ON THE USE AND ABUSE OF NECESSITY IN THE LAW OF STATE RESPONSIBILITY

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Robert D. Sloane

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ABSTRACT

In an era of crises (economic, environmental, humanitarian, and even existential), the defensive plea of necessity has become a growth industry in the law of state responsibility, spurred in part by the publication of Article 25 of the International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts. Recorded incidents suggest that necessity has been raised more times in the past three decades than in the preceding three centuries – in diverse fields ranging widely across the landscape of contemporary international law. Yet recent scholarship focuses almost exclusively on necessity’s role in the distinctive (lex specialis) context of investor-state arbitration. This is understandable because of its significance to recent disputes in the field. But it is also regrettable, for it has to some extent eclipsed more fundamental questions that should be asked about the very concept of necessity in international law, which characteristically lacks the effective institutions and comparatively high degree of normative consensus that enable states to regulate necessity, consistent with the rule of law, in national law.

This Article, first, analyzes the historical evidence for Article 25, which purports to codify the customary definition of necessity; second, argues on the basis of this evidence that at least in terms of the ILC’s formal mandate, Article 25 reflects far more “progressive development” than it does “codification”; third, clarifies several of the most troubling conceptual and institutional problems that necessity raises in general international law – that is, outside of the confines of a treaty regime or other lex specialis; and finally, inquires into the continuing viability, value, and appropriate analysis of necessity in the contemporary international legal order.

I argue, in part, that the modern plea of necessity should rest on foundations that differ fundamentally from those of the existential conception inherited from the law of nations, which privileged the “very existence” of the state qua state. Article 25 modifies, but also builds upon, this partly anachronistic pedigree by borrowing concepts from national criminal law. The often incongruous transposition of these concepts obscures what almost invariably proves to be the real question raised by necessity in the law of state responsibility: who – which state, states, or other international actors – should bear the loss? A categorical answer would be neither plausible nor desirable. International law should instead contextualize the inquiry

* Visiting Associate Professor & John Harvey Gregory Lecturer in World Organization, Harvard Law School; and Associate Professor, Boston University School of Law. Thanks to Anthony J. Colangelo, Gary Lawson, Sean D. Murphy, Steven R. Ratner, and W. Michael Reisman for comments on earlier drafts; and to Elizabeth Grosso, Nathaniel Halvorson, Meg Larkin, Lindsay Schare, Taimur Rabbani, and Ming Zhangzeng, all of whom provided excellent research assistance at various stages in this paper’s development. All errors, of course, are mine. I welcome critiques and suggestions: rdsloane@gmail.com.

and candidly consider the competing policies and values at stake in the diverse scenarios in which necessity has been, or foreseeably might be, pled. The lodestar of this inquiry should no longer be the formerly paramount “natural” right of states to preserve themselves; it should be a transparent recognition of the difficult tradeoffs required by the – sometimes mutually exclusive – global policies, social interests, and human rights recognized by contemporary international law.

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Necessity, necessità, is Machiavelli’s guiding principle. . . . that infringing the moral law is justified when it is necessary. Thus is inaugurated the dualism of modern political culture, which simultaneously upholds absolute and relative standards of value. The modern state appeals to morality, to religion, and to natural law as the ideological foundation for its existence. At the same time, it is prepared to infringe any or all of these in the interest of self-preservation.1

I. INTRODUCTION

In the past decade, a series of investor-state arbitrations, most arising out of Argentina’s turn-of-the-century economic crisis, has raised questions about the plea of necessity as a defense in the law of state responsibility.2 These arbitral awards have contributed to a rich and growing literature on the subject,3 the natural focus of which has been on necessity’s place in the distinctive context of foreign investment law, that is, within a lex specialis. Yet the increase in necessity pleas in contemporary international law has not been limited to this special context. In the first place, investor-state arbitral jurisprudence contributes to the evolution of general international law.4 Tribunals rely on their understanding of general international law to

1 J. M. COETZEE, DIARY OF A BAD YEAR 17 (2007).
4 The phrase “general international law” is not used consistently. I mean the full corpus of international law that does not depend on particular treaty regimes or norms.
inform treaty interpretation and to cure perceived lacunae in the applicable substantive law.\textsuperscript{5} Second, and far more significantly, the past three decades have seen a remarkable growth in necessity pleas in diverse fields ranging widely across the landscape of contemporary international law.

As a \textit{general} defense to state responsibility, necessity has been raised by states or appraised \textit{sua sponte} by tribunals in, among other contexts, those of—

- humanitarian intervention in violation of an orthodox reading of the U.N. Charter regime on the use of force;\textsuperscript{6}
- violation of the \textit{jus ad bellum} (the law governing recourse to force) by the Israeli wall or security fence in the West Bank;\textsuperscript{7}
- violation of the \textit{jus in bello} (the law governing conduct of hostilities) by “the threat or use of nuclear weapons” in what the International Court of Justice (ICJ) described as “an extreme circumstance of self-defence, in which the \textit{very survival} of a State would be at stake”;\textsuperscript{8}
- breaches of the arbitral award settling the \textit{Rainbow Warrior} affair;\textsuperscript{9}
- contemporary international trade jurisprudence;\textsuperscript{10}
- the seizure of vessels in circumstances that might otherwise violate the comprehensive U.N. Convention on the Law of the Sea;\textsuperscript{11}

\textsuperscript{5} Especially because the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, under the auspices of which most investor-state arbitrations take place, prohibits tribunals from “[b]ringing in a finding of \textit{non liquet} on the ground of silence or obscurity of the law.” Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 42(2), Mar. 18, 1975, 17 U.S.T. 1270, 575 U.N.T.S. 160 [hereinafter ICSID Convention].


\textsuperscript{7} Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 194 (July 9).

\textsuperscript{8} \textit{Legality of the Threat or Use of Nuclear Weapons}, Advisory Opinion, 1996 I.C.J. 226, 266 (July 9) (emphasis added).


Beyond the realm of state responsibility, too, necessity has recently been raised as a defense to individual criminal responsibility under international law, often in the context of adapting international humanitarian law (IHL) or human rights law to the modern conflict with transnational terrorism.\footnote{See The National Security Strategy of the United States of America (2002), http://www.whitehouse.gov/nsc/nss.pdf; see also Mark Osieł, The End of Reciprocity: Terror, Torture, and the Law of War 40-41 (2009).} The increase in necessity pleas in international law may be attributed in large part to two factors: The first is perception of imminent crisis or risk, a common denominator of necessity. In the first decade of the twenty-first century, there has been an increase—or at least a perceived increase—in the number and scope of potentially catastrophic, perhaps even existential, threats. These include terrorism at or surpassing the scale of 9/11; the risk that a “rogue state” might build nuclear weapons or transfer them to a non-state actor anxious to acquire and use them;\footnote{Roman Boed, State of Necessity as Justification for Internationally Wrongful Conduct, 3 Yale Hum. Rts. & Dev. L.J. 1, 2-3 (2000).} the global economic recession; impending climate change;\footnote{For a thorough analysis of necessity as a defense to torture, see Jens David Ohlin, The Torture Lawyers, 51 Harv. Int’l L.J. 193 (2010). On necessity as a proposed humanitarian justification in IHL, see Gabriella Blum, The Laws of War and the Lesser Evil, 35 Yale J. Int’l L. 1 (2010); cf. Christopher P. DeNicola, A Shield for the “Knights of Humanity”: The ICC Should Adopt a Humanitarian Necessity Defense to the Crime of Aggression, 30 U. Pa. J. Int’l L. 641 (2008) (comparable idea vis-à-vis the jus ad bellum). The defense of necessity in IHL has also arisen in the context of targeted killings. One critique of this practice is that even if an unprivileged belligerent technically may be killed under IHL under the circumstances, he only should be killed if it is necessary, that is, if he cannot be captured or otherwise disabled. See Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, Hum. Rts. Coun., 14th Sess., Agenda Item 3, Addendum, at 23, ¶ 76.} and potential global pandemics.\footnote{Cf. W. Michael Reisman, Assessing Claims to Revise the Laws of War, 97 Am. J. Int’l L. 82, 86 (2003) (“As long as nonstate actors did not amass significant arsenals, their indifference or even hostility to world public order was inconsequential.”)}

The second, and more prosaic, factor, which may nonetheless facilitate or augment the first, is the U.N. International Law Commission’s (ILC)
publication, in 2001, of its Draft Articles on Responsibility of States for Internationally Wrongful Acts (ILC Articles), Article 25 of which provides:

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 toward 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.18

Article 25 enumerates the criteria for necessity’s invocation and, within the context of the Articles as a whole, also purports to specify the defense’s limits. Its definition is general: that is, absent a lex specialis,19 it purports to apply to any violation of international law, whatever the source and nature of the primary obligation. It also offers a facially appealing, but deceptively simple, definition of necessity. That appeal might help to explain why, four years before the ILC released the Articles, the ICJ simply quoted an earlier, substantially similar, draft of Article 25 (former Article 33)20 to conclude without analysis that it codifies existing international custom.21 That conclusion is doubtful, or so I will argue.

Yet even if Article 25 did accurately codify the customary definition of necessity, it would remain troubling. It defines necessity in terms of several abstract or vague phrases, which the Articles do not define: for example,
“essential interest,” “grave and imminent peril,” “seriously impair,” and “contributed to the situation.” Without exposition, these phrases tend to elide the difficult questions that necessity raises in international law or, for that matter, any legal system. To be sure, many legal concepts seem abstract or vague considered in isolation; that alone need not render Article 25 problematic. But the opacity of Article 25’s terms turns out to be more troubling than it may seem at first glance. The international legal system, unlike stable and well-functioning national legal systems, lacks clear analogues to the legal institutions that can effectively and authoritatively answer the hard questions raised by necessity. If states could realistically be expected to construe Article 25 strictly, this might not be a concern. Indeed, a strict construction of Article 25 might even render it nugatory, and in the past, at least, the ILC embraced that construction, stressing that “it must be impossible for the peril to be averted by any other means, even one which is much more onerous but which can be adopted without a breach of international obligations.” Yet the real concern is directly to the contrary: in practice and over time, the threshold for successfully invoking necessity may well atrophy, or “soften,” enabling necessity’s pretextual, abusive, or simply misguided invocation.

The Commentary explains that the ILC decided not to request that the General Assembly promulgate the Articles as the basis for an immediate multilateral treaty. Certain articles proved controversial and were thought unlikely to attract sufficient consensus. The final authors of the Articles therefore concluded that “a suitable period for reflection” would be more prudent than a draft convention and, indeed, might better facilitate “the possible conversion of the articles into a convention, [but only] if this is thought appropriate and feasible.” Nonetheless, states, scholars, and tribunals often treat the Articles as though they codify existing custom or


23 Cf. Bjorklund, supra note 3, at 485 (critiquing the appraisal of Argentina’s necessity plea by several arbitral tribunals because they suggested that it would suffice to defeat the plea “simply to show that a State could have taken steps other than the ones it chose,” and yet because “other alternatives will nearly always be available, such a strict interpretation of the requirement would seem to defeat any [necessity] defense”) (citation omitted).

24 Ago, Eighth Report, supra note 20 at 51, ¶ 14 (footnote omitted; emphasis added).


27 Crawford, supra note 18, at 59 (emphasis added).

enjoy the status of a widely ratified multilateral treaty. That is—not always but also not infrequently—misguided. Necessity is a case in point.

Recent scholarship’s predominant focus on necessity’s proper role in the special context of investor-state arbitration, while understandable given its contemporary relevance, is unfortunate in this regard. It has tended to eclipse logically antecedent questions about the very concept of necessity in international law: Why should the law of state responsibility recognize a default necessity defense, if it should? Mindful of the role that a general legislature and a compulsory judicial system serve in regulating necessity in national legal systems, can a comparable defense be regulated in a legal system that lacks effective analogues to these legal institutions? In terms of the ILC’s mandate, does Article 25 codify existing custom, or is it better understood as progressive development? And if the latter, is Article 25 progressive? In what sense?

This Article ventures answers to these questions. In the process, it both critiques and partially recasts necessity in the law of state responsibility. Architecturally, the argument proceeds at three distinct but interrelated levels: descriptive, jurisprudential, and normative. This approach proves helpful because each level informs the other two. By analyzing necessity through each lens, it becomes possible to offer a richer account of the potential role of necessity in the law of state responsibility and a clearer appraisal of its practical limits. I do not, of course, purport to supply all the answers. I do, however, aspire at a minimum to clarify the nature of the questions that should be asked about a general defense of necessity in the law of state responsibility; and I sound some cautionary notes in this regard, drawing attention to conceptual, institutional, and other issues that a general necessity plea raises—issues that have to a certain extent been obscured by the veneer of an authoritative treaty that the Articles enjoy.

To be clear at the outset, I neither argue nor believe that necessity has no place in contemporary international law. Carefully defined and policed by effective institutions, necessity can serve an indispensable role in, for example, a multilateral treaty regime, as it arguably has in the realm of international trade law under GATT/WTO. But beyond those contexts in which necessity constitutes one part of a carefully designed lex specialis, I hope to encourage a more circumspect approach to necessity as a general defense to state responsibility and to foster a greater appreciation of the potential for abuse that necessity creates in any legal system—and, for

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28 In 1947, the General Assembly established the ILC and charged it with “the promotion of the progressive development of international law and its codification.” G.A. Res. 174 (II), at 105, U.N. Doc. A/519 (Nov. 17, 1947); see also U.N. CHARTER art. 13(1).

reasons that will become clear, a fortiori in the international one.\textsuperscript{30} I do not, however, mean to question the “ancient wisdom that the abuse of a rule does not take away its uses.”\textsuperscript{31}

Part II inquires into the current status of necessity in general and Article 25 in particular. Does Article 25, that is, codify existing international law (lex lata), either as custom or as a general principle of law within the meaning of the Article 38(1)(c) of the ICJ Statute?\textsuperscript{32} Many would answer that it does, relying chiefly on the authorities cited in the Commentary,\textsuperscript{33} as well as, perhaps, Bin Cheng’s classic study of general principles of law, necessity among them. Part II’s analysis casts considerable doubt on this view. It establishes, at a minimum, that an orthodox (positivist) analysis of custom supports a definition of necessity with a far more limited scope than that of Article 25. In fact, research discloses not a single case before the twenty-first century in which an international tribunal sustained necessity on the merits; and only in a handful of incidents did states recognize it as, in the lexicon of the Articles, a “circumstance precluding wrongfulness.”\textsuperscript{34} The textbook components of custom (state practice and opinio juris) support a very limited privilege, which, historically, states have seldom invoked—and then only in rare circumstances of insurrection, war, or a comparable threat to the “safety, and even to the very existence of the State.”\textsuperscript{35}

The italicized phrase, which appears in the two earliest authorities for Article 25 cited by the ILC in the Commentary, also appears in the most controversial conclusion of the ICJ’s 1996 advisory opinion on the Legality of the Threat or Use of Nuclear Weapons.\textsuperscript{36} That is not coincidental. It is a

\textsuperscript{30} See, e.g., Sarah Heathcote, Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility: Necessity, in THE LAW OF STATE RESPONSIBILITY 491, 492 (James Crawford et al. eds., 2010) (enumerating instances in which states have invoked necessity to justify the annexation or occupation of foreign territory).

\textsuperscript{31} Glanville Williams, The Defence of Necessity, 6 CURRENT LEGAL PROBS. 216, 225 (1953); see also OsieR, supra note 12, at 37 (“[T]hat a legal doctrine is subject to potential abuse—many are, after all—is not an argument for its repudiation, but only for its careful limitation and circumspect application.”).

\textsuperscript{32} Statute of the International Court of Justice art. 38(1)(c), June 26, 1945, 59 Stat. 1055, T.S. 993 (1945) [hereinafter ICJ Statute].

\textsuperscript{33} For U.S. lawyers, in particular, there may be an unfortunate tendency to treat the ILC Articles as a “Restatement” of the law of state responsibility.

\textsuperscript{34} BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 69-75 (1953).

\textsuperscript{35} Crawford, supra note 18, at 65.

\textsuperscript{36} Letter from Herbert Jenner, Doctors’ Commons, to the British Foreign Office (Nov. 22, 1832), in 2 LORD ARNOLD MCNAIR, INTERNATIONAL LAW OPINIONS 232 (1956) (emphasis added).

\textsuperscript{37} Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 266 (July 8) (“[T]he Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.”) (emphasis added).
legacy of the strong influence of natural law on the theologians and secular publicists who shaped the early law of nations. From the very different perspective of contemporary international law, this existential conception of necessity relies on an oddly anthropomorphic vision of the state—which, in this view, enjoys an inalienable natural right analogous to the one that Hobbes ascribed to human beings: the right to take any action necessary to avoid death or, by analogy for states, dissolution or annexation. But while the existential conception of necessity may well be anachronistic today, it would be difficult to defend Article 25’s more capacious definition as existing international custom.

Necessity has historically been treated, not so much as a formal defense based on rule-oriented criteria like those in Article 25 but as a political axiom of international law. This view is aptly captured by former Secretary of State Dean Acheson’s reply to the question whether the U.S. naval quarantine of Cuba violated international law: “The survival of states,” he said, “is not a matter of law.”\(^{39}\) Whatever its merits, Article 25, which goes well beyond this existential conception of necessity, is therefore not—in a word—codification; it is largely progressive development. But precisely because necessity’s pedigree lies in archaic and, today, partially discredited ideas about sovereignty,\(^{40}\) the moral standing of states,\(^{41}\) and natural law,\(^{42}\) Part II’s conclusion calls for renewed reflection on whether Article 25’s development of necessity is indeed progressive.

Part III argues that, in part, it is not, especially insofar as it (i) continues to rely on a fundamentally state-centric conception of necessity and (ii) incongruously imports conceptual and institutional assumptions borrowed from national criminal law into the law of state responsibility. In national legal systems, the exceptional defense of necessity can subsist alongside a robust general norm requiring categorical obedience to the law because of the characteristic legal institutions of stable states: a general legislature, a hierarchical judicial system, a disciplined police force, and so forth. The institutional apparatus of a state can regulate necessity by, for example, the techniques of legislative preclusion and ex ante specification of general, default criteria for its invocation, which can be enforced ex post by a compulsory judicial system and disciplined police force. Analogous legal


\(^{41}\) See, e.g., David Luban, The Romance of the Nation-State, in International Ethics 238 (Charles R. Beitz et al. eds., 1985); but see Michael Walzer, The Moral Standing of States, in id. at 217 (Charles R. Beitz et al. eds., 1985).


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institutions seldom exist or function reliably in general international law. Necessity also requires a legal system’s subjects to perceive the institutions that regulate the defense as legitimate in a sense that remains, by and large, aspirational in general international law.

Doubtless some specialized fields of contemporary international law, such as trade, possess, or might eventually develop, functionally analogous institutions. The point of emphasis is simply that general international law lacks them—or that insofar as they exist, they nonetheless tend to prove dysfunctional or unreliable in practice. Also, the relatively high degree of normative homogeneity that characterizes national legal systems—that is, relative consensus about the comparative weight of at times competing values—is often either lower or absent in international law, especially in those incidents in which necessity will be pled. For these, among other, reasons, necessity is more susceptible to misuse and abuse in international than in national law. And if abuses occur, international law often lacks institutions with the jurisdiction, legitimacy, and effective power to remedy them. Part III concludes that Article 25’s tacit reliance on predominant conceptions of and rationales for necessity in national criminal law should be viewed with a healthy degree of skepticism in the law of state responsibility.

Part IV seeks to show, through the vehicle of concrete incidents in two subfields of international law (war and investment), some of the difficulties with and ambiguities of Article 25 in practice. Notwithstanding the ILC’s painstaking effort to stress the exceptional nature of Article 25’s necessity plea, recent state practice suggests that, so defined, it remains susceptible to a protean interpretation or application. A well-known legal maxim holds that a rule should extend no further than its rationale: cessante ratione legis cessat et ipsa lex. Yet unmoored from its pedigree as an existential limit on the early law of nations, and absent a coherent analogy to national criminal law, it is not obvious that Article 25’s definition of necessity has a clear—still less an uncontroversial—rationale. Partially for this reason, it is often equally unclear how to interpret the plea or ascertain its limits.

