

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

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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.

—*J. M. Coetzee*<sup>1</sup>

Recent jurisprudence in investment arbitration, almost all of which originated in disputes arising out of Argentina's turn-of-the-century fiscal crisis, has raised difficult questions about the existence, nature, and advisability of necessity as a defense to state responsibility. The jurisprudence has contributed to a sophisticated literature focusing on necessity's role in the special context of investment arbitration. But the growing prominence of necessity pleas in international law has not been so limited. Nor will its effects be. In the first place, investor-state arbitral jurisprudence contributes to the evolution of general international law.<sup>2</sup> Investment tribunals invoke the latter, for example, to inform their interpretation of bilateral investment treaties (BITs) or to cure lacunae in the law.<sup>3</sup> More significantly, beyond the realm of investment arbitration, the past few decades have seen a striking growth in necessity pleas in fields ranging widely across the landscape of international law.

As an arguable defense to state responsibility, necessity has been raised by states or analyzed *sua sponte* by tribunals in, among other contexts, the following:

- humanitarian intervention in violation of an orthodox reading of the UN Charter;<sup>4</sup>

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<sup>1</sup> DIARY OF A BAD YEAR 17 (2007).

<sup>2</sup> The phrase *general international law* is not used consistently. I mean the full corpus of international law that does not depend on treaty regimes or other special legal norms.

<sup>3</sup> See Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Art. 42(2), Mar. 18, 1965, 17 UST 1270 [hereinafter ICSID Convention].

<sup>4</sup> For analysis, see *infra* notes 350–66 and accompanying text. See generally Ian Johnstone, *The Plea of "Necessity" in International Legal Discourse: Humanitarian Intervention and Counter-terrorism*, 43 COLUM. J. TRANSNAT'L L. 337 (2005); Ole Spierman, *Humanitarian Intervention as a Necessity and the Threat or Use of Jus Cogens*, 71 NORDIC J. INT'L L. 523 (2002); cf. Andreas Laursen, *The Use of Force and (the State of) Necessity*, 37 VAND. J. TRANSNAT'L L. 485 (2004).

- violation of the *jus ad bellum* by Israel's construction of a security barrier or wall in the West Bank;<sup>5</sup>
- a hypothetical breach of the *jus in bello* by "the threat or use of nuclear weapons" in what the International Court of Justice (ICJ) characterized as "an extreme circumstance of self-defence, in which the very survival of a State would be at stake;"<sup>6</sup>
- breaches of the arbitral award settling the *Rainbow Warrior* affair;<sup>7</sup>
- international trade disputes;<sup>8</sup>
- seizure of foreign vessels in violation of the UN Convention on the Law of the Sea;<sup>9</sup>
- a conceptual justification for the doctrine of preventive war;<sup>10</sup>
- closing borders to refugees in circumstances that might violate the customary principle of *non-refoulement*;<sup>11</sup> and
- suggestions by European states that they might justifiably suspend the Schengen regime because of the influx of refugees from Libya, Tunisia, and elsewhere following the "Arab Spring."<sup>12</sup>

The meaning of necessity, like many legal terms of art, differs "greatly in color and content according to the circumstances and the time in which it is used."<sup>13</sup> We must take care not to equate distinct legal concepts merely because they share a name.<sup>14</sup> But mindful of that qualification, the growing prevalence of necessity in international law may be ascribed, in part, to two factors. The first is the widespread perception of an imminent crisis or risk, a common denominator of necessity. Recently, the number, nature, and scope of potentially catastrophic, or even existential, threats have increased. They include potential terrorist strikes at or surpassing the scale of the September 11, 2001, attacks; the possibility that a "rogue state" might

<sup>5</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ REP. 136, para. 140 (July 9).

<sup>6</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ REP. 226, para. 105 (July 8) (emphasis added).

<sup>7</sup> See *Rainbow Warrior* (N.Z./Fr.), 20 R.I.A.A. 217, 254–63 (Arb. Trib. 1990).

<sup>8</sup> See, e.g., Appellate Body Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R (adopted Jan. 19, 2010).

<sup>9</sup> See, e.g., *The M/V "Saiga" (No. 2)* (St. Vincent and the Grenadines v. Guinea), 1999 ITLOS REP. 10, paras. 132–36 (July 1), 38 ILM 1323 (1999); see also UN Convention on the Law of the Sea, Art. 92(1), *opened for signature* Dec. 10, 1982, 1833 UNTS 397.

<sup>10</sup> See THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (Sept. 17, 2002), at <http://www.whitehouse.gov/nsc/nss.pdf>; see also MARK OSIEL, *THE END OF RECIPROCITY: TERROR, TORTURE, AND THE LAW OF WAR* 40–41 (2009).

<sup>11</sup> See generally Roman Boed, *State of Necessity as a Justification for Internationally Wrongful Conduct*, 3 YALE HUM. RTS. & DEV. L.J. 1, 2–3 (2000).

<sup>12</sup> See, e.g., Ian Traynor & John Hooper, *France and Italy in Call to Close EU Borders in Wake of Arab Protests*, GUARDIAN (London), Apr. 26, 2011, at 1; Judy Dempsey, *Denmark Reinroduces Border Controls*, N.Y. TIMES, May 12, 2011, at <http://www.nytimes.com/2011/05/13/world/europe/13iht-border13.html>.

<sup>13</sup> *Towne v. Eisner*, 245 U.S. 418, 425 (1918).

<sup>14</sup> Necessity has also been analyzed, for example, as a potential defense to international criminal responsibility. See, e.g., Jens David Ohlin, *The Torture Lawyers*, 51 HARV. INT'L L.J. 193 (2010); Gabriella Blum, *The Laws of War and the "Lesser Evil"*, 35 YALE J. INT'L L. 1 (2010); Christopher P. DeNicola, Comment, *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).

develop nuclear weapons or transfer them to a nonstate actor;<sup>15</sup> severe fiscal crises of a degree last seen during the Great Depression;<sup>16</sup> global warming;<sup>17</sup> and pandemics.<sup>18</sup>

A second, more prosaic factor, which may nonetheless sometimes interact with the first—as it did in the context of Argentina’s fiscal crisis—concerns the Articles on Responsibility of States for Internationally Wrongful Acts (Articles on State Responsibility) by the International Law Commission (ILC).<sup>19</sup> Article 25 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 towards which the obligation exists, or of the international community as a whole.
2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
  - (a) The international obligation in question excludes the possibility of invoking necessity; or
  - (b) The State has contributed to the situation of necessity.<sup>20</sup>

Necessity, so defined, is one of seven circumstances precluding wrongfulness (CPWs) enumerated in the Articles on State Responsibility.<sup>21</sup> Absent a *lex specialis*,<sup>22</sup> Article 25 offers, in the lexicon of the articles, a uniformly applicable “secondary rule,” which may preclude the wrongfulness of state conduct that might otherwise breach a “primary rule.” In brief, primary rules govern “the content and the duration of substantive State obligations,” whereas secondary rules

<sup>15</sup> See, e.g., International Atomic Energy Agency, Implementation of the NPT Safeguards Agreement and Relevant Provisions of United Nations Security Council Resolutions in the Islamic Republic of Iran, IAEA Doc. GOV/2011/69 (Nov. 18, 2011); cf. W. Michael Reisman, *Assessing Claims to Revise the Laws of War*, 97 AJIL 82, 86 (2003).

<sup>16</sup> Arthur E. Wilmarth Jr., *Reforming Financial Regulation to Address the Too-Big-to-Fail Problem*, 35 BROOK. J. INT’L L. 707, 707 (2010); Bob Willis, *U.S. Recession Worst Since Great Depression, Revised Data Show*, BLOOMBERG NEWS, Aug. 1, 2009, at <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aNivTjr852TI>.

<sup>17</sup> Statement by the President of the Security Council, UN Doc. S/PRST/2011/15 (July 20, 2011).

<sup>18</sup> Denise Grady & Donald G. McNeil Jr., *Debate Persists on Deadly Flu Made Airborne*, N.Y. TIMES, Dec. 27, 2011, at A1.

<sup>19</sup> Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of Its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001) [hereinafter Articles on State Responsibility], reprinted in JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 61 (2002) [hereinafter ILC COMMENTARY]. The Lauterpacht Centre for International Law of the University of Cambridge maintains what it characterizes as an “almost complete collection of all the relevant historical documents relating to the International Law Commission’s State Responsibility work from 1996 to 2001.” The collection is available online at [http://www.lcil.cam.ac.uk/projects/state\\_responsibility\\_document\\_collection.php#6](http://www.lcil.cam.ac.uk/projects/state_responsibility_document_collection.php#6). All of the ILC documents are also available online on the Commission’s website, <http://www.un.org/law/ilc/>.

<sup>20</sup> Articles on State Responsibility, *supra* note 19, Art. 25.

<sup>21</sup> *Id.*, Arts. 21–27.

<sup>22</sup> *Id.*, Art. 55.

establish a uniform (and conceptually and temporally subsequent) framework setting forth “the consequences of a breach of an applicable primary obligation.”<sup>23</sup>

Because of the predominance of treaty norms in investment arbitration, most awards to date have focused on how the presumed customary defense codified in Article 25 should apply in this special context. Few awards, if any, have raised the logically antecedent question whether Article 25 actually codifies custom. Like the ICJ,<sup>24</sup> investor-state tribunals have assumed that it does.<sup>25</sup> The virtually exclusive focus on necessity in the investment context has tended to eclipse more general or theoretical questions about Article 25’s positive legal status and, normatively, the propriety, prudence, and appeal of necessity, so defined, in contemporary international law.

These broad inquiries raise a number of questions. In terms of the ILC’s formal mandate, does Article 25 codify custom, as the ICJ, the International Tribunal for the Law of the Sea, and investment tribunals have opined, or would it more accurately be characterized as “progressive development”?<sup>26</sup> If the latter, as I argue below, in what way is Article 25 progressive? Necessity, after all, is notoriously subject to abuse,<sup>27</sup> although that does not by itself, of course, counsel against its legal recognition.<sup>28</sup> But might not Article 25—if it is grafted on, or sequentially applied to, analyses of primary rules of necessity—effectively give the invoking state “two bites at the apple” of necessity? And mindful of the vital role that effective legal institutions (for example, legislatures and courts) serve in regulating necessity in national law, would a comparable defense be feasible, constructive, and prudent in a legal system that lacks reliable analogues to these institutions?<sup>29</sup>

This essay attempts, at a minimum, to identify and clarify the nature of the questions that should be asked about Article 25’s conception of necessity, and it also ventures tentative answers to, or at least reflections upon, some of the most significant of these questions. It also sounds some cautionary notes about the idea of a general necessity defense as a secondary rule, drawing attention to the conceptual, institutional, and other potential issues that Article 25 might raise in practice. These issues can be obscured by the veneer of a multilateral treaty that the Articles on State Responsibility tend to enjoy.<sup>30</sup>

<sup>23</sup> James Crawford, *Introduction*, in ILC COMMENTARY, *supra* note 19, at 1, 15–16. For analysis, see *infra* notes 350–366 and accompanying text.

<sup>24</sup> See Gabčíkovo-Nagymaros Project (Hung./Slovk.), 1997 ICJ REP. 7, paras. 51–52 (Sept. 25); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, *supra* note 5, para. 140.

<sup>25</sup> See Jürgen Kurtz, *Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis*, 59 INT’L & COMP. L.Q. 325, 334–35 (2010); see, e.g., Sempra Energy Int’l v. Argentine Republic, ICSID Case No. ARB/02/16, Award, para. 344 (Sept. 28, 2007); CMS Gas Transmission Co. v. Argentina, ICSID Case No. ARB/01/8, Award, para. 315 (May 12, 2005).

<sup>26</sup> See UN Charter Art. 13(1); GA Res. 174 (II), at 105 (Nov. 21, 1947); Donald McRae, *The Work of the International Law Commission, 2007–2011: Progress and Prospects*, 106 AJIL 322, 324–31 (2012).

<sup>27</sup> See Sarah Heathcote, *Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility: Necessity*, in THE LAW OF INTERNATIONAL RESPONSIBILITY 491, 492 (James Crawford, Alain Pellet & Simon Olleson eds., 2010); see also Roberto Ago, Addendum to the Eighth Report on State Responsibility, [1980] 2 Y.B. INT’L L. COMM’N, pt. 1, at 13, paras. 71–76, UN Doc. A/CN.4/318/Add.5–7 [hereinafter Eighth Report Addendum]; ILC yearbooks are available online at <http://untreaty.un.org/ilc/publications/yearbooks/yearbooks.htm>.

<sup>28</sup> Glanville Williams, *The Defence of Necessity*, 6 CURRENT LEGAL PROBS. 216, 225 (1953); see also OSIEL, *supra* note 10, at 37.

<sup>29</sup> For further explanation and analysis, see *infra* text accompanying notes 229–36.

<sup>30</sup> See generally David D. Caron, *The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority*, 96 AJIL 857 (2002).

To be clear from the outset, this essay does not focus on the many and diverse conceptions of necessity or cognate principles—at the level of *primary* rules—that permeate contemporary international law. Within particular fields or regimes in which necessity is clearly defined, intended to serve a clear purpose, and subjected to control by effective institutions,<sup>31</sup> necessity can play valuable, even indispensable, roles. International trade law is one strong case in point.<sup>32</sup> In situations of this sort, however, necessity operates as a primary rule in a particular field, and its role is limited by, inter alia, its context; it does not operate as a generally applicable and uniform secondary rule of state responsibility. Neither the existence nor the normative appeal of such a secondary rule in contemporary international law is clear. And insofar as Article 25 resembles the choice-of-evils paradigm of necessity found in national law—that is, that an otherwise unlawful action may be justified as the lesser of two acknowledged harms or evils—its development of international law may be more problematic than progressive.

I suggest by way of conclusion that necessity be reoriented to facilitate and incentivize a more transparent appraisal of the competing interests, policies, and values that will virtually always be at stake, at least implicitly, in those international disputes in which necessity is pleaded. The lodestar of the inquiry should not be the once paramount axiom of the law of nations that states enjoy a natural right to preserve their very existence. In contemporary international law, the plea of necessity instead requires a contextual inquiry into, and candid consideration of, the unavoidable trade-offs among the often incommensurable interests, policies, and values embedded in international law; and the lodestar of the inquiry today should be the reorientation of international law after World War II toward promoting human dignity and welfare—perhaps *through* states, but not *for* states (*qua* states).<sup>33</sup>

## I. IS NECESSITY (ALREADY) INTERNATIONAL CUSTOM?

### *Construing the Articles on State Responsibility*

Because the Articles on State Responsibility blend codification and progressive development, it can be “difficult to say which article partakes more of one or the other.”<sup>34</sup> The ILC decided not to request that the General Assembly promulgate the Articles on State Responsibility as the framework for an immediate multilateral treaty because certain articles proved controversial and were deemed unlikely to attract sufficient consensus.<sup>35</sup> The Commission

<sup>31</sup> On the vital role of control systems generally and in international law and dispute resolution in particular, see W. MICHAEL REISMAN, *SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION* 1–10 (1992).

<sup>32</sup> Others may include, for example, the *jus ad bellum* obligation that all force be necessary, the *jus in bello* obligation limiting force to no more than necessary to achieve legitimate military objectives, treaties of all sorts authorizing temporary derogation based on various exigent circumstances, and international human rights treaties that allow states to derogate from certain obligations “[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed.” International Covenant on Civil and Political Rights, Art. 4(1), Dec. 16, 1966, 999 UNTS 171.

<sup>33</sup> See W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AJIL 866, 872 (1990).

<sup>34</sup> Caron, *supra* note 30, at 873.

<sup>35</sup> Report of the International Law Commission on the Work of Its Fiftieth Session, UN GAOR, 53d Sess., Supp. No. 10, para. 224, UN Doc. A/53/10 (1998) [hereinafter Fiftieth Session Report].

concluded that “a suitable period for reflection” would be more prudent than a draft convention and, indeed, that it might *better* facilitate “the possible conversion of the articles into a convention, *if* this is thought appropriate and feasible.”<sup>36</sup> At the ILC’s request,<sup>37</sup> the General Assembly therefore took the modest step of “commend[ing] [the Articles on State Responsibility] to the attention of Governments without prejudice to the question of their future adoption or other appropriate action.”<sup>38</sup>

But as David Caron argued shortly thereafter in a symposium on the Articles on State Responsibility in this *Journal*, the ILC’s choice of form has its own perils.<sup>39</sup> As summarized by the symposium editors, the

seductive clarity, seeming concreteness, and treatylike form [of the Articles on State Responsibility], together with the paucity of other sources on some important issues, may tempt decision makers to apply the articles 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.<sup>40</sup>

This admonition is sound both generally and relative to Article 25 in particular.<sup>41</sup> The Articles on State Responsibility offer tribunals and other decision makers formulaic, textual, and facially authoritative answers to some of the thorniest issues in the law of state responsibility. Many of these issues, however—necessity included—proved controversial during the drafting of the Articles on State Responsibility and, despite their publication, remain so.<sup>42</sup> A combination of 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 on State Responsibility’s publication (nearly half a century) confers a veneer of authority on the text as a whole, which some provisions may not merit. Nonetheless, tribunals have tended to treat the Articles on State Responsibility as though they reflect uncontroversial international custom or a widely ratified multilateral treaty. This approach to the articles is—not invariably, but also not infrequently—misguided. Article 25 is a case in point.

Four years before the Articles on State Responsibility’s publication, the ICJ said 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

<sup>36</sup> Crawford, *supra* note 23, at 59 (emphasis added). I respectfully disagree with the suggestion that post-2001 developments vindicate the ILC’s prescriptive hope in this regard. Rather than analyze Article 25 “rigorously, together with all of [its] associated context and history,” Daniel Bodansky & John R. Crook, *Symposium: The ILC’s State Responsibility Articles: Introduction and Overview*, 96 AJIL 773, 775 (2002), most tribunals and scholars have adopted Article 25 without analysis or reflection. See Caron, *supra* note 30, at 858, 868–70.

<sup>37</sup> Crawford, *supra* note 23, at 59; see also GA Res. 56/83, pmbl. (Jan. 28, 2002).

<sup>38</sup> GA Res. 56/83, *supra* note 37, para. 3.

<sup>39</sup> Caron, *supra* note 30, at 868–70.

<sup>40</sup> Bodansky & Crook, *supra* note 36, at 775; see also Caron, *supra* note 30, at 858.

<sup>41</sup> See also Kürtz, *supra* note 25, at 335.

<sup>42</sup> See, e.g., James Crawford, Addendum to Second Report on State Responsibility, paras. 278, 282, UN Doc. A.CN.4/498/Add.2, (Apr. 30, 1999) [hereinafter Second Report Addendum]; Crawford, *supra* note 23, at 4 & n.20; Heathcote, *supra* note 27, at 491–92; Comments and Observations of Governments on Part I of the Draft Articles on State Responsibility for Internationally Wrongful Acts, [1982] 2 Y.B. INT’L L. COMM’N, pt. 1, at 15, 17–20, UN Doc. A/CN.4/351 & Adds. 1–3; see also Caron, *supra* note 30, at 858.

not in conformity with an international obligation.<sup>43</sup> The ICJ cited no authority for this statement other than ILC draft Article 33, which, as revised, became Article 25. Nor did the ICJ analyze relevant state practice and *opinio juris* in an effort to validate draft Article 33's purported customary status in accordance with its traditional methodology for ascertaining custom. Four years later, the ILC, in turn, relied on the presumptive authority of the ICJ's naked assertion in *Gabčíkovo-Nagymaros Project* to bolster Article 25.<sup>44</sup> Three years later, the ICJ applied Article 25, which it again, without analysis, treated as custom.<sup>45</sup>

This institutional circularity is troubling. It is not clear that ILC members uniformly regarded Article 25 as codification. In draft, the article prompted significant debate, and the ILC Commentary on its status is ambiguous. The commentary first remarks that in a handful of cases and incidents, "the plea of necessity has been accepted in principle, or at least not rejected"<sup>46</sup>—hardly a robust affirmation of Article 25's status as international custom. But after canvassing those cases and incidents, the ILC concludes that "[o]n balance, State practice and judicial decisions support the view that necessity may constitute a circumstance precluding wrongfulness under certain very limited conditions, and this view is embodied in article 25."<sup>47</sup>

### *A Critique of the ILC Commentary to Article 25*

Of course, fierce debates continue about customary international law.<sup>48</sup> Whether Article 25 codifies custom—or perhaps a general principle of law within the meaning of the ICJ Statute, as Bin Cheng has suggested<sup>49</sup>—might depend on one's view of how custom should be ascertained. But for present purposes, these perennial methodological debates can and should be elided. First, whether one treats the putative authorities as state practice, evidence of *opinio juris*, trends in decision, indicia of "the core notion of expectations,"<sup>50</sup> or something else, scrutiny of the authorities casts at least some doubt on the prevailing assumption that Article 25 codifies custom. Second, most international lawyers embrace some form of legal positivism. Both the ICJ and, perhaps to a lesser degree in view of its "progressive development" mandate, the ILC adopt the orthodox definition of custom as a consistent, widespread, and (often) long-standing state practice that states follow out of a sense of legal obligation, *opinio juris sive necessitatis*. Third, this essay is not the place for what would necessarily be a long digression into the morass of academic literature on custom. It aspires only to provide a critical appraisal of the authorities said to support the view that Article 25 codifies custom, and then to consider Article 25's potential practical effects and normative dimensions.

<sup>43</sup> Gabčíkovo-Nagymaros Project, *supra* note 24, para. 51.

<sup>44</sup> ILC COMMENTARY, *supra* note 19, at 181–82, cmt. 11.

<sup>45</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, *supra* note 5, para. 140.

<sup>46</sup> ILC COMMENTARY, *supra* note 19, at 179, cmt. 3.

<sup>47</sup> *Id.* at 183, cmt. 14; *see also* Heathcote, *supra* note 27, at 495 (suggesting that except for the phrase in Article 25(1)(b) privileging interests of "the international community as a whole," which "is considered progressive development," Article 25 codifies custom).

<sup>48</sup> *See generally* Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AJIL 757 (2001).

<sup>49</sup> BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 69–77 (1953); *see* Statute of the International Court of Justice, June 26, 1945, Art. 38(1)(c), 59 Stat. 1055, TS No. 993.

<sup>50</sup> W. Michael Reisman, *International Lawmaking: A Process of Communication*, 75 ASIL PROC. 101, 103 (1981).

The cases and incidents in the ILC Commentary to Article 25 fall into roughly three categories. These correspond, by and large, to three factual rubrics: state security, fiscal crises, and ecological harms. They will be explored seriatim, but at the outset it may be helpful to supply a general conceptual framework that sets out the basic contours of each paradigm of necessity that may be discerned in the authorities in question. I will refer to the first of these paradigms as *classical necessity*. Without exception, precedents in this rubric involve alleged threats to state security, often framed in terms of a state's natural right to self-preservation. Indeed, it is telling to note that before the recent arbitral awards arising (in all but one case)<sup>51</sup> out of Argentina's fiscal crisis, necessity had never been sustained on the merits in a context *other than* state self-preservation. I will refer to the second rubric as *economic necessity* (or force majeure). These cases and incidents generally involve the awkward conflation of necessity and force majeure. International tribunals in the late nineteenth and early twentieth centuries failed to distinguish the two defenses clearly, which has led to some confusion in the jurisprudence from that era. The Articles on State Responsibility, by contrast, appropriately distinguish force majeure (Article 23) and necessity (Article 25). I will refer to the final rubric as *ecological necessity*. These precedents frequently seem to involve the questionable identification of an official's use of the word *necessity* (or a similar term) with a *legal claim* to that effect.

