Application No. 5809/08, Judgment, 21 June 2016, para. 57.

[1163] [147] IACHR, Preliminary Objections, Merits, Reparations and Costs. Series C No. 353 (Spanish), Judgment, 15 March 2018.

Committee on the Elimination of Racial Discrimination

State of Palestine v. *Israel*

In its decision on jurisdiction regarding the inter-State communication *State of Palestine* v. *Israel*, the Committee on the Elimination of Racial Discrimination cited the commentary to article 26, noting that "several international bodies have recognized the essential character of the principle of the prohibition of racial discrimination for the international community as a whole", and emphasizing that "the International Law Commission has stated that the peremptory norms (*jus cogens*) that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination".[1164] [111]

[A/77/74, p. 22]

[1164] [111] Decision on jurisdiction, CERD/C/100/5, 12 December 2019, para. 40.

Article 27. Consequences of invoking a circumstance precluding wrongfulness

The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to:

(*a*) compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;

(*b*) the question of compensation for any material loss caused by the act in question.

Commentary

(1) Article 27 is a without prejudice clause dealing with certain incidents or consequences of invoking circumstances precluding wrongfulness under chapter V. It deals with two issues. First, it makes it clear that circumstances precluding wrongfulness do not as such affect the underlying obligation, so that if the circumstance no longer exists the obligation regains full force and effect. Secondly, it refers to the possibility of compensation in certain cases. Article 27 is framed as a without prejudice clause, because, as to the first point, it may be that the effect of the facts which disclose a circumstance precluding wrongfulness may also give rise to the termination of the obligation, and as to the second point, because it is not possible to specify in general terms when compensation is payable.

(2) Subparagraph (*a*) of article 27 addresses the question of what happens when a condition preventing compliance with an obligation no longer exists or gradually ceases to operate. It makes it clear that chapter V has a merely preclusive effect. When and to the extent that a circumstance precluding wrongfulness ceases, or ceases to have its preclusive effect for any reason, the obligation in question (assuming it is still in force) will again have to be complied with, and the State whose earlier non-compliance was excused must act accordingly. The words "and to the extent" are intended to cover situations in which the conditions preventing compliance gradually lessen and allow for partial performance of the obligation.

(3) This principle was affirmed by the tribunal in the *"Rainbow Warrior"* arbitration,[1165]419 and even more clearly by ICJ in the *Gabčíkovo-Nagymaros Project* case. In considering Hungary's argument that the wrongfulness of its conduct in discontinuing work on the Project was precluded by a state of necessity, the Court remarked that "[a]s soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives."[1166] 420 It may be that the particular circumstances precluding wrongfulness are, at the same time, a sufficient basis for terminating the underlying obligation. Thus a breach of a treaty justifying countermeasures may be "material" in terms of article 60 of the 1969 Vienna Convention and permit termination of the treaty by the injured State. Conversely, the obligation may be fully reinstated or its operation fully restored in principle, but modalities for resuming performance may need to be settled. These are not matters which article 27 can resolve, other than by providing that the invocation of circumstances precluding wrongfulness is without prejudice to "compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists". Here "compliance with the obligation in question" includes cessation of the wrongful conduct.

[1165] 419 *"Rainbow Warrior"* (footnote [40] 46 above), pp. 251–252, para. 75.

[1166] 420 *Gabčíkovo-Nagymaros Project* (footnote [31] 37 above), p. 63, para 101; see also *ibid*., page 38, para. 47.

(4) Subparagraph (*b*) of article 27 is a reservation as to questions of possible compensation for damage in cases covered by chapter V. Although the article uses the term "compensation", it is not concerned with compensation within the framework of reparation for wrongful conduct, which is the subject of article 34. Rather, it is concerned with the question whether a State relying on a circumstance precluding wrongfulness should nonetheless be expected to make good any material loss suffered by any State directly affected. The reference to "material loss" is narrower than the concept of damage elsewhere in the articles: article 27 concerns only the adjustment of losses that may occur when a party relies on a circumstance covered by chapter V.

(5) Subparagraph (*b*) is a proper condition, in certain cases, for allowing a State to rely on a circumstance precluding wrongfulness. Without the possibility of such recourse, the State whose conduct would otherwise be unlawful might seek to shift the burden of the defence of its own interests or concerns onto an innocent third State. This principle was accepted by Hungary in invoking the plea of necessity in the *Gabčíkovo-Nagymaros Project* case. As ICJ noted, "Hungary expressly acknowledged that, in any event, such a state of necessity would not exempt it from its duty to compensate its partner."[1167] [421].