Now, none of the preceding observations and arguments compel the conclusion that necessity is always a misplaced defense in international law. And in any event, as former Special Rapporteur on State Responsibility Roberto Ago wrote, “the concept of a ‘state of necessity’ is far too deeply rooted in the consciousness of the members of the international community . . . . If driven out of the door it would return through the window, if need be in other forms.” If so, the question is not whether, but how, necessity should be conceived as a general defense in contemporary

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43 Addendum to Eighth Report on State Responsibility by Mr. Roberto Ago, supra note 20, at 51, ¶ 53.
international law, a legal system in which states may no longer claim the same kind or degree of legitimacy as they presumptively enjoyed in the classical law of nations. Relative to that question, Article 25 provides scant guidance, particularly once we descend from the level of theory to consider scenarios in which necessity has been, or foreseeably might be, invoked.

Part V concludes in this way. After canvassing potential circumstances in which necessity might be pled, it argues that a more coherent—which is not to say precise—analogy for a general necessity defense in the law of state responsibility may be found in the doctrine of private necessity in tort law. Absent a lex specialis, that is, pleading necessity as a defense to state responsibility may be understood, at least as a default point of departure, roughly as an “incomplete privilege.”44 Why? Because whatever positive law provides, it would be Pollyannaish not to recognize that a state will derogate from an international legal obligation “to safeguard an essential interest against a grave and imminent peril.”45

Article 25 appears to assume, to the contrary, that having made the foregoing judgment, a state might (or at any rate, should) thereafter forbear from the wrongful but putatively necessary conduct if that conduct would “seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.” That is simply quixotic.46 In practice, the question is not whether a state may plead necessity as a defense to state responsibility for its breach of a particular international obligation, for if a state concludes that it must breach such an obligation so as “to safeguard an essential interest against a grave and imminent peril,” it undoubtedly will. The real question is who should bear the loss, and with respect to that question, Article 25 is silent. How, then, should contemporary international law approach it?

It would be misguided to look to antiquated natural-law conceptions of necessity that privilege the state or sovereign as such; rather, as an exercise in progressive development, the plea of necessity in the contemporary law of state responsibility should be reoriented to appraise candidly how best to reconcile the perforce competing policies and values at stake under the diverse circumstances in which necessity has been, or might foreseeably be, pled. The lodestar of that inquiry should not be the formerly paramount axiom that states enjoy a natural right to preserve themselves; rather, in the modern era, necessity compels a more complex inquiry that considers the full range of interests recognized by postwar international law, including, in particular, the normative reorientation of international law toward the

44 Restatement (Second) of Torts § 197(2).
45 ILC Articles art. 25(1)(a).
46 Id. art. 25(1)(b).
II. IS NECESSITY (ALREADY) A DEFENSE TO STATE RESPONSIBILITY?

A. Construing the Articles

Because the Articles blend codification and progressive development, it can be “difficult to say which article partakes more of one or the other.”\(^{48}\) In part for this reason, at the ILC’s request,\(^{49}\) the General Assembly did not recommend that the Articles be made the basis for a multilateral treaty. Instead, it took the apparently modest step of “commend[ing] them to the attention of Governments without prejudice to the question of their future adoption or other appropriate action.”\(^{50}\) Yet as David Caron suggested in a symposium on the Articles published in the American Journal of International Law, this choice of form has its own perils.\(^{51}\) As summarized by the editors, the seductive clarity, seeming concreteness, and treaty-like form [of the Articles], together with the paucity of other sources on some important issues, may tempt decision makers to apply the articles \textit{verbatim}, rather than treat them only as evidence of the relevant international rule. Caron cautions decision makers not to give the articles such unwarranted authority, and urges them to scrutinize the articles rigorously, together with all of their associated context and history, in weighing whether the ILC offers the right result.\(^{52}\)

I believe this admonition is sound in general and relative to Article 25 in particular. The Articles offer international decisionmakers formulaic and apparently authoritative answers to some of the thorniest issues in the law of state responsibility. Many such issues were contentious throughout the drafting of the Articles and, notwithstanding their publication, remain so.\(^{53}\)

\(^{47}\) “By shifting the fulcrum of the system from the protection of sovereigns to the protection of people, [international human rights law] works qualitative changes in virtually every component.” Reisman, \textit{Sovereignty and Human Rights in Contemporary International Law}, supra note 40 at 872. State responsibility is no exception.

\(^{48}\) Caron, supra note 29, at 873.

\(^{49}\) \textit{CRAWFORD}, supra note 18, at 59; see also G.A. Res. 56/83, supra note 18, pmbl.

\(^{50}\) G.A. Res. 56/83, supra note 18, ¶ 3.

\(^{51}\) Caron, supra note 29, at 868-70.

\(^{52}\) Bodansky, supra note 22, at 775.

But the general esteem in which the ILC is held, the succession of eminent special rapporteurs on state responsibility, and the sheer amount of time that preceded the Articles (nearly half a century) together confer a veneer of authority on the text as a whole, which some articles may not merit.

As noted in passing above, four years before the formal publication of the Articles, the ICJ said in Gabčíkovo-Nagymaros Project that necessity—as defined in an earlier, substantially similar, draft of what would become Article 25—is “a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation.” The Court cited no authority for this assertion apart from the ILC’s draft article. Nor did it analyze relevant state practice and opinio juris in an effort to corroborate the ILC’s view in accordance with the methodology for ascertaining custom that the ICJ has embraced since its inception. Just four years later, the ILC, in turn, relied on the presumptive authority of the ICJ’s statement in Gabčíkovo-Nagymaros Project to support Article 25. This institutional circularity, if not bootstrapping, is troubling. Some ILC members disagreed with Article 25 or, at a minimum, regarded parts of it as progressive development rather than codification. The Commentary remarks that in a handful of cases and incidents, “the plea of necessity has been accepted in principle, or at least not rejected.” That is hardly a confident affirmation of Article 25’s status as existing international custom. In short, the evidence invites further scrutiny.

Of course, debate continues to rage about the nature of international custom. Whether Article 25 codifies existing custom naturally depends on how custom should be understood. For present purposes, however, I want to elide this debate. The objective of the following sections is to scrutinize the particular definition of necessity arrived at by the ILC. Insofar as the ILC pursues questions of codification, it adopts a relatively conservative, positivist methodology, viz., customary international law emerges from a general and consistent practice of states, which those states follow because

Necessity clearly qualified as one of the most controversial articles. See Heathcote, supra note 30, at 491-92.

55 Crawford, supra note 18, at 181-82, ¶ 11.
56 See Heathcote, supra note 30, at 492-94.
57 Crawford, supra note 18, at 179 cmt. 3.
of a sense of legal obligation (opinio juris sive necessitatis). Several oft-cited ICJ constructions of custom refine or qualify this textbook definition.

As for state practice, it is said that the formation of custom does not require any particular length of time, but “an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform.”

State practice, in other words, need not be entirely uniform; it suffices that “the conduct of states should, in general, be consistent with such rules, and that instances of state conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.” As for opinio juris, the ICJ similarly treats it as indispensable to custom, for “[t]here are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.”

B. A Critique of the Commentary to Article 25

Does Article 25 qualify as customary international law, so conceived? Even to say that an affirmative answer is dubious would be charitable. As we will see, the evidence of opinio juris for a necessity plea turns out to be (sufficiently) dense in only one context, that of state self-preservation; and there is scant evidence of what the ICJ describes as indispensable to custom: “extensive and virtually uniform” state practice. Rather than support a

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59 See, e.g., Brian D. Leppard, Customary International Law: A New Theory with Practical Applications 6 (2010) (footnote omitted). ("A customary practice among states can evolve into a customary legal norm binding on all states if (1) the practice is consistent among states and endures over some period of time, and (2) states believe that the practice is legally mandated (a belief referred to as opinio juris sive necessitatis or more simply as opinio juris.).") Other common formulations include those found in the Restatement (Third) of the Foreign Relations Law of the United States § 102(2); ICJ Statute art. 38(1)(b); and ICJ jurisprudence, e.g., Continental Shelf (Libya v. Malta), 1985 I.C.J. 13, 29-30 (June 3).


61 Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 98 (June 27) [hereinafter Nicaragua].

62 Id. at 109 (citing North Sea Continental Shelf, 1969 I.C.J. at 44).

63 North Sea Continental Shelf, 1969 I.C.J. at 44.

64 Id. at 43 ¶ 74 (emphasis added). As we will see, even if we were to adopt the unorthodox view of the International Law Association, which argues that opinio juris is not strictly necessary to establish custom but rather serves only a contingent evidentiary function, it is doubtful that adequate evidence of opinio juris exists to fulfill even this more limited function. See International Law Association, Final Report of the Committee on Formation of Customary (General) International Law, Statement of Principles Applicable to the formation of General Customary International Law, 69 INT’L L. ASS’N REP. CONF. 712, 743 § 16 (2000) ("A belief, on the part of the generality of States, that a practice satisfying the
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definition comparable to Article 25, past trends in decision establish only a limited, existential conception of necessity, which allows the defense if, and only if, the state’s very existence would otherwise be jeopardized.65

Historically, necessity emerges as a rare defense, which a state may invoke in the event of a literal threat to its existence on the order of war or insurgency. Only in that context does it enjoy an established pedigree. It has otherwise been uniformly rejected on the facts and recognized, if at all, only in dicta or as an arguable inference from rejection of the plea. It would be both superfluous and tedious to belabor these points by analyzing every incident that arguably bears on them. But in the interest of analytic rigor, the chief authorities cited in the Commentary will be scrutinized closely in an effort to stress the major patterns and jurisprudential themes that recur. I conclude that Article 25 is largely an exercise in progressive development. That, in turn, invites the question whether Article 25’s development of the law in this regard is indeed progressive and, if so, in what sense.

1. Classical Necessity: The Very Survival of a State

Early writers on the law of nations—Hugo Grotius, Alberico Gentili, Emer de Vattel, and other luminaries—uniformly agreed that it included necessity.66 But it is critical to appreciate how they understood the plea. Because the law of nations regulated the conduct of states, which alone qualified as subjects of international law, no state could be expected to obey an international obligation if, in consequence, it would cease to be a legal subject. With minor variations, those who wrote about the early law of nations thus located necessity’s rationale in the structure of the post-Westphalia international order, which governed the rights and duties of (juridically equal) sovereign states inter se. Within this order, each state enjoyed the right to take any action necessary to preserve itself. Publicists on the early law of nations, that is, regarded the necessity plea as a natural right of states in much the way that Thomas Hobbes regarded the sole, but inalienable, natural right of human beings: “the liberty that each man hath, to use his own power as he will himself, for the preservation of his own
nature.”\textsuperscript{67} It would have been implausible, for the classical publicists, to say that the law of nations, a system predicated on the existence of states, did not recognize the right of each to preserve itself.

At the same time, the classical publicists also generally insisted that internationally wrongful acts defended as necessary obliged the invoking state to pay reparations\textsuperscript{68}—the implication being that necessity might excuse, but seldom if ever justified, non-compliance with an international obligation. In \textit{De Jure Belli ac Pacis}, Grotius wrote, “For if I cannot defend myself without intercepting those Things that are sent to my Enemy, Necessity \ldots will give me a good Right to them, but upon Condition of Restitution, unless I have just Cause to the contrary.”\textsuperscript{69} About a century later, Vattel argued that necessity authorized a state to compel the sale of (or, if the seller refused to sell, to take by force) “ships, wagons, horses, or even the personal labour of foreigners \ldots. But as [the state] has no more right to these things than necessity gives her, she ought to pay for the use she makes of them, if she has the means of paying.”\textsuperscript{70}

The classical conception of necessity is evident in a bare handful of recorded nineteenth-century precedents. In the 1829 \textit{Chichester} incident, for example, Great Britain complained of Mexico’s detention of a British vessel pursuant to an embargo that Mexico had declared in anticipation of a Spanish attack and “to prevent information from reaching the Spanish squadron.”\textsuperscript{71} Herbert Jenner of the Doctors’ Commons advised the Crown that necessity authorized the \textit{Chichester}’s temporary seizure and detention. Echoing Vattel, he wrote, “The first and paramount duty of every Nation is that of self-preservation, and the Law of Nations will sanction the adoption of any measure, which may be necessary to secure this great object, although it may in some degree infringe upon the rights of others.”\textsuperscript{72}

Mindful of this rationale, the balance of the early precedents fall into a largely uniform pattern. In the 1832 Anglo-Portuguese dispute, the first authority cited in the Commentary,\textsuperscript{73} Portugal had obliged itself by treaty

\textsuperscript{67} HOBES, supra note 38.

\textsuperscript{68} Cf. AGO, \textit{Eighth Report}, supra note 20, at 51, ¶ 71 (emphasizing that while the classical writers accepted necessity, “very restrictive conditions were attached to it”).

\textsuperscript{69} 3 HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE § 1.V, at 1190 (Richard Tuck ed., 2005) (1625); see also 2 HUGO GROTIUS, supra, at 434.

\textsuperscript{70} EMER DE VATEL, THE LAW OF NATIONS § 120, at 320-21 (Béla Kapossy & Richard Whatmore eds., 2008) (1758). In fact, referring to the mythical rape of the Sabine women by the early Romans, Vattel even argued that because “[a] nation cannot preserve and perpetuate itself except by propagation,” necessity authorizes “a nation to procure for itself, even by force of arms, the liberty of obtaining women in marriage.” \textit{Id.} § 120, at 321.

\textsuperscript{71} 2 MCNAIR, supra note 36, at 231.

\textsuperscript{72} \textit{Id.}

\textsuperscript{73} CRAWFORD, supra note 18, at 179 cmt. 4.
to respect the property of British nationals residing there. But faced with the “necessity of providing for the subsistence of certain contingents of troops engaged in quelling internal disturbances,” Portugal appropriated British property. The Consul General in Lisbon notified the British Crown that “under the plea of necessity, the Viscount de Santarem claims the right of appropriating British property, to the use of the Portuguese Government.” Again, Jenner advised the Crown that for the purpose of self-preservation, state conduct that is necessary may to a certain degree “infringe upon the rights of others.”

Relying on Vattel, he said that treaty obligations, even though otherwise binding in good faith, may be suspended temporarily, or observed less strictly, so as not “to deprive . . . Portugal of the right of using those means, which may be absolutely and indispensably necessary to the safety, and even the very existence of the State.”

The Commentary next turns to the Caroline incident. The Caroline has been, and continues to be, routinely cited—not as support for necessity in the customary law of state responsibility but as purported support for a customary right to anticipatory self-defense. The details of the incident have been related often. Briefly, in 1837, New York citizens sympathetic to a Canadian insurrection against British rule had been using the Caroline, a U.S. vessel, to aid the insurgents. A British regiment crossed the border

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74 Ago, Eighth Report, supra note 20, pt. 1, 13, 40, ¶ 23.
75 Crawford, supra note 18, at 179 cmt. 4.
76 2 McNair, supra note 36, at 231-32.
77 Id. at 231; see also id. at 232 (“The extent of the necessity, which will justify such appropriation of the Property of British Subjects, must depend upon the circumstances of the particular case, but it must be imminent and urgent.”) (emphasis added).
78 Id. at 232.
79 See id. at 232 (citing Vattel, supra note 70, § 170, at 345). The cited passage reads in relevant part:
If [treaty obligations] should on any occasion prove incompatible with the duties a nation owes to herself, or with what the sovereign owes to his own nation, the case is tacitly and necessarily excepted in the treaty. . . . If the sovereign, in order to preserve his own nation, has occasion for the things he has promised in the treaty . . . he ought without hesitation to give preference to his own nation . . . . Necessity here forms an exception, and he does not violate the treaty, because he cannot fulfill it.
Vattel, supra note 70, § 170, at 345-46.
80 2 McNair, supra note 36, at 232.
82 The classic account is Robert Y. Jennings, The Caroline and McLeod Cases, 32 Am. J. Int’l L. 82, 82-89 (1938).
into New York, forcibly boarded the *Caroline*, set it on fire, and let it drift downstream to its destruction on the Niagara Falls, killing several U.S. citizens.\textsuperscript{83} Secretary of State Daniel Webster protested with characteristic eloquence, arguing that

\begin{quote}
[i]t will be for [the British] Government to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation . . . . [T]he act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it . . . .\textsuperscript{84}
\end{quote}

Based on Webster’s references to self-defense, many contemporary scholars see the *Caroline* as an early example of the inherent, customary right to self-defense, which predates and survives the adoption of the U.N. Charter (or perhaps places a historical gloss on the apparently more restrictive text of Article 51).\textsuperscript{85} But reliance on the *Caroline* as authority for anticipatory self-defense is misplaced. At the time of the incident, which coincided with the high watermark of legal positivism in international law, *nulla ad bellum* existed.\textsuperscript{86} It would have been odd for Webster to suggest a legal threshold for force, defensive or otherwise.\textsuperscript{87} The law of nations regulated the rights of neutral states in wartime and the like;\textsuperscript{88} it did not limit recourse to war. Rather, it regarded war as “a metajuristic phenomenon, an event outside the range and control of the law.”\textsuperscript{89}

The Commentary frames the issue in the *Caroline* accurately: did “the necessity of self defense” authorize Britain to encroach upon and injure the territory, property, and nationals of the United States?\textsuperscript{90} The United States

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\footnotetext{83}{Yoram Dinstein, *War, Aggression, and Self-Defence* 248 (4th ed. 2005).}
\footnotetext{84}{Letter from Daniel Webster to Henry Fox (Apr. 24, 1841), reprinted in 2 McNair, *supra* note 36, at 222.}
\footnotetext{85}{U.N. Charter art. 51; cf. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring).}
\footnotetext{87}{Furthermore, “[t]here was nothing anticipatory about the British action against the *Caroline* steamboat on US soil, inasmuch as use of the *Caroline* for transporting men and materials across the Niagara River—in support of an anti-British rebellion in Canada—had already been in progress.” Dinstein, *supra* note 83, at 184-85.}
\footnotetext{89}{Arthur Nussbaum, *Just War—A Legal Concept?*, 42 Mich. L. Rev. 453, 477 (1943).}
\footnotetext{90}{See 2 McNair, *supra* note 36, at 222-23 (quoting the British Special Envoy, Lord Ashburton, who agreed with Webster “as to the paramount obligation of reciprocal respect for the independent territory of each,” i.e., the United States and British colonial territory, but seeking to frame the *Caroline* incident in terms of “overpowering necessity,” which}
\end{footnotes}
and Great Britain reached agreement on the legal principles at issue and resolved the incident by, in effect, “agreeing to disagree” about whether, given the facts, necessity authorized Britain’s conduct. Yet as a precedent for necessity as a defense to state responsibility, the relevant point should be the scope of that agreement. Consistent with the Chichester and Anglo-Portuguese disputes, the Caroline suggests that necessity supplies a state with a temporary privilege to suspend an international obligation based on war, insurgency, or another, comparably serious, threat to that state—where the state is identified with its government.

So much for the nineteenth century precedents. Each involves a literal military threat to a state. None furnishes authority for the more capacious definition of necessity codified in Article 25. The remaining incidents relied on by the Commentary differ in two significant respects: first, their focus shifts from security to ecological or economic harms; and second, in these latter contexts, the authorities—without exception—reject the plea. \(^91\) True, the rejection of a legal concept may indirectly support that very concept. \(^92\) But that is highly doubtful here: in each case, the tribunal rejects necessity in terms that cast serious doubt on the Commentary’s position that state practice supports necessity in any context other than that of state security.

2. Economic Necessity

Much of the balance of the evidence adduced by the ILC focuses on two recurring economic scenarios: either (i) a state contracts with a foreign commercial entity, receives some benefits from the agreement, and citing necessity, argues that it cannot and “therefore” need not pay; or (ii) a debtor state invokes its financial distress to avoid, defer, or modify its obligations to the creditor state.