A fourth category of precedents could be adduced from (probably hundreds of) treaties that include provisions for derogation or limitation based on exigent circumstances. But these treaties would be irrelevant to the present inquiry. Again, the question is not whether diverse primary-rule *conceptions* of necessity exist throughout international law. They clearly do and long have. The question is whether necessity—as a generally applicable, uniform secondary rule, which offers states a potential defense to responsibility for the violation of primary rules in almost any field—is general international law, as custom or otherwise. Treaties that prescribe necessity or a cognate principle as a primary rule do not speak to this issue. (That is presumably why the ILC Commentary does not refer to this fourth category either.) The analysis that follows therefore focuses only on whether the precedents, including but not limited to those in the ILC Commentary, establish Article 25 as a general CPW in the law of state responsibility.

*Classical (existential) necessity.* Early publicists on the law of nations—Hugo Grotius, Alberico Gentili, Emer de Vattel, and others—agreed that it included necessity.<sup>52</sup> But it is important to understand what they meant by necessity: because the law of nations governed the rights and duties of juridically equal sovereign states *inter se*, each state perforce retained the right to take any action necessary to preserve its existence as a state. No state, that is, could be expected to obey an international obligation if, in consequence, it would cease to *be* a legal subject of the law and community of nations.<sup>53</sup>

The classical publicists therefore understood necessity to be a *natural* right of states in much the way that Thomas Hobbes understood the sole, but inalienable, natural right of men: “the

<sup>51</sup> The exception is *Funnekotter v. Zimbabwe*, ICSID Case No. ARB/05/6, Award, para. 106 (Apr. 22, 2009) (rejecting the defense).

<sup>52</sup> See ILC COMMENTARY, *supra* note 19, at 182–83, cmt. 13 & n.420; see also Eighth Report Addendum, *supra* note 27, para. 71.

<sup>53</sup> See, e.g., 2 HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 434 (Richard Tuck ed., 2005) (1625); EMER DE VATTEL, THE LAW OF NATIONS, bk. II, ch. ix, §120 (Béla Kapossy & Richard Whatmore eds., Thomas Nugent trans., 2008) (1758).

liberty each man hath, to use his own power, as he will himself, for the preservation of his own nature."<sup>54</sup> Vattel drew an analogy in this regard:

The earth was designed to feed its inhabitants; and he who is in want of every thing is not obliged to starve because all property is vested in others. When, therefore, a nation is in absolute want of provisions, she may compel her neighbours, who have more than they want for themselves, to supply her with a fair share of them at a fair price: she may even take it by force, if they will not sell.<sup>55</sup>

For Vattel and many other early publicists, it would have been implausible to think that the law of nations, a legal system predicated on the interaction of juridically equal states, denied states the right to preserve themselves.

Whether these publicists understood necessity as a justification or an excuse is unclear, in all likelihood because this distinction, though routinely drawn today, is a comparatively modern legal development. Grotius wrote, "For if I cannot defend myself without intercepting those Things that are sent to my Enemy, Necessity . . . will give me a good Right to them, but upon Condition of Restitution, unless I have just Cause to the contrary."<sup>56</sup> Vattel argued that necessity authorized a state to compel the sale of (or, if the seller refused to sell, to seize forcibly) "ships, wagons, horses, or even the personal labour of foreigners . . . . 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."<sup>57</sup> This obligation to compensate suggests that necessity excuses rather than justifies, for if it justified—that is, precluded the wrongfulness of the act—no international wrong would exist to repair. But Vattel, among others, could be ambiguous in this regard. Elsewhere in his treatise, he wrote that necessity renders lawful what would otherwise be an unlawful act,<sup>58</sup> implying that necessity indeed precludes wrongfulness (and therefore justifies rather than excuses).

It may well be anachronistic to apply the excuse/justification distinction to the concept of necessity found in the writings of these classical publicists. I mention it here because it anticipates an inadequately theorized dimension of Article 25 to which I will return below—namely, whether necessity should excuse or justify, and why. What *is* clear from the early treatises, however, is that, as a defense to state responsibility, necessity originated in the natural right of a state to preserve itself. This idea appears not only in classical treatises on the law of nations but, as we will see, in the vast majority of the authorities that the ILC Commentary invokes to support Article 25's more expansive conception of necessity. With due and sincere respect, the authorities do not seem to bear out Special Rapporteur Roberto Ago's emphatic view 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."<sup>59</sup>

<sup>54</sup> THOMAS HOBBS, *LEVIATHAN* 103 (Michael Oakshott ed., 1962) (1651).

<sup>55</sup> VATTEL, *supra* note 53.

<sup>56</sup> 3 GROTIUS, *supra* note 53, at 1190; *see also* 2 GROTIUS, *supra* note 53, at 434.

<sup>57</sup> VATTEL, *supra* note 53.

<sup>58</sup> *Id.*, §119.

<sup>59</sup> Eighth Report Addendum, *supra* note 27, para. 8 (citation omitted).

Recorded state practice evincing the classical conception of necessity is limited to a few nineteenth-century incidents. In the 1829 *Chichester* affair, Britain had objected to Mexico's detention of its vessel pursuant to an embargo that Mexico declared in anticipation of a Spanish attack and in order "to prevent information from reaching the Spanish squadron."<sup>60</sup> Herbert Jenner, the advocate general, advised the Crown that necessity authorized Mexico's temporary seizure of the vessel. 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."<sup>61</sup>

The same rationale for necessity emerges in the two early nineteenth-century incidents cited in the ILC Commentary: the 1832 Anglo-Portuguese dispute and *The Caroline*.<sup>62</sup> In the former, Portugal agreed by treaty to respect the property of British nationals residing there.<sup>63</sup> But faced with an insurgency and the "necessity of providing for the subsistence of certain contingents of troops engaged in quelling internal disturbances,"<sup>64</sup> it appropriated British property. The British consul general in Lisbon notified the 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.*"<sup>65</sup> Jenner again advised the Crown that in the interest of self-preservation, Portugal could temporarily violate Britain's treaty rights insofar as strictly necessary.<sup>66</sup> Relying on Vattel,<sup>67</sup> he said that Portugal's observance of the treaty, although ordinarily subject to the principle *pacta sunt servanda*, could be suspended, 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 to the *very existence* of the State."<sup>68</sup> The italicized phrase reinforces both the existential rationale for necessity and the stringency of the threshold for its invocation in the classical law of nations.

The ILC Commentary next turns to *The Caroline*.<sup>69</sup> In 1837, New York citizens sympathetic to a Canadian insurrection had been using the *Caroline*, a U.S. vessel, to aid the insurgents. A British regiment crossed the border into New York, boarded the vessel, set it ablaze, and let it drift downstream to its destruction on the Niagara Falls, injuring and killing several U.S. citizens.<sup>70</sup> Secretary of State Daniel Webster protested with characteristic eloquence: "It 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

<sup>60</sup> 2 ARNOLD MCNAIR, INTERNATIONAL LAW OPINIONS 231 (1956).

<sup>61</sup> *Id.*

<sup>62</sup> ILC COMMENTARY, *supra* note 19, at 179, cmts. 4–5.

<sup>63</sup> Eighth Report Addendum, *supra* note 27, para. 23.

<sup>64</sup> ILC COMMENTARY, *supra* note 19, at 179, cmt. 4.

<sup>65</sup> 2 MCNAIR, *supra* note 60, at 231–32 (footnote omitted).

<sup>66</sup> *Id.*

<sup>67</sup> *See id.* (citing VATTEL, *supra* note 53, ch. xii, §170).

<sup>68</sup> *Id.* at 232 (emphasis added).

<sup>69</sup> ILC COMMENTARY, *supra* note 19, at 179, cmt. 5.

<sup>70</sup> YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 248 (4th ed. 2005). *See generally* John E. Noyes, *The Caroline: International Law Limits on Resort to Force*, in INTERNATIONAL LAW STORIES 263 (John E. Noyes, Laura A. Dickinson & Mark W. Janis eds., 2007); R. Y. Jennings, *The Caroline and McLeod Cases*, 32 AJIL 82, 82–89 (1938).

necessity of self-defence . . . must be limited by that necessity . . . .”<sup>71</sup> Based on Webster’s references to self-defense, *The Caroline* is often cited as a precedent for anticipatory self-defense or the necessity component of the postwar *ius ad bellum*.<sup>72</sup> This reliance seems misplaced. At the time, which coincided with the high-water mark of positivism in international law, no *ius ad bellum* existed.<sup>73</sup> It therefore would have been odd for Webster to insist on a legal threshold for recourse to force, defensive or otherwise.<sup>74</sup>

The ILC Commentary more accurately frames the issue presented by *The Caroline*:<sup>75</sup> did “the necessity of self-defence and self-preservation”<sup>76</sup> authorize Britain to encroach upon and to damage or injure the territory, property, and people of the United States?<sup>77</sup> The two states ultimately agreed upon the legal principles at stake and resolved their dispute by effectively “agreeing to disagree” about whether Britain’s conduct conformed to those principles. Yet as a precedent for necessity, the critical question concerns the nature and scope of their agreement on the antecedent legal principles. In this regard, *The Caroline*, like the *Chichester* and Anglo-Portuguese disputes, supports only the classical view that necessity may temporarily excuse one state’s failure to observe an international legal obligation (here, respect for another state’s sovereignty) in circumstances of war or a comparably serious security threat to the invoking state.<sup>78</sup>

The earliest precedents cited in the ILC Commentary thus reflect the classical conception of necessity found in Grotius, Vattel, and other early publicists. Each involved a literal security threat to the invoking state. One may certainly question, as did Andrew Stevenson, the U.S. minister to Great Britain during the *Caroline* incident, whether these threats could reasonably be said to imperil the “very existence” of the invoking states.<sup>79</sup> But the accuracy of those factual judgments is beside the point. The early authorities, including the classical publicists and the incidents cited in the ILC Commentary, consistently establish the threshold for necessity at the level of a security threat and not merely, to quote Article 25, an “essential interest”—a more open-textured phrase that may lend itself to a more capacious and protean standard in practice.

Another difference between the classical conception of necessity and that of Article 25 is that the latter requires that the act in question not “seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.” Neither the early publicists nor anything in the incidents cited in the ILC Commentary suggests that the determination of necessity requires that one weigh the “grave and imminent

<sup>71</sup> Letter from Daniel Webster to Henry Fox, British Minister to Washington (Apr. 24, 1841), *reprinted in* 2 MCNAIR, *supra* note 60, at 222.

<sup>72</sup> See, e.g., Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1634–35 (1984); see also MALCOLM SHAW, *INTERNATIONAL LAW* 1131 & n.63 (6th ed. 2008) (collecting authorities).

<sup>73</sup> See, e.g., DINSTEIN, *supra* note 70, at 67; 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 114–15 (Bruno Simma et al. eds., 2d ed. 2002); Arnold D. McNair, *Collective Security*, 1936 BRIT. Y.B. INT’L L. 150, 150–52.

<sup>74</sup> Furthermore, “There was nothing anticipatory about the British action against the *Caroline* . . . , inasmuch as use of the *Caroline* for transporting men and materials across the Niagara River . . . had already been in progress.” DINSTEIN, *supra* note 70, at 184–85.

<sup>75</sup> ILC COMMENTARY, *supra* note 19, at 179, cmt. 5.

<sup>76</sup> Noyes, *supra* note 70, at 270.

<sup>77</sup> See 2 MCNAIR, *supra* note 60, at 222–23; DINSTEIN, *supra* note 70, at 185.

<sup>78</sup> Britain’s diplomatic correspondence, which concluded the affair, characterized the competing legal interests as, on the one hand, “[r]espect for the inviolable character of [sovereign] territory,” and on the other, “a strong overpowering necessity.” NOYES, *supra* note 70, at 290 (internal quotation marks omitted).

<sup>79</sup> See *id.* at 270.

peril” to the invoking state’s interests against the nature or degree of “impair[ment]” to the interests “of the State or States towards which the obligation exists, or of the international community as a whole,” and as noted in the ILC Commentary, the “interest [of the acting State] relied on must outweigh all other considerations, not merely from the point of view of the acting State but on a reasonable assessment of the competing interests, whether these are individual or collective.”<sup>80</sup> This notion of balancing the essential interests of states against one another—or against the essential interests of “the international community as a whole”—is implicit in the structure of Article 25, and in this regard the ILC conception of necessity is redolent of the choice-of-evils paradigm found in the criminal law of some national legal systems. That paradigm is wholly foreign to necessity as understood in the early law of nations. It would not have been framed or conceptualized in this way at the time, but if classical necessity applied in a situation, the invoking state’s right to preserve its existence took precedence over any injury to another state caused by the former’s violation of international law.

Before turning to the second rubric, economic force majeure, it is worth pausing to consider why the classical conception of necessity did not embrace a choice-of-evils standard. The answer, in short, is that it would have been incongruous in the context of roughly contemporaneous political theory, including, in particular, Enlightenment thought positing law as the product of a literal or figurative social contract arising out of a state of nature.<sup>81</sup> Within a legal system based on social contract, people retained at least one inalienable natural right, the “liberty each man hath, to use his own power, as he will himself, for the preservation of his own nature; that is to say, of his own life; and consequently, of doing any thing, which in his own judgment, and reason, he shall conceive to be the aptest means thereunto.”<sup>82</sup> Necessity in the early law of nations may well reflect analogous social contract theory transposed incongruously to the level of international relations.

As a common heuristic device in international law, national law analogies must always be scrutinized carefully. Indeed, Article 25’s structural similarity to a choice-of-evils paradigm of necessity proves troubling in part for this reason. That said, for the limited purpose of clarifying an important distinction between two conceptions of necessity, consider a hoary example from Anglo-American law: people stranded in a lifeboat with scarce space and provisions must sacrifice one or more of themselves in order to survive, and so one eventually throws others overboard, or kills and cannibalizes another.<sup>83</sup> Either act would, of course, ordinarily be a crime. But if the perpetrator or perpetrators, after rescue, plead necessity, how should we understand the defense? Consider two possibilities.

First, perhaps it is meaningless to speak of law under the circumstances. Law presupposes minimal conditions, and a lifeboat adrift in the middle of an ocean, with inadequate space and food, and no expectation of rescue, does not meet them. From this perspective, necessity is an *extralegal* plea: absent minimal conditions, a “state of nature” revives, and people cannot then

<sup>80</sup> Articles on State Responsibility, *supra* note 19, Art. 25(1); ILC COMMENTARY, *supra* note 19, at 184, cmt. 17; *see also* Second Report Addendum, *supra* note 42, para. 290 (suggesting that under draft Article 33 “the balance to be struck” in cases involving *erga omnes* obligations should differ from the usual “balance between the interests of the respondent State and the individual interests of the State or States complaining of the breach”).

<sup>81</sup> *See* HOBBS, *supra* note 54, at 103.

<sup>82</sup> *Id.*

<sup>83</sup> Sadly, neither example is hypothetical. *See* United States v. Holmes, 26 F.Cas. 360 (C.C.E.D. Pa. 1842) (No. 15,383); R v. Dudley, [1884] Q.B.D. 273.

be expected to refrain from exercising their natural right to preserve their lives by any means available to them.

That is not, of course, the only, or even the predominant, conception of necessity. Criminal acts might instead be defended as the lesser of two evils under certain circumstances. It is better to kill one to save two than to forbear and let three die. That is the simple consequentialist logic advanced in the infamous case *Regina v. Dudley*, in which the court rejected necessity and held that even such dire circumstances cannot justify homicide.<sup>84</sup> But with that one exception, Anglo-American law generally recognizes the lesser-evils conception of necessity and regards an ordinarily criminal act that is the lesser of two evils as justifiable.<sup>85</sup> So conceived, necessity is not an extralegal defense. Rather, if it applies under the factual circumstances, the violation of one law in the service of values underlying or instantiated by another (or by the legal system as a whole) is justified.<sup>86</sup>

By analogy, in the early law of nations, if war or a similarly exigent security threat jeopardized a state's existence, "the Law of Nations [would] 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."<sup>87</sup> Classical necessity thus resembles the first conception of necessity, whereas Article 25 resembles the second. The ILC's definition eschews the existential conception and, unlike classical necessity, does not limit itself to state self-preservation. Instead, it reconceives necessity by, first, expanding the scope of state interests that may qualify as "essential" and, second, subjecting those interests to what is, in effect, a balancing analysis redolent of the choice-of-evils paradigm. This approach may or may not be normatively appealing, but as a descriptive matter, it finds scant support in the precedents cited in the ILC Commentary. Contrary to Ago's view, the precedents indeed suggest, to a certain extent, that "the concepts of [state] self-preservation and state of necessity" are, or were, "linked"; the former is not only one rationale for the latter but, insofar as the evidence indicates, the overwhelmingly predominant one.<sup>88</sup>

The predominance of this historical rationale will become clearer from a review of the remaining authorities in the ILC Commentary. Those authorities also reflect and reinforce the classical conception of necessity. What differs in the remaining ILC Commentary authorities is not the conceptual nature of the plea but the factual predicate for its invocation—which tends to be economic or ecological rather than related to security, strictly speaking. Tellingly, however, in economic and ecological contexts, as we will see, tribunals and other decision makers, without exception (to the best of my knowledge and research), had never sustained a necessity plea before the 2001 publication of the Articles on State Responsibility. The principled rejection of a legal concept might, of course, indirectly support, define, or refine the contours of that concept.<sup>89</sup> But that is doubtful in the cases and incidents that the ILC Commentary

<sup>84</sup> *Regina v. Dudley*, [1884] Q.B.D. 273; cf. *Prosecutor v. Erdemović*, Case No. IT-96-22-A, Judgment, Joint & Sep. Op. McDonald & Vohrah, JJ. (Oct. 7, 1997).

<sup>85</sup> See, e.g., MODEL PENAL CODE §3.02 (Proposed Official Draft 1962).

<sup>86</sup> Ordinarily illegal conduct might also be *excused* as understandable under the circumstances. But this conception of necessity depends on the nature of the legal subject as a human being (rather than a state). See *infra* notes 204–16 and accompanying text.

<sup>87</sup> 2 MCNAIR, *supra* note 60, at 231.

<sup>88</sup> See Eighth Report Addendum, *supra* note 27, para. 8 (citation omitted).

<sup>89</sup> See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 ICJ REP. 14, para. 186 (June 27).

cites. Those sources consistently reject necessity in terms that cast doubt on Article 25's structure and that further call into question its presumption that the existing customary international law of state responsibility recognizes necessity as a valid defense in contexts other than state self-preservation.

*Economic necessity.* Two paradigms characterize the economic necessity cases: either (1) a debtor state invokes its fiscal distress to avoid, defer, or modify obligations to a creditor state, or (2) a state contracts with a private foreign commercial entity and later pleads necessity to avoid or mitigate its obligations. Before the arbitrations arising out of Argentina's fiscal crisis, necessity had never been sustained based on a state's financial troubles. Even more significantly (for, as noted, the principled rejection of a legal plea may nonetheless offer legal support for the existence of that plea), no case or incident before the Argentina cases contemplates a conception of necessity other than the classical one. Time and again, tribunals reject necessity because, as they observe, the threat to the invoking state does not threaten its very existence as a state.

The *Russian Indemnity* award typifies the first economic paradigm (involving debtor and creditor states).<sup>90</sup> In the 1879 treaty between the Ottoman Empire and Russia that ended their hostilities,<sup>91</sup> the empire agreed to indemnify Russia for its war losses.<sup>92</sup> In 1894, after a series of partial payments by the empire, and with much left unpaid, Russia refused to grant the empire another extension and insisted on immediate repayment of the outstanding balance.<sup>93</sup> From 1895 to 1899, however, the Ottoman Empire's efforts to put down insurgencies in Asia Minor exacerbated its financial straits, further delaying payment. In 1900, it paid Russia the outstanding principal but refused to pay interest that it allegedly owed because of its failure to pay Russia on time. In 1910, the two states submitted to arbitration the question whether the empire owed Russia interest and, if so, how much.<sup>94</sup>

The tribunal described Turkey's defense as force majeure "adapt[ing] itself to political necessities."<sup>95</sup> But to present-day international lawyers, the defense would be characterized as necessity,<sup>96</sup> for "[i]n the case of *force majeure*, respecting the obligation is absolutely impossible, whereas in the case of necessity [under Article 25], the impossibility is relative: a choice is made between suffering the grave and imminent peril and violating an obligation protecting an interest of lesser importance."<sup>97</sup> At the time, however, tribunals not infrequently failed to distinguish the two. In practical terms, conflation of the two defenses in *Russian Indemnity* did not affect the result, for the tribunal effectively applied the same classical conception of necessity discussed by the precedents in the preceding section, rendering Turkey's defense unavailing.

<sup>90</sup> *Affaire d'Indemnité Russe (Russ./Turk.)*, 11 R.I.A.A. 431 (Perm. Ct. Arb. 1912), translated in 7 AJIL 178 (1913) [hereinafter *Russian Indemnity*].

<sup>91</sup> 7 AJIL at 183.

<sup>92</sup> *Id.* at 184.

<sup>93</sup> *Id.* at 185.

<sup>94</sup> *Id.* at 178.

<sup>95</sup> *Id.* at 195.

<sup>96</sup> The ILC COMMENTARY cites *Russian Indemnity* as support for both force majeure and necessity. ILC COMMENTARY, *supra* note 19, at 172, cmt. 7; *id.* at 180, cmt. 7.

<sup>97</sup> Heathcote, *supra* note 27, at 495; see also "Force Majeure" and "Fortuitous Event" as Circumstances Precluding Wrongfulness: Survey of State Practice, International Judicial Decisions and Doctrine—Study Prepared by the Secretariat, [1978] 2 Y.B. INT'L L. COMM'N, pt. 1, at 61, paras. 25, 30, UN Doc. A/CN.4/315 [hereinafter *Secretariat Survey*].

Yet the *Russian Indemnity* award illustrates an important distinction between the classical conception of necessity and Article 25. The tribunal acknowledged that between 1881 and 1902, the empire suffered “financial difficulties of the utmost seriousness, increased by domestic and foreign events (insurrections and wars)” that placed it “in a position where it could meet its engagements only with delay and postponements, and even then at great sacrifice.”<sup>98</sup> The conception of necessity set forth in Article 25, had it governed at the time, would likely have supplied a sound defense for the empire’s delay. Turkey’s severe lack of economic health could quite plausibly have been characterized as an “essential interest” under Article 25(1)(a). By contrast, its delay in paying Russia the outstanding interest due under an 1879 armistice treaty could hardly be said to “seriously impair an essential interest of [Russia].”<sup>99</sup> But absent a threat to Turkey’s existence as a state, the tribunal held that its financial difficulties, however dire, did not suffice to sustain the defense.