(6) Subparagraph (*b*) does not attempt to specify in what circumstances compensation should be payable. Generally, the range of possible situations covered by chapter V is such that to lay down a detailed regime for compensation is not appropriate. It will be for the State invoking a circumstance precluding wrongfulness to agree with any affected States on the possibility and extent of compensation payable in a given case.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

International arbitral tribunal (under the ICSID Convention)

CMS Gas Transmission Company v. *Argentine Republic*

In its 2005 award, the arbitral tribunal constituted to hear the *CMS Gas Transmission Company* v. *Argentina case*,[1168] [170] after having concluded its examination of Argentina's defence based on state of necessity and article XI of the relevant bilateral treaty,[1169] [171] stated that it was "also mindful" of the rule embodied in subparagraph (*a*) of article 27, as finally adopted by the International Law Commission in 2001 (which it quoted), adding thereafter:

> 380. The temporary nature of necessity is thus expressly recognized and finds support in the decisions of courts and tribunals. The commentary cites in this connection the *Rainbow Warrior* and *Gabcíkovo Nagymaros* cases. In this last case the International Court of Justice held that as soon 'as the state of necessity ceases to exist, the duty to comply with treaty obligations revives'.
>
> …

[1167] [421] *Ibid.*, p. 39, para. 48. A separate issue was that of accounting for accrued costs associated with the Project (*ibid.*, p. 81, paras. 152–153).

[1168] [170] See footnote [1100] 163 above.

[1169] [171] See [pp. 281–283] above.

382. Even if the plea of necessity were accepted, compliance with the obligation would reemerge as soon as the circumstance precluding wrongfulness no longer existed, which is the case at present.[1170] 172

The tribunal then quoted subparagraph (*b*) of article 27 finally adopted by the International Law Commission, observing that it found support again in the *Gabcíkovo Nagymaros Project* case, as well as in earlier decisions such as the *Compagnie générale de l'Orinoco*, the *Properties of the Bulgarian Minorities in Greece* and *Orr & Laubenheimer* cases (in the latter cases, the tribunal noted, "the concept of damages appears to have been broader than that of material loss in article 27"). After having described the positions of the parties on this issue, the tribunal continued as follows:

390. The Tribunal is satisfied that article 27 establishes the appropriate rule of international law on this issue. The Respondent's argument is tantamount to the assertion that a Party to this kind of treaty, or its subjects, are supposed to bear entirely the cost of the plea of the essential interests of the other Party. This is, however, not the meaning of international law or the principles governing most domestic legal systems.

391. The Tribunal's conclusion is further reaffirmed by the record. At the hearing the Tribunal put the question whether there are any circumstances in which an investor would be entitled to compensation in spite of the eventual application of article XI and the plea of necessity.

392. The answer to this question by the Respondent's expert clarifies the issue from the point of view of both its temporary nature and the duty to provide compensation: while it is difficult to reach a determination as long as the crisis is unfolding, it is possible to envisage a situation in which the investor would have a claim against the government for the compliance with its obligations once the crisis was over; thereby concluding that any suspension of the right to compensation is strictly temporary, and that this right is not extinguished by the crisis events.

393. The Tribunal also notes that, as in the *Gaz de Bordeaux* case, the International Law Commission's commentary to article 27 suggests that the States concerned should agree on the possibility and extent of compensation payable in a given case.

394. It is quite evident then that in the absence of agreement between the parties the duty of the Tribunal in these circumstances is to determine the compensation due. This the Tribunal will do next.[1171] 173

[A/62/62, para. 98]

LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. *Argentine Republic*

In its 2006 decision on liability, the arbitral tribunal constituted to hear the *LG&E Energy Corp.*, *LG&E Capital Corp.*, *LG&E International Inc.* v. *Argentina*, having found that Argentina was under a state of necessity that excused it from liability for any breaches of the 1991 bilateral investment treaty under article XI of that treaty,[1172] 174 responded to the claimants argument, based on article 27 finally adopted by the International Law Commission in 2001, that Argentina should compensate them for losses incurred as a result of the government's actions:

With regard to article 27 of the United Nations draft articles alleged by Claimants, the Tribunal opines that the article at issue does not specifically refer to the compensation for one or all the losses incurred

[1170] 172 See footnote [1100] 163 above, paras. 379, 380 and 382.

[1171] 173 *Ibid.*, paras. 390–394 (footnotes omitted).

[1172] 174 See [pp. 283–285] above.

by an investor as a result of the measures adopted by a State during a state of necessity. The commentary introduced by the Special Rapporteur establishes that article 27 "does not attempt to specify in what circumstances compensation would be payable". The rule does not specify if compensation is payable during the state of necessity or whether the State should reassume its obligations. In this case, this Tribunal's interpretation of article XI of the Treaty provides the answer.[1173] 175

The tribunal later added that:

Article 27 of the International Law Commission's draft articles, as well as article XI of the Treaty, does not specify if any compensation is payable to the party affected by losses during the state of necessity. Nevertheless, … this Tribunal has decided that the damages suffered during the state of necessity should be borne by the investor.[1174] 176

[A/62/62, para. 99]

Ad hoc committee (under the ICSID Convention)