Typical of the latter scenario is the Russian Indemnity award. \(^93\) In 1879, could temporarily suspend the obligation. See also Dinstein, supra note 83, at 185.

\(^91\) A contemporary example of the same pattern, in the context of the law of the sea, is the International Tribunal for the Law of the Sea’s dismissal of Guinea’s necessity argument in The M/V “Saiga” (No. 2) Case (St. Vincent and The Grenadines v. Guinea), 38 I.L.M. 1323, 1351-52 (1999).

\(^92\) Nicaragua, supra note 61, at98.

\(^93\) Russia Indemnity (1912), 11 Rep. Int’l Arb. Awards 431 (1912), translated in 7 Am. J. Int’l L. 178 (1913). Another supposed authority is the Forests of Central Rhodope incident, decided by the Council of the League of Nations in 1934. Under an arbitral award rendered the year before, see 3 Rep. Int’l Arb. Awards 1405 (1949), Bulgaria owed Greece reparations in the amount of 475,000 gold leva plus interest. See Ago, Eighth Report, supra note 20, at 23 ¶ 23. Greece appealed to the Council after Bulgaria failed to pay on time. Bulgaria replied that although its financial situation prevented it from paying the amount in cash, as the arbitral award had contemplated, it stood ready to discharge its debt by “any other method of payment which might suit [Greece].” Id. (internal quotation marks omitted). Greece agreed. According to Ago, “the two Governments seem to have clearly recognized that a
Russia and the Ottoman Empire concluded a treaty formally terminating their hostilities.\textsuperscript{94} In it, the Ottoman Empire agreed to indemnify Russia for its losses in the amount of 350,000 Turkish pounds.\textsuperscript{95} But it took Turkey nearly twenty years to pay. Turkey made periodic installment payments but asked for numerous extensions. By 1894, an exasperated Russia refused to grant any further extensions and insisted on immediate repayment of the balance.\textsuperscript{96} From 1895 to 1899, however, the waning Ottoman Empire’s efforts to put down insurgencies in Asia Minor placed Turkey in difficult financial straits. Consequently, even though it finally did, in 1900, pay Russia the outstanding principal, it failed to pay the interest. In 1910, Russia and Turkey submitted to arbitration the question whether, and if so how much, interest Turkey owed Russia.\textsuperscript{97}

The tribunal inaccurately described Turkey’s defense as force majeure. It noted in this regard that Russia accepted, in principle, “that the obligation of a state to carry out treaties may give way if the very existence of the state should be in danger, if the observance of the international duty is . . . self-destructive.”\textsuperscript{98} That proposition, of course, is the idea of necessity at work in the writings of Grotius, Vattel, and other classical publicists. But relative to Turkey’s defense, it is irrelevant. Indeed, it may well be an indicium of the complete absence of authority for necessity in the economic context that the tribunal awkwardly framed Turkey’s defense as force majeure “adapt[ing] itself to political necessities.”\textsuperscript{99} Regardless, the tribunal (correctly) rejected that defense. It observed, first, that even if Turkey suffered from financial difficulties between 1881 and 1902, it could have obtained loans at favorable rates to pay off its outstanding debt to Russia; and second, that it would at any rate be absurd for Turkey to suggest that “payment . . . of the comparatively small sum . . . would imperil the existence of the Ottoman Empire or seriously compromise its internal or external situation.”\textsuperscript{100} While the tribunal conflated necessity and force majeure, it therefore accurately set

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\textsuperscript{94} Russia Indemnity, 7 AM. J. INT’L L. at 183.  \\
\textsuperscript{95} Id. at 184.  \\
\textsuperscript{96} Id. at 185.  \\
\textsuperscript{97} Id. at 178.  \\
\textsuperscript{98} Id. at 195 (emphasis added; internal quotation marks omitted). Stated otherwise, Russia treated Turkey’s necessity claim as implausible unless, consistent with the earlier precedents, it could truly be said to threaten the existence of Turkey as a state.  \\
\textsuperscript{99} Id. at 195.  \\
\textsuperscript{100} Id. at 195-96 (emphasis added).
\end{flushleft}
the evidentiary threshold for necessity at, to quote Article 25, “a grave and imminent peril.” Contrary to Article 25, however, it stressed that the peril must be to the state’s “very existence,”\(^{101}\) not to the far more capacious and protean idea of the state’s “essential interest.”\(^{102}\)

The other necessity scenario that recurs in the economic realm involves circumstances in which a state enters into a concession agreement or other contract with a private commercial entity and later seeks to avoid, mitigate, or defer its debt by citing necessity. Société Commerciale de Belgique (SCdB) is a paradigmatic example.\(^{103}\) In 1925, Greece engaged SCdB to construct railway lines. It financed the project by issuing bonds to SCdB. In 1932, after the global financial crisis hit, Greece defaulted on its sovereign debt. Because SCdB ceased to receive interest or amortization payments from Greece, it could no longer pay its subcontractors and had no choice but to terminate the project.

When SCdB brought arbitration, Greece characterized its fiscal crisis as force majeure.\(^{104}\) It argued that “by reason of its budgetary and monetary situation . . . it is materially impossible for the Greek Government to execute the awards.”\(^{105}\) Now, perhaps paying SCdB would have been inappropriae from the standpoint of political theory, that is, given the needs of Greece’s citizens to whom the Greek government owes its first and foremost allegiance. But as in Russian Indemnity, it is simply inaccurate to characterize the debtor’s situation as force majeure, still less as necessity. Greece’s financial distress, however extreme, cannot be assimilated to an irresistible natural force such as a hurricane, a tsunami, or an earthquake. No “act of God” prevented Greece from paying SCdB.\(^{106}\) Greece decided not to pay. Again, this might have been appropriate from the perspective of political morality. The point is simply that it does not constitute a true example of necessity in the international law of state responsibility.

At any rate, the tribunal rejected Greece’s arguments, including force majeure, and awarded SCdB damages. Because Greece refused to pay,\(^{107}\) Belgium, espousing the claim of SCdB (its juridical national), submitted the dispute to the PCIJ. Before the PCIJ, Greece renewed its financial distress
argument. The PCIJ held in relevant part that by the terms of the awards, which were “‘final and without appeal’, and since the Court ha[d] received no mandate from the Parties in regard to them, it [could] neither confirm nor annul them either wholly or in part.”\footnote{108} Its competence extended only to recording, at Belgium’s request, Greece’s recognition of their validity—presumably to erase any doubt that the matter was \textit{res judicata}.

The Commentary nonetheless cites \textit{SCdB} as authority for Article 25 and necessity in general. It says that Greece and Belgium “implicitly accepted the basic principle, on which the two parties were in agreement.”\footnote{109} But what principle is that? If the ILC means to suggest that the parties agreed that Greece’s “serious budgetary and monetary situation . . . justified [it] in not executing the arbitral awards,”\footnote{110} as the Commentary to Article 25 says, that is a misreading of the PCIJ’s decision. The PCIJ neither expressed nor implied anything to this effect. The two states agreed only that Greece had indeed advanced the foregoing argument and requested a decision “on the merits.”\footnote{111} Far from affirming that financial distress supplies a state with a valid necessity defense, which justifies its failure to honor its international obligations, the PCIJ disavowed its competence to reexamine two arbitral awards that \textit{rejected} that very proposition—which, it bears reiterating, had been described inaccurately as \textit{force majeure}, not necessity.

In the interest of brevity, I will not review the other cases often cited, including in the Commentary, as examples of economic necessity.\footnote{112} Suffice it to say that they simply confirm the principle implicit in \textit{SCdB}: a state’s economic hardship, however severe, does not constitute, so to speak, economic \textit{force majeure}, which justifies or excuses a state’s failure to pay what it owes under international law. Before turning to the final category of cases that ostensibly support Article 25, however, it is worth reviewing one final economic arbitration: \textit{French Company of Venezuelan Railroads}.\footnote{113} Its facts differ from the other two paradigms, and it presages necessity’s use in

\begin{itemize}
\item \footnote{108} \textit{Société Commerciale De Belgique}, 1939 P.C.I.J. at 174.
\item \footnote{109} \textsc{Crawford, supra} note 18, cmt. 8, at 180; \textit{see also} 1978 ILC Survey ¶ 288.
\item \footnote{110} \textsc{Crawford, supra} note 18, cmt. 8, at 181 (emphasis added).
\item \footnote{111} \textit{Société Commerciale De Belgique}, 1939 P.C.I.J. (ser. A/B) No. 78, at 174 (June 15).
\item \footnote{112} In \textit{Oscar Chinn} (U.K. v. Belg.), 1934 P.C.I.J. (Ser. A/B) No. 63, at 65 (Dec. 12), the PCIJ held that Belgium did not breach its treaty obligations and therefore did not even reach Belgium’s necessity defense, which it pled in the alternative. Judge Dionisio Anzilotti wrote separately, concurring, because he disagreed with the majority’s interpretation of the treaty and therefore would have reached Belgium’s necessity plea, which he accepted in principle but rejected as applied: despite its economic difficulties, Belgium could have acted in conformity with its treaty obligations. For Anzilotti, the existence of an alternative to violating the treaty precluded necessity. \textit{Id.} at 113-14 (separate opinion of Judge Anzilotti); \textit{see also} Payment of Various Serbian Loans Issued in France (Fr. v. Ser.) 1929 P.C.I.J. (ser. A) No. 14 (Jul. 12).
\end{itemize}
modern investor-state arbitration.

In 1887, Venezuela concluded a concession agreement with Campagnie Française de Chemins de Fer Vénézuéliens (Company) to construct a railroad from Merida to the Lake of Maracaibo. The agreement provided that the Company would enjoy the right to revenue generated by the railroad for 99 years, at which time Venezuela would nationalize it. In the first decade of the concession, natural disasters, including earthquakes and floods, afflicted the line’s construction. Then, in 1898, General José Cipriano Castro initiated a coup d’état. During the ensuing civil war, Castro’s forces commandeered the railroad to transport supplies and troops, stole one of the Company’s ships, and sunk another. In 1899, crippled by both the natural disasters and the civil war, the Company abandoned the railroad altogether and declared bankruptcy. It then brought arbitration, seeking reparations for the loss of the railroad and for the loss and detention of the Company’s ships.

Venezuela, like Greece and Turkey, respectively, in SCdB and Russian Indemnity, did not even raise necessity in defense—so, once again, it is not even clear that this arbitration should be characterized as a precedent for necessity. The panel found for the Company and ordered Venezuela to pay for its use of the railroad and damage to the Company’s vessels. Why, then, does the Commentary include this award as authority for Article 25? The apparent answer is that the arbitral umpire wrote in dicta that a state’s “paramount” duty is its own “preservation.” For this reason, he speculated, if Castro’s forces had been defeated, Venezuela might not have been obliged to pay the Company for the losses it sustained as a result of the railway traffic paralysis during the civil war. Why not? Because in that alternative universe, the Company would have been, in effect, demanding payment from the state treasury even though it had funds sufficient only to prosecute a civil war for its own survival, that is, to preserve its very existence. (Again, the state is identified with its government.) According to the arbitral umpire, that kind of civil war fell within the class of investment risks that the Company assumed when it entered into the concession with Venezuela. The French Company award is therefore fully consistent with the classical, existential conception of necessity evident in the precedents

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114 Id. at 289.
115 Id. at 288-289.
116 Id. at 342.
117 Id. at 344.
118 Id. at 303.
119 Id. at 288.
120 Id. at 354.
121 Id. at 353.
122 Id. at 353.
and writings of publicists referenced earlier: because the law of nations governs states, it cannot oblige one of them to obey an international obligation if the cost of compliance would be the state’s destruction as a state—the state being identified with its regime.123

3. Ecological Necessity

The final area of international law in which Article 25 is said to find support is environmental or ecological. In the Russian Fur Seals dispute,124 for example, increased predatory sealing in the late nineteenth century had led to a decline in the number of seals frequenting rookeries in waters adjacent to Russia but neither subject to its maritime jurisdiction nor regulated by treaty.125 In 1892, the Zabraka, a Russian cruiser, seized three British sealing vessels in waters forty to fifty miles from the Commander Islands,126 a maritime area well beyond Russia’s territorial sea and the sites of previous seizures.127 Russia authorized the captures even though it had no treaty with Great Britain that prohibited the latter’s predatory sealing in the maritime area at issue.128 In 1893, Russia nonetheless issued a decree prohibiting the taking of fur seals within ten nautical miles of its coast and thirty nautical miles of the Islands.129

The Commentary apparently cites this incident in support of Article 25 because Russia’s Foreign Minister emphasized the “necessity of immediate precautionary measure[s]” in his exchange with the British Ambassador.130 But his use of the word necessity did not indicate a legal claim of necessity. Insofar as Russia legally defended its conduct, the Foreign Minister simply ascribed Russia’s seizures to “the pressure of exceptional circumstances.”131 Implicitly conceding that Russia lacked a viable legal defense, the Foreign Minister proposed that Russia’s seizure of the vessels “may be regarded as a case of force majeure and assimilated to cases of self-defense.”132 Of course,
neither force majeure nor self-defense is synonymous with necessity.\textsuperscript{133} The Articles accurately categorize the former as distinct defenses.\textsuperscript{134} Nor would the conditions for either force majeure or self-defense have applied in the Russian Fur Seals incident.\textsuperscript{135} Great Britain ultimately decided to accept Russia’s somewhat exorbitant maritime claims, but it nevertheless insisted that this arrangement operate prospectively only, foreclosing any claim for reparations.\textsuperscript{136} No evidence suggests that either state regarded this incident as involving a legal claim of necessity, still less as resolved on that basis.\textsuperscript{137}

In the more recent Torrey Canyon incident, a Liberian oil tanker collided with submerged rocks off the coast of Cornwall, spilling oil into areas just outside British territorial waters. After several unavailing efforts to contain the spill and avert damage to the coast, the United Kingdom bombed the vessel, burning up any remaining oil.\textsuperscript{138} Once again, the Commentary cites this incident in support of Article 25 even though the United Kingdom did not advance necessity or, for that matter, any legal argument in defense of its action.\textsuperscript{139} Also, almost immediately thereafter, states hastily concluded a multilateral treaty on oil spills.\textsuperscript{140} It may be inferred that states preferred to establish clear international law on the issues arising out of such accidental

\begin{footnotesize}
\textsuperscript{133} Cf. Heathcote, supra note 30, at 495 ("Older cases sometimes assimilated necessity with force majeure.") (citing Russian Indemnity; footnote omitted).
\textsuperscript{134} ILC Articles arts. 21, 23; see Crawford, supra note 18, at 65.
\textsuperscript{135} Under Article 21 of the ILC Articles (self-defense), the "wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defense taken in conformity with the Charter of the United Nations." But the U.N. Charter did not exist at the time, and even if it had, it would be absurd to characterize Great Britain’s sealing as an armed attack. Under Article 23 (force majeure), the wrongfulness of an act may be precluded if that act is attributable to "an irresistible force or an unforeseen event, beyond the control of the State, making it materially impossible to perform the obligation." Crawford, supra note 18, at 65. The seizure of the vessels, which Russia ordered, obviously did not lie beyond its control.
\textsuperscript{136} 86 British and Foreign State Papers, supra note 125, at 227.
\textsuperscript{137} Another potentially relevant authority, which I note here rather than in the body of the text for the sake of brevity, is the Faber case. See Venezuelan Arbitrations of 1903, at 603-30 (J.H. Ralston & W.T. Sherman Doyle eds., 1904). German exporters in Colombia challenged Venezuela’s blockade of commerce on certain Venezuelan rivers flowing from Colombia through the port of Maracaibo to the Atlantic Ocean. Germany argued that its merchants must be permitted to travel from their Colombian headquarters to the Atlantic Ocean via Venezuela’s rivers under a customary international rule protecting access to coastal waters. The arbitral umpire held that despite their preference for using blockaded rivers, alternate maritime routes were available to the German merchants. This fact would have rendered necessity unavailable were it advanced in terms of Article 25’s language. But neither Germany nor the arbitral umpire even framed the issue in terms of necessity. Only in dicta, after issuing his ruling, did the arbitral umpire discuss William Edward Hall’s view that necessity cannot justify the creation of new rights or an infringement on others’ rights.
\textsuperscript{138} Ago, Eighth Report, supra note 20, at 40, ¶ 23.
\textsuperscript{139} Crawford, supra note 18, at 181 cmt. 9.
\textsuperscript{140} International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, Nov. 29, 1969, 970 U.N.T.S. 211.
\end{footnotesize}
spills rather than leave comparable incidents in the future to the unilateral judgments of affected states. But once again, the point of emphasis is that this incident offers no support for Article 25 or necessity’s existence as an acknowledged defense beyond its original confines as an existential plea in the classical law of nations.

The ICJ’s Fisheries Jurisdiction decision is equally irrelevant. Briefly, when Canada accepted the Court’s general jurisdiction under Article 36(2) of the ICJ Statute, it reserved as to disputes arising out of measures related to fishing vessels in the maritime Regulatory Area of the Northwest Atlantic Fisheries Organization (NAFO). The same day, Canada statutorily directed its navy to seize and search vessels that were taking “straddling stocks” or that fell within certain enumerated classes of vessels in the NAFO Area. Canada’s navy subsequently seized several vessels fishing for Greenland halibut. Its seizure of the Estai, a Spanish vessel, some 245 miles from the Canadian coastline (within the NAFO Area but beyond Canada’s exclusive economic zone under the U.N. Convention on the Law of the Sea), culminated in the ICJ dispute.

Spain argued that the seizure violated Article 92 of the Convention. But the ICJ never reached the merits. It disclaimed jurisdiction based on Canada’s reservation. The Commentary apparently includes the Fisheries Jurisdiction case because Canada defended its seizure of the Estai as “necessary in order to put a stop to the overfishing of Greenland halibut by Spanish fishermen.” The preamble to Canada’s national legislation also included the statement that because “foreign fishing vessels continue to fish for [enumerated] stocks in the NAFO Regulatory Area,” the federal government deemed “urgent action necessary to prevent further destruction of those stocks and to permit their rebuilding, while continuing to seek effective international solutions to the situation.” There is no reason to think Canada intended to advance necessity as a legal defense. Yet here too, as in the Russian Fur Seals dispute, the Commentary appears to equate

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141 As of 2010, the Convention had 86 states parties, “the combined merchant fleets of which constitute approximately 74% of the gross tonnage of the world’s merchant fleet.” International Maritime Organization, Status of Multilateral Conventions and Instruments in Respect of Which the International Maritime Organization or its Secretary-General Performs Depositary or Other Functions 202 (Feb. 28, 2010).
142 CRAWFORD, supra note 18, at 182 cmt. 12; Fisheries Jurisdiction (Spain v. Can.), 1998 I.C.J. 432 (Dec. 4).
144 See UNCLOS.
145 Fisheries Jurisdiction, 1998 I.C.J. at 443; see UNCLOS (confering exclusive jurisdiction on a vessel’s flag state while it traverses the high seas).
147 Id. at 443 (emphasis added).
148 Id. at 440 (emphasis added).
the word necessity with the legal defense.

C. Necessity as a General Principle?

In terms of the traditional sources of international law, the distinction between custom and “the general principles of law recognized by civilized nations”\(^\text{149}\) is not always clear. At times, the two overlap or apply concurrently. It may therefore be artificial to scrutinize necessity separately within the rubric of a general principle. But because necessity is a defense in most modern national legal systems,\(^\text{150}\) it seems worthwhile to consider whether necessity in general and Article 25 in particular might best be understood, not as custom, but as a general principle of law—especially because the preceding section casts doubt on the former claim. Bin Cheng, whose sixty-year-old treatise remains, despite its age, the *locus classicus* on general principles, included necessity among them.\(^\text{151}\) He defined necessity in terms that closely echo the classical conception:

If, after every conceivable legal means of self-preservation has first been exhausted, the very existence of the State is still in danger, and if there exists only one single means of escaping from such danger, the State is justified in having recourse to that means in self-preservation, even though it may otherwise be unlawful.\(^\text{152}\)

In the first place, note that Cheng, like the classical publicists, defines necessity by reference to state self-preservation and threats to its very existence—despite Ago’s insistence that “the concepts of self-preservation and state of necessity are in no way identical, nor are they indissolubly linked in the sense that one is merely the basis and justification of the other.”\(^\text{153}\) Second, and also contrary to Ago’s expressed view, Cheng indeed seems to define self-preservation as the justification for necessity.