The tribunal noted that Russia “expressly admits 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.’”<sup>100</sup> But even the “incontestable” facts about Turkey’s dire financial straits did not meet that threshold—on two grounds, one factual, the other legal.<sup>101</sup> First, as a matter of fact, Turkey could have obtained reasonable loans to pay its outstanding debts to Russia. Second, as a matter of law:

It would clearly be exaggeration to admit that the payment (or the obtaining of a loan for the payment) of the comparatively small sum of about six million francs due the Russian claimants would imperil the existence of the Ottoman Empire or seriously compromise its internal and external situation. The exception . . . cannot, therefore, be admitted.<sup>102</sup>

In other words, the *Russian Indemnity* tribunal accurately set the legal threshold for invoking necessity at, to quote Article 25, “a grave and imminent peril.” But contrary to Article 25 and consistent with every other precedent, the tribunal explained that for a necessity plea to prevail, the relevant peril must be to the state’s existence—not to the broader and potentially far more protean notion of its “essential interest[s].”<sup>103</sup>

Another putative example of the economic necessity paradigm is the *Forests of Rhodope* incident, decided by the Council of the League of Nations in 1934.<sup>104</sup> Under an arbitral award made in 1933,<sup>105</sup> Greece sought 475,000 gold leva plus interest.<sup>106</sup> Bulgaria’s representative replied that

it was not the Bulgarian Government’s intention, as might be supposed from the Greek Government’s action in asking for this question to be placed on the Council’s agenda . . . , to evade the obligation imposed upon it by the arbitral award in question. He confirmed

<sup>98</sup> *Russian Indemnity*, 7 AJIL at 195.

<sup>99</sup> Articles on State Responsibility, *supra* note 19, Art. 25(1)(b) (emphasis added).

<sup>100</sup> *Russian Indemnity*, 7 AJIL at 195 (citation omitted).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 196.

<sup>103</sup> Articles on State Responsibility, *supra* note 19, Art. 25(1)(a).

<sup>104</sup> Dispute Between Greece and Bulgaria Concerning the Forests of Rhodope, 15 LEAGUE OF NATIONS OFFICIAL JOURNAL 1432 (1934); see ILC COMMENTARY, *supra* note 19, at 180, cmt. 7, n.407.

<sup>105</sup> International Arbitral Awards of Östen Undén Arbitration Under Article 191 of the Treaty of Neuilly, 3 R.I.A.A. 1405 (1933), translated in 28 AJIL 760 (1934) [hereinafter Östen Undén Arbitration].

<sup>106</sup> See Eighth Report Addendum, *supra* note 27, para. 23.

therefore the statement that his Government was prepared to discharge to Greece the payment stipulated in the award. The present situation of the national finances, however, prevented the Bulgarian Government from contemplating a payment in cash. His Government was nevertheless prepared to examine immediately with the Greek Government, any other method of payment which might suit the latter. . . . The Bulgarian Government hoped that a friendly settlement could be reached.<sup>107</sup>

Greece agreed, ending the dispute. The ILC Commentary, following Ago, says that “the two Governments seem to have clearly recognized that a situation of *necessity* such as one consisting of *very serious financial difficulties* could justify, if not the repudiation by a State of an international debt, at least a recourse to means of fulfilling the obligation other than those actually envisaged by the obligation.”<sup>108</sup>

This conclusion is doubtful or, at best, overstated. First, so far as the record indicates, the two states regarded the resolution as “a friendly settlement.” It is unclear why a settlement would imply that Greece and Bulgaria “clearly recognized” the principle that a state’s “serious financial difficulties could justify” the discharge of an international monetary obligation in terms “other than those actually envisaged by the obligation.” Bulgaria did not even argue that its fiscal straits justified a distinct form of payment. Nor did it raise necessity. It merely expressed the hope that Greece would accept the amount Bulgaria owed in a form other than cash. For its part, Greece never said or implied that Bulgaria’s financial troubles raised the predicate for a necessity plea or that they *justified* a form of payment other than cash. The evidence suggests that Greece agreed to Bulgaria’s proposal because of its natural desire to be paid fully and on time, and because, in all likelihood, of its indifference to the form of the payment.<sup>109</sup> Necessity does not seem to have played a significant role, if any, in this incident.

The second paradigm that may be discerned in the economic necessity precedents cited in the ILC Commentary involves state contracts with private business entities (rather than other states). *Société Commerciale de Belgique (SCB)* is the *locus classicus* of this paradigm.<sup>110</sup> Greece contracted with SCB, a Belgian company, to construct railway lines, which Greece financed by issuing bonds to SCB. In 1932, after the global financial crisis, Greece defaulted on its sovereign debt. Because SCB thereafter ceased to receive interest or amortization payments from Greece, it could not pay its subcontractors and ultimately had to terminate the project. When it brought arbitration pursuant to the underlying contract,<sup>111</sup> Greece pleaded necessity—styled, here again, as economic force majeure—based on its financial straits,<sup>112</sup> arguing that “by reason of its budgetary and monetary situation, . . . it is materially impossible for the Greek Government to execute the awards as formulated.”<sup>113</sup>

<sup>107</sup> Dispute Between Greece and Bulgaria Concerning the Forests of Rhodope, 15 LEAGUE OF NATIONS OFFICIAL JOURNAL at 1432.

<sup>108</sup> Eighth Report Addendum, *supra* note 27, para. 23; *see also* ILC COMMENTARY, *supra* note 19, at 180, cmt. 7 & n.407 (adopting the same interpretation).

<sup>109</sup> No evidence implies that Greece attached any significance to the latter. *See* Östen Undén Arbitration, 28 AJIL at 807 (*dispositif* in the underlying arbitration).

<sup>110</sup> *Société Commerciale de Belgique (Belg. v. Greece)*, 1939 PCIJ (ser. A/B) No. 78 at 160 (June 15).

<sup>111</sup> *See id.* at 166.

<sup>112</sup> *Id.* at 178.

<sup>113</sup> *Id.* at 164; *see also* Secretariat Survey, *supra* note 97, paras. 276, 281.

In *SCB*, as in *Russian Indemnity*, characterizing necessity as a form of force majeure is misguided and misleading. Paying the awards might have been inappropriate as a matter of political morality—that is, in view of the needs of Greece’s citizens, to whom the government owes its paramount allegiance. But paying the awards had not been rendered *impossible* by a natural event or otherwise, as Greece later conceded.<sup>114</sup> Its financial difficulties, however dire, could not be conceptually analogized to a natural disaster, such as a hurricane or earthquake, which might literally render the performance of an obligation impossible. No “act of God” prevented payment. Greece chose, albeit in difficult financial circumstances, not to pay *SCB*, and “circumstances rendering performance more difficult or burdensome do not constitute a case of *force majeure*.”<sup>115</sup> It is the element of choice that distinguishes force majeure from necessity.<sup>116</sup>

At any rate, the tribunal rejected Greece’s defenses, necessity included, and awarded *SCB* damages.<sup>117</sup> After Greece failed to pay, Belgium, espousing *SCB*’s claim, sued in the Permanent Court of International Justice (PCIJ). Greece replied, in part, by renewing its economic force majeure argument. The PCIJ formally held that because the arbitral awards were, by their terms, “‘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.”<sup>118</sup> The Court also emphasized that “the question of Greece’s capacity to pay is outside the scope of the proceedings before the Court” and that, “if the Court cannot invite the Greek Government and [*SCB*] to agree upon an arrangement corresponding to the budgetary and monetary capacity of the debtor, still less can it indicate the bases for such an arrangement.”<sup>119</sup> The Court’s competence extended only to recording Greece’s recognition of the validity of the awards, thus dispelling any doubt that the awards were *res judicata*.<sup>120</sup>

The ILC Commentary, after reciting the PCIJ’s holding, says that “the Court implicitly accepted the basic principle, on which the two parties were in agreement.”<sup>121</sup> But what principle is that? The commentary is, on its face, unclear on this point. Insofar as the PCIJ’s decision indicates, Belgium and Greece agreed only on the uncontroversial fact that Greece had renewed its force majeure argument and sought a decision “on the merits.”<sup>122</sup> The Court said that “it will suffice to note that the two Parties are in agreement: the Belgian Government asks the Court to say that the arbitral awards have the force of *res judicata*, and the Greek Government asks the Court to declare it recognizes that they possess this force.”<sup>123</sup> But if *SCB* is authority for Article 25, as the ILC Commentary suggests, surely the ILC does not mean to refer to the *res judicata* status of the awards; their preclusive effect does not, of course, speak to the merits of Greece’s economic force majeure defense, which had been rejected previously in arbitration.

<sup>114</sup> Eighth Report Addendum, *supra* note 27, para. 28 (quoting Greece’s pleadings); *see also* Secretariat Survey, *supra* note 97, para. 277.

<sup>115</sup> Rainbow Warrior, *supra* note 7, para. 78; *see also* Articles on State Responsibility, *supra* note 19, Art. 23(1).

<sup>116</sup> Second Report Addendum, *supra* note 42, para. 276; *see also* Secretariat Survey, *supra* note 97, paras. 25, 30.

<sup>117</sup> *See* Secretariat Survey, *supra* note 97, paras. 280–81.

<sup>118</sup> *Société Commerciale de Belgique*, 1939 PCIJ (ser. A/B) No. 78 at 174.

<sup>119</sup> *Id.* at 177.

<sup>120</sup> *Id.* at 172, 174–76.

<sup>121</sup> ILC COMMENTARY, *supra* note 19, at 180–81, cmt. 8; Secretariat Survey, *supra* note 97, para. 288.

<sup>122</sup> *Société Commerciale de Belgique*, 1939 PCIJ (ser. A/B) No. 78 at 174.

<sup>123</sup> *Id.* at 175.

By tracing the ILC Commentary's remark back to the Articles on State Responsibility *travaux*, it becomes clear that when the commentary states that "the *Court* implicitly accepted the basic principle, on which the two parties were in agreement,"<sup>124</sup> it means to refer to an excerpt from *Belgium's* oral pleadings, which the commentary does not reproduce. In that excerpt, counsel for Belgium states:

In a learned survey . . . , Mr. Youpis [counsel for Greece] stated yesterday that a State is not obliged to pay its debt if in order to pay it[,] it would have to jeopardize its essential public services.

So far as the principle is concerned, the Belgian Government would no doubt be in agreement.<sup>125</sup>

This quotation, more than anything reviewed so far, might offer some support for Article 25's transition from (1) the classical, existential threshold for necessity—that is, that the state's "very existence" be at stake, to (2) the lower threshold and broader scope suggested by the ILC phrase "essential interest."<sup>126</sup> But several factors cast doubt on the extent to which inferences about general international law can be drawn from the PCIJ's opinion, in general, and the foregoing quotation, in particular.

First, the passage reproduced above is cherry-picked from a long and complicated litigation record, which also includes multiple references to the traditional threshold for necessity. Greece, for example, invoked *Russian Indemnity* as authority for the view that economic force majeure refers to a situation in which the debtor's payment "would, by reason of the amount involved, have imperilled the existence of the debtor State or gravely jeopardized its internal or external situation."<sup>127</sup> To suggest that Belgium, still less the PCIJ, agreed with Greece on this point would overstate the implications of the quotation's hypothetical agreement "in principle."<sup>128</sup>

Second, the prolonged litigation that culminated in *SCB* included "modifications or withdrawals of submissions,"<sup>129</sup> making it difficult to know, more than half a century later, the extent to which the quotation from Belgium's oral pleadings actually reflected a general, or generalizable, principle.

Third, it is not as clear as Ago and the ILC Commentary suggest that the *PCIJ*, in contrast to the parties, "implicitly accepted th[is] basic principle."<sup>130</sup> The Court held, first, that it lacked competence "to oblige the Belgian Government . . . to enter into negotiations with the Greek Government with a view to a friendly arrangement regarding the execution of the arbitral awards," and second, that in view of the parties' "agreement that the question of Greece's capacity to pay [was] outside the scope of the [PCIJ] proceedings," the Court could not make

<sup>124</sup> ILC COMMENTARY, *supra* note 19, at 181, cmt. 8 (emphasis added); Secretariat Survey, *supra* note 97, para. 288.

<sup>125</sup> Eighth Report Addendum, *supra* note 27, para. 30 (emphasis omitted); *see also* Secretariat Survey, *supra* note 97, para. 284; ILC COMMENTARY, *supra* note 19, at 181, cmt. 8.

<sup>126</sup> Articles on State Responsibility, *supra* note 19, Art. 25(1).

<sup>127</sup> Secretariat Survey, *supra* note 97, para. 281.

<sup>128</sup> Eighth Report Addendum, *supra* note 27, paras. 29–30.

<sup>129</sup> Secretariat Survey, *supra* note 97, para. 275.

<sup>130</sup> ILC COMMENTARY, *supra* note 19, at 181, cmt. 8; *see also* Secretariat Survey, *supra* note 97, para. 288.

a “declaration in law to the effect that the Greek Government is justified, owing to *force majeure*, in not executing” those arbitral awards.<sup>131</sup> Ago inferred from the above that,

by observing that . . . it could only have made such a declaration after having itself verified the financial situation as alleged by the Greek Government and ascertained what the effects of the execution of the awards would have been, the *Court* showed that it implicitly accepted the basic principle on which the two parties were in agreement.<sup>132</sup>

That is a strained inference, given the scant evidence on this point in the PCIJ’s written opinion. A more neutral interpretation, which also better reflects the Court’s precise language, is that the procedural posture of the case rendered impracticable any possible judicial attention to both the factual issues raised by a plea of economic force majeure and the potential legal consequences of any such assessment. In short, the inference suggested by Ago involves assumptions that go well beyond the clear positions to which the Court committed.<sup>133</sup>

Fourth, the pleadings suggest that Greece’s conception of necessity did not, in fact, differ much, if at all, from the classical one. Greece did not argue that because of its dire fiscal situation, paying the awards would jeopardize an *essential interest*; it argued that paying them would jeopardize its *very existence* as a state. In concluding oral argument, counsel for Greece stressed that paying the awards would involve a “risk . . . so large and so substantial that the Government cannot afford to take it. There is no question of a slight danger; *the very existence of the State is at stake*.”<sup>134</sup>

Fifth, neither the parties nor the PCIJ suggested that necessity might *justify* Greece’s failure to pay—that is, preclude its wrongfulness under international law.<sup>135</sup> Belgium said that if Greece proved the allegations about its fiscal condition, its “[i]ncapacity to pay [could] entail only a full or partial suspension of payment, which may moreover be modified and terminated; it [could] not entail release from the debt, even in part.”<sup>136</sup> Greece did not disagree.<sup>137</sup> If its necessity defense had prevailed, that defense might, at most, have temporarily suspended Greece’s obligation to pay immediately.<sup>138</sup> Yet even this more modest inference sits uneasily with the ILC’s classification of necessity as a circumstance *precluding* wrongfulness, for as Ago wrote of CPWs in general:

The conduct in question cannot be characterized as wrongful for the good reason that, owing to the presence in that particular case of certain circumstances, the State which committed the act was not under any international obligation to conduct itself otherwise. In other words, there is not wrongfulness when one of the circumstances . . . is present . . . .<sup>139</sup>

<sup>131</sup> *Société Commerciale de Belgique*, *supra* note 110, at 177–78 (emphasis added).

<sup>132</sup> Eighth Report Addendum, *supra* note 27, para. 31 (emphasis added); *see also* Secretariat Survey, *supra* note 97, para. 288.

<sup>133</sup> Eighth Report Addendum, *supra* note 27, para. 30; *see also* Secretariat Survey, *supra* note 97, para. 284.

<sup>134</sup> *See* Secretariat Survey, *supra* note 97, para. 281 (emphasis added).

<sup>135</sup> *Contra* LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/1, Liability, paras. 266–67 (Oct. 3, 2006), 46 ILM 40 (2007).

<sup>136</sup> *See* Secretariat Survey, *supra* note 97, para. 284; *see also id.*, para. 287.

<sup>137</sup> *See, e.g., id.*, para. 276; *Société Commerciale de Belgique*, *supra* note 110, at 176.

<sup>138</sup> *See* Secretariat Survey, *supra* note 97, paras. 14, 30.

<sup>139</sup> Roberto Ago, Eighth Report on State Responsibility, [1979] 2 Y.B. INT’L L. COMM’N, pt. 1, at 3, para. 55, UN Doc. A/CN.4/318/Add.1–4.

Finally, even the most charitable reading of *SCB* vis-à-vis Article 25 would not suggest that the PCIJ or the state litigants understood Greece's plea as a call for the tribunal to consider the essential interests of Greece, the invoking state, juxtaposed against the degree of impairment to "an essential interest of" Belgium, "the State . . . towards which the [breached] obligation exists."<sup>140</sup> The idea of comparing or balancing the essential interests of states (or the international community as a whole) against one other is an innovation of Article 25.

Doubtless the PCIJ sympathized with Greece. It praised Belgium's willingness to negotiate a payment schedule to accommodate Greece's fiscal straits and recorded Belgium's statements in that regard.<sup>141</sup> But the Court did not clearly recognize, even in dicta, a new substantive defense resembling Article 25 that could have potentially justified (that is, precluded the attribution of wrongfulness to) Greece's failure to meet its financial obligations under a concededly valid arbitral award. International, like national, courts frequently both encourage settlements and praise accommodations between the parties. As the judicial organ of the League of Nations, it would be unsurprising for the PCIJ to construe its institutional mandate to conform to the Covenant's broader objectives relating to peaceful dispute settlement.<sup>142</sup> In the final analysis, if *SCB* is an authority for Article 25 at all, it is a weak one, and the remaining economic force majeure precedents cited in the ILC Commentary offer thin, if any, support for Article 25's conception of necessity.<sup>143</sup>

*Ecological necessity.* The final area of international law in which Article 25's definition of necessity is said to find support is in precedents on environmental or ecological preservation. In the *Russian Fur Seals* dispute,<sup>144</sup> for example, increased predatory sealing in the late nineteenth century had led to a decline in the number of seals frequenting rookeries in waters that were adjacent to Russia but neither subject to its maritime jurisdiction nor regulated by treaty.<sup>145</sup> In 1892, the *Zabraka*, a Russian cruiser, seized three British sealing vessels in waters more than forty miles from the Commander Islands,<sup>146</sup> a maritime area well beyond Russia's territorial sea and the sites of previous seizures.<sup>147</sup> Russia authorized the captures even though it had no treaty with Britain that prohibited the latter's sealing in that maritime area,<sup>148</sup> and

<sup>140</sup> Articles on State Responsibility, *supra* note 19, Art. 25.

<sup>141</sup> Société Commerciale de Belgique, 1939 PCIJ (ser. A/B) No. 78 at 177–78.

<sup>142</sup> See League of Nations Covenant, pmbl., Art 13.

<sup>143</sup> ILC COMMENTARY, *supra* note 19, at 181, cmt. 8, n.410. In *Payment of Various Serbian Loans Issued in France* (Fr. v. Serb.), 1929 PCIJ (ser. A) Nos. 20/21, at 5 (July 12), the PCIJ dismissed Serbia's economic "force majeure" plea and held that "the war itself, despite its grave economic consequences," did not give rise to a necessity defense affecting Serbia's legal obligations. *Id.* at 39–40. In *Chinn* (U.K. v. Belg.), 1934 PCIJ (ser. A/B) No. 63 at 65, 112–14 (Dec. 12), only Judge Dionisio Anzilotti, in his separate opinion, reached necessity, but he noted that Belgium probably did not itself mean to raise the defense and that, at any rate, it would have been rejected on the facts. *Id.*, para. 7. See ILC COMMENTARY, *supra* note 19, at 181, cmt. 8, n.410 (citing *Chinn*, *supra*). Finally, the commentary, *id.*, cites *French Co. of Venezuelan R.R.* (Fr. v. Venez.), 10 R.I.A.A. 285 (Fr.-Venez. Mixed Claims Comm'n 1902), without comment. That award, in short, considered and rejected the classical conception of necessity; it offers no support for Article 25.

<sup>144</sup> ILC COMMENTARY, *supra* note 19, at 180, cmt. 6.

<sup>145</sup> Letter from Earl of Rosebery to R. Morier (Mar. 17, 1893), in 86 BRITISH AND FOREIGN STATE PAPERS 1893–1894, at 226 (1899).

<sup>146</sup> See *The Zabraka's Seizure*, N.Y. TIMES, Sept. 8, 1892 (on file with author).

<sup>147</sup> *Id.*

<sup>148</sup> Letter from R. Morier to Earl of Rosebery, *supra* note 145, at 228.

in 1893, Russia issued a decree purporting to prohibit the taking of seals within ten nautical miles of its coast and thirty nautical miles of the Commander Islands.<sup>149</sup>

The ILC Commentary apparently includes this incident because the Russian foreign minister justified the seizures based on what he described in his exchange with the British ambassador as the “absolute *necessity* of immediate precautionary measures.”<sup>150</sup> But the foreign minister’s use of the word “necessity” does not appear to have indicated, expressly or implicitly, a claim of legal necessity. Insofar as Russia defended its conduct in legal terms at all, the foreign minister ascribed Russia’s seizures to “the pressure of exceptional circumstances.”<sup>151</sup> Implicitly conceding that it 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-defence.”<sup>152</sup> It is true, as we have seen, that *force majeure* and necessity were sometimes conflated at the time of that incident.<sup>153</sup> But necessity, *force majeure*, and self-defence all would have failed to provide a viable defense for Russia’s conduct in the *Russian Fur Seals* incident.<sup>154</sup> Britain ultimately accepted Russia’s somewhat exorbitant maritime claims but insisted, understandably, that the arrangement operate prospectively only, foreclosing any claim for reparations.<sup>155</sup> More to the point, no evidence suggests that either state regarded this incident as involving a plea of necessity.<sup>156</sup> Depending on one’s methodological views, the incident might nonetheless be viewed as a form of state practice that contributes to the modern customary law of necessity. But if so, it is not especially helpful support for Article 25. Unlike that article, the conception of necessity at issue in the *Russian Fur Seals* incident did not involve any consideration of the competing “essential interests” of Russia and Britain.

In the *Torrey Canyon* incident, a Liberian oil tanker collided with submerged rocks off the coast of Cornwall, spilling oil into areas just beyond 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.<sup>157</sup> The ILC Commentary cites this incident even though, as it concedes, the United Kingdom did not advance necessity or, for that matter,

<sup>149</sup> Secretariat Survey, *supra* note 97, para. 155.

<sup>150</sup> ILC COMMENTARY, *supra* note 19, at 180, cmt. 6 (emphasis added); *see also* Secretariat Survey, *supra* note 97, para. 155.

<sup>151</sup> ILC COMMENTARY, *supra* note 19, at 180, cmt. 6.

<sup>152</sup> Secretariat Survey, *supra* note 97, para. 155.

<sup>153</sup> *See* Heathcote, *supra* note 27, at 495.

<sup>154</sup> Under Article 21 of the Articles on State Responsibility (self-defense), the “wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.” The UN Charter did not exist at the time, and even if it had, it would be implausible to characterize Great Britain’s seal hunting as an armed attack. Under Article 23 (*force majeure*), the wrongfulness of an act may be precluded if it is attributable to “the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.” Seizing the British vessels, which Russia ordered, did not, of course, lie beyond Russia’s control.

<sup>155</sup> Letter from Earl of Rosebery to R. Morier, *supra* note 145, at 227.