Patrick Mitchell v. *Democratic Republic of the Congo*

In its 2006 decision on the application for annulment of the award rendered on 9 February 2004 in the *Patrick Mitchell* v. *Democratic Republic of the Congo* case, the *ad hoc* committee noted that even if the arbitral tribunal had concluded that the measures at issue were not wrongful by reason of the state of war in the Congo, "this would not necessarily have had any impact on evaluating the act of dispossessing Mr. Mitchell, and on the need for compensation; possibly, it could have had an influence on the calculation of the amount of such compensation". The *ad hoc* committee thereafter quoted in a footnote the text of article 27 finally adopted by the International Law Commission in 2001, "bearing witness to the existence of a principle of international law in this regard".[1175] 177

[A/62/62, para. 100]

International arbitral tribunal (under the ICSID Convention)

Sempra Energy International v. *Argentine Republic*

The arbitral tribunal constituted to hear the *Sempra Energy International* v. *Argentina* case, in its 2007 award, noted that the requirement of temporality in subparagraph (*a*) of article 27 was not disputed by the parties, even though "the continuing extension of the emergency … [did] not seem to be easily reconciled with the requirement of temporality". That in turn resulted in "uncertainty as to what will be the legal consequences of the Emergency Law's conclusion",[1176] 36 which related to the application of subparagraph (*b*) of article 27. In the face of an interpretation of subparagraph (*b*), offered by the respondent, that the provision would require compensation only for the damage arising after the emer-

[1173] 175 ICSID, Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 260 (footnote omitted).

[1174] 176 *Ibid.*, para. 264.

[1175] 177 ICSID, *Ad Hoc* Committee, Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006, para. 57, footnote 30.

[1176] 36 See footnote [1026] 25 above, para. 392.

gency was over, and not for that taking place during the emergency period, the tribunal expressed the following view:

> Although [Article 27] does not specify the circumstances in which compensation should be payable because of the range of possible scenarios, it has also been considered that this is a matter to be agreed with the affected party. The Article thus does not exclude the possibility of an eventual compensation for past events. The 2007 agreements between the Respondent and the Licensees appear to confirm this interpretation … [1177] 37

[A/65/76, para. 27]

Ad hoc committee (under the ICSID Convention)

Continental Casualty Company v. *The Argentine Republic*

The *ad hoc* committee in *Continental Casualty Company* v. *The Argentine Republic* noted that the applicant's claim relied primarily on article 27 of the State responsibility articles. The committee recalled that the "Tribunal [had] expressly found … that the effect of the application of Article XI of the BIT [was] different to the effect of the application of Article 25 (and by logical implication, of Article 27) of the ILC Articles".[1178] 142

[A/68/72, para. 99]

International arbitral tribunal (under the ICSID Convention)

EDF International S.A. et al. v. *Argentine Republic*

The arbitral tribunal in *EDF International S.A. et al.* v. *Argentine Republic* found that the respondent had failed to demonstrate, as required under article 27, that it had "return[ed] to the pre-necessity *status quo* when possible, or compensate[d] Claimants for damage suffered as a result of the relevant measures".[1179] 143

[A/68/72, para. 100]

Urbaser S.A. and Consorcio De Aguas Bilbao Bizkaia, Bilbao Bizkaia UR Partzuergoa v. *the Argentine Republic*

In *Urbaser S.A. and Consorcio De Aguas Bilbao Bizkaia, Bilbao Bizkaia UR Partzuergoa* v. *the Argentine Republic*, the arbitral tribunal recognized articles 25 and 27 of the State responsibility articles as reflecting "in large part general principles of international law".[1180] 148

[A/74/83, p. 27]

[1177] 37 *Ibid*., para. 394 (footnote omitted).

[1178] 142 See footnote [1126] 136 above, para. 127.

[1179] 143 See footnote [167] 31 above, para. 1171.

[1180] 148 ICSID, Case No. ARB/07/26, Award, 8 December 2016, para. 709.

Unión Fenosa Gas, S.A. v. *Arab Republic of Egypt*

The tribunal in *Unión Fenosa Gas, S.A.* v. *Arab Republic of Egypt*, referred to the commentary of Article 27 and stated that "the defence of necessity under international law lapses 'if and to the extent that the circumstance precluding wrongfulness no longer exists'".[1181] [149]

[A/74/83, p. 28]

Eco Oro Minerals Corp. v. *Republic of Colombia*

The arbitral tribunal in *Eco Oro Minerals Corp.* v. *Republic of Colombia* referred to articles 27, under which the invocation of a circumstance precluding wrongfulness is without prejudice to the question of compensation for any material loss caused by the act in question, and to article 36.[1182] [112] The tribunal therefore determined that under the applicable investment treaty, "whilst a State may adopt or enforce a measure pursuant to the stated objectives" in the treaty, "this does not prevent an investor claiming … that such a measure entitles it to the payment of compensation".[1183] [113]

[A/77/74, p. 22]

[1181] [149] ICSID, Case No. ARB/14/4, Award, 31 August 2018, para. 8.47.

[1182] [112] See footnote [401] 51 above, para. 835.

[1183] [113] *Ibid*., para. 830.