Yet elsewhere in his analysis, Cheng refers to necessity as an excuse or equates the two rubrics. In a proximate passage, for instance, he says, “The necessity of self-preservation justifies and excuses an otherwise unlawful act, exempting it from the legal consequences normally resulting from acts of

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\(^\text{149}\) ICJ Statute art. 38(1)(c); see also Statute of the Permanent Court of International Justice art. 38(3), Dec. 16, 1920, 6 L.N.T.S. 379 (same).

\(^\text{150}\) Necessity remained largely unknown to “the major nineteenth-century Western criminal codes.” GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 774-75 § 10.2 (1978). By the latter half of the twentieth century, however, it had become “standard for revised criminal codes to recognize the claim.” *Id.*

\(^\text{151}\) See CHENG, supra note 34A. The Commentary does not discuss or cite Cheng’s views.

\(^\text{152}\) *Id.* at 74 (emphases added).

\(^\text{153}\) Ago, Eighth Report, supra note 20, at 51, ¶ 8 (citation omitted).
this kind. But it does not render the commission of the act a matter of right.”¹⁵⁴ Unlike the above block quotation and despite Cheng’s reference to justification and excuse, here, he appears to characterize necessity as an excuse inasmuch as he says that it does not render “the act a matter of right.” In short, Cheng appears to be less sensitive to the significance of the excuse-justification distinction than most contemporary scholars.¹⁵⁵

Yet for the status of necessity as existing law (lex lata), this neglect is problematic—not only because of the correlative consequences that often, but not always,¹⁵⁶ follow from characterizing a particular defense as excuse or justification (for example, the implications for third parties); it is also troubling because, as we will see shortly, state legal systems do not share a uniform conception of necessity, and the justification-excuse distinction demarcates the principal fault line between different national definitions of necessity. Some states treat it as an excuse, others as a justification, and still others as either or both, depending on the facts. In short, like duress,¹⁵⁷ analysis of necessity in national legal systems shows that it varies among and within them. In what sense, then, might necessity be understood as a general principle of law common to civilized nations?

In a well-known typology, Oscar Shachter distinguished five views of general principles that have “been invoked and applied in international law discourse and cases”:

(1) The principles of municipal law “recognized by civilized nations”.
(2) General principles of law “derived from the specific nature of the international community”.
(3) Principles “intrinsic to the idea of law and basic to all legal systems”.
(4) Principles “valid through all kinds of societies in relationships of hierarchy and co-ordination”.
(5) Principles of justice founded on “the very nature of man as a rational and social being”.¹⁵⁸

Into which of these categories does Cheng’s definition of necessity fall? The substantial variation in national legal systems seems to exclude the first. Insofar as Cheng defines necessity in terms redolent of the classical view—

¹⁵⁴ CHENG, supra note 34, at 74.
as a defense based on the claim that compliance with an international legal obligation would jeopardize the state’s very existence—he locates necessity in Shachter’s second category.\footnote{Cheng’s citation of national law might suggest the first. See Cheng, supra note 34, at 69 n.3. But as noted in the body text, national legal systems do not share a single conception of necessity. Nor can necessity be characterized as “intrinsic to the idea of law and basic to all legal systems,” Schachter, supra note 158, at 118, for it is a relatively recent development in national law. Fletcher, supra note 150, at 774-75 § 10.2. Finally, the fourth and fifth conceptions in Schachter’s typology seem incongruous as applied to necessity in the context of a legal system that principally governs states rather than human beings.}

But if that is right, then Cheng’s analysis only reinforces the classical conception; it does not support the more capacious definition of Article 25. Nor do the authorities on which Cheng relies. Almost all of them overlap with those analyzed already,\footnote{Cheng relies, for example, on the Serbian Loans, Russian Indemnity, and Oscar Chinm cases, among others. Cheng, supra note 34, at 72-73.} and the remainder likewise support the classical definition. One example, which typifies Cheng’s authorities, will suffice here. In the Neptune arbitration,\footnote{The Neptune (1797), in 4 International Adjudications: Modern Series 372 (J.B. Moore ed., 1931).} a U.S. merchant vessel sued to recover lost profits after a British vessel seized its cargo of provisions destined for France, with which Britain was then at war. Great Britain compensated the vessel’s owners but at a rate below market price. So the owners accepted under protest and then brought arbitration under the Jay Treaty.\footnote{Treaty of Amity, Commerce and Navigation, U.S.-Gr. Brit., Nov. 19, 1794, 8 Stat. 116.} As relevant here, the tribunal considered whether necessity authorized Britain’s seizure. Citing Grotius, it denied even the relevance of necessity, and in dicta, it opined that even were necessity relevant, Britain would be obliged to pay restitution “as soon as practicable.”\footnote{The Neptune, in 4 International Adjudications: Modern Series, supra note 161, at 385-86 (citations to Grotius omitted). The tribunal also cited Rutherford’s interpretation of Grotius to the effect that the “necessity must be absolute and unavoidable.” Id. at 386 (citing Thomas Rutherford, 2 Institutes of Natural Law; Being the Substance of a Course of Lectures on Grotius de Jure Belli et Pacis, chap. IX, at 543-544 (W. Baltimore & J. Neal pubs. 1832)).} But despite its war with France, the tribunal found that, at the time of the seizure, Britain did not need the Neptune’s provisions—and, certainly, its existence as a state did not depend on them.

The Neptune’s strict construction of necessity and reference to war as the relevant peril, reinforce the classical definition of necessity. Consistent with every other precedent before the twenty-first century,\footnote{Recently, several investor-state arbitral awards, or annulment decisions, have validated the defense. See, e.g., LG&E Energy Corp. v. The Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, Oct. 3, 2006, 46 I.L.M. 40, 72 (2007); Continental Casualty Corp. v. Argentina, ICSID Case No. ARB/03/09, Award, Sept. 5, 2008.} the Neptune recognizes necessity in its classical, existential form, only to reject it on the

merits. The tribunal held the *Neptune’s* seizure unlawful and ordered full compensation. This arbitration therefore falls into the familiar pattern that has been observed earlier. It typifies the precedents on which Cheng relies. It does not support Article 25, and as we will see shortly, neither do the main conceptions of necessity shared by the world’s national legal systems.

**D. Conclusion**

Before an earlier draft of Article 25 led the ICJ to analyze necessity in its terms,\(^{165}\) no international decisionmaker had ever understood necessity in the law of state responsibility as Article 25 does. From its seventeenth-century origins until the last decade of the twentieth century, the most that can be confidently said is that international law recognized the “natural” right of states to preserve themselves in the face of war or insurgency. This definition of necessity does not, as the phrase “circumstances precluding wrongfulness”\(^{166}\) implies, render lawful conduct that would otherwise be unlawful. At most, it suspends an international legal obligation or excuses its temporary violation if compliance would threaten the existence of the invoking state, which meant, in the prewar era, that state’s regime. Once the state of necessity passed, classical international law also obliged the invoking state to pay reparations for damages caused by non-compliance. Finally, even in this limited form, it is remarkable that so far as research discloses, no international tribunal before the twenty-first century had ever sustained necessity on the merits.\(^{167}\) Its status as existing international law—*lex lata* rather than *de lege ferenda*—is inferred almost exclusively from assorted dicta and innovative additions to the existential understanding of necessity shared by the early publicists.

Until recently, therefore, necessity could most accurately be described as a political axiom of the law of nations. Because of the state-centric nature of classical international law, no state could be expected to relinquish the right to violate an international obligation if violation proved to be the only way to preserve its existence as a state. To rephrase the classical definition of necessity in terms of Article 25, the sole “essential interest”\(^{168}\) that existing custom deems essential *enough* to underwrite a necessity plea is an imminent threat to the very existence of a state qua state. Under the guidance of Special Rapporteur Ago, the ILC went to great lengths to argue otherwise.\(^{169}\) In 1980, Ago wrote that “the concepts of self-preservation and

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\(^{166}\) *ILC Articles ch. V* (emphasis added).

\(^{167}\) Herbert Jenner’s advice to the British Crown in two incidents in the early 19th century is as close to affirmative precedent as exists. *See 2 McNair, supra* note 36, at 232.

\(^{168}\) *ILC Articles art. 25(1)(a).*

\(^{169}\) *See Ago, Eighth Report, supra* note 20, at 16-18, ¶¶ 7-11.
state of necessity are in no way identical, nor are they indissolubly linked in the sense that one is merely the basis and justification of the other.”\(^{170}\) The evidence is directly to the contrary: no authority for a customary rule of necessity speaks of any basis for the defense other than self-preservation. Article 25, which reconceives necessity as a general plea that, in principle, applies to the full range of international delicts (other than those governed by a lex specialis) is therefore innovative. As Ian Brownlie wrote in the final edition of his treatise, existing authority does not support necessity as an “omnibus”\(^{171}\) defense to state responsibility.\(^{172}\)

### III. Necessity’s Needs and the Analogy to National Criminal Law

#### A. Introduction

Part I shows, I believe, that in terms of the ILC’s mandate, Article 25 reflects largely progressive development, not codification.\(^{173}\) True, parts of its language and locutions mirror the classical conception of necessity. But the Article 25 reorients the defense in at least four innovative ways. First, it reconceives necessity as a justification rather than an excuse.\(^{174}\) Second, it expands the ambit of the plea to reach not only self-preservation but “essential interest[s],”\(^{175}\) a protean phrase that the ILC does not define. Third, in effect, even if not clearly in form, Article 25 introduces an interest-balancing test redolent of the choice-of-evils paradigm of necessity found

\(^{170}\) *Id.* ¶ 8 (citation omitted).

\(^{171}\) *IAN BROWNLEE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 466 (7th ed. 2008).

\(^{172}\) Several international tribunals have expressed similar doubts. See, for example, Libyan Arab Foreign Investment Co. v. Republic of Burundi, 96 I.L.R., 279, 319 (1994) (characterizing the doctrine of necessity in international law as “a matter of debate” and hesitating to express a view on it); Rainbow Warrior (N.Z. v. Fr.), 20 REP. INT’L ARB. AWARDS 217, 254 (Arb. Trib. 1990) (characterizing the ILC’s draft article on necessity as “controversial” and noting that, according to at least one commentary, “no general principle allow[s] the defence of necessity”) (internal citation omitted). For a list of scholars that share these doubts, see *Ago, Eighth Report, supra* note 20, at 51, ¶ 75.


\(^{174}\) *See Heathcote, supra* note 30, at 494 (“[Necessity in international law] renders the act lawful, rather than merely excusing the actor.”) (footnote omitted). *But cf.* Boed, *supra* note 13, at 7 (arguing that Ago reconceptualized necessity as “an excuse to breach [of] a State’s international obligation when necessary to protect an essential interest”) (citation omitted).

\(^{175}\) ILC Articles art. 25(1). *Cf.* Boed, *supra* note 13, at 10. According to one investor-state tribunal, “an interest’s greater or lesser [status as] essential, must be determined as a function of the set of conditions in which the State finds itself under specific situations. The requirement is to appreciate the conditions of each specific case where an interest is in play, since what is essential cannot be predetermined in the abstract.” LG&E Energy Corp. v. Argentina, ICSID Case No. ARB/02/1, Decision on Liability, Oct. 3, 2006, 46 I.L.M. 40, 72 (2007) (internal citations omitted).
in the national criminal law of some states.176 Fourth, in a development that also involves the adaptation of ideas from national criminal law, Article 25 makes necessity unavailable if the invoking state “contributed to the situation”177 culminating in its invocation of necessity.

Each of these changes raises questions about the nature and scope of necessity under Article 25. But absent institutions comparable to those in national law, the “exceptional”178 plea of necessity threatens to “expand itself to the limits of its logic”—for to the extent that Article 25 revises the plea, it surely does not “confine itself within the limits of its history.”179 By so revising necessity, Article 25 also begs the question of its contemporary rationale. A natural right of anthropomorphized states to preserve themselves makes sense, if it still does, only if the law limits necessity to the historical context of threats to the very existence of the state, with the state identified with its regime: l’état, c’est moi. Unmoored from these natural law origins—which, in contemporary political theory and international law alike, seem anachronistic—the rationale for necessity in international law is unclear.

If history and precedent do not explain Article 25, however, what does? Close analysis of Article 25’s definition suggests that the answer lies in the influence of national criminal law. Reliance on analogies to national law is a common, but always perilous, technique for interpreting or progressively developing international law.180 The literature on necessity in international law often analogizes the defense to necessity in national criminal law,181 even though the law of state responsibility does not (and never has) subjected states to criminal liability.182 The authors of the 2001 Articles

176 E.g., MPC § 3.02. Article 25(1)(a), similarly, provides that even if a state deems it necessary to violate an international obligation “to safeguard an essential interest against a grave and imminent peril,” that state must forbear if its breach would “seriously impair an essential interest of the State or States toward which the obligation exists, or of the international community as a whole,” presumably referring to obligations erga omnes. Barcelona Traction, Light, and Power Co. (Belg. v. Spain), 1970 I.C.J. 3, 32 (Feb. 5).
177 ILC Articles art. 25(2)(c).
179 BENJAMIN CARDozo, THE NATURE OF THE JUDICIAL PROCESS 51 (1921). Of course, “progressive development” itself implies reform of the law; the point here is the extent of the reform given Part II’s analysis of the historical limits of necessity.
181 See, e.g., DeNicola, supra note 14, at 672-74.
debated and explicitly rejected this idea in 1997, not because it would be unprecedented to hold juridical entities criminally liable (many national legal systems, after all, recognize corporate criminal liability), but because of the absence of international analogs to the institutions required for a criminal justice system to meet modern standards of international human rights and due process. Efforts to understand necessity in the law of state responsibility through the lens of national criminal law may be illuminative in some respects but will almost surely distort it in others. The next two sections consider the two major paradigms of necessity in national criminal law and then explain why neither can or should be transposed to the law of state responsibility.

B. Necessity in National Criminal Law

Globally, two conceptions of necessity prevail in state criminal law: the first subsection focuses on the choice-of-evils model, or justified necessity, and the next subsection on “duress of circumstances,” or, to adopt the parallel shorthand, excused necessity.


One paradigm of necessity is frequently and appropriately described as “lesser evils” or “choice of evils.” It predominates in the United States, in part because of the influence of the MPC. But it is by no means limited to

that “no basis in State practice” supported “the concept of international State crimes” and noting that “[n]o State, as a legal person, in contrast to its leaders, has ever appeared as a defendant in criminal proceedings”.

183 See generally Kathleen F. Brickey, Corporate Criminal Accountability: A Brief History and an Observation, 60 WASH. U.L.Q. 393 (1982).

184 See Crawford, supra note 18, at 18-20.


186 I adopt this shorthand from Ohlin, supra note 14, at 218.

187 See MPC § 3.02; see also Fletcher, supra note 150, § 10.2, at 774-798 (contrasting the MPC definition with a cognate provision of the German penal code).

188 Only two of the several states have adopted the MPC definition verbatim. Neb. Rev. Stat. Ann. § 28-1407; 18 PA. CONS. STAT. ANN. § 503. The MPC provides: “Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable [if] the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged.” MPC § 3.02(1)(a). Nineteen states of the Union codify necessity, while others rely on common-law jurisprudence. See, e.g., Jenks v. State, 582 So.2d 676 (Fla. 1991). The existence and definition of necessity as a defense in federal law is unclear. Compare United States v. Oakland Cannabis Buyers’ Co-Op., 532 U.S. 483, 490 (2001) (“[I]t is an open question whether federal courts ever have authority to recognize a necessity defense not provided by statute.”), with id. at 501 (Breyer, J., dissenting) (suggesting that Supreme Court “precedent has expressed no doubt about the
U.S. or common law jurisdictions. It exists in, among other state legal systems, those of India, Germany, Russia, Argentina, the United Kingdom, China, and Switzerland. Despite variation at the margins, the core of the choice-of- evils paradigm in each of these legal systems is the same: a defendant should be acquitted, as justified, if he chose the lesser of two harms or evils.

viability of the common-law defense, even in the context of federal criminal statutes that do not provide for it in so many words); see also United States v. Bailey, 444 U.S. 394 (1980).

In some of these nation-states, it is only one of two (or more) recognized defenses within the rubric of necessity. See, e.g., Ian Howard Dennis, On Necessity as a Defence to Crime: Possibilities, Problems and the Limits of Justification and Excuse, 3 J. CRIM. L. & PHIL. 29-49 (2008).

Nothing is an offence merely by reason of its being done with the knowledge that it is likely to cause harm, if it be done without any criminal intention to cause harm, and in good faith for the purpose of preventing or avoiding other harm to person or property.”; but see Michael H. Hoffheimer, Codifying Necessity: Legislative Resistance to Enacting Choice-of-Evils Defense, 82 TUL. L. REV. 191, 215-16 (2007) (arguing that this section “does not codify a general necessity defense but provides more narrowly that awareness of injurious consequences does not establish criminal intent in cases where the actor was motivated in good faith to avoid harm”).

The MPC definition, while adopted verbatim in only two U.S. state jurisdictions, see NEB. REV. STAT. ANN. § 28-1407; 18 PA. CONS. STAT. ANN. § 503, offers a clear example of this paradigm. In general, it provides that “[c]onduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable [if] the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the

Much of the additional criteria that varies by jurisdiction lies along five dimensions: (i) the degree to which the evil averted must outweigh the evil or harm at which the statute defining the offense aims;\textsuperscript{198} (ii) the culpability of the actor’s contribution, if any, to the situation culminating in the need for a choice of evils;\textsuperscript{199} (iii) whether the evil sought to be avoided must be imminent;\textsuperscript{200} (iv) whether the defendant’s reasonable (subjective) belief in the contingencies defining the defense suffices, or whether the (objective) circumstances must compel a choice of evils; and (v) whether certain acts (murder is the typical example) may never, whatever the circumstances, be justified by necessity—that thus placing deontological limits on what otherwise seems to be a quintessentially utilitarian defense.\textsuperscript{201} The relevant focus here, however, will be on the shared features of necessity, so conceived, rather than on these marginal variations.

First, because the choice-of-evils paradigm requires actors figuratively to weigh competing values, to balance one harm or evil against another, it assumes that values can be objectively ranked in a normative hierarchy. That hierarchy could theoretically be set out explicitly in positive law. But because of “the recognized futility of attempting all-complete statutory codes,”\textsuperscript{202} as Justice Jackson said in a distinct context, it is instead, almost

\textsuperscript{198} Many U.S. jurisdictions follow the model in New York State, see Hoffheimer, supra note 190, at 239 n.284, which requires that the value of the harm averted “clearly outweigh” that sought to be prevented by the law. E.g., N.Y. PENAL LAW § 35.05(2) (emphasis added). In Germany, the question is whether “upon weighing the conflicting interests, . . . the protected interest substantially outweighs the one interfered with.” STRAFGESETZBUCH [StGB] [PENAL CODE] § 34 (Ger.), supra note 191, at 45 (emphasis added).

\textsuperscript{199} Some jurisdictions bar the defense if the defendant’s conduct contributed to the situation, e.g., COLO. REV. STAT. ANN. 18-1-702(1); others if the defendant’s fault contributed to the situation, e.g., N.Y. PENAL LAW § 35.05(2). See generally Marc O. DeGirolami, Culpability in Creating the Choice of Evils, 60 Ala. L. Rev. 597 (2009).