<sup>156</sup> Another arguable authority not cited in the ILC Commentary is the *Faber* case. VENEZUELAN ARBITRATIONS OF 1903, at 600 (Jackson Harvey Ralston & W. T. Sherman Doyle eds., 1904). Yet neither Germany nor the arbitral umpire even framed the issue in terms of necessity. Only in dicta, after issuing his ruling, did the umpire mention necessity—and even then, only in passing and in the course of a more general digression into “the true source of natural law.” *Id.* at 626; *see id.* at 627–30.

<sup>157</sup> Eighth Report Addendum, *supra* note 27, para. 35.

any legal argument in defense of its conduct.<sup>158</sup> It is an arguable, but far from clear or robust, inference that the absence of protest from other states qualifies as negative state practice contributing to Article 25's customary status.<sup>159</sup> But affirmative state practice points in the other direction, for almost immediately thereafter, states hastily concluded a multilateral treaty on oil spills,<sup>160</sup> from which it may with equal force be inferred that states preferred to establish clear international law on the legal issues arising out of such accidental spills rather than to leave comparable future incidents to the unilateral judgments of affected states.

The *Fisheries Jurisdiction* decision seems equally inapposite.<sup>161</sup> Briefly, when Canada accepted the ICJ's general jurisdiction under Article 36(2) of the ICJ Statute, it included a general reservation 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 Regulatory Area.<sup>162</sup> Pursuant to this directive, Canada's navy seized several vessels fishing for Greenland halibut, including the *Estai*, a Spanish vessel, which the navy seized approximately 245 miles from the Canadian coastline—within the NAFO Regulatory Area but beyond Canada's exclusive economic zone under the UN Convention on the Law of the Sea. Spain brought suit before the ICJ, arguing that the seizure constituted illegal force and violated Article 92 of the Convention or a substantially identical customary rule.<sup>163</sup> The ICJ did not reach the merits; it disavowed jurisdiction based on Canada's clear reservation.<sup>164</sup>

The ILC Commentary nonetheless treats *Fisheries Jurisdiction* as support for Article 25, apparently because Canada defended the *Estai*'s seizure as "necessary in order to put a stop to the overfishing of Greenland halibut by Spanish fishermen"<sup>165</sup> and because the preamble to Canada's national law stipulated that because "foreign fishing vessels continue to fish for [certain enumerated] stocks in the NAFO Regulatory Area," Canada 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."<sup>166</sup> But no evidence suggests that Canada meant by these words to plead necessity. Nor did Spain perceive the situation in that way.<sup>167</sup>

<sup>158</sup> ILC COMMENTARY, *supra* note 19, at 181, cmt. 9.

<sup>159</sup> *See id.*

<sup>160</sup> International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, Nov. 29, 1969, 26 UST 765, 970 UNTS 211.

<sup>161</sup> Fisheries Jurisdiction (Spain v. Can.), 1998 ICJ REP. 432 (Dec. 4); *see* ILC COMMENTARY, *supra* note 19, at 182, cmt. 12;

<sup>162</sup> Fisheries Jurisdiction, 1998 ICJ REP., para. 15.

<sup>163</sup> *Id.*, para. 20; UN Convention on the Law of the Sea, *supra* note 9, Art. 92.

<sup>164</sup> Fisheries Jurisdiction, 1998 ICJ REP., paras. 67–68.

<sup>165</sup> *Id.*, para. 20 (emphasis added).

<sup>166</sup> *Id.*, para. 15. (emphasis added).

<sup>167</sup> *See id.*, para. 20 (summarizing Spain's position as set forth in "two Notes Verbales [sent] to the Canadian Department of Foreign Affairs and International Trade," as well as the European Community's view as set forth in its own "Note Verbale" to Canada). The Second Report Addendum says that Spain's memorial subsequently "dealt with issues of justification at some length" but, tellingly, "[w]ithout expressly referring to draft article 33." Because of the ICJ's lack of jurisdiction, "the claim was . . . neither formally pleaded nor adjudicated on the merits." Second Report Addendum, *supra* note 42, para. 285.

As in the *Russian Fur Seals* incident, the ILC Commentary treats the use of the word “necessary” as a precedent that lends support to Article 25’s *particular* conception of necessity as a *legal plea*. That inference is dubious. No evidence suggests that Canada intended to raise necessity as a legal defense. Nor, apparently, did Canada even perceive a need to cite an international legal defense (especially because that would seem to be an implicit admission of potential state responsibility): in its view, no wrongful act existed to preclude.

Again, perhaps according to certain methodological perspectives on custom, it might be reasonable to regard *Fisheries Jurisdiction* as support for some conception of necessity in international law. But it is difficult to see how the case supports the particular conception set forth in Article 25. As with the other ecological necessity precedents discussed in the ILC Commentary, neither the states involved (nor the ICJ, when brought into the conflict) saw the legal question as whether a grave and imminent peril to one of the invoking state’s essential interests justified “impair[ing] an essential interest of [another] State or States . . . or of the international community as a whole.”<sup>168</sup>

### *Necessity as a General Principle?*

In terms of the traditional “sources” of international law, the distinction between custom and “general principles of law”<sup>169</sup> is not always clear. At times, the two overlap or apply concurrently. It may well be artificial to scrutinize Article 25 separately under the rubric of general principles. But because necessity is a defense in many modern national legal systems,<sup>170</sup> we should consider briefly whether necessity, in general, and Article 25, in particular, might be best understood as a general principle of law. Bin Cheng—whose sixty-year-old treatise remains, despite its age, the classic treatise on general principles—included necessity as one of them:<sup>171</sup>

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.<sup>172</sup>

As the italicized language suggests, Cheng’s definition is strongly redolent of the classical conception and is, again, in tension with Ago’s categorical statement that “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.”<sup>173</sup>

Furthermore, despite the word “justified” in Cheng’s definition, elsewhere he refers to necessity as an excuse or simply equates the two rubrics<sup>174</sup>—which modern scholars regard as analytically mistaken.<sup>175</sup> If one regards necessity as having the status of *lex lata*, the neglect or elision of this distinction is problematic. In the first place, significant legal consequences often,

<sup>168</sup> Articles on State Responsibility, *supra* note 19, Art. 25(1)(b); *see also* Gabčíkovo-Nagymaros Project, *supra* note 24, para. 53. *But see supra* text accompanying notes 43–47.

<sup>169</sup> Statute of the International Court of Justice, *supra* note 47, Art. 38(1)(c).

<sup>170</sup> *See* GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 774–75 (1978).

<sup>171</sup> *See* CHENG, *supra* note 49, at 69.

<sup>172</sup> *Id.* at 74 (emphasis added).

<sup>173</sup> Eighth Report Addendum, *supra* note 27, para. 8 (citation omitted).

<sup>174</sup> *E.g.*, CHENG, *supra* note 49, at 74.

<sup>175</sup> *See, e.g.*, H. L. A. HART, *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* 13–14 (1968); Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897 (1984).

though not always,<sup>176</sup> follow from characterizing a defense as an excuse or a justification (for example, the implications of the defense for third parties). Moreover, as we will see, national legal systems do not share a uniform conception of necessity, and the justification/excuse distinction is perhaps the paramount fault line between diverse national conceptions. Some states treat necessity as an excuse; others, as a justification, and still others, as one or the other, depending on context. A comprehensive analysis of necessity in national legal systems would disclose considerable variation.<sup>177</sup> In what sense, then, might necessity qualify as a general principle of law?

In a well-known typology, Oscar Schachter discerned five conceptions of general principles “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 coordination”.
- (5) Principles of justice founded on “the very nature of man as a rational and social being”.<sup>178</sup>

Insofar as Cheng defines necessity in terms that echo the classical conception, he situates the defense in the second category—that is, as a principle “derived from the specific nature of the international community.”<sup>179</sup> Cheng’s analysis therefore reinforces the continuing vitality of the classical conception, at least as of 1953, when he published his treatise. It does not support Article 25’s distinct conception of necessity. Nor do the authorities on which Cheng relies, most of which have been reviewed already.<sup>180</sup>

### Conclusion

Before an earlier draft of Article 25 led the ICJ to analyze necessity in its explicit terms,<sup>181</sup> few, if any, decision makers had understood necessity—as a defense in the law of state responsibility—in the terms set forth in that article. From its origins in the classical law of nations to the last decade of the twentieth century, international custom recognized a narrow defense of

<sup>176</sup> See Alon Harel, *The Torture Lawyers: A Response*, 51 HARV. INT’L L.J. ONLINE 12 (Mar. 30, 2010), at <http://www.harvardilj.org/articles/HarelTortureLawyers-Final%20PDF.pdf>.

<sup>177</sup> Cf. *Prosecutor v. Erdemović*, *supra* note 84.

<sup>178</sup> OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 50 (1991) (footnotes omitted).

<sup>179</sup> Cheng’s citation of national law might suggest the first, CHENG, *supra* note 49, at 69 n.3, but the sheer variety of national conceptions belies this possibility. Nor can necessity be characterized as “intrinsic to the idea of law and basic to all legal systems,” SCHACHTER, *supra* note 178, at 50, for it is a comparatively recent development in national law. See FLETCHER, *supra* note 170, at 774–75. Finally, the fourth and fifth conceptions in Schachter’s typology seem incongruous as applied to necessity in the context of a legal system (international law, in general, and the law of state responsibility, in particular) that chiefly governs states rather than human beings.

<sup>180</sup> See CHENG, *supra* note 49, at 72–73. The remaining authorities further exemplify the classical view. See, e.g., *The Neptune* (1797), in 4 *INTERNATIONAL ADJUDICATIONS: MODERN SERIES* 372, 385–86 (John Bassett Moore ed., 1931).

<sup>181</sup> See *Gabčíkovo-Nagymaros Project*, *supra* note 24, paras. 49–58.

necessity, which was based on the supposedly natural right of states to preserve themselves. The classical conception of the defense did not, as the rubric “[c]ircumstances *precluding* wrongfulness”<sup>182</sup> suggests, render lawful certain conduct that would otherwise have been unlawful; rather, it temporarily suspended or excused a state’s failure to carry out its international legal obligations under circumstances in which compliance would arguably imperil the state’s very existence. Furthermore, once the state of necessity passed, the weight of authority suggests that international law obligated the invoking state to pay reparations. Finally, even in this limited form, so far as research discloses, no international tribunal before the twenty-first century had sustained on the merits a claim of necessity. Until the ICJ’s 1997 judgment in *Gabčíkovo-Nagymaros Project*,<sup>183</sup> Herbert Jenner’s advice to the British Crown in two incidents in the early nineteenth century may have been as close to an affirmative precedent for necessity as existed in state practice or international jurisprudence.

Until recently, necessity could therefore be most accurately described as a highly circumscribed defense in the law of state responsibility—one based on the idea that in a legal system chiefly governing states, no state could be expected to adhere to an obligation if doing so threatened that state’s “very existence” as a state and therefore as a proper subject of the law of nations. It may be helpful at this stage to rephrase this classical conception in Article 25’s terms. One might say, in this regard, that classical necessity recognized only one “essential interest” sufficient to underwrite a necessity plea—namely, an imminent threat to the existence of the state qua state. The ILC has suggested otherwise,<sup>184</sup> and Article 25 provides a distinct conception of necessity. But the tribunal decisions and other past practice cited to support this view call into question the widely adopted conclusion that Article 25 codifies existing general international law. Article 25 is partially, if not substantially, innovative—that is, progressive development.

Innovative does not mean or imply anything pejorative; to the contrary, in international, even more than national, law, Justice Holmes’s maxim decrying legal anachronisms has particular force,<sup>185</sup> and necessity may well require rethinking in the twenty-first century. As progressive development, Article 25 may or may not be normatively prudent or appealing. The evidence reviewed thus far simply suggests that, as of the 2001 publication of the Articles on State Responsibility, Article 25 probably did not codify existing general international law. This conclusion is hardly a radical one. In the final edition of his treatise, for example, Ian Brownlie, one of the preeminent positivists among twentieth-century international lawyers, echoed the reservations of several tribunals<sup>186</sup> when he expressed doubt that international law recognizes necessity as an “omnibus” defense to state responsibility.<sup>187</sup> The real question is whether it should.

<sup>182</sup> Articles on State Responsibility, *supra* note 19, pt. 1, ch. V (emphasis added).

<sup>183</sup> *Supra* note 24; see 2 MCNAIR, *supra* note 60, at 232.

<sup>184</sup> See, e.g., Eighth Report Addendum, *supra* note 27, paras. 7–11.

<sup>185</sup> Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

<sup>186</sup> See, e.g., *Libyan Arab Foreign Investment Co. v. Burundi*, 96 ILR 279, 319 (1994); *Rainbow Warrior*, *supra* note 7, at 254.

<sup>187</sup> IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 466 (7th ed. 2008); see also Kurtz, *supra* note 25, at 334–35; Eighth Report Addendum, *supra* note 27, para. 75.

## II. SOME PERILS OF THE NATIONAL LAW ANALOGY

Part I established that in terms of the ILC's formal mandate,<sup>188</sup> Article 25 reflects progressive development. Some of its phrases and locutions echo classical necessity. But Article 25 reorients the classical plea in at least four ways. First, it recasts necessity as a justification rather than an excuse.<sup>189</sup> Second, it expands the plea's ambit to reach not only circumstances threatening state self-preservation but any "essential interest,"<sup>190</sup> a phrase that may well enable dangerously protean interpretation. Third, in effect if not strictly in form, Article 25 introduces a balancing test redolent of the choice-of-evils necessity paradigm found in some national legal systems.<sup>191</sup> Fourth, and again echoing national law, Article 25 excludes the necessity plea categorically if the invoking state "contributed to the situation"<sup>192</sup> that culminated in its invoking necessity.

These changes raise serious questions about the precise nature and scope of necessity as reconceived by Article 25. Yet absent centralized, international institutions comparable in competence and efficacy to those in national law, the "exceptional"<sup>193</sup> plea of necessity, to paraphrase Justice Cardozo, threatens to "expand itself to the limit of its logic"—for, insofar as Article 25 modifies the classical plea, it does not "confine itself within the limits of its history."<sup>194</sup> By so revising necessity, Article 25 also invites inquiry into its contemporary rationale.

A venerable maxim provides that a legal rule should extend no further than its rationale: *cesante ratione legis cessat et ipsa lex*. But unmoored from its pedigree as an existential limit on the law of nations, the rationale for necessity, as reconceptualized by Article 25, is neither obvious nor uncontroversial. Partially for this reason, it will often be unclear how to interpret the plea or discern its limits. A natural right of anthropomorphic states to preserve themselves makes sense, if it still does, only insofar as international law limits necessity to the traditional context of threats to state survival. Absent this limitation derived from supposedly natural law—which, in contemporary political theory and international law alike, seems anachronistic—the normative prudence and appeal of a general necessity plea, such as Article 25, calls for further reflection.

But if neither history nor precedent explains Article 25, what does? Article 25's text suggests that the answer lies partially in the influence of national law. To be clear, I do not mean to suggest that the ILC self-consciously pursued this analogy. Nearly fifty years of *travaux préparatoires* include little evidence to that effect and equally scant analysis of national law conceptions of necessity. Ago acknowledged the influence of national law on certain publicists.<sup>195</sup> But he remarks only briefly upon national law conceptions of necessity, chiefly to caution (appropriately, in my view) that while "general principles of national law" may "be of some help," the ILC must "b[ear] in mind, firstly that determining their existence in this matter is by no means

<sup>188</sup> GA Res. 174 (II), at 105 (Nov. 17, 1947); UN Charter Art. 13(1).

<sup>189</sup> See, e.g., Heathcote, *supra* note 27, at 494. But see Boed, *supra* note 11, at 7.

<sup>190</sup> Articles on State Responsibility, *supra* note 19, Art. 25(1); see Boed, *supra* note 11, at 10.

<sup>191</sup> E.g., MODEL PENAL CODE, *supra* note 85, §3.02; see Articles on State Responsibility, *supra* note 19, Art. 25(1).

<sup>192</sup> Articles on State Responsibility, *supra* note 19, Art. 25(2)(c).

<sup>193</sup> Gabčíkovo-Nagyymaros Project, *supra* note 24, para. 51.

<sup>194</sup> BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 51 (1921). Of course, "progressive development" implies reform of the law, which may be laudable. The point here is not normative; it is only to stress the extent of the reform in light of the history.

<sup>195</sup> Eighth Report Addendum, *supra* note 27, para. 72.

as easy as one might wish, and, secondly, that transferring them from the field of relations between individuals to that of relations between States is a dubious undertaking.<sup>196</sup> More recently, Special Rapporteur James Crawford explained that all CPWs “operate like general defences or *excuses* in national legal systems.”<sup>197</sup> They function “more as a shield than a sword,” for while “they may protect the State against an otherwise well-founded accusation of wrongful conduct, they do not strike down the obligation, and the underlying source of the obligation, the primary rule, is not affected by them *as such*.”<sup>198</sup>

Semantically, at least, Crawford’s statement is puzzling. It suggests that “circumstances precluding wrongfulness” do not, in fact, preclude wrongfulness. If they did, the conduct at issue would be justified, rather than wrongful but excused, *vis-à-vis* the primary rule. In general, however, that is not the effect of a CPW. Rather, it suspends temporarily the invoking state’s obligation to honor what continues to be a binding international obligation, thus functioning more like an excuse than a justification as modern lawyers understand those terms. At the same time, closer consideration of the seven CPWs suggests that their effects may differ from one another. Some CPWs justify otherwise wrongful conduct (for example, consent or self-defense), whereas others excuse it (for example, distress or force majeure).

At times, this distinction in CPWs between those that justify and those that excuse may be one without a difference. But at other times, CPWs that only excuse (but do not justify) may require *ex post* reparations.<sup>199</sup> I will revisit this issue below. It suffices here to observe that although the *travaux préparatoires* do not suggest that the ILC self-consciously adopted ideas from, or analogies to, national law, Article 25’s text, implicitly and in practice, recasts necessity, in part, in terms of a balance between the often competing (respective) essential interests of two or more states (or of the international community as a whole). This balancing dynamic resembles the one required by the choice-of-evils paradigm of necessity found in some national legal systems. Mongolia recognized this point explicitly in the course of ILC deliberations, emphasizing “the difficulty of balancing individual State interests against international obligations” and the abuses to which any such process might lend itself.<sup>200</sup> Furthermore, Article 25(2)(b)’s categorical exclusion based on contribution resembles a similar exclusion in several national legal systems.

National law analogies remain a common, but often perilous, heuristic device in international legal discourse.<sup>201</sup> Some scholarship on necessity in international law directly analogizes it to necessity in national criminal law,<sup>202</sup> even though, among other defects in the analogy, the law of state responsibility does not subject, and never has subjected, states to criminal liability.<sup>203</sup> In general, efforts to understand necessity in the international law of state responsibility

<sup>196</sup> *Id.*, para. 11 (footnotes omitted).

<sup>197</sup> Second Report Addendum, *supra* note 42, para. 223 (emphasis added).

<sup>198</sup> *Id.*, para. 224.

<sup>199</sup> See Articles on State Responsibility, *supra* note 19, Art. 27(b).

<sup>200</sup> Second Report Addendum, *supra* note 42, para. 282.

<sup>201</sup> See, e.g., Hedley Bull, *Society and Anarchy in International Relations*, in *DIPLOMATIC INVESTIGATIONS: ESSAYS IN THE THEORY OF INTERNATIONAL POLITICS* 35 (Herbert Butterfield & Martin Wight eds., 1966); GEORGE F. KENNAN, *AMERICAN DIPLOMACY, 1900–1950*, at 95 (1951). With reference to criminal law analogies in particular, see Prosecutor v. Erdemović, *supra* note 84, Sep. & Diss. Op. Cassese, J., para. 2; see also Saira Mohamed, *Restructuring the Debate on Unauthorized Humanitarian Intervention*, 88 N.C. L. REV. 1275 (2010).

<sup>202</sup> See, e.g., DeNicola, *supra* note 14, at 672–74.

<sup>203</sup> See Fiftieth Session Report, *supra* note 35, paras. 247–50.

through the lens of national law might illuminate it in some respects but will surely distort it in others.<sup>204</sup> Still, Article 25 does, textually at least, include or resemble ideas apparent in national law conceptions of necessity—in particular, (1) exclusion of the plea based on contribution and (2) the de facto requirement that states, in the first instance, and decision makers, after the fact, weigh the essential interests of states against one another (or against those of the international community as a whole). Each of these ideas proves problematic in the context of state responsibility. To appreciate why, a brief digression into the predominant conceptions of necessity in national law is informative.

### *Necessity in National Criminal Law*

Two conceptions of necessity prevail in national legal systems: first, “duress of circumstances,” or *excused necessity*; and second, the choice-of-evils paradigm, or, to adopt the parallel shorthand, *justified necessity*.<sup>205</sup>

*Excused necessity.* Excused necessity arguably informs at least one of the ideas that Article 25 incorporates: that the invoking state’s *contribution* excludes the defense. As its name implies, excused necessity excuses actors from liability insofar as they acted under circumstances that the law regards as sufficient to compromise their agency unfairly. The circumstances excuse the actor but do not, to paraphrase Article 25, preclude the wrongfulness of the act. Excused necessity also does not require the defendant, *ex ante*, or a decision maker, *ex post*, to balance social evils against one other. Because of the inherent difficulties of such a process, many regard its absence as one of excused necessity’s chief virtues.<sup>206</sup>

The gravamen of excused necessity is a “concession to *human frailty*.”<sup>207</sup> Its rationale 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.”<sup>208</sup> Variations on this paradigm exist in many national systems.<sup>209</sup> Unlike the choice-of-evils paradigm, which appeals to the idea that, *ceteris paribus*, an actor should choose the greater social good, the rationale for excused necessity depends ineluctably on beliefs about the nature of the actor, not the act. The core intuition is that even those who act voluntarily in the minimal sense required for liability<sup>210</sup> may not have had a meaningful or fair opportunity to exercise their agency under extenuating circumstances of severe duress. Such persons therefore either should not be held liable at all or should be held liable only in rough proportion to their culpable contribution to the circumstances culminating in the situation to which the necessity defense may apply.

One plausible rationale for excused necessity is consequentialist in nature. “Detached reflection cannot be demanded in the presence of an uplifted knife,” as Justice Holmes memorably

<sup>204</sup> See André Nollkaemper, *Internationally Wrongful Acts in Domestic Courts*, 101 AJIL 760, 791–92 (2007).

<sup>205</sup> I adopt this shorthand from Ohlin, *supra* note 14, at 218.

<sup>206</sup> See, e.g., *Perka v. R.*, [1984] 2 S.C.R. 232 (Can.).

<sup>207</sup> *Regina v. Howe*, [1987] 1 A.C. 417, 432 (H.L.) (emphasis added).

<sup>208</sup> 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, 35 (2008); accord *Perka*, [1984] 2 S.C.R., para. 33.

<sup>209</sup> See, e.g., *In re A* (Conjoined Twins), [2000] 4 All E.R. 961, 1043–45; *Moss v. Howdle*, (1997) J.C. 123 (Scot.); STRAFGESETZBUCH [STGB] [PENAL CODE] §34 (Ger.), in *THE GERMAN CRIMINAL CODE: A MODERN ENGLISH TRANSLATION* 45 (Michael Bohlander trans., 2008); see also Ohlin, *supra* note 14, at 218 & n.152.