\textsuperscript{200} The MPC does away with a formal imminence requirement because, according to the Commentary, necessity might sometimes justify illegal conduct before literal imminence exists. See 2 MODEL PENAL CODE AND COMMENTARIES 16-17 (Official Draft and Revised Comments 1985) [hereinafter Commentaries] (“If, for example, A and B have driven in A’s car to a remote mountain location for a month’s stay and B learns that A plans to kill him near the end of the stay, B would be justified in escaping with A’s car although the threatened harm will not occur for three weeks.”). The overwhelming majority of U.S. jurisdictions, however, retain imminence as a criterion, perhaps because, as Fletcher argues, it effectively limits the ability of private individuals “to pick the victims of socially justified conduct.” FLETCHER, supra note 150, § 10.2, at 795.

\textsuperscript{201} E.g., KY. REV. STAT. ANN. § 503.030(1) (categorically excluding intentional homicide).

\textsuperscript{202} D’Oench, Dhume & Co. v. FDIC, 315 U.S. 447, 470 (1942) (Jackson, J., concurring). Jackson made this comment in the context of explaining the need for interstitial federal common law, but it seems apt in this context as well. Civil law systems, of course, do not recognize this “futility,” at least in theory. See JOHN HENRY MERRYMAN & ROGELIO PEREZ-
invariably, implicit in and to be inferred from the sociopolitical and legal system as a whole. 203

Almost every national legal system, for instance, values life above ordinary property interests and expresses this in multiple ways. Glanville Williams, the chief proponent and in some sense the architect of § 3.02 of the MPC, wrote “that although the [necessity] defense . . . is subjective as to facts, it is objective as to values.” 204 In practice, the actor invoking necessity must in the first instance (at the time he acts) choose what he subjectively believes to be the lesser evil. But he chooses at his peril. His subjective belief about the comparative weight of, by hypothesis, competing values is immaterial. What matters is the objective normative hierarchy established by the sociopolitical community to which he belongs and the national legal order within which he acts. Necessity will be unavailing unless he chooses what is objectively the lesser evil in this sense. 205

Second, for that reason, and all the more so because of the principle of legality (nullum crimen sine lege), the choice-of-ills paradigm requires that subjects of the legal system be able to ascertain how to weigh competing values and social interests: subjects of the law must enjoy at least “lawyer’s notice” in this regard. Legal institutions and social norms therefore must express the hierarchical ranking of social values and interests, 206 including incommensurable ones, meaning those that cannot clearly be weighed against one another along a common scale. The definition of necessity

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203. See, e.g., MPC COMMENTARY, supra note 200, at 12; GREENAWALT, supra note 204, at 292 (“[T]he law should be treated as justifying only behavior that society generally considers justified; the actor’s idiosyncratic evaluations are not sufficient.”); accord WILLIAMS, supra note 204, § 239, at 746. This need not, and ordinarily does not, mean that the legislative code explicitly ranks values. German law, for example, recognizes that transcendental, unenacted norms implicit in its legal order but not expressed in legislation may nonetheless outweigh the balance otherwise struck in positive legislation. Yet these transcendental norms remain “law both in a descriptive and a prescriptive sense. [Recht] describes the ultimate principles of a particular legal system and prescribes their acceptance as binding rules.” FLETCHER, supra note 150, § 10.2, at 780-81 (emphasis added).

205. See Dennis, supra note 189, at 32; see also FLETCHER, supra note 150, § 10.2, at 793-94.

supplies the figurative scale, but it is only a community’s social process that can supply the relevant weights. An abstract definition of necessity cannot exclude ab initio any social value or interest; only legal institutions that express the polity’s choices can do that. That is why Williams wrote that “[n]ecessity cannot be used to set aside values expressed in the law; it can only qualify and modify them.” And, we should add, it can only qualify and modify them insofar as the legislature theoretically would have qualified or modified them, that is, had it foreseen the circumstances requiring a choice of evils.

Third, what makes necessity, so conceived, an administrable defense, and one widely regarded as consistent with the rule of law, is reliable and effective legal institutions: a general legislature, a hierarchical court system with general, compulsory jurisdiction, and a disciplined police force. These institutions fulfill indispensable functions for a choice-of-evils paradigm of necessity: (i) they express, ex ante, which values and social interests count and for how much; (ii) they help to resolve clashes between what may be competing social values and interests under some circumstances; and (iii) they enforce, ex post, the polity’s social choices in this regard. Hence the prescriptive, adjudicatory, and enforcement jurisdiction of, respectively, the legislative, judicial, and executive institutions in a state that embraces the choice-of-evils model must be sufficiently general to enable them to make and enforce the polity’s choices. Subjects of the law who find themselves in a circumstance that the legislature did not foresee must be able to act against the background of an integrated, unified, and relatively comprehensive legal code—one that offers both notice and guidance about how to weigh potentially dissimilar sociopolitical interests and values.

Typically, therefore, a general legislature decides in the first instance, by positive laws and inferences to be drawn therefrom, on the rough normative hierarchy recognized by the legal system. It determines what counts as an evil and, at least in a general way, how to choose among evils that might be in tension with one another under certain circumstances. It remits this choice to subjects of the law, subject to ex post appraisal by the courts, in unanticipated situations, which “call for an exception to the criminal prohibition that the legislature could not reasonably have intended to exclude, given the competing values to be weighed.” To similar effect, the New Jersey Supreme Court wrote:

207 Williams, supra note 204, at 233.
208 FLETCHER, supra note 150, § 10.2 at 790 (Because “the legislature cannot envision the full range of cases, . . . the courts should decide in particular cases whether the defendant’s conduct furthers an interest greater than that sought to be prevented by the law defining the offense charged.”) (internal quotation marks omitted); cf. GREENAWALT, supra note 204, at 306.
209 MPC COMMENTARY, supra note 200, at 12.
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[Necessity] reflects a determination that if, in defining the offense, the legislature had foreseen the circumstances facing the defendant, it would have created an exception. It would have balanced the competing values and chosen the lesser evil. Obviously, then, the defense is available at common law only when the legislature has not foreseen the circumstances encountered by a defendant. If it has in fact anticipated the choice of evils and determined the balance to be struck between competing values, defendants and courts alike are precluded from reassessing those values to determine whether certain conduct is justified.  

In sum, the choice-of-evils paradigm functions as a “gap-filler, recognizing exceptions in order to further legislative values already recognized in the penal code.”  

Absent legislative guidance, a court of general jurisdiction—or, in some jurisdictions, a jury, as the presumptive voice of societal norms—decides if the actor indeed chose the lesser evil. In the civil law tradition, this task falls to a professional judge. But in either tradition, if the rule of law is to

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210 State v. Tate, 505 A.2d 941, 946 (1986); accord 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 10.1(a), at 118-19 (2d ed. 2003).


212 United States v. Schoon, 971 F.2d 193, 196-97 (9th Cir. 1991); see also GREENAWALT, supra note 204, at 289-90 (suggesting that necessity as a justification “should be viewed . . . not as an encouragement to some other body to second-guess judgments made by the legislature, but rather to provide opportunities for supplementary, particularistic judgments that are beyond legislative capacity,” for legislation tends to speak in generalities) (emphasis added); FLETCHER, supra note 150, at 790. (arguing that because legislatures cannot foresee every context to which laws may apply, “courts should decide in particular cases whether the defendant’s conduct furthers an interest greater than that sought to be prevented by the law defining the offense charged”) (internal quotation marks omitted).

213 See Hoffheimer, supra note 190, at 227-28; see also Arnolds & Garland, The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil, 65 J. CRIM. L. & CRIMINOLOGY 289, 296-98 (1974) (comparing the plea of necessity to jury nullification in the event that the law vests the jury with this task). The MPC does not indicate whether the judge or the jury is the proper legal institution to determine the ranking of competing values. Id. at 296.

214 German criminal law, for example, includes a provision analogous to MPC § 3.02, justifying acts in technical violation of the law if they represent the lesser harm or evil among competing values or social interests under the circumstances. See FLETCHER, supra note 150, § 10.2 at 782-83. The most important difference between German law and the MPC is that, unlike the MPC’s utilitarian formulation, German law introduces qualifications that place deontological constraints on the strong utilitarian bent of the MPC. The first, which

be respected, the choice-of-evils model requires effective, legitimate legal institutions. Otherwise, as the proverb has it, necessity would indeed “know no law,” necessitas non habet legem.\footnote{Dictionary of Proverbs 405 (George Latimer Apperson et. al. eds., Wordsworth Editions Limited, 2006) (“Necessity hath no law.”) (attributed to St. Augustine).}

2. Excused Necessity: Moral or Normative Involuntariness

An alternative paradigm of necessity in national criminal law does not \textit{justify} otherwise criminal conduct but rather \textit{excuses} the defendant from responsibility if, and insofar as, she acted under circumstances that the law regards as sufficient to compromise her agency \textit{unfairly}. This model of necessity requires an explicit normative judgment about human fault. It excuses the actor but does not, to adapt the language of Article 25, preclude the wrongfulness of the act. George Fletcher refers to this as “moral or normative involuntariness.”\footnote{Fletcher, supra note 150, at § 10.3.2 at 803.} It does not require the defendant, or the judiciary, to balance evils against one other. Rather, as the Supreme Court of Canada wrote in \textit{Perka v. R.}, a seminal decision in which it both rejected the choice-of-evils paradigm and adopted the excuse approach, necessity “rests on a realistic assessment of human weakness, recognizing that a liberal and humane criminal law cannot hold people to the strict obedience of laws in emergency situations where normal human instincts, whether of self-preservation or of altruism, overwhelmingly impel disobedience.”\footnote{Perka v. R., [1984] 2 S.C.R. 232, ¶ 33 (emphasis added). The Supreme Court saw the choice-of-evils paradigm as legally and institutionally problematic. First, it expressed “skepticism” that “a system of positive law can recognize any principle which would entitle a person to violate the law because on his view the law conflicted with some higher social value”; and second, it worried that justified necessity “would invite the courts to second-
Excused necessity may thus be understood as a “concession to human frailty.”218 English law calls it “duress of circumstances” in contrast to “duress of threats,”219 meaning threats that emanate from another person. As these phrases suggest, in England, unlike the United States,220 necessity may be invoked as a defense to either human or natural threats, provided, in each case, that the relevant threat sufficiently compromises the actor’s agency. The gravamen of excused necessity is “that strong understandable emotions in extreme circumstances may effectively block the defendant’s capacity for making moral choices on which criminal liability is normally premised.”221 Variations on this paradigm of necessity exist in the national legal systems of Canada, England,222 Scotland,223 Germany,224 Switzerland, and other civil law systems influenced by the German penal code.225

Unlike the choice-of-evils model, which appeals to the utilitarian idea that, ceteris paribus, an actor should choose the greater social good (or lesser social evil), the rationale for excused necessity depends on moral intuitions about the nature of the actor: a human being. The basic idea is that even a person who acted voluntarily in the minimal sense required for criminal liability226 might not have had a meaningful chance to exercise her agency if she acted under duress. Such a person should not be held criminally liable or, perhaps, should be liable only in some rough proportion to her culpable contribution to the circumstances culminating in duress.

One rationale for excused necessity is consequentialist: the criminal law cannot effectively deter an actor under duress, whether the source of the threat is human or natural: “Detached reflection cannot be demanded in the presence of an uplifted knife,” as Justice Holmes put it in the context of

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219 See Dennis, supra note 189, at 31. For a general discussion of this distinction in English law, see ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 221-31.
220 See, e.g., 1 MPC COMMENTARY, supra note 200, § 2.09, at 378.
221 Dennis, supra note 189, at 35.
223 Moss v. Howdle, 1997 J.C. 123.
224 STRAFGESETZBUCH [StGB] [PENAL CODE] § 34 (Ger.), supra note 191, at 45. The German Penal Code calls this “duress,” but it is unlike the prevailing U.S. conception of duress, e.g., MPC § 2.09, in that it includes natural as well as human threats.
225 See Ohlin, supra note 14, at 218 & n.152. Excused necessity also exists in traditional Islamic and Jewish jurisprudence. On the nature and scope of the defense in Islamic law, see RUDOLPH PETERS, CRIME AND PUNISHMENT IN ISLAMIC LAW 23-27 (2005); MATTHEW LIPPMAN, ET AL., ISLAMIC CRIMINAL LAW AND PROCEDURE 55-56 (1998); and in Talmudic law, see generally Harina Ben Menahem, Free Will and Coercion in the Talmud: A Preliminary Taxonomy (unpublished manuscript, on file with author).
226 See, e.g., MPC § 2.01.
self-defense. But this is a weak rationale for excused necessity. People differ in their capacity and inclination to withstand threats—and in their criminal propensity. From a consequentialist standpoint, it might optimize deterrence to do away with excused necessity and instead allow mitigation at the sentencing phase based on the ex post judgment of a court or jury that can consider the degree of coercion and other germane factors. So argued James Fitzjames Stephen when he famously remarked that “it is at the moment when temptation to crime is strongest that the law should speak most clearly and emphatically to the contrary.”

The more common rationale for excused necessity is based on a broadly shared intuition that a person who commits a crime because of the extreme pressure of an unusual threat, natural or human, is less or not culpable. As relevant here, note that, under either rationale, excused necessity assumes that the actor, the subject of the criminal law, is a human being—with the characteristic traits and frailties of our species. Excused necessity makes sense only on that basis. Of course, the United States, among other states, imposes corporate criminal liability. Yet no one would suggest, by analogy, that a corporation should not be held criminally liable if, say, it acted unlawfully because of financial pressure. It is the nature and constitution of human beings that supplies the rationale for excused necessity.

C. Necessity’s Needs and the International Legal Order

Having said all of this, it is clear that neither paradigm of necessity in national criminal law can be transposed to general international law. Yet as we will see, Article 25 draws upon both of them insofar as it departs from the existential definition that prevailed in the law of nations.

1. Justified Necessity: Sovereign Lesser Evils?

Begin with justified necessity. The analogy fails for four reasons. First, general international law lacks the comparatively high degree of normative homogeneity that characterizes national legal systems. People disagree, of course, within polities, and hard cases arise from time to time. But in the main, the constituents of a national legal system may be expected to rank social interests and values—e.g., life and property—in similar ways. That is not necessarily, or even likely, so in contemporary international law. To

229 JAMES FITZJAMES STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 108 (1883).
speak anthropomorphically, a state may be expected (reasonably and, in general, not inappropriately) to prioritize its own interests and values, or those of its constituents, above those of another state—and a fortiori above those of the figurative international community. Indeed, according to at least some scholars, it would violate political morality for a state to act otherwise. States owe allegiance, first and foremost, to their constituents. Political elites would be in dereliction of that obligation were they to prioritize the interests of another state or of the international community over “safeguard[ing] an essential interest [of their own state] against a grave and imminent peril.”

Second, international law notoriously lacks, among other institutions, a regularly effective, centralized, and plenary legislature analogous to those in national law. So the idea of necessity as interstitial legislation, which, by analogy, might authorize states to craft informal amendments or one-time exceptions to international legal rules or obligations “when a real legislature would formally do the same under those circumstances” is, at a minimum, incongruous in the international context, especially given the absence of an integrated, relatively comprehensive legal code of the sort that characterizes well-functioning national legal systems.

Third, the law of state responsibility is not a body of legal rules and principles that can be rote translated into national law; rather, state responsibility in international law differs fundamentally from the concept of responsibility in national legal orders. International law subjects all breaches of all rules of international law, irrespective of their origin and contents, to a uniform set of secondary principles. Contrary to many national systems, it does not distinguish between contractual and tortious responsibility or between civil, criminal, and public law (“administrative”) responsibility. The rules of state responsibility form a single system without any precise counterpart in national legal systems.

To be sure, at times it is constructive to analogize the international law of state responsibility to tort law in national legal systems. But that analogy

231 ILC Articles art. 25(1)(a); see, e.g., Eric Posner, Do States Have a Moral Obligation to Obey International Law?, 55 STAN. L. REV. 1901 (2003).
233 United States v. Schoon, 971 F.2d 193, 196-97 (9th Cir. 1991).
234 Nollkaemper, supra note 185, at 791.
235 A clear example, which Nolkeamper cites, id. at 791 & n.167, is the U.S. Alien Tort
is far from perfect: to cite just one example, reparation for the breach of an international obligation may take forms that do not exist in tort law.\textsuperscript{236}

Fourth, in a legal system without the regularly effective institutions and comparatively high degree of normative homogeneity enjoyed by stable national legal systems, necessity will almost invariably be self-judging ex ante, even though, as all agree, it cannot be self-judging ex post.\textsuperscript{237} This fact, combined with the aforementioned features of the international legal order, renders commonplace strategies by which national law deters the abuse of necessity unavailable. Both legislative preclusion and the ex post appraisal of a choice among evils by a court with compulsory jurisdiction seldom if ever exist in general international law.\textsuperscript{238} Yet the potential for necessity’s pretextual use or other abuse in international law is no less—to the contrary, probably more—acute than in national law, as the ILC has indeed recognized.\textsuperscript{239}

Fifth, the peoples of states, even more than “the People”\textsuperscript{240} of a state,\textsuperscript{241} may reasonably be expected to disagree about core moral, social, political, and cultural values; their appropriate instantiation in the law; and their lexical priority.\textsuperscript{242} The European Court of Human Rights’ doctrine of a

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\textsuperscript{236} See Nollkaemper, supra note 185, at 791-92.

\textsuperscript{237} Cf. José E. Alvarez & Kathryn Khamsi, The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime, in YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY, 2008-2009, at 395 (Karl P. Sauvant ed., 2009) (observing that, whatever their other differences, every investor-state tribunal to consider Argentina’s necessity defense has agreed that “Article XI [the provision relevant to necessity] is not ‘self-judging’”).

\textsuperscript{238} The U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 20-100 (1988), 1465 U.N.T.S. 85 [hereinafter CAT], is likely the closest analogue to legislative preclusion that exists in international law. Article 2(2) provides unequivocally, “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.” Yet the authors of the “torture memos,” John Choon Yoo and Jay S. Bybee chief among them, did not so much as mention this article in their analysis of necessity as a defense to prosecution for torture in the United States, which has ratified CAT. See Memorandum for Alberto R. Gonzales, Counsel to the President, from Jay S. Bybee, Asst. Atty. General, Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A, Aug. 1, 2002, reprinted in DAVID COLE, THE TORTURE MEMOS 41, 91-93 (2009).


\textsuperscript{240} U.S. CONST. pmbl.

\textsuperscript{241} Some, perhaps most, states have more than one people, as that term is understood in international human rights law and, in particular, the collective right to self-determination. International Covenant on Civil and Political Rights art. 1, Dec. 19, 1966, 999 U.N.T.S. 171.

\textsuperscript{242} It is not coincidental that John Rawls excluded international law from his original theory of justice. JOHN RAWLS, A THEORY OF JUSTICE § 2, at 8 (1971). Even within a society,
“margin of appreciation” recognizes reasonable variation of this sort in the context of international human rights law.243 But necessity cannot operate as a “gap-filler, recognizing exceptions in order to further legislative values already recognized,”244 within a figurative international community in which shared values exist only in limited areas and may not exist precisely in those circumstances in which states will foreseeably invoke necessity. Given the structure of Article 25, almost by definition, if one state invokes necessity to safeguard what it characterizes as an “essential interest,” it will simultaneously impair the interests of the state to which it owes the relevant international obligation—and that state will surely characterize the impairment of its “essential interest” as “serious.”245

In short, states naturally, and not unreasonably or even inappropriately (in many cases), prioritize their own interests. It is difficult to see how a decentralized and fragmented legal system, serving a heterogeneous legal community, without effective institutional analogues to national law, can decide impartially on the correct choice among evils. Which is the lesser evil? According to which state’s hierarchy of values? Who or what state or international institution decides? With the possible exception of jus cogens norms like the prohibition on genocide or slave trading, general international law lacks the degree of normative homogeneity characteristic of well-functioning national legal systems.