<sup>210</sup> See, e.g., MODEL PENAL CODE, *supra* note 85, §2.01.

put it, albeit in the distinct context of self-defense.<sup>211</sup> But this rationale is weak. People differ in their capacities to cope with, and inclination to endure, threats—not to mention their criminal propensities. From a consequentialist perspective, it might optimize deterrence to eschew excused necessity and instead allow only mitigation, not a full defense, based on *ex post* judgments by a decision maker.<sup>212</sup> 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.”<sup>213</sup> The better and more common rationale for excused necessity is a broadly shared intuition that a defendant who acts wrongfully because of the severe pressure of an unusual threat is less culpable. As relevant here, note that under either rationale, excused necessity assumes that the actor is a human being (not a state) who shares the characteristic traits and frailties of our species.<sup>214</sup> The defense makes sense only on that basis.

It would therefore be strange—and more to the point, a potential source of serious abuse—to apply a cognate rationale in the context of state responsibility. National law can meaningfully establish a standard for excused necessity based on, for example, “a *person* of reasonable firmness in his situation.”<sup>215</sup> That is not obviously or even likely true for states. Of course, states can be, and they often are, subjected to severe pressure by circumstances, including threats from other states. But it is precisely because power dynamics of this sort so thoroughly permeate international law that only the most literal forms of coercion—that is, the threat or use of force in violation of the UN Charter—can be accepted as a legitimate ground for excusing or voiding an international obligation. To recognize a general defense based on, say, extreme diplomatic or economic coercion would seriously destabilize the international legal system.

Article 25 is therefore prudent insofar as it largely avoids the conceptual baggage of excused necessity—largely, but not entirely. Paragraph (2)(b) excludes necessity if “the [invoking] State has contributed to the situation of necessity.” As we will see,<sup>216</sup> this clause raises several difficult questions, foremost among them: (1) the nature and scope of exclusionary contribution—that is, what it means for a state’s contribution “to the situation” to be “sufficiently substantial and not merely incidental and peripheral”;<sup>217</sup> and (2) whether contribution refers to the actor’s *fault* or merely to its *conduct* (or lack thereof). Article 25 seems to adopt the latter conception. Still, it is unclear whether or why genuinely blameless state conduct culminating in a state’s invocation of necessity should categorically preclude the defense. But the alternative—that is, adopting the “fault” interpretation of contribution—raises its own difficulties. Crawford has suggested that the issue cannot be decided generally but must be resolved on the basis of the implicated primary rules.<sup>218</sup> That approach may well be appropriate in considering the exclusion for contribution.

<sup>211</sup> *Brown v. United States*, 256 U.S. 335, 343 (1921).

<sup>212</sup> *Cf. Prosecutor v. Erdemović*, *supra* note 84, Sep. Op. McDonald & Vohrah, JJ.

<sup>213</sup> 2 JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 107 (1883).

<sup>214</sup> *See Prosecutor v. Erdemović*, *supra* note 84, para. 85.

<sup>215</sup> MODEL PENAL CODE, *supra* note 85, §2.09(1) (emphasis added).

<sup>216</sup> *See infra* notes 307–18 and accompanying text.

<sup>217</sup> ILC COMMENTARY, *supra* note 19, at 185, cmt. 20.

<sup>218</sup> Crawford, *supra* note 23, at 13.

*Justified necessity.* The analogy to justified necessity, often characterized as a “lesser evils” or “choice of evils”<sup>219</sup> defense, requires a more extensive analysis. Article 25(1) structurally appears to call for a similar judgment, and the consequentialist logic of the paradigm might also be viewed as the chief rationale for Article 25. This conception of necessity pervades U.S. criminal law, initially as a legacy of the common law and more recently because of the Model Penal Code’s influence.<sup>220</sup> Yet it is by no means limited to the United States or to common law jurisdictions.<sup>221</sup> Despite important variations, the conceptual core of this paradigm is always and everywhere the same: it is justifiable (and hence not wrongful) for an actor to choose the lesser of two social harms or evils.<sup>222</sup> Other criteria vary by jurisdiction. But for present purposes, the relevant issues arise in connection with the core conceptual framework that Article 25(1) shares with the justified-necessity paradigm in national law. Unsurprisingly, facial similarities between the two perspectives obscure deeper differences, and it is questionable whether adopting some variation of the justified-necessity paradigm as an element of the law of state responsibility is normatively prudent or appealing. For analytic purposes, the paradigm’s essential contours will first be described briefly, and we will then consider how and why its adaptation to the law of state responsibility in Article 25(1) seems especially problematic.

First, the choice-of-evils paradigm requires actors to compare competing values and interests—that is, to weigh them against one another. It therefore perforce assumes that these values and interests can, in principle, be ranked ordinally in a normative hierarchy. Yet it is far from clear that a normative hierarchy sufficient for a comparable ranking exists in general international law.<sup>223</sup> Because of what former justice Robert Jackson referred to (in a distinct context) as “the recognized futility of attempting all-complete statutory codes,”<sup>224</sup> the normative hierarchy in a national legal system is almost always implicit in, and inferred from, not only positive laws but the principles that animate them and the sociopolitical context in which they operate.<sup>225</sup> Almost every national legal system, for example, values life above property. In this regard, as Glanville Williams wrote, “although the defence of necessity is subjective as to facts,

<sup>219</sup> See MODEL PENAL CODE, *supra* note 85, §3.02; see also FLETCHER, *supra* note 170, at 774–98.

<sup>220</sup> See MODEL PENAL CODE, *supra* note 85, §3.02; see, e.g., NEB. REV. STAT. ANN. §28-1407 (2008); 18 PA. CONS. STAT. ANN. §503 (1998).

<sup>221</sup> See, e.g., Act Likely to Cause Harm, but Done Without Criminal Intent, and to Prevent Other Harm, PEN. CODE ch. 4, §81 (India), at <http://chddistrictcourts.gov.in/The Indian Penal Code.pdf>; STRAFGESETZBUCH [STGB] [Penal Code] §34 (Ger.); ÜGOLOVNIYI KODEKS ROSSIYSKOI FEDERATSII [UK RF] [Criminal Code] Arts. 39, 41 (Russ.), in CRIMINAL CODE OF THE RUSSIAN FEDERATION (William Butler trans. & ed., 1997); CÓDIGO PENAL [CÓD PEN.] [CRIMINAL CODE] §34(3) (Arg.), in THE ARGENTINE PENAL CODE 11–12 (Verónica Beccar Varela trans., 2004); *In re A* (Conjoined Twins), *supra* note 209; Criminal Code of China, Art. 21, in THE 1997 CRIMINAL CODE OF THE PEOPLE’S REPUBLIC OF CHINA 39–40 (Wei Luo trans., 1998); INTRODUCTION TO SWISS LAW 254 (F. Dessemontet & T. Ansay eds., 3d ed. 2004) (discussing Swiss Penal Code Art. 34 PC (Art. 17 revPC)).

<sup>222</sup> E.g., MODEL PENAL CODE, *supra* note 85, §3.02(1).

<sup>223</sup> Cf. Lee M. Caplan, *State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory*, 97 AJIL 741, 765–76 (2003).

<sup>224</sup> *D’Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 470 (1942) (Jackson, J., concurring).

<sup>225</sup> To adapt an example made famous by Ronald Dworkin, see RONALD DWORKIN, *LAW’S EMPIRE* 15–20 (1986), Anglo-American law, like international law, adopts the general principle that no one should profit from his own wrong. Consequently, the New York Court of Appeals construed a statute of wills—which, interpreted literally, might have bequeathed an estate to the very man who had murdered the legator in order to ensure his inheritance—to conform to the general principle that a delictor may not benefit from his own delict and thereby avoided this absurd result. See *Riggs v. Palmer*, 22 N.E. 188 (N.Y. 1889). General principles play a comparable role in international law, and for this reason, among others, any formal or literal normative hierarchy in international law would

it is objective as to values.”<sup>226</sup> The actor invoking necessity must, at the time that he acts, choose what he subjectively believes to be the lesser evil. But he chooses at his peril. His belief about the comparative weight of what are, by hypothesis, competing values is ultimately immaterial. What matters is the objective normative hierarchy implicit in the sociopolitical community to which he belongs and in the legal order within which he acts. Necessity will be unavailing unless he chooses the lesser evil in *that* sense.<sup>227</sup>

Second, for the above reason, and a fortiori because of the principle of legality (*nullum crimen sine lege*), the choice-of-evils paradigm requires that actors be able to ascertain, in a rough and ready sense, how to weigh competing values and interests. They must enjoy at least “lawyer’s notice” in this regard, and legal institutions must express or imply how to ordinally rank values and interests,<sup>228</sup> including incommensurable ones—that is, those that defy efforts to measure them along a common scale. A formulation of necessity such as Article 25 or section 3.02 of the Model Penal Code can supply the figurative scale. But only the relevant legal community’s social process can supply the measurements. In other words, 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 so. That is why Williams emphasized that “[n]ecessity cannot be used to set aside the values expressed in the law; it can only qualify and modify them.”<sup>229</sup> We should add that it can qualify and modify them only insofar as the relevant legislature theoretically *would have* so 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 the presence of reliable and effective legal institutions, including a general legislature, a hierarchical court system with compulsory jurisdiction, and a disciplined police force. These institutions fulfill indispensable functions for the lesser-evils paradigm. In particular, they (1) express, *ex ante*, which social values and interests count, and for how much, (2) help to resolve clashes between what may be competing values and interests in some contexts, and (3) enforce, *ex post*, the polity’s choices in this regard. The prescriptive, adjudicatory, and enforcement jurisdiction of the legislative, judicial, and executive institutions, respectively, in a national legal system that adopts the choice-of-evils model must therefore 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 a relatively integrated, unified, and comprehensive legal code. At a minimum, it must offer notice and guidance about how to weigh dissimilar sociopolitical interests or values.

Typically, therefore, a general legislature decides in the first instance, by positive law and inferences to be drawn from it, on the rough contours of the normative hierarchy. It decides (or codifies) what counts as an evil and, even if only in a general way, how to compare evils that

likely be misguided. For a more detailed analysis and critique of the idea of a normative hierarchy in international law, see generally Caplan, *supra* note 223.

<sup>226</sup> GLANVILLE WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* §239 (2d ed. 1961); see also KENT GREENAWALT, *CONFLICTS OF LAW AND MORALITY* 292 (1987); 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT JR., *SUBSTANTIVE CRIMINAL LAW* 629 (1986).

<sup>227</sup> See, e.g., 2 MODEL PENAL CODE AND COMMENTARIES (OFFICIAL DRAFT AND REVISED COMMENTS) 12 (1985) [hereinafter MODEL PENAL CODE COMMENTARY]; GREENAWALT, *supra* note 226, at 292; WILLIAMS, *supra* note 226, at 746.

<sup>228</sup> See Dennis, *supra* note 208, at 32–33; see also FLETCHER, *supra* note 170, at 793–94.

<sup>229</sup> Williams, *supra* note 28, at 233.

might be in tension with one another. It remits this choice to legal actors, subject to *ex post* appraisal by the judiciary,<sup>230</sup> only in an unanticipated situation that “calls for an exception to the criminal prohibition that the legislature could not reasonably have intended to exclude, given the competing values to be weighed.”<sup>231</sup> In short, this paradigm of necessity operates as a “gap-filler, recognizing exceptions in order to further legislative values already recognized in the penal code”;<sup>232</sup> it “allows us to act as individual legislatures, amending a particular criminal provision or crafting a one-time exception to it . . . when a real legislature would formally do the same under those circumstances.”<sup>233</sup> Absent legislative guidance, a court of general jurisdiction or a jury, as the presumptive voice of societal norms,<sup>234</sup> decides if the actor chose the lesser evil. In the civil law tradition, this task perforce falls to a professional judge.<sup>235</sup> But the point of emphasis is simply that in either tradition, for the rule of law to be respected, the choice-of-evils paradigm requires effective legal institutions, which legal subjects perceive as legitimate. Otherwise, as the proverb has it, necessity would indeed “[have] no law”: *necessitas non habet legem*.<sup>236</sup>

### *Sovereign Lesser Evils?*

Given the preceding exposition, it should be clear that the choice-of-evils conception of justified necessity is, at best, a problematic paradigm to adapt to the law of state responsibility—and yet Article 25 structurally resembles this paradigm and, at least to that extent, departs from the classical (and arguably still customary) conception of necessity. Five disanalogies, in particular, afflict the rough transposition of the choice-of-evils model to the law of state responsibility.

First, general international law lacks the comparatively high degree of normative consensus that characterizes well-functioning national legal systems. People disagree, of course, within every polity, and hard cases arise with some frequency. But in the main, the constituents of any particular polity can be expected to rank social interests and values similarly. This expectation is not plausible in general international law. To speak anthropomorphically, a state may be expected—reasonably and often not inappropriately—to prioritize its own “essential interests” above those of other states and, a fortiori, those of the figurative international community as a whole. Perhaps it would even violate political morality for a state’s political elite to reason otherwise. States owe their prime allegiance to their constituents. Officials might betray that allegiance if they prioritized the interests of another state or the international community as a whole above the imperative to “safeguard an essential interest against a grave and imminent

<sup>230</sup> FLETCHER, *supra* note 170, at 790; *cf.* GREENAWALT, *supra* note 226, at 306.

<sup>231</sup> 2 MODEL PENAL CODE COMMENTARY, *supra* note 227, at 12; *see also* State v. Tate, 505 A.2d 941, 946 (N.J. 1986); *accord* 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW 118–19 (4th ed. 2003).

<sup>232</sup> Kenneth W. Simons, *Exploring the Intricacies of the Lesser Evils Defense*, 24 L. & PHIL. 645, 648 (2005).

<sup>233</sup> United States v. Schoon, 971 F.2d 193, 196–97 (9th Cir. 1992); *see also* GREENAWALT, *supra* note 226, at 289–90; FLETCHER, *supra* note 170, at 790.

<sup>234</sup> *See* Michael H. Hoffheimer, *Codifying Necessity: Legislative Resistance to Enacting Choice-of-Evils Defenses to Criminal Liability*, 82 TUL. L. REV. 191, 227–28 (2007); Edward B. Arnolds & Norman F. Garland, *The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil*, 65 J. CRIM. L. & CRIMINOLOGY 289, 296–98 (1974).

<sup>235</sup> *See* FLETCHER, *supra* note 170, at 782–83.

<sup>236</sup> *E.g.*, Oliver Cromwell, Speech to the First Protectorate Parliament (Sept. 12, 1654), *in* 2 THOMAS CARLYLE, OLIVER CROMWELL’S LETTERS AND SPEECHES: WITH ELUCIDATIONS 301 (1845).

peril.<sup>237</sup> Political theory aside, it would surely be quixotic to imagine a state's officials engaging in any figurative balancing analysis of the oft competing interests to which Article 25(1) refers.

Second, international law lacks an analogue to a general legislature,<sup>238</sup> as well as the comparatively well-integrated mosaics of interrelated legal and moral norms that characterize well-functioning national legal systems. It would be incongruous to regard necessity in the general law of state responsibility as a kind of figurative interstitial legislation, which, by analogy, might authorize an informal amendment or one-time exception to a legal obligation "when a real legislature would formally do the same under those circumstances."<sup>239</sup>

Third, although the law of state responsibility is often analogized, *very roughly*, to national tort law,<sup>240</sup> it cannot precisely be analogized to any discrete category of legal obligations in national law. The concept of 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.<sup>241</sup>

Doubtless the tort analogy can be helpful pedagogically and otherwise.<sup>242</sup> But it is not at all precise. Reparation for the violation of an international obligation, for example, may take forms that do not exist in national tort law.<sup>243</sup>

Fourth, given the absence of both the effective institutions and the comparatively high degree of normative consensus that exist in robust national legal systems, necessity in the law of state responsibility is perforce self-judging *ex ante*, even though (as everyone agrees) it is not, and cannot be, *ex post*.<sup>244</sup> These features of international law render the familiar strategies by which national law deters necessity's abuse unavailable in most instances. Consider, for example, legislative preclusion or the *ex post* appraisal of an actor's choice by a court or other authoritative decision maker with compulsory jurisdiction—common techniques in national law that seldom exist in general international law.<sup>245</sup> Yet the risk of necessity's pretextual use and

<sup>237</sup> Articles on State Responsibility, *supra* note 19, Art. 25(1)(a); *see, e.g.*, Eric A. Posner, *Do States Have a Moral Obligation to Obey International Law?*, 55 STAN. L. REV. 1901 (2003).

<sup>238</sup> *See* LOUIS HENKIN, *HOW NATIONS BEHAVE* 23–24 (2d ed. 1979).

<sup>239</sup> *United States v. Schoon*, 971 F.2d 193, 197 (9th Cir. 1992).

<sup>240</sup> DAVID J. BEDERMAN, *INTERNATIONAL LAW FRAMEWORKS* 7 (3d ed. 2010).

<sup>241</sup> Nollkaemper, *supra* note 204, at 791; *see also* James Crawford, *The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect*, 96 AJIL 874, 878 (2002).

<sup>242</sup> Consider, for example, as Nollkaemper does, *supra* note 204, at 791 & n.167, the Alien Tort Statute, 28 U.S.C. §1350 (2000); *see also* *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

<sup>243</sup> *See* Nollkaemper, *supra* note 204, at 791–93.

<sup>244</sup> *Cf.* José E. Alvarez & Kathryn Khamsi, *The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime*, in 2008–09 Y.B. INT'L INVESTMENT L. & POL'Y 379, 395–96 (Karl P. Sauvant ed., 2009).

<sup>245</sup> Perhaps the closest analogue to legislative preclusion in international law is Article 2(2) of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 20-100 (1988), 1465 UNTS 85, which brooks no exceptions (necessity included) to the categorical prohibition on torture. It is telling that the Convention conspicuously failed under circumstances of perceived crisis, receiving not even a citation in the notorious "torture memos." *See* Memorandum from Assistant Attorney General

abuse in international law is no less (to the contrary, probably far more) acute than in national law—as the ILC Commentary recognizes.<sup>246</sup>

Fifth, the diverse peoples of states, even more than “the People”<sup>247</sup> of one state, can reasonably be expected to disagree about (1) core moral, social, political, and cultural values, (2) their appropriate instantiation in the law, and (3) their lexical priority.<sup>248</sup> The “margin of appreciation” doctrine recognizes reasonable variations of this sort in the context of some regional human rights systems.<sup>249</sup> But it would still be incongruous to conceptualize necessity in the law of state responsibility as an international “gap-filler, recognizing exceptions in order to further legislative values already recognized in the [law]”<sup>250</sup> by the international community as a whole.

Doubtless that community does share a few fundamental value judgments—foremost among them, those corresponding to *jus cogens* norms—and Article 26 of the Articles on State Responsibility properly exempts from the CPWs the primary rules that qualify as *jus cogens*. But Vaughan Lowe has rightly pointed out that the class of *jus cogens* norms is “nowhere near being sufficiently comprehensive in its claimed coverage, let alone in its accepted reach.”<sup>251</sup> Moreover, it is precisely in those circumstances in which states can be expected to invoke Article 25 that shared values or interests seldom exist. If one state invokes necessity to safeguard what it sees as its “essential interest” against a “grave and imminent peril,” it will be the rare case in which its necessitated conduct does not simultaneously impair an essential interest of the state or states to which it owes the relevant international legal obligation. One may speculate with reasonable confidence that the latter state will characterize the impairment of *its* “essential interest” as “serious,”<sup>252</sup> underscoring again that in many instances, it will be critical to have access to a neutral, authoritative decision maker that is both competent and institutionally suited to resolve conflicts of this sort.

In sum, experience and common sense suggest that states—naturally and often neither unreasonably nor improperly—prioritize their own interests. It is unlikely that an increasingly decentralized and fragmented international legal system, which serves a heterogeneous legal community and operates, in general, without reliable institutional analogues to national legal

Jay S. Bybee to White House Counsel Alberto R. Gonzales, Standards of Conduct for Interrogation Under 18 U.S.C. §§2340–2340A (Aug. 1, 2002), reprinted in *THE TORTURE MEMOS: RATIONALIZING THE UNTHINKABLE* 41, 91–93 (David Cole ed., 2009).

<sup>246</sup> See, e.g., ILC COMMENTARY, *supra* note 19, at 178, cmt. 2 & n.398; *id.* at 182–83, cmts. 13–14; see also Heathcote, *supra* note 27, at 491–92.

<sup>247</sup> U.S. CONST. pmb.

<sup>248</sup> Not coincidentally, John Rawls excluded international law from his initial theory of justice. See JOHN RAWLS, *A THEORY OF JUSTICE* 7–8 (1971). Even within a polity, Rawls later concluded, “The fact of a plurality of reasonable but incompatible comprehensive doctrines—the fact of reasonable pluralism—shows that, as used in [*A Theory of Justice*], the idea of a well-ordered society of justice as fairness is unrealistic.” JOHN RAWLS, *POLITICAL LIBERALISM*, at xvii (1993). Time and again, he stressed that “in modern democratic societies,” value pluralism “is not a mere historical condition that may soon pass away; it is a permanent feature of the public culture of democracy.” *Id.* at 36. A fortiori, it is a permanent feature of the “different cultures and traditions of thought” found within the figurative international community. JOHN RAWLS, *THE LAW OF PEOPLES WITH “THE IDEA OF PUBLIC REASON REVISITED”* 11 (2001).

<sup>249</sup> E.g., *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A), para. 48 (1976).

<sup>250</sup> Simons, *supra* note 232, at 648.

<sup>251</sup> Vaughan Lowe, *Precluding Wrongfulness or Responsibility: A Plea for Excuses*, 10 EUR. J. INT’L L. 405, 407 (1999).

<sup>252</sup> See Articles on State Responsibility, *supra* note 19, Art. 25(1)(b).

institutions, can incorporate a principle calling for the adoption of the lesser evil under the circumstances of crisis in which Article 25 will foreseeably be invoked: Which is the lesser evil? According to whom? What tribunal or other institution decides? With the limited exception of *jus cogens* norms like the prohibition on genocide, general international law will generally lack both the degree of consensus and the institutions required to resolve disputes involving the competing “essential interests” of states.

Of course, necessity may not differ in the foregoing respects from many other international legal norms. The point of emphasis is simply that Article 25’s conception of necessity performance requires subjective choice<sup>253</sup>—in the first instance (*ex ante*), by the invoking state, and in the second (*ex post*), by an international decision maker. It cannot be objectively appraised with the same certitude or in the same manner as, for example, a hurricane that gives rise to a force majeure plea. Article 25 compels a value-laden judgment that differs qualitatively from other CPWs.<sup>254</sup>

### Conclusion

As a general defense to state responsibility, necessity neither can nor should be analogized to necessity in national law. Yet Article 25’s structure is, in practice if not intent, redolent of the national choice-of-evils paradigm in that it appears to presume that (1) the increasingly fragmented international legal system offers decision makers a sufficient, and sufficiently clear, consensus on a rough normative hierarchy within the diverse mosaic of social interests, policies, and values comprehended within that system,<sup>255</sup> (2) invoking states can and should be held to an objective standard requiring the comparison of dissimilar harms to states or the “international community as a whole” (and in circumstances of imminent crisis, no less), and (3) international law can make sense of “contribut[ion] to the situation of necessity”<sup>256</sup> in a dynamic global order of increasingly interdependent states—for the invoking state will almost always have “contributed to the situation” to some degree and in some fashion.

Before scrutinizing Article 25 in greater depth, we should consider a reasonable objection. Perhaps Article 25 does not contemplate that states will look to it for guidance or try to conform their conduct to it; rather, it merely states a rule of decision for tribunals and the like. Put otherwise, to adapt Jeremy Bentham’s distinction, Article 25 speaks chiefly to officials charged with deciding disputes rather than to legal actors: it is a “decision rule,” not a “conduct rule.”<sup>257</sup> After all, the Articles on State Responsibility aspire to establish a set of secondary rules, which apply uniformly to the diverse primary rules in most every field of international law, absent a *lex specialis*. Indeed, Special Rapporteur Crawford refers to the primary/secondary rule distinction as “the central organizing idea” of the Articles on State Responsibility.<sup>258</sup>

<sup>253</sup> See Heathcote, *supra* note 27, at 495; see also Secretariat Survey, *supra* note 97, paras. 25, 30.

<sup>254</sup> Self-defense may involve an equal measure of subjectivity. But it is part of the *jus ad bellum*, which, whatever its faults and controversies, supplies a shared framework, which, not coincidentally, includes its own, conceptually distinct, necessity standard.

<sup>255</sup> See Caplan, *supra* note 223, at 742–43.

<sup>256</sup> Articles on State Responsibility, *supra* note 19, Art. 25.

<sup>257</sup> See Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 627 (1984).

<sup>258</sup> Crawford, *supra* note 23, at 15 (emphasis added).

That this distinction is both central and indispensable cannot be doubted. But does the status of the Articles on State Responsibility as secondary rules mean that Article 25 is only, or that it will in practice function only as, a decision rule? That seems substantively wrong and, at any rate, unlikely in practice. Doubtless one important purpose of the Articles on State Responsibility is to offer a uniform framework for use in formal disputes implicating state responsibility. But the idea of a world of “acoustic separation” between conduct and decision rules is, as Meir Dan-Cohen stressed in his celebrated article, no more than a heuristic device: “In the real world, the public and officialdom are not in fact locked into acoustically sealed chambers, and consequently each group may ‘hear’ the normative messages the law transmits to the other group.”<sup>259</sup> Decision rules almost invariably influence conduct.<sup>260</sup> In part because international, unlike national, law does not rely on the regular availability of authoritative, neutral decision makers, it would be a mistake to relegate the Articles on State Responsibility to the status of “pure” decision rules.<sup>261</sup>

Of course, the law of state responsibility does not uniquely determine how states will act within its ambit—no more than international law does in any other subfield. But it is a variable in the decision process. Officials consider the law of state responsibility in shaping their internal laws and global interactions. The Articles on State Responsibility cannot be limited to a default choice of law, so to speak, for international tribunals adjudicating arguable violations of primary rules. They guide state conduct, and Article 25 does not differ from the remainder of the Articles on State Responsibility in this regard. Mindful of this dual function, the next part scrutinizes Article 25’s conception of necessity in greater depth.

### III. CONSTRUING ARTICLE 25

#### *Justification or Excuse?*

As noted earlier, necessity is one of seven CPWs<sup>262</sup> set forth in Chapter V of the Articles on State Responsibility.<sup>263</sup> The phrase “circumstances precluding wrongfulness,” within which Article 25 is situated, semantically denotes justification. CPWs do not vitiate or mitigate state responsibility; they render the conduct *not wrongful*—that is, justified.<sup>264</sup> In fact, conduct so justified might even be laudable if, for example, it conforms to an ideal moral standard stipulating how the figurative international community as a whole would want states to act under the circumstances in question. Humanitarian intervention may be a case in point.<sup>265</sup> Furthermore, it would be linguistically strained to read the phrase “circumstances *precluding* wrongfulness” as

<sup>259</sup> See Dan-Cohen, *supra* note 257, at 631.

<sup>260</sup> *Id.*

<sup>261</sup> It would be equally misguided to construe provisions of the Articles on State Responsibility other than Article 25 solely as decision rules. Countermeasures (part 3, chapter II of the Articles on State Responsibility), for example, establish, and presumably were intended to establish, principles that will influence state conduct—namely, the circumstances under which states may take countermeasures and the nature and scope of those measures. Chapter II does not deal only with the formal consequences of a violation in the event that an institution happens to be available to apply the Articles on State Responsibility as decision rules.

<sup>262</sup> Articles on State Responsibility, pt. 1, ch. V; see also ILC COMMENTARY, *supra* note 19, at 160, cmt. 2.

<sup>263</sup> *Id.* at 65–66, Arts. 20–25.

<sup>264</sup> See Lowe, *supra* note 251, at 406.

<sup>265</sup> See DeNicola, *supra* note 14. *But see* Mohamed, *supra* note 201.

implying excuse—that is, vitiation of legal responsibility and the consequences that ordinarily attend it but simultaneous affirmation that the state, nonetheless, acted wrongfully.

Despite the superficial clarity of the text, the status of CPWs, in general, and of necessity, in particular, remains ambiguous vis-à-vis the distinction between justification and excuse.<sup>266</sup> In 1956, the first special rapporteur on state responsibility, F. V. García Amador, observed that international law distinguishes between “exonerating grounds properly so called, and other grounds which may be considered as extenuating or aggravating circumstances.”<sup>267</sup> About two decades later, in 1979, Special Rapporteur Ago stressed that CPWs do not merely preclude legal responsibility but “preclude the characterization of the conduct . . . as wrongful.”<sup>268</sup> He concluded that “as a result of [a CPW’s] presence the objective element of the internationally wrongful act, namely, the breach of an international obligation, is lacking.”<sup>269</sup> This approach apparently endured into the 1990s, and the *travaux* from that period indicate an intent to treat all CPWs as justifications.

In 1999, however, Special Rapporteur Crawford adopted a new approach. Observing that “defences,” “justifications,” and “excuses” have all been used at times to describe various CPWs,<sup>270</sup> and citing the sometimes conflicting views of states on the appropriate characterization of each CPW,<sup>271</sup> he recognized that the CPWs technically conflate two conceptually distinct types of defenses (justification and excuse) within a single rubric.<sup>272</sup> He decided against drawing a “categorical distinction” in that regard, however, in part because, as he wrote, one can imagine a “range of cases,” and “a clear example of distress or even necessity [ordinarily an excuse] may be more convincing as a [CPW] than a marginal case of self-defence [ordinarily a justification].”<sup>273</sup> This statement is doubtless correct as far as it goes. But it risks confusing a factual question (how *evidentially persuasive* is a particular defense in context?) with a question of legal principle (how should that defense be conceived for purposes of understanding its *legal consequences* (inter alia, for third parties or for the obligation *vel non* to pay reparations)?).

The ILC adopted Crawford’s approach, and the Articles on State Responsibility do not distinguish excuses from justifications among the CPWs. The ILC noted only that the issue “should be discussed in the commentary.”<sup>274</sup> But it is not. The ILC Commentary often treats justification and excuse interchangeably. It neither discusses nor attributes significance to the distinction between those two rubrics. At the outset of chapter V, for example, the commentary

<sup>266</sup> Perhaps, as Vaughan Lowe argues, the concept of excuse would be preferable for all CPWs. Lowe, *supra* note 251, at 409–11. This essay’s argument is limited to Article 25.

<sup>267</sup> F. V. García Amador, Report on State Responsibility, [1956] 2 Y.B. INT’L L. COMM’N, pt. 1, at 173, para. 191, UN Doc. A/CN.4/96.

<sup>268</sup> Eighth Report on State Responsibility, *supra* note 139, para. 49 (internal quotation marks and footnote omitted).

<sup>269</sup> *Id.*, para. 55; *see also id.*, paras. 48–54; Lowe, *supra* note 251, at 406.

<sup>270</sup> Second Report Addendum, *supra* note 42, para. 214.

<sup>271</sup> *Id.*, paras. 216–29.

<sup>272</sup> *Id.*, para. 353. Some CPWs fit more comfortably within one or the other rubric. It is difficult to see, for example, how consent (Article 20) could be anything but a justification. In contrast, *force majeure* (Art. 23), absent a *lex specialis*, is generally an excuse. The *travaux* suggest that states regarded countermeasures, consent, and self-defense as justifications and *force majeure*, necessity, and distress as excuses. Second Report Addendum, *supra* note 42, para. 353.

<sup>273</sup> *Id.*, para. 353.

<sup>274</sup> Report of the Commission to the General Assembly on the Work of Its Fifty-First Session, [1999] 2 Y.B. INT’L L. COMM’N, pt. 2, at 74 [hereinafter Fifty-First Session Report].

says that CPWs “do not annul or terminate the obligation; rather they provide a justification or excuse for non-performance while the circumstance in question subsists.”<sup>275</sup> Two comments later, the commentary characterizes force majeure (Article 23) as a justification and an excuse in the same paragraph.<sup>276</sup>

As for necessity, the ILC Commentary suggests that it should be understood as an excuse rather than a justification, noting, for example, that Article 25 will “rarely be available to *excuse* non-performance of an obligation.”<sup>277</sup> But the footnotes introduce some ambiguity in this regard, for they neither distinguish, nor ascribe significance to the distinction between, the precedents characterizing necessity as an excuse and those characterizing it as a justification.<sup>278</sup> It should also be noted that Article 27 provides that invoking a CPW is “without prejudice to . . . [t]he question of compensation for any material loss caused by the act in question.”<sup>279</sup> For unclear reasons, the ILC evidently decided that, here again, it would be prudent not to draw a formal distinction between justification and excuse—reparations, perhaps, being the presumptive, but defeasible, obligation in the latter case.<sup>280</sup>

The Articles on State Responsibility’s decision to elide the justification/excuse fault line in the context of CPWs is surprising. It is not, of course, a trivial linguistic issue. It may be unclear or hard to sustain in some circumstances<sup>281</sup> or where a valid defense is “overdetermined.”<sup>282</sup> But the characterization of a defense as one or the other generally has significant legal implications,<sup>283</sup> including, for example, that

[j]ustified 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.<sup>284</sup>

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

First, suppose that necessity *justified* NATO’s aerial bombardment of Serbia in 1999, as Belgium argued before the ICJ.<sup>285</sup> If so, necessity rendered NATO’s acts, which violated an orthodox reading of Article 2(4) of the UN Charter, legally *right*, not just morally “legitimate,” as

<sup>275</sup> ILC COMMENTARY, *supra* note 19, at 160, cmt. 2.

<sup>276</sup> *Id.* at 161, cmt. 4.

<sup>277</sup> *Id.* at 178, cmt. 2 (emphasis added); *see also id.* at 183, para. 14.

<sup>278</sup> *See id.* at 179–82, cmts. 4–12.

<sup>279</sup> Articles on State Responsibility, *supra* note 19, Art. 27(a).

<sup>280</sup> *See* Fifty-First Session Report, *supra* note 274, at 85.

<sup>281</sup> *See generally* Greenawalt, *supra* note 175.

<sup>282</sup> *See* FLETCHER, *supra* note 170, at 818.

<sup>283</sup> *See, e.g.,* Harel, *supra* note 176, at 14–15 (citing FLETCHER, *supra* note 170, at 759–62; Miriam Gur-Arye, *Should a Criminal Code Distinguish Between Justification and Excuse?*, 5 CAN. J. L. & JURISPRUDENCE 215, 222–29 (1992)).

<sup>284</sup> Greenawalt, *supra* note 175, at 1900.

<sup>285</sup> *See* Verbatim Record, Legality of Use of Force (Yugo. v. Belg.), Request for the Indication of Provisional Measures, ICJ Doc. CR 1999/15, *trans. available at* <http://www.icj-cij.org/docket/files/105/4515.pdf> (Rusen Ergec, representing Belgium in oral pleadings) [hereinafter Ergec ICJ pleadings].

some scholars and commissions of inquiry concluded.<sup>286</sup> Justification might also have meant that third parties (states not members of NATO) would have acted legally had they contributed to the attack on Serbia. If necessity excused NATO's campaign, by contrast, then NATO states might not incur state responsibility, or the same degree of it, for their presumptive violation of Article 2(4). But third parties would not legally be entitled to join in the attack, and the use of force under the circumstances would remain internationally wrongful.

For international custom, among other issues,<sup>287</sup> the excuse/justification distinction might matter in a long-term, more legally profound sense. Excused, unlike justified, force does not pose the same jurisprudential threat to what many scholars see as one of the "least controversial" examples of a *jus cogens* norm:<sup>288</sup> the UN Charter's prohibition on "the threat or use of force against the territorial integrity or political independence of any state."<sup>289</sup>

Second, suppose that Argentina's default on its sovereign debt in 2002, the largest to date,<sup>290</sup> entitled it to invoke necessity under Article 25 and that necessity therefore *justified* Argentina's subsequent market interventions and other controversial economic measures. In that case, Argentina's prima facie failures to honor certain obligations vouchsafed to foreign nationals by bilateral investment treaties were not internationally wrongful acts, and the Argentine government, having done nothing wrongful under international law, need not compensate affected investors for their losses—ever. So concluded at least one investment tribunal.<sup>291</sup> Yet that conclusion is at least in tension with the structure of the Articles on State Responsibility, which provide, first, that the Articles on State Responsibility "do not apply where and to the extent that" a *lex specialis* governs (BITs, according to the weight of authority, qualify in this regard),<sup>292</sup> and second, that a state's invocation of a CPW "is without prejudice to . . . [t]he question of compensation for any material loss caused by the act in question."<sup>293</sup> Consequently, here, in contrast to the former example, Article 25 (assuming, for the sake of the argument, that it applies despite the BITs) seemingly *should* operate as an excuse. After the state of necessity in Argentina ceased, as it now has, Argentina's obligation to compensate foreign investors for past violations of the relevant BITs should revive.<sup>294</sup>

Treating necessity as a justification in this context<sup>295</sup>—that is, as a circumstance that *precludes* wrongfulness—therefore seems not only misguided, but at odds with how the ILC Commentary suggests that CPWs should operate. To further clarify this point, assume, contrary to part I above, that necessity's customary scope extends to various essential interests other than

<sup>286</sup> *E.g.*, INDEP. INT'L COMM'N ON KOSOVO, THE KOSOVO REPORT 10 (2000), at <http://reliefweb.int/node/21913>; *cf.* Thomas M. Franck, *Lessons of Kosovo*, 93 AJIL 857 (1999).

<sup>287</sup> See generally Lowe, *supra* note 251.

<sup>288</sup> See, *e.g.*, BROWNLEE, *supra* note 187, at 510.

<sup>289</sup> UN Charter Art. 2(4); see 1 OPPENHEIM'S INTERNATIONAL LAW 7–8 (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

<sup>290</sup> See J. F. Hornbeck, *Argentina's Default Sovereign Debt: Dealing with the "Holdouts"*, CRS REPORT FOR CONGRESS 1 (Jan. 21, 2010), at <http://www.fas.org/sgp/crs/row/R41029.pdf>.

<sup>291</sup> *LG&E Energy Corp.*, *supra* note 135, para. 267(d).

<sup>292</sup> Articles on State Responsibility, *supra* note 19, Art. 55; see also, *e.g.*, Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, Nov. 14, 1991, Art. XI, S. TREATY DOC. 103-2 (1993), 31 ILM 124 (1992) [hereinafter U.S.-Arg. BIT].

<sup>293</sup> Articles on State Responsibility, *supra* note 19, Art. 27(b).

<sup>294</sup> See ILC COMMENTARY, *supra* note 19, at 160, cmt. 2; Second Report Addendum, *supra* note 42, paras. 222, 226; accord Gabčíkovo-Nagymaros Project, *supra* note 24, para. 101.

<sup>295</sup> Heathcote, *supra* note 27, at 494 (citation omitted).

the very survival of the state. Still, in the rare case in which necessity could properly be invoked, it would not be because exigent circumstances render the invoking state's otherwise legally wrongful conduct *right*; rather, it would be because those circumstances temporarily suspend the invoking state's duty to perform the obligation at issue. The invoking state must resume compliance with that obligation (or pay reparations for damages caused by its non-observance) once the state of necessity ceases.<sup>296</sup>

In sum, the Articles on State Responsibility and the ILC Commentary characterize necessity, like all CPWs, as a justification. It is said to preclude the wrongfulness of an otherwise illegal act, and Sarah Heathcote, among others, understands that to mean that necessity "renders the act lawful, rather than merely excusing the actor."<sup>297</sup> But the foregoing examples suggest otherwise. At a minimum, they suggest that the effects of necessity may differ contextually. That is unsurprising. As stressed, general international law lacks the conceptual and institutional features of a legal system that could render the choice-of-evils paradigm of justified necessity feasible. Article 25 invites confusion, and perhaps abuse, insofar as it reorients necessity to be a plea that, in practice, requires comparative analysis of the essential interests of states and, at times, "the international community as a whole."<sup>298</sup>

*From the "Very Survival" of a State to Its "Essential Interests"*

After all, what is an "essential interest"? The law of nations recognized only existential threats as grounds for a necessity plea. Article 25 expands the scope of necessity by extending it, potentially, to any state conduct taken "to safeguard an *essential interest* against a grave and imminent peril."<sup>299</sup> The ILC Commentary declines to define "essential interest," stressing that its meaning "depends on all the circumstances, and cannot be prejudged."<sup>300</sup> That is surely correct and prudently stated. But at a bare minimum, it seems clear that the essential interests cognizable under Article 25 include more than the (sovereign) existential interests recognized by classical international law. Heathcote says that what qualifies as "an essential interest is not a fixed category," but she opines further that it "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."<sup>301</sup>

This list is illustrative, not exhaustive. Untethered from its pedigree as an existential limit on the force of obligations under the law of nations, there is no obvious way to limit a state's discretion to characterize certain interests as essential for purposes of Article 25.<sup>302</sup> Special Rapporteur Crawford recognized the history of abuses carried out under the pretext of necessity.<sup>303</sup>

<sup>296</sup> See, e.g., *CMS Gas Transmission Co.*, *supra* note 25, paras. 355, 388; Gabčíkovo-Nagymaros Project, 1997 ICJ REP., para. 48.

<sup>297</sup> Heathcote, *supra* note 27, at 494 (citation omitted).

<sup>298</sup> Articles on State Responsibility, *supra* note 19, Art. 25(1)(b).

<sup>299</sup> *Id.*, Art. 25(1)(a) (emphasis added); see Heathcote, *supra* note 27, at 496.

<sup>300</sup> ILC COMMENTARY, *supra* note 19, at 183, cmt. 15.

<sup>301</sup> Heathcote, *supra* note 27, at 496 (citations omitted).

<sup>302</sup> *Id.* at 497.

<sup>303</sup> See *id.* at 492; Second Report Addendum, *supra* note 42, paras. 278, 281.

But he concluded that “concerns as to the possible abuse of necessity are not borne out by experience.”<sup>304</sup> For Article 25, this statement raises an empirical question that probably cannot be answered after only a decade. It is reasonable to worry, however, that Article 25 might incentivize states to characterize interests as essential in circumstances in which international obligations impose more serious hardships than anticipated, prove politically unpopular, or perhaps simply turn out to be inconvenient. Already, in fact, Francisco Orrego Vicuña laments the “softening” of necessity, observing with reference to international investment jurisprudence:

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 unemployment reaching a third of its work force.<sup>305</sup>

Current and future crises—fiscal, ecological, military, epidemiological, and otherwise—will doubtless shape the protean concept of an essential interest in the years to come. Much will depend on how Article 25 is construed and enforced. As Orrego Vicuña suggests, however, experience to date in investor-state arbitration provides some cause for concern.

### *Normative Hierarchy and Dissonance*

Assume that a state concludes that it must breach an international obligation because breach is, or seems to be, the only way to safeguard an essential interest of that state against a grave and imminent peril under Article 25(1)(a). Article 25(1)(b) asks whether that breach will “seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.”<sup>306</sup> If the answer to this question is yes, the plea will be unavailing. In effect, whatever the intent of the drafters, Article 25 thereby introduces a balancing test into the law of state responsibility that resembles the choice-of-evils paradigm.

No such test existed in the classical law of nations—for good reason. As a rule, if a state regards the observance of an international obligation as a threat to its survival, it is unrealistic to expect that state to consider whether its breach might impair essential interests of another state or states or of the amorphous international community as a whole—and then potentially to modify its conduct on that basis. By reorienting the predicate for a necessity plea from self-preservation to (undefined) essential interests, Article 25 makes it theoretically possible for a state to engage in a balancing test of that sort, but does not make it much, if at all, more likely. Surely, it would be quixotic to imagine a state concluding that it must violate an international obligation as the sole means “to safeguard an essential interest against a grave and imminent

<sup>304</sup> Second Report Addendum, *supra* note 42, para. 291.

<sup>305</sup> Francisco Orrego Vicuña, *Softening Necessity*, in *LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN* 741, 751 (Mahmoud H. Arsanjani, Jacob Katz Cogan, Robert D. Sloane & Siegfried Wiessner eds., 2011).

<sup>306</sup> Articles on State Responsibility, *supra* note 19, 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, such as obligations *erga omnes*. *Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, Second Phase, 1970 ICJ REP. 3, para. 33 (Feb. 5). For discussion of the effect on necessity of applicable *erga omnes* interests or obligations, see Second Report Addendum, *supra* note 42, para. 290.

peril”—only to conclude, upon further reflection, that it will nonetheless forebear from the violation because it would “seriously impair an essential interest of” another state or the international community as a whole.<sup>307</sup>

Even if Article 25 is understood only as a decision rule for officials (rather than a conduct rule for state actors), a balancing analysis of this sort remains as impracticable as it is abstruse. Within national legal systems, legislatures, *ex ante*, and courts or juries, *ex post*, can regulate choices among evils and enforce the polity’s will in that regard. But beyond the context of (the bare handful of) *jus cogens* norms or a self-contained treaty regime or other *lex specialis*, comparably strong institutions and norms of general international law seldom exist or enjoy the requisite efficacy and legitimacy to serve an analogous role. Heathcote observes to similar effect that one “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.”<sup>308</sup> Indeed, even if an impartial tribunal with compulsory jurisdiction or a cognate institution were in place, it remains unclear how—that is, on the basis of what standards—such an institution should balance the essential interests of states against one another or the international community as a whole. In short, especially in the event of incommensurable social values or interests, one state’s *safeguarded* essential interest will often be another’s *seriously impaired* essential interest.

### *Contribution*

Article 25(2) precludes necessity if the “State has contributed to the situation.”<sup>309</sup> In national law, both justified and excused necessity embrace a similar concept of contribution (based on intuitions about culpable fault), which may limit or exclude the defense entirely. Within a compulsory judicial system, it is feasible to develop a jurisprudence that distinguishes degrees of fault and that establishes a threshold beyond which the necessity defense is disallowed or only partially allowed.<sup>310</sup> 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. But because functionally analogous legal institutions to those in national law seldom exist in general international law (for example, a hierarchical court system that can, over time, define and refine a sophisticated jurisprudence distinguishing different kinds and degrees of contribution), it is not obvious how we should understand contribution under Article 25(2). For example, does it refer to conduct, as it does in some national legal systems, or to fault, as it does in others?

The *travaux* offer some guidance. Commenting on an earlier draft, Ago had taken the extreme position that the peril must be “*entirely* beyond the control of the State whose interest is threatened.”<sup>311</sup> If that is correct, even a de minimis contribution by the invoking state would categorically exclude the plea. Such a high threshold is not only facially unreasonable but also inconsistent with the distinction drawn by the Articles on State Responsibility between force

<sup>307</sup> Articles on State Responsibility, *supra* note 19, Art. 25(1)(b).