2. Excused Necessity: Agency and Culpability

The analogy to excused necessity fares no better. As stressed above, it presupposes human beings as the subjects of the law. Because people, in at least a rough sense, share similar physical and psychological constitutions, it is arguable that the criminal law can meaningfully establish a standard for excused necessity (duress of circumstances) based on, for example, “a person of reasonable firmness in his situation.”246 That is not obviously or even likely true for states.

To be sure, states can be, and often are, subjected to extraordinary

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244 Simons, supra note 211, at 648.
245 See ILC Articles art. 25(1)(b).
246 MPC § 2.09(1).

pressure by circumstances, other states, or coalitions of states. But precisely because power dynamics of this sort permeate the international legal system, only the most literal form of coercion—that is, nothing short of violence or its threat—can be accepted as a legitimate ground for excusing performance of an international obligation. To give states a general defense to responsibility based on economic or diplomatic pressure would radically destabilize the international system.

That is why, for example, in the negotiations culminating in the Vienna Convention on the Law of Treaties, developed states insisted that Article 52 of the Convention,\textsuperscript{247} which says that “[a] treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations,” must be limited to literal coercion only—the threat or use of force. Other types of coercion, however severe, could not qualify as defenses, for as the Dutch delegate to the Convention’s drafting conference stressed, if Article 52 were to “include[e] all forms of pressure exerted by one State on another, and not just the threat or use of armed force, the scope of Article [52] would be so wide as to make it a serious danger to the stability of treaty relations.”\textsuperscript{248}

D. Conclusion

To summarize, Article 25’s definition of necessity as a defense to state responsibility neither can nor should be analogized to necessity in national criminal law, regardless of the paradigm (excuse or justification). Yet as Part IV shows, the ILC definition draws heavily on concepts borrowed from national criminal law. Implicit in Article 25 is, \textit{first}, a presumption that the international legal order manifests a comparatively high degree of shared interests and social values (the controversial concept of a normative hierarchy in international law);\textsuperscript{249} \textit{second}, the ability and willingness of states to weigh dissimilar harms against a coherent backdrop supplied by the law—in circumstances of crisis and imminence, no less; and \textit{third}, the assumption that international law can make sense of “contribut[ion] to the situation of necessity”\textsuperscript{250} in a global order of interdependent states that interact in complex ways. The state invoking necessity will almost always have contributed to the situation; the real question is whether the degree or kind of its contribution should preclude necessity.


\textsuperscript{249} See Caplan, \textit{supra} note 230, at 742.

\textsuperscript{250} ILC Articles art. 25(2)(b).
IV. CONSTRUING ARTICLE 25

Having examined the historical rationale and use of necessity in the classical law of nations, and its common rationales in national law, we can try to provide a more sophisticated, informed analysis of Article 25 and its probable consequences were it accepted in contemporary international law.

A. Justification or Excuse?

Necessity is one of six “circumstances precluding wrongfulness” set forth in Chapter V of the ILC Articles. The ordinary meaning of the quoted phrase, the rubric within which Article 25 is situated, suggests that Chapter V defenses justify, rather than excuse, otherwise internationally wrongful conduct. If a Chapter V circumstance applies, in other words, the invoking state has not acted wrongfully; in fact, justified conduct might even be laudable if, for example, it comports with how the international community would have wanted the state to act under the circumstances. Conversely, it would be difficult to interpret the phrase “circumstances precluding wrongfulness” to indicate excuses, that is, circumstances that vitiate the legal consequences that would ordinarily attend an international delict, but that do not—just for that reason—render the delict lawful.

Notwithstanding the ordinary meaning of “circumstances precluding wrongfulness,” however, the Commentary to Chapter V leaves open the question whether these circumstances should be understood as excuses or justifications. Some Chapter V defenses fit much more comfortably within one rubric or another. It is difficult to see, for example, how the “consent” of the state against which necessity has been invoked could be anything but a justification. Force majeure, in contrast, is just as surely an excuse. Yet the Commentary is not pellucid in this regard. It says that absent a lex

251 Id. Ch. 5, reprinted in CRAWFORD, supra note 18, at 65; see also id. at 160 ¶ 2 (describing the circumstances as “of general application”).
252 ILC Articles arts. 20-24.
253 Consider, for example, bona fide humanitarian intervention. It violates an orthodox reading of Article 2(4) of the U.N. Charter. But it may be justified if it forestalls a genocide or other situation characterized by systematic human rights atrocities. At least one writer so argues. DeNicola, supra, note 14.
254 Vaughan Lowe argues forcefully that Chapter V defenses should be understood as excuses. Precluding Wrongfulness or Responsibility: A Plea for Excuses, 10 EUR. J. INT’L L. 405 (1999).
255 ILC Articles art. 20 (“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.”).
256 ILC Articles art. 23 (providing a defense to state responsibility “if the act is due to . . . an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation”).
specialis, Chapter V defenses “do not annul or terminate the obligation; rather they provide a justification or excuse for non-performance while the circumstance in question subsists.”

Perhaps the disjunctive is intended to suggest—accurately, I think—that some defenses operate as excuses and others as justifications. But that reading of the quoted language is difficult to square with other remarks in the Commentary. It characterizes force majeure, for example, as an excuse and a justification in the same paragraph. More generally, the prefatory material in the Commentary to Chapter V treats justification and excuse synonymously. It neither discusses nor attributes any significance to the distinction.

That is surprising. The distinction between justification and excuse is not a trivial linguistic issue. It may be difficult to sustain the distinction in borderline cases, as Kent Greenawalt has argued, or in circumstances in which it is overdetermined, but the characterization of a defense as an excuse or justification often has significant legal implications.

In general, justified action is warranted action; similar actions could properly be performed by others; such actions should not be interfered with by those capable of stopping them; and such actions may be assisted by those in a position to render aid. If action is excused, the actor is relieved of blame but others may not properly perform similar actions; interference with such actions is appropriate; and assistance of such actions is wrongful.

The characterization of a particular defense to state responsibility as either justification or excuse might therefore have serious implications in general international law. Consider two examples.

257 See ILC Articles art. 55.
258 Crawford, supra note 18, at 160, ¶ 2 (emphasis added).
259 Id. at 161, ¶ 4 (“Force majeure justifies non-performance of the obligation for so long as the circumstance exists; . . . . Force majeure excuses non-performance for the time being . . . .”).
261 Some cases involve conduct that is justified and excused. Fletcher critiques Francis Bacon’s examples of two examples—a prisoner who flees a jail that has caught on fire and a starving man who steals food—observing that “Bacon’s cases are overdetermined [because] [t]hey are justified in the sense that saving a life is more important than either petty property interests or the social interest in confining prisoners [but] [t]hey are excused in the sense that the starving thief and the inmate act under overwhelming pressure.” Fletcher, supra note 150, § 10.1, at 759-62 and Miriam Gur-Arye, Should a Criminal Code Distinguish Between Justification and Excuse?, 5 CAN. J. L. & JURISPRUDENCE 222-29 (1992)).
262 See, e.g., Harel, supra note 156, at 14-15 (citing Fletcher, supra note 150, § 10.1, at 759-62).
263 Greenawalt, supra note 204, at 1900.

First, suppose that necessity justified NATO’s aerial bombardment of Serbia in 1999, as counsel for Belgium argued before the ICJ.\(^{264}\) If so, and assuming the viability of the defense, necessity rendered NATO’s conduct, even though it violated Article 2(4) of the U.N. Charter, legally right—not just “legitimate” as a matter of political morality, as several scholars and commissions of inquiry suggest.\(^{265}\) It would also imply that third parties (states not party to NATO) would be acting properly, in legal as well as moral terms, if they chose to contribute to the attack on Serbia.\(^{266}\) In contrast, if necessity is better conceived as an excuse, NATO states might not incur state responsibility, or the same degree of it, for violating Article 2(4). But their resort to force would remain illegal.

For the evolution of customary international law, among other issues,\(^{267}\) the excuse-justification distinction in this factual context might well be particularly salient: excused, unlike justified, force would not pose the same jurisprudential threat to what many scholars see as one of the least controversial examples of a *jus cogens* norm of contemporary international law: the U.N. Charter’s prohibition of “the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”\(^{268}\)

Second, suppose Argentina’s default on its sovereign debt, the largest in history,\(^{269}\) created a state of necessity, which justified Argentina’s serious intervention in the market and intrusive economic measures promulgated in and after 2001. If so, then its failure to honor international obligations that had been vouchsafed to foreign nationals by bilateral investment treaties (BITs) should not be viewed as an international delict in the first place. Argentina should not be obliged to compensate the affected foreign nationals for their losses—at least for such time as the state of necessity persisted. So at least one tribunal concluded.\(^{270}\) That conclusion, however, is in tension with the structure of the ILC Articles. They provide, *first*, that


\(^{266}\) Subject, of course, to the limits imposed by the avowed purpose of the force as humanitarian intervention.

\(^{267}\) See Lowe, *supra* note 254.


the Articles “do not apply where and to the extent that” a lex specialis governs (as it does under the BITs that foreign states had entered into with Argentina);\(^{271}\) and second, that the invocation of a Chapter V defense “is without prejudice to . . . the question of compensation for any material loss caused by the act in question.”\(^{272}\) Consequently, in this context, unlike in the former example, Article 25 (assuming, for the sake of argument, that it is even relevant despite a governing BIT) should operate, if at all, as an excuse. After the state of necessity ceased, as it has, Argentina’s obligation to compensate foreign investors under the relevant BITs should revive.\(^{273}\)

Treating necessity as a justification in this context,\(^{274}\) as a circumstance that precludes wrongfulness, seems, not just misguided, but contrary to the manner in which the Commentary itself suggests that Chapter V defenses should operate. To see this more clearly, assume, contrary to Part II of this Article, that the customary scope of necessity as a general defense to state responsibility extends to essential interests other than self-preservation. Even so, in the rare case in which a state may properly invoke necessity under Article 25, it is not because the circumstances render what would otherwise be internationally wrongful conduct right; rather, it is because those circumstances temporarily suspend the legal obligation at issue. That is how the ILC Commentary and the ICJ alike have described Chapter V defenses generally and Article 25 in particular.\(^{275}\) The invoking state must resume compliance with its obligations once the state of necessity passes. And as a rule, the invoking state must also compensate injured parties for damages caused by the temporary suspension of those obligations.\(^{276}\)

In sum, although the ILC Articles classify necessity as a “circumstance precluding wrongfulness,”\(^ {277}\) and although necessity is said to “render[[]

\(^{271}\) See, e.g., U.S.-Arg. BIT art. XI.

\(^{272}\) ILC Articles art. 27(2).

\(^{273}\) See CRAWFORD, supra note 18, at 160 (“[Chapter V circumstances] do not annul or terminate the obligation; rather, they provide an excuse or justification for non-performance while the circumstance in question subsists.”); see also Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7, 39 (Sept. 25).

\(^{274}\) Heathcote, supra note 30, at 494 (“[N]ecessity . . . in international law . . . renders the act lawful, rather than merely excusing the actor.”) (citation omitted).

\(^{275}\) See CRAWFORD, supra note 18, at 160 (“[Chapter V circumstances] do not annul or terminate the obligation; rather they provide a justification or excuse for non-performance while the circumstance in question subsists . . . [B]ut the nonperformance . . . looks toward a resumption of performance so soon as the factors causing and justifying the non-performance are no longer present.”) (internal citations and quotation marks omitted); accord Gabčíkovo-Nagymaros Project, 1997 I.C.J. at 63 ¶ 101 (“As soon as the state of necessity ceases to exist, the duty to comply . . . revives.”).


\(^{277}\) ILC Articles ch. V.

the act lawful, rather than merely excusing the actor," it seems clear that Article 25 should operate as an excuse rather than a justification. And that is not surprising, for as we have seen, international law generally lacks the conceptual and institutional features that render a (justified) choice-of- evils paradigm of necessity feasible.

**B. From the “Very Survival” of a State to its “Essential Interests”**

The law of nations recognized threats to the “very survival” of a state as the sole valid ground for necessity. Article 25 expands this scope. Subject to further criteria, a state may invoke necessity “to safeguard an essential interest against a grave and imminent peril.” But what is an essential interest? The Commentary says only that this “depends on all the circumstances, and cannot be prejudged.” Similarly, according to one commentator:

> What constitutes an essential interest is not a fixed category and is not limited to safeguarding the very survival of the State itself. It includes, notably, the preservation of the natural environment or the ecological equilibrium, the economic survival of the State, and the maintenance of the food supply of the population.

Yet there is no obvious way to limit a state’s discretion to characterize its interests as essential, and of course, Article 25 incentivizes states to so characterize their interests in circumstances in which an international obligation proves to be a hardship, politically unpopular, or simply inconvenient—but not absolutely and indispensably necessary, as classical necessity required. Already, this has led to what Orrego Vicuña aptly describes as the “softening” of necessity:

If the threshold is lowered to the extent that recent decisions have suggested one may wonder whether a state of necessity may not be invoked by the United States in view of a major financial crisis, the United Kingdom in the light of its GDP having fallen to levels comparable to the postwar years, or Spain for having

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278 Heathcote, supra note 30, at 494.
279 Humanitarian intervention is an arguable exception. But see Mohamed, supra note 180.
280 Heathcote, supra note 30, at 496.
281 ILC Articles art. 25(1)(a) (emphasis added).
282 CRAWFORD, supra note 18, at 183.
283 Heathcote, supra note 30, at 496 (citations omitted).
284 Id. at 497.
unemployment reaching a third of its work force.\footnote{Orrego Vicuña, supra note 24, at 751.}

\section*{C. Sovereign Lesser Evils?}

Assuming that a state satisfies the “essential interest” criterion, Article 25 contemplates a test analogous to the choice-of-evils paradigm. It asks whether the invoking state’s breach of an international obligation would “seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.”\footnote{ILC Articles art. 25(1)(b).} In effect, this introduces into international law a balancing test redolent of the choice-of-evils paradigm from national law: Article 25(1)(a) says that even if a state believes it must violate an international obligation as the only way “to safeguard an essential interest against a grave and imminent peril,” it must proceed to consider whether and to what extent that violation might “seriously impair an essential interest of the State or States toward which the obligation exists, or of the international community as a whole”\footnote{Id. art. 25(1)(b). Presumably an interest of the international community as a whole is the converse of an obligation of the international community as a whole, that is, what the ICJ has denominated obligations \textit{erga omnes}. Barcelona Traction, Light, and Power Co. (Belg. v. Spain), 1970 I.C.J. 3, 32 (Feb. 5).}

Nothing comparable to this inquiry appears in the classical conception of necessity known to the law of nations—and for good reason. If a state concludes that its survival will be threatened by compliance with an international obligation, it is unrealistic to suppose that it will balance that interests against those of other states or of the international community as a whole. By reorienting the legal predicate of necessity, \textit{from} state self-preservation \textit{to} a state’s essential interest, it becomes theoretically \textit{possible} that a state could reason in this way—but it does not become more likely. It is implausible to imagine a state concluding that it must violate a particular international obligation “to safeguard an essential interest against a grave and imminent peril”—only to conclude, upon further reflection, that it must forebear from that violation because it would “seriously impair an essential interest of” another state or the international community.\footnote{ILC Articles art. 25(1)(b).}

Within national legal systems, legislatures, ex ante, and courts or juries, ex post, can regulate such required choices among evils and enforce the polity’s will. Outside the context of particular treaty regimes, in contrast, comparably strong institutions of general international law seldom exist or serve an analogous role. Nor, at any rate, is it clear how an international institution should weigh one state’s essential interest against another’s, or

the international community’s, seriously impaired essential interest. In short, one state’s safeguarded essential interest is another’s seriously impaired essential interest.

D. Contribution

Article 25(2) precludes the plea of necessity if “the State has contributed to the situation.” Both justified necessity and excused necessity embrace the idea of contribution, a legal concept grounded in intuitions about fault. Within a court system of compulsory jurisdiction, it is feasible to develop a jurisprudence that distinguishes degrees of fault and establishes a clear threshold beyond which the necessity defense will be disallowed or only partially allowed. In the law of state responsibility, however, it will be the rare case in which the invoking state has not contributed to the situation to some extent. Yet institutions functionally analogous to national courts do not exist in general international law, which could gradually set forth and refine a sophisticated jurisprudence that distinguishes between different kinds and degrees of contribution.

Consider, again, the viability of Argentina’s necessity defense in the more than forty investor-state arbitrations initiated by foreign investors against it since 2001. Doubtless Argentina’s fiscal and monetary policies in the preceding years contributed to its financial crisis in 2001-02. Should Argentina, for that reason, be precluded from invoking necessity? Perhaps: tribunals differ on this issue, which has been adjudicated almost entirely within a lex specialis created by BITs. The point of emphasis, however, is simply that in comparison to appraising degrees of fault, or comparative fault, in national law, it is exponentially more difficult in international law to determine the extent to which an invoking state should be able to invoke Article 25 despite its relative contribution to the relevant state of necessity. Both the complexity and numerosity of factors potentially involved defy the comparative clarity of analysis of contribution in national law.

Similarly, consider again NATO’s aerial war against Serbia. However necessary humanitarian intervention might have appeared to NATO’s member states, many commentators opposed to the 1999 intervention have

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289 See Heathcote, supra note 30, at 494 (“Another problem of transposibility is the lack of compulsory jurisdiction at the international level which would ‘objectivize’ through impartial adjudication any invocation of the necessity plea.”).
290 ILC Articles art. 25(2)(b).
291 See, e.g., MPC § 3.02(2).
292 See, e.g., Sempa Energy Int’l v. Argentina, ICSID Case No. ARB/02/16, Sept. 18, 2007, ¶ 341 (summarizing the views of expert witnesses Sebastián Edwards that, for example, “Argentina itself primarily caused its economic crisis by making policy mistakes prior to 2001”).
argued that members of NATO contributed to the situation in Kosovo by nearly a decade of inept policies in the face of the breakdown of the former Yugoslavia.\textsuperscript{294} Does that, or should it, preclude humanitarian intervention in such a situation? What if belated military intervention might nonetheless save thousands of lives or prevent largescale human rights atrocities? We need to know, in short, both how much contribution is too much and, to speak anthropomorphically, the \textit{mens rea} that attended the contribution. Is it helpful to say that the “contribution must be sufficiently substantial and not merely incidental or peripheral,”\textsuperscript{295} or does that merely restate the question?

E. Conclusion

A reasonable response at this point would be to ask how much the law on necessity truly matters in the international context and, consequently, why Article 25’s deviation from the classical, customary view of necessity should be troubling. International law, after all, is frequently said to be less effective or ineffective in crisis—as Louis Henkin memorably put it, “in the crunch, when it really hurts.”\textsuperscript{296} Yet that is precisely the context in which states may be expected to plead necessity. As Henkin observed, however, even if critics rightly impugn the efficacy of international law in crisis, “the implications are less devastating than might appear, since a nation’s perception of ‘when it really hurts’ to observe law must take into account its interests in law and in its observance, and the costs of violation.”\textsuperscript{297} Empirically, it is revealing to note that so far as recorded instances indicate, necessity seems to have been invoked more in the past three decades than in the preceding three centuries. Doubtless it would be an overstatement to suggest that the ILC’s preparatory work and 2001 draft alone account for this. But it is not unreasonable to suppose that Article 25 facilitates and encourages use of the plea—often, as I argue in the next part, in scenarios in which it might be inappropriate even by reference to the ILC Articles.

IV. After the Articles: Proliferation of the Plea

The ILC published the Articles in 2001. Earlier drafts began to circulate

\textsuperscript{295} Heathcote, \textit{supra} note 30, at 499 (internal quotation marks omitted). As Heathcote observes, citing Salmon, this might lead to the absurd result that “necessity could not be invoked to safeguard the life of the population because the State itself contributed to the situation.” Id.
\textsuperscript{296} HENKIN, \textit{supra} note 232, at 97 (internal quotation marks omitted).
\textsuperscript{297} Id.
in the 1990s. The increase in states’ invocation of necessity in international dispute settlement corresponds almost precisely to this period of time. In substantive terms, necessity’s use also ranges across much of the landscape of contemporary international law—as evinced, for example, by a recent conference examining necessity’s role throughout international law. Yet Article 55 of the Articles provides that they “do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.”