<sup>308</sup> See Heathcote, *supra* note 27, at 494.

<sup>309</sup> Articles on State Responsibility, *supra* note 19, Art. 25(2)(b).

<sup>310</sup> See, e.g., MODEL PENAL CODE, *supra* note 5, §3.02(2) (footnote omitted).

<sup>311</sup> Eighth Report Addendum, *supra* note 27, para. 13 (emphasis added).

majeure and necessity. The former applies to an “irresistible force,”<sup>312</sup> typically a natural disaster, that lies wholly beyond the state’s control, whereas necessity clearly involves a choice on the part of the invoking state: “In the case of *force majeure*, respecting the obligation is absolutely impossible, whereas in the case of necessity, the impossibility is relative: a choice is made between suffering the grave and imminent peril and violating an obligation protecting an interest of lesser importance.”<sup>313</sup> If that choice alone qualified as a contribution sufficient to exclude the plea, necessity could never be availing.

Under Crawford’s guidance, the ILC changed the cognate contribution exclusions in Articles 23 (*force majeure*) and 24 (distress) to read “due, either alone or in combination with other factors, to the conduct of the State invoking it.”<sup>314</sup> But the ILC preserved the simpler phrase “has contributed” in Article 25 because “necessity needs to be more narrowly confined.”<sup>315</sup> In comparative terms, the nature, type, or extent of contribution that precludes necessity is therefore lower than for distress or *force majeure*. The ILC Commentary adds that the contribution “must be sufficiently substantial and not merely incidental or peripheral,”<sup>316</sup> but this abstract statement offers little additional guidance.

Consider again the viability of Argentina’s necessity plea in the more than forty investment arbitrations brought against it in the past decade. Doubtless Argentina’s fiscal and monetary policies in the 1990s contributed to its crisis in 2001–02.<sup>317</sup> But were its policies merely incidental or peripheral to its default on its sovereign debt? Should Argentina, based on contribution, be precluded from invoking necessity? Perhaps. Tribunals differ on this issue. The point of emphasis is simply that in appraising degrees of fault in national law, the existence and operation of precedent, a hierarchical judiciary, and *stare decisis* help to refine and clarify the standard of contribution, whereas in the general law of state responsibility, the comparative absence of analogous institutions often makes it difficult to ascertain objectively the extent to which an invoking state’s greater or lesser degree of contribution to the situation should preclude its plea of necessity. The complexity and sheer number of potentially relevant factors involved in such an analysis is daunting.<sup>318</sup>

Also reconsider NATO’s aerial campaign against Serbia. However critical humanitarian intervention might have seemed to NATO states at the time, it is arguable, and several scholars across the ideological spectrum have argued, that many NATO states contributed to the situation in Kosovo through nearly a decade of inept policies in response to the breakup of the former Yugoslavia.<sup>319</sup> Assuming that the contribution of these states qualifies as substantial and not merely incidental or peripheral, does their contribution preclude intervention? *Should* it? What if belated intervention would nonetheless save thousands of lives and prevent serious, widespread human rights atrocities? Might the exclusion for contribution lead to the absurd result that “necessity could not be invoked to safeguard the life of the population because the

<sup>312</sup> Articles on State Responsibility, *supra* note 19, Art. 23(1).

<sup>313</sup> Heathcote, *supra* note 27, at 495; *see also* Secretariat Survey, *supra* note 97, paras. 25, 30.

<sup>314</sup> Articles on State Responsibility, *supra* note 19, Arts. 23(2)(a), 24(2)(a).

<sup>315</sup> ILC COMMENTARY, *supra* note 19, at 185, cmt. 20.

<sup>316</sup> *Id.*; *see, e.g.*, Gabčíkovo-Nagymaros Project, *supra* note 24, paras. 57–58.

<sup>317</sup> *See, e.g.*, *Sempra Energy Int’l*, Award, *supra* note 25, para. 341.

<sup>318</sup> *See, e.g.*, *State v. Crawford*, 521 A.2d 1193 (Md. 1987).

<sup>319</sup> *See, e.g.*, Richard A. Falk, *Kosovo, World Order, and the Future of International Law*, 93 AJIL 847, 850–51 (1999).

State itself contributed to the situation”?<sup>320</sup> We need to know both (1) the degree and kind of contribution that triggers the Article 25(2)(b) exclusion and, to speak anthropomorphically, (2) the state’s mens rea relative to the contribution—assuming that Article 25(2)(b) refers to fault rather than conduct only.

### *Conclusion*

It would be reasonable to ask how much law matters in circumstances of crisis, and consequently, why Article 25’s deviation from classical necessity should trouble us, if it does. International law is often said to be less effective or ineffective in circumstances of crisis, “in the crunch, when it really hurts.”<sup>321</sup> And that is precisely the context in which states may be expected to invoke necessity. As Louis Henkin stressed, however, even while conceding some force to the hackneyed critique of international law’s efficacy 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.”<sup>322</sup> Article 25 must be understood with these observations in mind. As putative law, it is a variable in the decision process. It may or may not matter, and to a greater or lesser degree, depending on a host of contextual factors. Empirically, however, it is noteworthy that the available precedents suggest that necessity has been raised about as frequently in the past three decades as it had been in the preceding three centuries. It would, of course, be a vast overstatement to imply that the Articles on State Responsibility alone account for this. But it is not unreasonable to think that Article 25, by supplying an apparently authoritative textual basis and definition that expand the nature and scope of necessity, might facilitate or encourage its invocation, even in scenarios in which reliance upon it may be inappropriate by reference to the Articles on State Responsibility themselves.

#### IV. PRIMARY RULES, SECONDARY RULES, AND *LEX SPECIALIS*

The Articles on State Responsibility were published in 2001. Earlier drafts circulated in the 1990s and influenced international institutions; witness, for example, the ICJ’s citation of draft Article 33 in 1997.<sup>323</sup> It is probably not entirely coincidental that the growing prominence of necessity as a general defense to state responsibility in international law corresponds roughly to the past two decades. During the same time, international law has also seen an increase in primary-rule conceptions of necessity—as evidenced, for example, by a recent academic conference that examined diverse conceptions of necessity in international law.<sup>324</sup> Before turning to examples that illustrate Article 25’s influence and application to date, two additional features of the Articles on State Responsibility merit analysis: first, the foundational distinction between primary and secondary rules, and second, Article 55’s *lex specialis* exclusion.

<sup>320</sup> Heathcote, *supra* note 27, at 499 (internal quotation marks omitted).

<sup>321</sup> HENKIN, *supra* note 238, at 97 (internal quotation marks omitted).

<sup>322</sup> *Id.*

<sup>323</sup> Gabčíkovo-Nagymaros Project, *supra* note 24, at 38–40.

<sup>324</sup> VU University Amsterdam, *Necessity Across International Law*, Apr. 24–25, 2009. A symposium issue arising out of this conference appears in volume 41 of the *Netherlands Yearbook of International Law* (I. F. Dekker & E. Hey eds., 2010).

*Primary Rules and Secondary Rules*

The primary/secondary rule distinction is “the central organizing idea” of the Articles on State Responsibility.<sup>325</sup> This language might, at first blush, be thought to refer to the jurisprudential distinction drawn by H. L. A. Hart in *The Concept of Law*. Every legal system, he famously argued, consists in the union of primary rules of obligation and secondary rules, which “specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined.”<sup>326</sup> But despite some similarities, the primary/secondary rule distinction in Hart’s magnum opus is not the one that the drafters of the Articles on State Responsibility had in mind.

The distinction rather originated in a “quasi-political consideration”—in particular, the need for “a way out of the impasse” created by Garcíá Amador’s initial focus on codifying the substantive rules of diplomatic protection.<sup>327</sup> In 1963, Ago, who succeeded Garcíá Amador as special rapporteur, recognized the futility of this task. In response, he introduced the primary/secondary rule distinction and thereby fundamentally recast the ILC’s work on state responsibility.<sup>328</sup> “By divorcing the Commission’s work from debates over the primary rules of international obligation, Ago allowed the ILC to elaborate ‘lawyers’ law,’ which with a few exceptions was not threatening to states.”<sup>329</sup> In the lexicon of the Articles on State Responsibility, primary rules establish “the content and the duration of substantive State obligations,” which often implicate issues of long-standing controversy, whereas secondary rules aspire to establish a uniform (and, relative to the breach of a primary rule, conceptually and temporally subsequent) framework to govern “the consequences of a breach of an applicable primary obligation.”<sup>330</sup> That said, and even though the distinction is indeed “indispensable”<sup>331</sup> to the Articles on State Responsibility, it remains for the most part a distinction of expedience rather than principle. As such, it is subject to forceful criticisms of which the ultimate appliers of the law of state responsibility should remain mindful.<sup>332</sup>

First, the status of a rule as primary or secondary is often ambiguous.<sup>333</sup> Consider the obligation to compensate for expropriation.<sup>334</sup> Compensation may at first look like a primary rule

<sup>325</sup> Crawford, *supra* note 23, at 15.

<sup>326</sup> H. L. A. HART, *THE CONCEPT OF LAW* 94 (1961).

<sup>327</sup> Crawford, *supra* note 241, at 877; *see also id.* at 879; Eric David, *Primary Rules and Secondary Rules*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY*, *supra* note 27, at 27–29; Crawford, *supra* note 23, at 1–2; Caron, *supra* note 30, at 870.

<sup>328</sup> Annemarieke Vermeer-Künzli, *As If: The Legal Fiction in Diplomatic Protection*, 18 EUR. J. INT’L L. 37, 49–50 (2007).

<sup>329</sup> Bodansky & Crook, *supra* note 36, at 778.

<sup>330</sup> Crawford, *Introduction*, in *ILC COMMENTARY*, *supra* note 19, at 16; *see, e.g.*, Gabčíkovo-Nagymaros Project, *supra* note 24.

<sup>331</sup> Crawford, *supra* note 23, at 15; *see also* David, *supra* note 327, at 32.

<sup>332</sup> One scholar suggested that the distinction served “as a means to justify and protect [the ILC’s state responsibility work] intellectually.” David J. Bederman, *Counterintuiting Countermeasures*, 96 AJIL 817, 818–19 (2002) (footnote omitted).

<sup>333</sup> Bodansky & Crook, *supra* note 36, at 780–81; *see also* Vermeer-Künzli, *supra* note 328, at 50.

<sup>334</sup> *See* J. Combacau & D. Alland, “Primary” and “Secondary” Rules in the Law of State Responsibility: Categorizing International Obligations, 1985 NETH. Y.B. INT’L L. 81, 104.

because it is a “condition of the lawfulness of [the] act.”<sup>335</sup> If a state takes property for a public purpose, on a nondiscriminatory basis, and after affording the expropriated actor due process of law and paying appropriate compensation, it does not act wrongfully in the first place. It has not breached any primary rule of international law. If that state refuses to compensate the expropriated actor, however, it violates the primary rule that conditions a lawful expropriation on, among other criteria, payment of appropriate compensation. Yet, with equal accuracy, one may characterize the state’s obligation to compensate, in the latter case, as a *consequence* of the wrongful expropriation. The expropriating state’s failure to pay compensation breached a primary rule, rendering the state’s obligation to compensate (now) a secondary rule.

Similarly, consider self-defense (Article 21). It precludes the wrongfulness of an otherwise unlawful recourse to force. So characterized, it operates as a secondary rule. But the same rule may, with equal logic and precision, be characterized as a primary rule. Bona fide self-defense does not violate the *jus ad bellum*, the relevant primary rules, in the first place.<sup>336</sup> The same goes for consent (Article 20): it precludes responsibility for an otherwise unlawful act (such as a cross-border incursion) and, in this regard, operates as a secondary rule. But because consent would vitiate the wrongfulness of the incursion in the first place, “the question of responsibility [would] not arise,”<sup>337</sup> and consent could properly be viewed as a primary rule. These examples illustrate why, as Eric David has argued, “If there is a particular field in which the existence of autonomous secondary rules can give rise to discussion, it is in the field of the circumstances precluding wrongfulness.”<sup>338</sup>

Second, the distinction is sometimes just too simple. Its dualistic quality fails to capture the rich complexity of certain norms of international law, as in the case of those that operate on both the primary and secondary levels.<sup>339</sup> For example,

if a state violates a rule of diplomatic law versus another state, which is a violation of a primary rule, the latter state will be entitled to respond and to resort to countermeasures, which is a secondary rule. However, it may not react in kind since diplomatic law is excluded from the realm of countermeasures under Art 50(2)(b) of the [Articles on State Responsibility], which reflects the dictum of the ICJ in the *Tehran Hostages* case. This indicates that the rules on diplomatic and consular relations operate both on the primary and on the secondary level.<sup>340</sup>

Third, as we will see in the context of investment arbitration, problems sometimes arise in practice because the nature of primary/secondary rule interaction is complex and variable. In particular, relative to a set of primary rules with its *own* necessity component (for example, the *jus ad bellum* or the *jus in bello*), it may not be clear whether Article 25, as a secondary rule, (1) *supplements* that primary rule, (2) *informs* its interpretation, or (3) *displaces* it. Much depends on whether the regime at issue should be characterized as a *lex specialis* under Article 55 of the Articles on State Responsibility.

<sup>335</sup> *See id.*

<sup>336</sup> David, *supra* note 327, at 30–31.

<sup>337</sup> *Id.* at 29.

<sup>338</sup> *Id.*

<sup>339</sup> Vermeer-Künzli, *supra* note 328, at 50.

<sup>340</sup> *Id.* (footnote omitted).

While acknowledging these complexities, Special Rapporteur Crawford stressed that “it is far from clear what other principle of organization might be adopted,” and observed that “the distinction has a number of advantages”<sup>341</sup> That is doubtless true. Yet the quintessentially *functional* rationale for the distinction must nonetheless be borne in mind, for, over time, decision makers can lose sight of the origins of, or rationale for, conventional distinctions, and the prudence and care that should attend their use may decline commensurately.

### *The Scope of Article 55 (Lex Specialis)*

A second critical qualification to the application of Article 25 is Article 55 (*lex specialis*), which says that the Articles on State Responsibility “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.”<sup>342</sup> Perhaps the clearest example of a *lex specialis* is international trade law under the WTO/GATT regime.<sup>343</sup> This network of treaties governing international trade constitutes a sophisticated body of law and includes an effective, compulsory dispute resolution process. Dispute panels initially adjudicate disputes, and their decisions may be reviewed by the Appellate Body. The reports of the panels and Appellate Body have binding precedential effect insofar as they are adopted by the Dispute Settlement Body. The whole system benefits from efficacious sanctions in the form of remedies that the Dispute Settlement Body approves—typically increased tariffs, which prevailing states may implement if the violating state does not take appropriate measures to correct the violation. WTO/GATT law also clearly defines the circumstances under which necessity constitutes a defense. Taken together, the panel and Appellate Body reports contribute to an evolving jurisprudence on necessity that is refined over time by a method approximating that of the common law.<sup>344</sup>

WTO/GATT law typifies a “strong” *lex specialis*, one of international law’s “self-contained regime[s].”<sup>345</sup> According to the ILC Commentary, however, Article 55 should also be understood to encompass “weaker” regimes—for example, “a specific treaty provision” that preempts one article of the Articles on State Responsibility but leaves others untouched.<sup>346</sup> Furthermore, as a general matter, except for *jus cogens* norms, the default presumption is that states may, by consent, displace the Articles on State Responsibility with a *lex specialis* if they

<sup>341</sup> James Crawford, First Report on State Responsibility, [1998] 2 Y.B. INT’L L. COMM’N, pt. 1, at 1, paras. 15–16, UN Doc. A/CN.4/490 (1998).

<sup>342</sup> Articles on State Responsibility, *supra* note 19, Art. 55.

<sup>343</sup> See, e.g., ILC COMMENTARY, *supra* note 19, at 290–91, cmt. 10.

<sup>344</sup> See General Agreement on Tariffs and Trade, Oct. 30, 1947, Arts. XX, XXI, TIAS No. 1700, 55 UNTS 194, 262–67; see, e.g., Appellate Body Report, China—Measures Affecting Trading Rights and Distribution Services of Certain Publications and Audiovisual Entertainment Products, WT/DS363/AB/R (adopted Jan. 19, 2010); see also General Agreement on Trade in Services, Apr. 15, 1994, Art. XIV, in WORLD TRADE ORGANIZATION, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 325 (1999), reprinted in 33 ILM 1167 (1994); Appellate Body Report, United States—Measures Affecting the Cross-border Supply of Gambling and Betting Services, WT/DS285/ARB (adopted Apr. 20, 2005).

<sup>345</sup> See ILC COMMENTARY, *supra* note 19, at 308, cmt. 5, & nn.868–69; see also Crawford, *supra* note 341, at 7.

<sup>346</sup> ILC COMMENTARY, *supra* note 19, at 308, cmt. 5 (internal quotation marks omitted).

choose.<sup>347</sup> To infer a *lex specialis*, however, it does not suffice that special rules cover the same subject matter as the Articles on State Responsibility; “there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other.”<sup>348</sup> In this regard, the ILC Commentary specifically contemplates that a treaty, such as a BIT, might render Article 25 inapplicable as between the states parties.<sup>349</sup> The same is true of international humanitarian law treaties in which, according to the commentary,

certain humanitarian conventions applicable to armed conflict expressly exclude reliance on military necessity. Others while not explicitly excluding necessity are intended to apply in abnormal situations of peril for the responsible State and plainly engage its essential interests. *In such a case the non-availability of the plea of necessity emerges clearly from the object and the purpose of the rule.*<sup>350</sup>

For similar reasons, Article 25 should not apply to the *jus ad bellum*. The ILC Commentary emphasizes that “while considerations akin to those underlying article 25 may have a role, they are taken into account in the context of the formulation and interpretation of the primary obligations” relating to substantive rules of the law of war and neutrality, as well as certain rules of international humanitarian law.<sup>351</sup> In short, Article 25 should not apply if the applicable primary rules already take into account its *raison d’être*.

Yet at times in the past two decades, international law has witnessed the incongruous application of necessity as a secondary rule—applied either in conjunction with, or as an additional layer of legal analysis grafted onto, primary rules that incorporate or deliberately displace Article 25. Given Article 55, the simultaneous or sequential application of Article 25 seems misguided in these fields. Illustrative examples from two fields—war and investment—will be considered below. They offer a sense of how Article 25 might function in the future. The examples also reflect potential problems created by Article 25’s adoption of a definition of necessity that, while prudently and carefully qualified, expands both the scope and nature of the defense.

### *Necessity and War: Jus ad Bellum and Jus in Bello*

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 the time, NATO sought to prevent Serb forces from carrying out atrocities against Kosovo’s ethnic Albanian majority. Whatever the moral merits of NATO’s campaign, many scholars have argued that it violated the *jus ad bellum*.<sup>352</sup> Rusen Ergec, counsel for Belgium, conceded that NATO’s assault would ordinarily violate Article

<sup>347</sup> See *id.* at 290–91, para. 10; James Crawford, Third Report on State Responsibility, [2000] 2 Y.B. Int’l L. Comm’n, pt. 1, at 3, para. 416, UN Doc. A/CN.4/507/Add.4.

<sup>348</sup> ILC COMMENTARY, *supra* note 19, at 307, cmt. 4.

<sup>349</sup> *Id.*, cmt. 3.

<sup>350</sup> *Id.* at 185, cmt. 19 (emphasis added).

<sup>351</sup> *Id.* at 186, cmt. 21.

<sup>352</sup> See, e.g., Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT’L L. 1 (1999); Louis Henkin, *Kosovo and the Law of “Humanitarian Intervention,”* 93 AJIL 824 (1999). *But cf.* W. Michael Reisman, *Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention*, 11 EUR. J. INT’L L. 3 (2000).

2(4) of the UN Charter. But in a clear echo of Article 25, he argued that under the exigent circumstances of humanitarian crisis, necessity “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.”<sup>353</sup> He reasoned, in other words, that the UN Charter’s general prohibition on force,<sup>354</sup> the “binding rule,” should yield to the moral imperative to prevent serious human rights atrocities, which Ergec characterized as implicating *higher* values of the international legal system.<sup>355</sup>

In the context of the Articles on State Responsibility, this argument has a facial plausibility—quite apart from its ethical appeal and humanitarian rationale. As argued above, despite the perils of the national law analogy, Article 25 lends itself, in practice, to precisely the kind of variation on a choice-of-evils analysis that Belgium proposed vis-à-vis the Kosovo campaign. While perhaps understandable in this context, that analysis remains, for the reasons set forth earlier, problematic generally in the international legal sphere and, for two additional reasons, even more troubling in this particular context.

First, the ILC Commentary implies that the law governing recourse to force (the *jus ad bellum*), which has its own necessity standard, implicitly excludes Article 25; “considerations akin to those underlying article 25 . . . are taken into account in the context of the formulation and interpretation of the primary obligations.”<sup>356</sup> In fact, the ILC Commentary expressly disavows the proposal substantively advanced by counsel for Belgium—namely, that Article 25 should be used to resolve the “question whether measures of forcible humanitarian intervention” not authorized by the Security Council “may be lawful under modern international law.”<sup>357</sup>

Second, while NATO’s conduct may have been legitimate despite its facial violation of the UN Charter, Ergec’s invocation of *necessity* as the legal concept to vindicate this judgment may well be misguided. Many international lawyers regard Article 2(4) of the UN Charter, far from being the lesser value in Ergec’s characterization, as the paradigm of a *jus cogens* norm, one of the “least controversial examples.”<sup>358</sup> It is not at all obvious that in the absence of Security Council authorization, humanitarian intervention by NATO qualifies as the “higher” value vis-à-vis the *jus cogens* norm codified by Article 2(4) of the UN Charter. Even in a context that may well strike some as a laudable example of how Article 25’s progressive definition of necessity might, and perhaps should, operate, international law does not readily lend itself to the choice-of-evils paradigm. This problem is especially acute where, as here, the paradigm would require decision makers not only to weigh incommensurable values but to do so in the absence of consensus on a normative hierarchy among the critical, perhaps equally salient values at stake in this example. To put the point in concrete terms, *both* the categorical prohibition on crimes against humanity and UN Charter Article 2(4) qualify as *jus cogens* norms, but their importance does not lie along a common measure.<sup>359</sup> The former reflects the vital postwar commitment

<sup>353</sup> Ergec ICJ pleadings, *supra* note 285, at 7.

<sup>354</sup> UN Charter Art. 2(4).

<sup>355</sup> Ergec ICJ pleadings, *supra* note 285.

<sup>356</sup> See ILC COMMENTARY, *supra* note 19, at 186, cmt. 21 (footnote omitted).

<sup>357</sup> See *id.* at 185, para. 21 (footnote omitted). *But cf.* Second Report Addendum, *supra* note 42, paras. 286–87.

<sup>358</sup> BROWNIE, *supra* note 187, at 510–11; see also OPPENHEIM’S INTERNATIONAL LAW, *supra* note 289, at 704; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §102, cmt. (k).