Examples of a lex specialis include international trade law under the WTO/GATT regime, investor-state arbitration under BITs, the jus ad bellum (governing recourse to force), the jus in bello (governing the conduct of hostilities), international human rights law, and other treaty regimes. In several of these fields, the past few decades have nonetheless seen the incongruous consideration of Article 25, either because a state litigant raised it or because a tribunal raised it sua sponte. Illustrative examples drawn from two fields—the law of war and international investment law—follow. They provide a tentative sense of how Article 25 might affect international law’s development and how it might operate in the twenty-first century, which, as noted at the outset, seems likely to be characterized by a variety of crises.

A. Necessity and War: Jus Ad Bellum and Jus in Bello

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298 VU University Amsterdam, Necessity Across International Law, Apr. 24-26, 2009, Amsterdam, The Netherlands.
299 ILC Articles art. 55.
300 See Crawford, supra note 18, at 306-08.
301 Necessity, as a condition of the lawfulness of both the initiation and conduct of hostilities, that is, of both jus ad bellum and jus in bello, rather than as a defense to state responsibility, permeates the law of war. For a doctrinal analysis, see generally Gabriella Venturini, Necessity in the Law of Armed Conflict and in International Criminal Law, § 3.1, at 16 (unpublished manuscript, on file with author); see also William Gerald Downey, Jr. The Law of War and Military Necessity, 47 Am. J. Int’l L. 251 (1953). Today it is broadly accepted that whatever a belligerent’s casus belli, all lawful force must ad bellum necessary and proportional. Equally, in the context of jus in bello, superfluous, which is to say, needless, force is prohibited as one of the earliest and most vital axioms of the field. See, e.g., Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 35(1), June 8, 1977, 1125 U.N.T.S. 3 (“It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.”); id. art. 54 (prohibiting the destruction of objections “indispensable to the survival of the civilian population” but allowing derogation “where required by imperative military necessity”); Venturini, supra, at § 2.2, at 13-14. See generally Burrus M. Carnahan, Lincoln, Lieber, and the Laws of War: The Origins and Limits of the Principle of Military Necessity, 92 Am. J. Int’l L. 213 (1998). See also Crawford, supra note 18, at 185-86 cmt. 21 & n.435 (citing additional examples).
Arguing before the ICJ in a case ultimately dismissed on jurisdictional grounds, Belgium advanced necessity as a defense to state responsibility for its participation in NATO’s 1999 aerial campaign against Serbia. At that time, NATO sought to prevent Serbian atrocities against Kosovo’s ethnic Albanian majority. Whatever the moral merits of the campaign, however, in the view of most scholars, NATO formally violated the *jus ad bellum* of the U.N. Charter and customary international law.® Rusen Ergec, counsel for Belgium, conceded that NATO’s assault ordinarily would have violated Article 2(4) of the U.N. Charter but suggested that necessity justified it. He suggested that necessity should be defined as “the cause which justifies the violation of a binding rule in order to safeguard, in [the] face of grave and imminent peril, values which are higher than those protected by the rule which has been breached.”® Therefore, Ergec reasoned, the U.N. Charter’s general prohibition on the use of force,® the “binding rule,” should yield to the principled imperative to prevent human rights atrocities, which he characterized as implicating higher, peremptory (*jus cogens*), norms and values of the international legal system.®

In the context of the ILC Articles, this argument is troubling for at least two reasons. First, the law governing recourse to force is a *lex specialis*, as the Commentary, in fact, says.® So Ergec’s necessity formulation, derived from what would become Article 25, should not have applied in the first place. Second, although NATO’s action might have been morally right despite its apparent violation of the Charter, the invocation of *necessity* as the legal device to vindicate this moral judgment is problematic. Article 2(4) of the Charter, far from being the clear “lower value,” is the paradigm of a *jus cogens* norm, one of “[t]he least controversial examples.”® It is not, in other words, uncontroversial that humanitarian intervention qualifies as the lesser evil when weighed against a clear violation of Article 2(4).

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® U.N. Charter art. 2, para. 4.


® See CRAWFORD, *supra* note 18, at 185 ¶ 21.

® Brownlie, *supra* note 171, at 510-511; see also OPPENHEIM’S INTERNATIONAL LAW, *supra* note 268, at 704; *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* § 102 cmt. n.(k).
even in what may seem to be an uncontroverted, benign application of the choice-of-evils paradigm of necessity, the nature of international law does not lend itself to the weighing of dissimilar or incommensurable values.

Several years earlier, also in the jus ad bellum context, the ICJ invoked necessity sua sponte in its advisory opinion on Nuclear Weapons. While the meaning of the Court’s infamous holding remains unclear, the ICJ said that nuclear weapons, though “scarcely reconcilable” with the jus in bello, might still be lawful “in an extreme circumstance of self-defence in which the very survival of a State would be at stake.” This language is a legacy of the classical conception of necessity, anachronistically transposed from an era in which no jus ad bellum governed recourse to force to an era in which a jus ad bellum not only exists, but qualifies as a lex specialis, which, here again, should have led the ICJ to disdain reliance on the default rules of state responsibility (Article 25’s definition of necessity included). Instead, the Court layered this conception of necessity on top of its earlier opinion that nuclear weapons inherently violate the law of armed conflict. This led the Court to a conclusion that commentators widely regard as confused, at best, and as a drastic setback for the goal of regulation and containment of nuclear weapons, at worst.

In the more recent Wall advisory opinion, the ICJ, after finding that Israel’s construction of a wall in the West Bank violated the jus ad bellum for a variety of reasons, considered sua sponte “whether Israel could rely on a state of necessity which would preclude the wrongfulness of the construction of the wall.” Yet the Articles explain that necessity under Article 25, like the rest of the Articles, “is not intended to cover conduct which is in principle regulated by primary obligations,” a chief example of which is military necessity. Furthermore, the ICJ has itself described the jus in bello as a lex specialis. So the ICJ should have found the Articles inapplicable. Instead, it mistakenly asked “whether an act not justified

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308 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 262, 266 (July 8); see id. at 590 (dissenting opinion of Judge Higgins) (noting that the Court’s holding “that a use of nuclear weapons contrary to humanitarian law might nonetheless be lawful” based on self-defense “goes beyond anything that was claimed by the nuclear-weapon States appearing before the Court, who fully accepted that any lawful threat or use of nuclear weapons would have to comply with both the jus ad bellum and the jus in bello ”).

309 Id. at 262, 266. For the author’s view of this aspect of the ICJ’s decision, see Sloane, supra note 88, at 90-92.

310 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9).

311 Id. at 194.

312 CRAWFORD, supra note 18, at 185 cmt. 21.

313 ILC Articles art. 55. The jus ad bellum also incorporates necessity, as noted, for any use of force today, to be internationally lawful, must be both necessary and proportional. See e.g., Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, 196 (Nov. 6).
by military necessity could still be permitted under a state of necessity” as defined in the law of state responsibility.\textsuperscript{314}

Given that no party had argued this point, the Court unsurprisingly found itself “not convinced that the construction of the wall along the route chosen [is] the only means to safeguard the interests of Israel against the peril which it has invoked as justification for that construction.”\textsuperscript{315} That factual finding, however questionable its evidentiary basis,\textsuperscript{316} may in the long term prove less troubling than its apparent legal implication, which is consistent with the Court’s suggestion in \textit{Nuclear Weapons}: that a general plea of necessity might at times justify violating categorical international legal obligations under the law of war, a \textit{lex specialis}.\textsuperscript{317}

\textbf{B. Necessity and Investment: Modern Investor-State Arbitration}

Many of the putative precedents for a general necessity defense in the law of state responsibility involve claims of economic necessity, even though, historically, these claims never prevailed.\textsuperscript{318} This is in one sense ironic, for national legal systems tend to exclude economic necessity claims categorically.\textsuperscript{319} It also highlights the dangers of unreflectively transposing

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\textsuperscript{314} Venturini, \textit{supra} note 301, at § 3.1.
\textsuperscript{315} Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 195 (July 9).
\textsuperscript{316} Id. at 240-41, 243-44 (declaration of Judge Buergenthal).
\textsuperscript{317} Parenthetically, it is worthy of note that British defendants cited necessity in the \textit{jus ad bellum} context recently, though in British criminal (not international) law and in a posture tangential to the principal issues explored in this article. They contended (unsuccessfully) that necessity precluded their conviction for trespass and destruction of military property because, according to the defendants, they violated the law as the only means to prevent the United Kingdom’s participation in a criminal war of aggression in Iraq in 2003. \textit{See} R. v. Jones, [2006] UKHL 16, 45 I.L.M 92 (2006).
\textsuperscript{318} \textit{See, e.g.}, Société Commerciale de Belgique (Belg. v. Greece), 1939 P.C.I.J. (ser. A/B) No. 78 (June 15); Case Concerning the Payment of Various Serbian Loans Issued in France (Fr. v. Ser.) 1929 P.C.I.J. (ser. A) No. 14 (Jul. 12); Oscar Chinn (U.K. v. Belg.), 1934 P.C.I.J. (Ser. A/B) No. 63. (Dec. 12); Russian Indemnities (Russ. v. Turk.), 11 R.I.A.A. 421 (Nov. 1912); French Co. of Venezuelan Railroads, 10. R.I.A.A. 285 (Fr.-Venez. Mixed Cl. Comm’n 1905).
\textsuperscript{319} \textit{See, e.g.}, People v. Fontes, 89 P.3d 484, 486 (Colo. App. 2003) (“[T]he law is clear that economic necessity alone cannot support a choice of crime. Although economic necessity may be an important issue in sentencing, a choice of evils defense cannot be based upon economic necessity.”) (internal citations omitted); State v. Moe, 24 P.2d 638, 640 (Wash. 1933). See \textit{generally} WILLIAMS, \textit{supra} note 204, § 232, at 729; LAFAYE, \textit{supra} note 210, § 10.1(d), at 528 & n.35. \textit{But cf.} Pottinger v. City of Miami, 810 F. Supp. 1551, 1561 (S.D. Fla. 1992) (striking down, in a civil context, certain city ordinances prohibiting homeless people from “lying down, sleeping, standing, sitting or performing other essential, life-sustaining activities in any public place at any time,” though by \textit{way of} Eighth Amendment analysis, as construed in Robinson v. California, 370 U.S. 360 (1962), rather than because of economic necessity).
the conceptual framework of necessity in national law to international law. Still, contemporary foreign investment law is the most visible area in which necessity has drawn renewed international attention in the past decade.\(^{320}\)

In a series of investor-state arbitral disputes, principally arising out of Argentina’s conduct in connection with its sovereign debt default in 2002, Argentina has advanced necessity as a defense. It has framed necessity as either or both a general principle of the law of state responsibility and a particular interpretation of a provision of the governing arbitral law, as set forth in the applicable bilateral investment treaty (BIT), typically Article XI of the BIT between Argentina and the United States.\(^{321}\) Argentina’s success has been mixed and the investor-state arbitral jurisprudence on necessity inconsistent and confused.\(^{322}\) In part, I think, this shows one danger created by the codification of a general necessity defense: it may be incorporated into contexts for which it was never intended. In the context of investor-state disputes, it has even been treated, at times, as hierarchically superior


\(^{321}\) Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment art. XI, Nov. 14, 1991, 31 I.L.M. 124 (1992) [hereinafter U.S.-Arg. BIT] (“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.”). This article of the BIT has led one author to devote an article of more than 100 pages to the “interpretive methodologies” evinced by different arbitral tribunals. Diane A. Desierto, Necessity and “Supplementary Means of Interpretation” for Non-Precluded Measures in Bilateral Investment Treaties, 31 U. Pa. J. Int’l L. 827, 827 (2010).

\(^{322}\) Compare LG&E Energy Corp. v. The Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, Oct. 3, 2006, 46 I.L.M. 40, 72 (2007) (sustaining the defense, under Article XI of the U.S. BIT, as an excuse to legal or financial responsibility for violations of its BIT with the United States during the months constituting the peak of the Argentine financial crisis); Continental Casualty Corp. v. Argentina, ICSID Case No. ARB/03/09, Award, Sept. 5, 2008 (likewise sustaining the defense, in part, based on Article XI of the U.S. BIT), with Sempra Energy Int’l v. Argentina, ICSID Case No. ARB/02/16, Sept. 28, 2007, ¶ 388 (concluding, after finding that the purported customary international law standard for invoking necessity should be read into Article XI of the BIT, that Argentina’s economic and fiscal crisis of 2001-2002 “does not meet the customary international law requirements of Article 25 of the Articles on State Responsibility”); CMS Gas Transmission Co. v. Argentina, ICSID Case No. ARB/01/8, Award, May 12, 2005, ¶ 355 (holding that “in the absence of [a total economic and social collapse] it is plainly clear that the [BIT] will prevail over any plea of necessity”); see also id. ¶ 388 (holding that, under general international law, “the plea of necessity may preclude the wrongfulness of an act, but it does not exclude the duty to compensate the owner of the right which had to be sacrificed”). The Constitutional Court of Germany rejected Argentina’s necessity defense in a case brought by German holders of Argentina’s sovereign bonds. See Stephan W. Schill, German Court Rules on Necessity in Argentine Bondholder Case, ASIL Insight, Vol. 11, Issue 20, July 31, 2007. See generally Rudolf Dolzer & Christoph Schreuer, Principles of International Investment Law 168-71 (2008).
to the language of the governing BIT, which supplies the lex specialis.

Most, if not all, of the tribunals confronted with Argentina’s necessity defense have also followed the ICJ’s lead and assumed without analysis that Article 25 codifies custom.\textsuperscript{323} And even though the substantive law that should apply to the merits of these cases is almost always that of a BIT, which qualifies as a lex specialis under Article 55 of the ILC Articles, several tribunals have interpreted provisions of the BIT as intended to incorporate Article 25’s criteria. At times, that is logically dubious, for the BIT at issue preceded the publication of the ILC Articles by a decade or more. While this technique may be understandable from the perspective of investor-state arbitral tribunals, especially because the parties seldom if ever dispute the status of Article 25 as custom, it can lead to highly questionable arbitral awards. Consider \textit{LG&E v. Argentina}.\textsuperscript{324}

\textit{LG&E}, like most of the arbitrations against Argentina arising out of its turn-of-the-century economic crisis, took place under the general auspices of the ICSID Convention.\textsuperscript{325} Article 42(1) of the Convention establishes the applicable substantive law. It provides in relevant part that “[t]he Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.”\textsuperscript{326} Applying Article 42(1) to the dispute between the claimant, a U.S. national incorporated in Delaware, and the respondent, Argentina, the BIT between Argentina and the United States sets forth the “rules of law . . . agreed [to] by the parties.”\textsuperscript{327}

The BIT specifies the scope of its application, establishes reciprocal standards for the treatment of investment by the nationals of each state in the territory of the other, and guarantees investors recourse to international arbitration in the event of one party’s violation of those standards. Article XI, however, provides: “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

\textsuperscript{323} See, e.g., Sempra Energy Int’l v. Argentina, ICSID Case No. ARB/02/16, Sept. 18, 2007, ¶ 344 (“The Tribunal shares the parties’ understanding of Article 25 of the Articles on State Responsibility as reflecting the state of customary international law on the matter.”); CMS Gas Transmission Co. v. Argentina, ICSID Case No. ARB/01/8, May 12, 2005, ¶ 315 (“The Tribunal, like the parties themselves, considers that Article 25 of the Articles on State Responsibility adequately reflect [sic] the state of customary international law on the question of necessity.”).


\textsuperscript{325} ICSID Convention, supra note 5.

\textsuperscript{326} ICSID Convention art. 42(1).

\textsuperscript{327} U.S.-Arg. BIT, supra note 321, at 103.
of international peace or security, or the protection of its own essential security interests.” Based on this provision (and a few comparable ones in other BITs), Argentina has often argued—in part by relying on Article 25—that it need not compensate injured foreign investors.

LG&E illustrates one point of potential confusion that applying Article 25, despite what should have been deemed a superseding lex specialis, can cause. In its Decision on Liability, the tribunal found as a matter of fact that “from 1 December 2001 until 26 April 2003 Argentina was in a period of crisis during which it was necessary to enact measures to maintain public order and protect its essential security interests.” While debatable, as a finding of fact, the tribunal’s conclusion is surely reasonable, and Article XI indeed makes clear that the BIT does not preclude Argentina from taking the measures it deems necessary to maintain public order domestically and to protect its essential security interests under these circumstances. The problem lies in the tribunal’s legal conclusion on the basis of its factual finding. The LG&E panel went on to conclude, with the interpretive aid of Article 25, that during the relevant period of time, “Argentina is excused under Article XI from liability for any breaches of the [BIT]” and, indeed, that Article XI “exempts Argentina of responsibility for measures enacted during the state of necessity.”

As a matter of law, this is breathtaking—both for its conclusion and for the methodology by which the tribunal arrives at it. The first and foremost rule of treaty interpretation is that a treaty should “be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Nothing in Article XI says or implies that it excuses the host state from liability or that it exempts the host state from responsibility for the measures that the host state deems necessary. It is by a leap of interpretive logic enabled by the tribunal’s reliance on Article 25 of the ILC Articles to inform Article XI of the BIT that the tribunal arrives at the conclusion that Article XI vitiates any right of the investor to compensation for losses over a more than two-year period.

Rather than look to the context and the object and purpose of the BIT, as embodied in the preamble—to establish standards for “the treatment to be accorded . . . investment” in order to “stimulate the flow of private capital” and “maintain a stable framework for” the “reciprocal protection of investment”—LG&E reached beyond the treaty. Its interpretation of

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328 U.S.-Arg. BIT art. XI.
329 LG&E ¶ 226.
330 See LG&E ¶¶ 246-61.
331 LG&E ¶¶ 229, 257.
332 Vienna Convention, supra at note 247.
333 U.S.-Arg. BIT pmbl.

Article XI incorporates a draft general rule on necessity set forth in the Articles, which did not exist at the time of the BIT’s ratification. In short, the tribunal retrospectively imported into its analysis an innovative rule of necessity, which neither state party could have had in mind during the negotiations culminating in the BIT. And it did so even though Article 25 itself should be “without prejudice to . . . the question of compensation for any material loss caused by the [wrongful] act in question”334 and indeed inapplicable “where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.”335 As between the states parties and their nationals (investors), the BIT supplies those special rules.

Since LG&E, and a similar analysis of Article XI in Continental Casualty Corp. v. Argentina,336 Article 52 annulment committees have also analyzed the relationship between Article 25 and Article XI of the BIT, often reaching comparable conclusions.337 But because Article 52 of the ICSID Convention limits the grounds for annulment, analysis of necessity has frequently been smuggled in under the strained rubric of excess of jurisdiction or failure to state reasons. I certainly do not mean to impugn the reasoning in each of these decisions or suggest that reasonable minds cannot differ; I mean only to indicate the remarkable and pervasive influence of Article 25 on the awards and annulment decisions. LG&E is just one of a host of investor-state awards and annulment decisions in which Article 25’s general necessity defense has been brought to bear on a disputes, which, in theory, should be adjudicated on the basis of the lex specialis of a BIT—notwithstanding ILC Article 55’s directive.

The literature on this issue, as noted at the outset, is rich. And, again, the point here has not been to stake out and defend a position within it at length.338 It has been to suggest a more fundamental point about Article 25’s influence, which is, I think, evident in the jurisprudential debate over the meaning of Article XI of the BIT as applied to the Argentine financial crisis: beneath the veneer of technical legal craft in awards like LG&E lies a normative dispute about the relative priority of distinct social interests and values. It is these differences, and not the overlay of positive legal analysis,

334 ILC Articles art. 27(b).
335 ILC Articles art. 55.
336 Continental Casualty Corp. v. Argentina, ICSID Case No. ARB/03/09, Award, Sept. 5, 2008.
337 See, e.g., Enron Creditors Recovery Corp. v. Argentina, ICSID Case No. ARB/01/3, Decision on Annulment, July 30, 2010; Sempra Energy Int’l v. Argentina, ICSID Case No. ARB/02/16, Decision on Annulment, June 29, 2010.
338 Nor, needless to say, to suggest that reasonable minds cannot differ on the issue—as they clearly have.

that explains the divergent decisions reached by tribunals and annulment committees appraising Argentina’s necessity plea. The awards illustrate, in other words, the problems inherent in Article 25’s tacit creation of a choice-of-evils model of necessity in an international legal order that generally lacks the comparatively high degree of normative homogeneity required for it.

C. Conclusion

The ILC went to great lengths to emphasize the exceptional nature of necessity. Were it plausible to assume that states would construe the plea exactingly, Article 25’s influence would be innocuous; indeed, as suggested earlier, a strict construction of its conditions might even render it nugatory. Yet the evidence to date suggests, to the contrary, that the mere existence of a draft codified definition of necessity encourages states to invoke the plea in circumstances in which compliance with an international obligation may be painful or inconvenient, to be sure, but not necessary in the exigent sense intended by the ILC. In short, Article 25 lends itself to pretextual use and abuse. What should be the rare exception increasingly becomes not-so-rare, as the threshold established by the ILC atrophies over time through a gradual process of assertion, adjudication, and interpretation.339

V. CONCLUSION: CONTEXTUALIZING — AND HUMANIZING — NECESSITY

Were we writing on a blank slate, it might well be more prudent not to codify necessity as a defense to state responsibility.340 The codification of law legitimizes, among other consequences. Necessity is like torture in this regard, which, not coincidentally, it has been invoked to defend; it, too, can be metastatic. To pursue the analogy a bit further, we might agree with Alan Dershowitz, the well-known proponent of codifying and regulating torture, that in certain crises, a state’s officials will torture—whatever the law says. But it is, as he argues, a distinct question whether acknowledging this fact means that it would be an appropriate or prudent policy decision to codify and regulate torture.341

339 See, e.g., Orrego Vicuña, supra note 24, at 745 (observing that, already, Article 25’s “essential interest” standard has “become less demanding since it would suffice to relate it to any danger seriously compromising the State’s internal or external situation, or event to a severe economic crisis”) (citations and alternations omitted).

340 That necessity should not be codified as a rule of decision is hardly a radical idea. In national law, few states codified it before the nineteenth century or, in the case of Anglo-American systems, the mid-twentieth century. Hoffheimer, supra note 190, at 217.

Similarly, in certain crises, a state will almost surely invoke necessity to defend its failure to conform to an international legal obligation, whatever positive international law has to say about the defense. It is nonetheless a distinct question whether it would be wise to codify necessity as a general defense to state responsibility. Once an exception for the exceptional exists in positive law, it tends to become less so over time and, eventually, even normative in some circumstances. By establishing criteria for necessity’s invocation, Article 25, rather than constraining its use, might facilitate its invocation: the invoking state may cite its technical satisfaction of the conditions for the plea, and tribunals (as opinions of both the ICJ and investor-state tribunal awards to date suggest) tend to adopt preexisting codifications rather than consider what factors, in context, should govern the propriety of necessity and its consequences. But we do not write on a blank slate, and it would be foolish to neglect Ago’s observation that necessity “is far too deeply rooted in the consciousness of the members of the international community . . . . If driven out of the door it would return through the window, if need be in other forms.”

The general wisdom of codifying necessity is therefore likely a moot issue; the critical questions that remain include how it should be understood and applied in general international law.

A. The Core of the Normative Paradigm Shift

Rethinking the plea of necessity for international law in the twenty-first century requires attention to necessity’s modern normative bases, the contextually available international legal institutions and their efficacy, the degree of normative consensus on particular international norms, and the diversity of factual circumstances in which necessity might foreseeably be invoked. A comprehensive consideration of these issues would require a book. Still, it may be feasible at least to set out some of the core changes to the plea that postwar developments in international law commend.

First, in terms of normative analysis, contemporary international law—at least in theory and certainly as a matter of progressive development—no longer privileges the state for its own sake; rather, “[c]onsidered in both its municipal aspect and in its international aspect, a state’s sovereignty is an artificial construct, not something whose value is to be assumed as a first

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342 Ago, Eighth Report, supra note 20, at 51, ¶ 53.
343 Of course, its precise language might still be modified when, if ever, states decide to conclude a multilateral convention on state responsibility.
344 To the best of my knowledge and research, the last comprehensive consideration of necessity in international law, published nearly a century ago, is BURLEIGH CUSING RODICK, THE DOCTRINE OF NECESSITY IN INTERNATIONAL LAW (1928).
principle of normative analysis.” International law continues to privilege state interests but, today, it is for the sake of the state’s constituents, that is, for the extent to which states, ideally, can promote the realization of fundamental values: self-determination, human dignity, social welfare, and personal autonomy. Necessity’s rationale in classical international law—the natural right of states to preserve themselves—has therefore not been mooted so much as modified by postwar developments.

North Korea, the state, as represented by Kim Jong-il’s autocratic regime, merits no moral weight in contemporary international law; the North Korean people do. States merit moral weight insofar as they act as trustees for the people committed to their care. As trustees, they are supposed to operate lawfully and in a way that is mindful that the peaceful and ordered world that is sought in international law—a world in which violence is restrained or mitigated, a world in which travel, trade, and cooperation are possible—is something sought not for the sake of national sovereigns themselves but for the sake of the millions of men, women, communities, and businesses who are committed to their care.

In the nineteenth century, Portugal could lawfully take the property of British nationals residing in its territory, despite a treaty with the United Kingdom prohibiting just that, because of the “necessity of providing for the subsistence of certain contingents of troops engaged in quelling internal disturbances.” And consistent with the international law of that era, Herbert Jenner could reasonably (and accurately) advise the Crown that necessity constituted a good defense under the circumstances—for “the strict observance of the Treaty would be altogether incompatible with the paramount duty which a Nation owes itself,” viz., self-preservation, which required Portugal to “us[e] those means, which may be absolutely and indispensably necessary to the safety, and even the very existence of the State.”

Today, however, if North Korea were to appropriate foreign aid for the use of its army, citing a comparable need to preserve its very existence in the face of, suppose, an effort to reunite the two Koreas peacefully, surely international law should condemn, not countenance, such a necessity plea.

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345 Waldron, supra note 40, at 21; See also LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 10 (1995); see generally Reisman, Sovereignty and Human Rights in Contemporary International Law, supra note 40; Luban, supra note 41.

346 Waldron, supra note 40, at 21.

347 CRAWFORD, supra note 18, at 179 cmt. 4.

348 2 MCNAIR, supra note 36, at 232.

349 Id. at 232.
Had East Germany invoked necessity, citing the imminent peril to its very existence in 1989, surely its government, too, should have had no right to prevent reunification in order to preserve its existence—even if it did so without violating the human rights of its citizens or *jus cogens* norms. These are hyperbolic examples. But the point of emphasis is modest: today, the focus of any necessity plea in the law of state responsibility should be on human beings as the first and paramount principle of normative analysis, not on states as such or for their own sake.

**B. Lex Specialis Versus Lex Generalis**

Second, contemporary international law distinguishes between the role and definition of necessity in general international law in contradistinction to fields governed by special rules of international law; in this regard, the ILC Articles doubtless codify custom. But this distinction has not always been respected, and, especially in convoluted factual contexts, such as the aftermath of Argentina’s financial crisis, it is understandably tempting to look beyond a *lex specialis* for guidance. Article 25 has a superficial appeal in this regard because of its one-size-fits-all formulaic character, generality, and abstraction. But those very features invite creative interpretation even in circumstances in which it would be inappropriate under Article 55.

The ILC prudently chose to define necessity in the negative, i.e., in terms of the conditions in which necessity may *not* be invoked, as one of several drafting techniques to emphasize the exceptional nature of the plea. Yet Article 25’s open-textured phrases—“essential interest,” “seriously impair,” “contributed to the situation,” and so forth—still leave much to interpretation. It may be accurate to say, as to the first of these phrases, that “[t]he extent to which a given interest is ‘essential’ depends on all the circumstances, and cannot be prejudged.” But it is also an invitation to the decisionmaker to weigh one state’s essential interest against another’s seriously impaired essential interest—a choice-of-evils exercise, which, for reasons set out earlier, is deeply problematic in general international law.

Within national law, the effective institutions of well-functioning states can resolve interpretive issues either directly, by general legislation, or indirectly, by the gradual refinement of abstract concepts like “essential interest” through a common law process, within a system of hierarchically ordered courts with compulsory jurisdiction. In general international law, similar institutional architecture seldom exists or functions reliably. The

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350 Arguably, the right of peoples to self-determination is a *jus cogens* norm, which, under Article 25(2)(a) and Articles 40 and 41 on peremptory norms.

351 ILC Articles art. 55 (*lex specialis*).

352 CRAWFORD, *supra* note 18, at 183 ¶ 15.
choice-of-evils paradigm implicit in Article 25 also calls for comparative value judgments in a legal system that is often characterized precisely by a lack of consensus on the ordering of certain values and interests. The exception may be a handful of widely acknowledged *jus cogens* norms such as the prohibitions on genocide, piracy, and slave-trading. But even in the realm of *jus cogens*, norms can conflict—as, for example, in cases of bona fide unilateral humanitarian intervention. Both UN Charter Article 2(4) and the prohibition of “ethnic cleansing” qualify as *jus cogens* norms. The plea of necessity obscures rather than confronts this tension in contemporary international law. For *general* international law, the viability of necessity almost invariably requires answers to a host of questions that cannot be adequately captured, still less answered by a general formula like Article 25.

In contrast, necessity can be a viable and readily administrable defense within a regime of special rules of international law, a *lex specialis*. Typically, this means a treaty regime in which the parties codify, ex ante, and bind themselves to adhere to particular rules that supply the otherwise absent normative consensus. A *lex specialis* may also include an explicit definition of necessity that is sensitive to its policy objectives. Under these circumstances, necessity can be subjected to meaningful interpretation and regulation by the effective legal institutions that the regime establishes.

Perhaps the clearest example of this in contemporary international law is the GATT/WTO regime for trade. It provides a sophisticated body of law to which the states parties to the treaties that collectively comprise this regime have agreed and an effective, compulsory dispute-resolution process. Dispute-settlement bodies (DSBs) adjudicate international trade disputes; their decisions can be reviewed by the Appellate Body, which issues reports with precedential effect; and the whole system benefits from effective sanctions in the form of DSB-authorized retaliation, e.g., increased tariffs, which prevailing states may adopt to enforce their rights or secure reparations. The GATT/WTO regime also defines necessity as a defense in trade disputes within its ambit, such that disputes over the propriety of the invocation of necessity can be adjudicated by DSBs. Appellate Body reports contribute to a jurisprudence on necessity that is defined and refined over time by a growing body of precedent.\footnote{Two articles govern necessity under the GATT/WTO regime. General Agreement on Tariffs and Trade arts. XX, XXI, Oct. 30, 1947, 61 Stat. A-11, A-60–A-63, 55 U.N.T.S. 194, 262–267. Article XX provides a general necessity exception while Article XXI provides for a type of necessity justified by national security interests. In general, DSBs must weigh relevant factors to determine the propriety of necessity’s invocation. These factors include (1) the contribution of the measures to the objectives sought to be protected by the state invoking the defense; (2) the restrictive effect of the measures on international trade; and (3) the availability of WTO/GATT-consistent—or less inconsistent—alternatives. A DSB panel’s
C. Necessity in General International Law: Who Bears the Loss?

In contrast, in general international law, necessity often involves factual circumstances that call for normative judgments in areas of law vigorously contested by states and that arguably should be governed by distinct rules. In almost every case, the real question is who—which state, states, or other international actors—should bear the cost occasioned by the violation defended as necessary. Article 25 does not speak to this issue even though, in practice, it is likely to be paramount. Consider three distinct paradigms in which necessity has been, or might be, pled.

The first is familiar: a state, citing necessity, expropriates the property of foreign nationals. Applying Article 25, and assuming the absence of a BIT or comparable instrument, the essential interest of the expropriating state (say, mitigating a severe economic crisis) might outweigh the interest of the state towards which the relevant international obligation exists (here, the obligation not to deny justice to the latter’s nationals). But if Article 25 is without prejudice to the question of compensation, as Article 27 says, then necessity adds nothing to the legal analysis. General international law, even in the absence of a BIT, requires payment of prompt, adequate, and effective compensation. Necessity only modifies the analysis if we assume, as the LG&E panel did (although within a BIT regime rather than general international law), that necessity shifts the loss. But mindful that one state’s “safeguarded” essential interest will almost always be the other’s “seriously impaired” essential interest, the question is whether necessity should require foreign investors to bear the loss under the circumstances. Article 25 does not answer, or even speak to, this question. It would be better to recognize the competing state interests and candidly decide the substantive question—who should bear the loss?—than to allow a plea of necessity to obscure what, in reality, is a conflict of state interests and values in a legal system without a clear normative hierarchy—except, perhaps, relative to jus cogens.

findings on each of these factors must be based on the evidence on the record but may be determined by following either a quantitative or qualitative approach. See, e.g., E.g., Appellate Body Report, China—Measures Affecting Trading Rights and Distribution Services of Certain Publications and Audiovisual Entertainment Products, WT/DS363/AB/R (Jan. 19, 2010). Article XIV of the General Agreement on Trade in Services (GATS) under the WTO uses language identical to Articles XX and XXI of the GATT, and disputes under GATS will be analyzed under the same interpretative framework. See General Agreement on Trade in Services art. XIV, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 194–96, 33 I.L.M. 1167, 1177–78; See, e.g., Appellate Body Report, United States—Measures Affecting the Cross-border Supply of Gambling and Betting Services, WT/DS285/AB/R (Apr. 7, 2005).

354 ILC Articles art. 27(b).
norms on the order of the prohibition of genocide. I say “perhaps” because, as noted above, in some scenarios even an arguable *jus cogens* norm does not clearly take precedence over the other state’s essential interest, which might also be deemed *jus cogens*.

Now consider a very different scenario. “In 1995,” Roman Boed noted, “50,000 Rwandan refugees and local Burundis fled to the border of Tanzania seeking safety.”  Yet Tanzania, which, just one year earlier, had absorbed some 500,000 refugees generated by the 1994 Rwandan genocide, closed its border and refused these new refugees a safehaven—arguably in violation of *non-refoulement*: “In effect, Tanzania had invoked the concept of ‘state of necessity’ as an excuse for a border-closure that may have violated its duties under international law.”  Whether *non-refoulement* is, in fact, a *jus cogens* norm or “merely” an important principle of international custom seems to be more a matter of semantic preference than substance. Should Tanzania be required to open its borders under the circumstances? Or does the plea of necessity operate as a defense to what would otherwise be its international obligation to these refugees? Boed suggests modifying the Article 25 formulation so that the “*erga omnes*” interests of the “community of States” would be privileged above a state’s essential interests as a way to minimize human rights violations.

As morally attractive as this may sound, it is unrealistic to suppose that a developing state like Tanzania, faced with the prospect of providing for thousands upon thousands of refugees, will not, at some point, conclude that it cannot accommodate any more and close its borders—at least absent substantial assistance and financial contribution from the “community of States” in the interest of which Tanzania, according to Boed’s argument, should be obliged to act. Once again, the question raised by necessity turns out to be in large part about who, which state or states, should bear the cost—in a legal system in which even the most altruistic and wealthy state will at some point privilege its own interests over the seriously impaired interests of “another state or of the international community as a whole.”

Third, imagine (not improbably) that global warming leads to rising sea levels, threatening to flood heavily populated areas in one state, Ruritania, which shares a river with another, Azania. Ruritania, invoking necessity, diverts the waters in order to avoid about $4 million in damages to the infrastructure of one of its major cities. But suppose that by diverting the waters, it exacerbates flooding in Azania, the lower riparian state. As a consequence, Azania sustains infrastructure damages in the amount of $4

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356 *Id.* at 2. Comparable situations arose in Jordan and Macedonia. *Id.* at 2-3 & n.4.
357 *Id.* at 5.
358 ILC Articles art. 25.
billion. Here again, it is difficult to imagine Ruritania refraining from diverting the waters even though the serious impairment of Azania’s interest outweighs the grave and imminent peril to Ruritania’s essential interest by a factor of ten. Doubtless this is a crude utilitarian analysis, but it suffices to make the basic point here. The real question is which state, or to what extent each state, should bear the loss. Article 25 simply defers the question.

How, then, might Article 25 be revised or augmented? As a default rule, where a state invokes necessity for its own benefit, one possibility would be to require that state to compensate the injured state or states at a level equal to the traditional reparation obligation of international law: *restitutio in integrum.*\(^{359}\) Necessity would then operate, in default of a *lex specialis,* in a way comparable to that of private necessity in U.S. tort law, which creates an incomplete privilege\(^ {360}\): the actor may derogate from its legal obligation, but it must compensate the injured party. Similarly, under Article 25, as a default, or initial point of departure, the invoking state would be liable to compensate “the State or States toward which the obligation exists” at a level at least equal to that of customary international law.

In a fundamentally decentralized legal system that relies on horizontal enforcement dynamics and reciprocity, it would be imprudent to supply a default doctrine that would let those who invoke the exception of necessity define its scope and consequences. To be clear, I do not mean to suggest a direct analogy to tort law. That might be only slightly less misguided than the criminal law analogy. But the essential issue necessity raises outside the context of a *lex specialis*—who should bear the loss?—must be answered if necessity is to be a constructive principle of international law and dispute resolution; and as a default rule, the traditional obligation of *restitutio in integrum* might supply a reasonable baseline. Requiring compensation at this level might not be appropriate in circumstances in which the state’s (necessary) violation of an international legal obligation averts or remedies serious human rights abuses; in that case, depending on the facts, necessity might be thought to supply an absolute defense. I do not mean to answer these questions blithely; only to stress that they require answers, and yet Article 25 offers scant guidance.

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\(^{359}\) The canonical statement of this obligation is that “reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.” Factory at Chorzów (Merits) (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 47 (Sept. 13).

D. Conclusion

Because contemporary international law is not a unified and integrated system (it is commonplace today to describe it as “fragmented”), a strong qualification is in order before concluding: it would clearly be an error to suppose that the word necessity, which appears in diverse subfields of international law, has the same meaning in each; and as noted earlier, some of the precedents cited in support of Article 25 confuse the word necessity with an international legal claim to that effect. Any analysis of necessity must be sensitive to the fact that, like so many legal concepts, necessity “may vary greatly in color and content according to the circumstances and the time in which it is used.” The principal focus of this Article has been on necessity in the law of state responsibility, and it is in that context that the paper seeks to appraise the status, practical operation, value, and limits of Article 25. This does not necessarily mean that the implications of the analysis reach no farther, but neither does it compel a contrary conclusion.

Necessity in international law pertains, first and foremost, to states, the traditional and still the principal subjects of international law. I doubt that they will cease to be so anytime in the near future, and it is at any rate far from clear that we would welcome this development. Still, there can be no question that the particular conception of the state in the classical law of nations has been significantly changed by the advent of international human rights law and the exponential growth of new institutions, regimes, and processes. These changes compel sustained reflection before general international law adopts a defense authorizing exceptions to international norms in what is—already—a characteristically unstable legal system.

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363 While the state may be the greatest threat to international human rights, it is also the most effective and reliable guarantor of those rights. MICHAEL IGNATIEFF, WHOSE UNIVERSAL VALUES? THE CRISIS IN HUMAN RIGHTS 19 (1999). But cf. Rosa Ehrenreich Brooks, Failed States, or the State as Failure?, 72 U. CHI. L. REV. 1159, 1169 (2005).
364 Cf. CMS Gas Transmission Co. v. Argentina, ICSID Case No. ARB/01/8, Award, May 12, 2005, ¶ 317, 44 I.L.M. 1205, 1240 (2005) (“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.”).