<sup>359</sup> BROWNIE, *supra* note 187, at 511.

to preventing serious human rights atrocities, whereas the latter reflects the equally vital post-war commitment to abolishing unilateral resort to force by states except in self-defense or under UN auspices. Without further, and surely controversial, analysis, neither can be said to be obviously more important than the other. Each involves a *jus cogens* norm, and Article 26 of the Articles on State Responsibility prohibits invoking one of the CPWs to “preclude[] the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.”<sup>360</sup>

Several years prior to Belgium’s argument before the ICJ, and also in the context of the *jus ad bellum*, the ICJ arguably invoked a similar choice-of-evils definition of necessity *sua sponte*. The meaning of the ICJ’s infamous *dispositif* in the *Nuclear Weapons* advisory opinion remains debatable. But the technical majority said that although “the threat or use of nuclear weapons would generally be contrary to the” *jus in bello*, their use might still be lawful “in an extreme circumstance of self-defence in which the very survival of a State would be at stake.”<sup>361</sup> Based on this language, it seems likely that this portion of the ICJ’s *dispositif*—which, as Judge Higgins observed, went beyond anything any state argued to the ICJ<sup>362</sup>—originated in the lingering influence of classical necessity, with its focus on the supposedly natural right of states to do anything necessary to their very survival *as states*.

It seems anachronistic for the ICJ to transpose classical necessity from an era in which no *jus ad bellum* existed to an era not only in which it exists, but in which its centerpiece—the general prohibition on the threat or use of force in international affairs—is generally thought to be the paradigm of a *jus cogens* norm. The ILC Commentary describes the *jus ad bellum* and the *jus in bello* alike as areas of the law that already “tak[e] into account [‘considerations akin to those underlying article 25’] in the context of the formulation and interpretation of the primary obligations.”<sup>363</sup> Surely, this statement seriously calls into question the ICJ’s tacit Article 25 reasoning, which is implicit in the quoted portion of the *dispositif*—in particular, that, as between the very survival of a state and respect for the *jus in bello*, the former might take precedence over the latter in circumstances that threaten the state’s “very survival.” The ICJ nonetheless incongruously grafted this conception of necessity onto its earlier conclusion that nuclear weapons inherently violate the *jus in bello*. This analytic process or methodology led to a holding that many international lawyers regard as theoretically confused and regressive in the context of the global effort to avoid a nuclear catastrophe.

More recently, in the *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 [as defined in Article 25] which would preclude the wrongfulness of the construction of the wall.”<sup>364</sup> Again, the ICJ’s analysis is in tension with the Articles on State Responsibility and the ILC Commentary, which cautions: “As embodied in article 25, the plea of necessity is not intended to cover conduct which is in principle regulated by the primary obligations,” a chief example of which, according to the

<sup>360</sup> Articles on State Responsibility, *supra* note 19, Art. 26.

<sup>361</sup> Legality of the Threat or Use of Nuclear Weapons, *supra* note 6, para. 105(2)(E).

<sup>362</sup> See *id.*, Diss. Op. Higgins, J., at 583, para. 29.

<sup>363</sup> ILC COMMENTARY, *supra* note 19, at 185–86, cmt. 21.

<sup>364</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, *supra* note 5, para. 140.

commentary, is “the rules relating to the use of force in international relations.”<sup>365</sup> Ignoring this admonition, the ICJ considered whether an act not justified by military necessity could still be permitted under a state of necessity as defined in the law of state responsibility. In other words, as Gabriella Venturini aptly put the question:

Might necessity justify under the law of peace acts that military necessity would not allow under the law of armed conflict? Although the ICJ’s *Nuclear Weapons Opinion* and *Wall Opinion* seem to point in that direction, this reading would seriously hamper the observance of [the law of armed conflict] based on the principle of equality of belligerents, and it is clearly contrary to the wording and authoritative interpretation of Article 25 of the ILC Draft Articles.<sup>366</sup>

Given that no party had advanced this misguided view, the ICJ, referring to Article 25, 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.”<sup>367</sup> But in the long term, the factual finding expressed in this statement, however questionable its evidentiary basis,<sup>368</sup> may well be less troubling than its legal implication, which is broadly consistent with the ICJ’s suggestion in the *Nuclear Weapons* opinion: that a *general* (secondary) rule of necessity may authorize a state to engage in hostilities even if those hostilities violate the independent necessity standard of the *jus ad bellum*. To put the point simply, the ICJ opinions suggest that in certain contexts, Article 25 effectively gives states “two bites at the apple” of necessity.

### *Necessity and Investment: Modern Investor-State Arbitration*

Many of the cited precedents for a general necessity defense in the law of state responsibility involve claims of economic necessity, although, historically, these claims have never prevailed.<sup>369</sup> The predominance of such defenses in international law is in one sense ironic, for national laws tend to exclude economic necessity defenses categorically.<sup>370</sup> It also highlights again the dangers in transposing concepts from national to international law. But foreign investment law and arbitration is doubtless the most visible area in which necessity has drawn renewed international attention in the past decade, and I would be remiss to disregard it. That said, I want to stress that the point of this section is not so much to contribute to the already

<sup>365</sup> ILC COMMENTARY, *supra* note 19, at 185, cmt. 21. The *jus ad bellum* also incorporates its own, independent necessity standard. See *Oil Platforms (Iran v. U.S.)*, 2003 ICJ REP. 161, para. 73 (Nov. 6).

<sup>366</sup> See Gabriella Venturini, *Necessity in the Law of Armed Conflict and in International Criminal Law*, 2010 NETH. Y.B. INT’L L. 45, 74.

<sup>367</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, *supra* note 5, para. 140.

<sup>368</sup> See *id.* at 240, paras. 1, 3, 5–7 (decl. Buergenthal, J.).

<sup>369</sup> See, e.g., *Société Commerciale de Belgique*, *supra* note 110; *Payment of Various Serbian Loans Issued in France*, *supra* note 143; *Chinn*, *supra* note 143; *Russian Indemnity*, *supra* note 90; *French Co. of Venezuelan R.R.*, *supra* note 143.

<sup>370</sup> See, e.g., *People v. Fontes*, 89 P.3d 484, 486 (Colo. App. 2003); *State v. Moe*, 24 P.2d 638, 640 (Wash. 1933) (“Economic necessity has never been accepted as a defense to a criminal charge.”). See generally WILLIAMS, *supra* note 226, at 729; LAFAVE, *supra* note 231, at 527 & n.35.

vast literature on necessity in investment arbitration.<sup>371</sup> It is to indicate how Article 25—despite the ILC’s prudent efforts to limit its ambit by, *inter alia*, defining the necessity defense in the negative, establishing a high threshold for its invocation, and subjecting it to apparently strict preconditions—has already (in foreign investment law, as in the laws of war) started to shape international law, not necessarily for the better.

In a series of investment disputes, almost all arising out of Argentina’s conduct following its sovereign debt default, necessity has been advanced as a defense to alleged BIT violations. Argentina has variously framed necessity either as a general or customary principle of the law of state responsibility or as a particular interpretation of the governing arbitral law set forth in the relevant BIT, often Article XI of the U.S.-Argentina BIT:<sup>372</sup> “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.” As of this writing, some twenty awards and annulment decisions have considered necessity in this context.<sup>373</sup> Argentina’s success has been mixed, and the evolving jurisprudence, both inconsistent and confused.<sup>374</sup> Jürgen Kurtz observes that most awards reflect one of three methodologies for applying Article 25 in the context of the relevant BITs.<sup>375</sup>

Kurtz refers to the first approach, which is predominant, especially in the earlier awards, as *confluence*.<sup>376</sup> But he means something stronger than that: not just confluence, but conflation of Article 25 with Article XI of the U.S.-Argentina BIT (or cognate articles of other BITs). These awards “expressly conflate the treaty defence with the customary plea of necessity,” and Article 25 of the Articles on State Responsibility accordingly is interpreted as offering guidance that informs the meaning of BIT Article XI.<sup>377</sup> This interpretation of Article XI is puzzling for several reasons,<sup>378</sup> not all of which can be pursued here. But from the perspective of the Articles on State Responsibility, note, in the first place, that the BIT preceded the Articles on State Responsibility by more than a decade. It is unlikely that the BIT’s drafters had in mind a conception of necessity that is substantively identical to that of Article 25. Second, recall that the assumption that Article 25 codifies customary international law, a *sine qua non* of the confluence approach, is mistaken or at best questionable.

<sup>371</sup> For a comprehensive review, see Andrea K. Bjorklund, *Emergency Exceptions: State of Necessity and Force Majeure*, in *THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW* 459 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008); see also, e.g., Rudolf Dolzer, *Emergency Clauses in Investment Treaties: Four Versions*, in *LOOKING TO THE FUTURE*, *supra* note 305, at 705.

<sup>372</sup> U.S.-Arg. BIT, *supra* note 292, Art. XI.

<sup>373</sup> See, e.g., *Continental Casualty Co. v. Argentine Republic*, ICSID Case No. ARB/03/9, Award (Sept. 5, 2008); *BG Group Plc. v. Argentine Republic*, Award (UNCITRAL Dec. 24, 2007), at <http://ita.law.uvic.ca>; *Sempra Energy Int’l*, Award, *supra* note 25; *Enron Corp. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award (May 22, 2007); *LG&E Energy Corp.*, *supra* note 135; *CMS Gas Transmission Co.*, *supra* note 25.

<sup>374</sup> See generally 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 (2010). Compare, e.g., *LG&E Energy Corp.*, *supra* note 135, and *Continental Casualty Co.*, *supra* note 373, with *Sempra Energy Int’l*, Award, *supra* note 25, para. 388, and *CMS Gas Transmission Co.*, *supra* note 25, paras. 355, 388.

<sup>375</sup> See Kurtz, *supra* note 25, at 329. In the interest of brevity, I discuss only the first, and only as relevant here.

<sup>376</sup> *Id.* at 343.

<sup>377</sup> See generally *id.* at 341.

<sup>378</sup> See *id.* at 343–44.

That said, the confluence approach is hardly unique in this regard. Most, if not all, of the tribunals faced with Argentina's necessity plea have followed the ICJ in assuming that Article 25 codifies custom.<sup>379</sup> The confluence approach, however, *also* perforce rejects the proposition that either the BIT, in general, or Article XI, in particular, qualifies as a *lex specialis* within the meaning of Article 55 of the Articles on State Responsibility—for otherwise Article 25 would be displaced and therefore inapplicable. Yet the parties to BITs enter into them precisely because they *wish to* modify, displace, or augment the customary international law that would otherwise govern investment in each state vis-à-vis each other's nationals. The ILC Commentary provides that for “the *lex specialis* principle to apply . . . [,] there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other,”<sup>380</sup> but the inconsistency need not, of course, be explicit.

Furthermore, the host state's treaty obligation to compensate foreign investors for violations of the BIT, in combination with the deliberate incentives that this obligation creates in connection with standards of treatment vouchsafed to those investors, is an indispensable means by which the paramount objective of the BIT—to promote greater economic cooperation between [the states parties]<sup>381</sup>—is to be realized. Article XI, accordingly, says nothing about *vitiating* the host state's obligation to compensate under exigent circumstances. Nor does it expressly exempt the parties from responsibility for measures taken under Article XI; and given the nature of the BIT, one would have expected clear language to that effect had the drafters so intended. Article XI, on its face, simply affirms that neither state party relinquishes its sovereign right and, indeed, obligation to preserve peace and minimum order. A state may nonetheless be exempt from the obligation to pay BIT-qualified investors compensation for unavoidable natural disasters under Article 23 (force majeure), for investors assume such ordinary business risks unless a contract or other investment instrument provides otherwise. But the same cannot be said of measures taken by the state, which, by definition, involve a deliberate choice.<sup>382</sup>

Finally, the scope of Article XI of the U.S.-Argentina BIT is not coterminous with that of Article 25. The former's reference to “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”<sup>383</sup> could be more or less restrictive than Article 25's comparatively vague reference to an “essential interest.”<sup>384</sup> Yet the methodology of confluence may nonetheless render Article XI superfluous, “violat[ing] the principle of effectiveness in treaty interpretation.”<sup>385</sup>

In short, the confluence approach illustrates one risk of codifying necessity in Article 25 as a general secondary defense to state responsibility: it may be (as it has been) incorporated by

<sup>379</sup> See, e.g., *Sempra Energy Int'l*, Award, *supra* note 25, para. 344; *CMS Gas Transmission Co.*, *supra* note 25, para. 315.

<sup>380</sup> ILC COMMENTARY, *supra* note 19, at 307, cmt. 4.

<sup>381</sup> U.S.-Arg. BIT, *supra* note 292, pmb.

<sup>382</sup> See Heathcote, *supra* note 27, at 495.

<sup>383</sup> U.S.-Arg. BIT, *supra* note 292, Art. XI.

<sup>384</sup> See Alvarez & Khamsi, *supra* note 244, at 392.

<sup>385</sup> William W. Burke-White & Andreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-precluded Measures Provisions in Bilateral Investment Treaties*, 48 VA. J. INT'L L. 307, 323 (2008). Notably, three of the earliest awards to adopt a variation on the “confluence” approach—*CMS*, *Enron*, and *Sempra*—have been annulled, in part based on a critique of this methodology.

tribunals into complex legal arrangements to which it (probably) should not apply. Contrary to Article 55, the confluence approach superimposes Article 25 upon a *lex specialis*. In fact, Article 25 has, at times, even been treated as hierarchically *superior* to the ordinary meaning of the governing BIT's text. This treatment of Article 25 may be understandable, which is not to say justifiable, because an apparently authoritative text can greatly facilitate a tribunal's analysis. But it can lead, in effect, to the application of Article 25 as a primary rather than a secondary rule—as before, assuming for the sake of the argument that Article 25 applies in this context despite Article 55's clear exclusion of the Articles on State Responsibility in circumstances in which a *lex specialis* governs. To illustrate the problems more concretely, consider one example, *LG&E v. Argentina*.<sup>386</sup>

*LG&E*, like most of the arbitrations arising out of Argentina's financial crisis, took place under the auspices of the ICSID Convention,<sup>387</sup> Article 42(1) of which provides:

The 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.<sup>388</sup>

Applying this article to the dispute between the claimant, a U.S. national, and the respondent, Argentina, the BIT between Argentina and the United States sets forth the “rules of law . . . agreed by the parties.”<sup>389</sup> The BIT, in turn, includes Article XI, which confirms that nothing in the BIT should be understood to prevent the parties from taking the measures that they regard as necessary to maintain public order, international peace or security, and their “own essential security interests.”<sup>390</sup>

*LG&E* illustrates the confusion caused by applying Article 25 to a situation controlled by a superseding *lex specialis*—in this case, the U.S.-Argentina BIT. 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.”<sup>391</sup> While debatable, this finding of fact is surely reasonable, and Article XI makes clear that the BIT does not preclude Argentina from taking the measures it deems necessary to maintain public order domestically or to protect its essential security interests. The problem in *LG&E* rather lies in the legal conclusion that the tribunal draws from this finding of fact. In particular, it concluded, with the dubious interpretive aid of Article 25,<sup>392</sup> that during the cited time period, “Argentina is *excused* under Article XI from *liability* for any breaches of the [BIT]” and, furthermore, that Article XI “*exempts* Argentina of *responsibility* for measures enacted during the state of necessity.”<sup>393</sup>

As a matter of law, what the tribunal has done here is breathtaking—both for its conclusion and for the methodology by which the tribunal arrived at it. The first and elementary rule of

<sup>386</sup> *LG&E Energy Corp.*, *supra* note 135.

<sup>387</sup> ICSID Convention, *supra* note 3.

<sup>388</sup> *Id.*, Art. 42(1).

<sup>389</sup> *Id.*

<sup>390</sup> U.S.-Arg. BIT, *supra* note 292, Art. XI.

<sup>391</sup> *LG&E Energy Corp.*, *supra* note 135, para. 226.

<sup>392</sup> *See id.*, paras. 249–61.

<sup>393</sup> *Id.*, paras. 229, 257 (emphasis added).

treaty interpretation is that a “treaty shall 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.”<sup>394</sup> Nothing in Article XI’s text expresses or implies that it excuses the host state from liability, or exempts it from responsibility, for measures taken under this provision. It is only by a leap of interpretive logic, enabled by the tribunal’s misplaced reliance on Article 25 of the Articles on State Responsibility to *inform* its interpretation of Article XI of the BIT, that the tribunal arrived at the conclusion that Article XI vitiates any treaty-based right of the investor to compensation for losses sustained during the period specified. Rather than look to the context and the object and purpose of the BIT, as embodied in the preamble (for example, to establish standards for “the treatment to be accorded . . . investment” in order to “stimulate the flow of private capital” and “to maintain a stable framework for” the “reciprocal protection of investment”),<sup>395</sup> the *LG&E* panel reached beyond the treaty. In particular, it interpreted Article XI of the BIT as incorporating Article 25—a *secondary* rule, which, according to the ILC Commentary, applies only in the event of a breach of a primary rule and which, in any event, constitutes progressive development that did not even exist at the time of the BIT’s ratification.

In other words, the tribunal retrospectively imported into its analysis an innovative rule of necessity from the law of state responsibility—a rule that neither state party could have had in mind during the negotiations culminating in the BIT. It did so even though Article 25, according to the Articles on State Responsibility, is both “without prejudice to . . . [t]he question of compensation for any material loss caused by the [wrongful] act in question”<sup>396</sup> and 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.”<sup>397</sup> As between the states parties and their nationals, the BIT supplies those special rules. Consequently, while Argentina doubtless had the right to take measures to preserve its security and order (which Article XI of the BIT makes clear the treaty does not purport to preclude), that should not necessarily have affected its responsibility or consequent liability to pay reparations for violations of standards vouchsafed by the BIT once the conditions of economic crisis had passed, as they have.<sup>398</sup>

Since *LG&E* and a somewhat similar analysis of Article XI in *Continental Casualty Co. v. Argentina*,<sup>399</sup> several further tribunals and ICSID annulment committees have analyzed the relationship between Article 25 and Article XI of the BIT. Some have reached comparable, and others contrary, conclusions.<sup>400</sup> To be clear, I do not mean to impugn any of these complex

<sup>394</sup> Vienna Convention on the Law of Treaties, Art. 31, *opened for signature* May 23, 1969, 1155 UNTS 331.

<sup>395</sup> U.S.-Arg. BIT, *supra* note 292, pmbl.

<sup>396</sup> Articles on State Responsibility, *supra* note 19, Art. 27(b).

<sup>397</sup> *Id.*, Art. 55.

<sup>398</sup> Cf. Ioana Tudor, *The Fair and Equitable Treatment Standard* in the International Law of Foreign Investment 226–27 (2008).

<sup>399</sup> *Continental Casualty Co.*, *supra* note 373.

<sup>400</sup> See, e.g., *Enron Creditors Recovery Corp. v. Argentine Republic*, ICSID Case No. ARB/01/3, Annulment (July 30, 2010). Because Article 52 of the ICSID Convention sharply limits the grounds for annulment, substantive analysis of the necessity plea has often been smuggled in under the strained rubric of an alleged excess of jurisdiction or failure of the tribunal to state reasons for its decision. See, e.g., *Sempra Energy Int’l v. Argentina*, ICSID Case No. ARB/02/16, Annulment (June 29, 2010) (characterizing a difference in interpretation of Article XI of the U.S.-Argentina BIT as manifest excess of powers).

decisions, on which reasonable minds can surely differ. The literature on necessity in investment arbitration is rich and complex, and although my sympathies on some of the legal issues will doubtless be apparent from this discussion, it has not been my objective here to fully defend a position or to blithely dismiss contrary perspectives. Instead, I mean to point out and emphasize a concern about Article 25's influence to date, which the jurisprudential dispute over Article XI of the U.S.-Argentina BIT and Article 25 in the context of the Argentine fiscal crisis aptly illustrates: beneath the veneer of technical legal craft in these awards lies a normative dispute about the relative priority of diverse social interests and values. It is these differences, and not the surface of positive legal analysis, that explains the divergent views reached by most of the tribunals and annulment committees that have considered the issue of necessity. The awards illustrate, in other words, a chief problem inherent in Article 25's establishment of a necessity standard redolent of the choice-of-evils paradigm. That paradigm has, to a certain extent, been imported by Article 25 into a legal order that lacks both the institutions needed to weigh (often incommensurable) interests and values against one another and the comparatively high degree of normative consensus on the relative priority of diverse values, policies, and interests that it also requires.

### *Conclusion*

The ILC went out of its way to stress the exceptional nature of necessity. But general international law lacks analogues to the national legal institutions that can authoritatively answer the difficult questions that necessity raises in any legal system. Were it plausible to expect states to construe the plea exactly, this lack of analogues might not be cause for concern. Ago once said that for necessity to be availing, "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."<sup>401</sup> But both conceptually and in practice, that view would render necessity, for all intents and purposes, nugatory. Neither states nor tribunals (or other decision makers) will be likely to construe Article 25 so stringently. The real cause for concern is to the contrary: in practice and over time, the *de facto* threshold for necessity will atrophy or "soften"<sup>402</sup> The evidence to date suggests that the mere existence of the ILC codification of necessity in the Articles on State Responsibility encourages states and tribunals to raise the plea, often in circumstances in which compliance with an obligation may be painful or inconvenient, to be sure, but perhaps not *necessary* in the genuinely exigent sense intended by the ILC. What should be the rare exception increasingly becomes less so, and the high threshold established in the Articles on State Responsibility tends to atrophy over time through an evolutionary process of assertion, adjudication, and interpretation.<sup>403</sup>

## V. CONCLUSION: CONTEXTUALIZING AND HUMANIZING NECESSITY

Because of the exponential increase in treaties and other codified law in the postwar era, the content, validity, and interpretation of Article 25 as a putative customary defense of necessity may affect the stability and operation of regimes beyond those contemplated or in ways not

<sup>401</sup> Eighth Report Addendum, *supra* note 27, para. 14 (emphasis added).

<sup>402</sup> Orrego Vicuña, *supra* note 305, at 750–51.

<sup>403</sup> See, e.g., *id.* at 745–46.

envisioned. Were we writing on a blank slate, it might be prudent not to codify necessity as a general defense to state responsibility in the nature of a secondary rule. It might be more prudent to leave it to states to shape necessity contextually as a primary rule to meet their particular mutual interests in different areas of the law. That is, in fact, what has happened in many fields of contemporary international law.

The codification of a rule tends to legitimize it. Necessity is, in this regard, like torture, which, not coincidentally, it has been invoked to defend. To pursue the analogy a bit further, one might acknowledge that in certain crises, officials will torture, whatever the law says. But it remains, of course, a distinct question whether recognition of this fact commends the codification or overt regulation of torture.<sup>404</sup>

Similarly, in certain crises, states will almost surely invoke necessity to defend their failure to adhere to an international legal obligation, whatever international law says. Article 25, like any general definition of necessity, is, and can be, at most a variable in this regard, the strength of which will vary contextually. But once positive law codifies an exception for the exceptional, it tends to become less so over time. By establishing criteria for invoking necessity, Article 25 might facilitate its invocation rather than limit it—for the invoking state can assert its technical observance of the criteria in putative satisfaction of its legal obligations. Tribunals, as some ICJ judgments and arbitral awards illustrate, rapidly tend to adopt codifications verbatim rather than consider them as one source of evidence.<sup>405</sup>

That said, we do not write on a blank slate. As Ago said, necessity may well be “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.”<sup>406</sup> If so, the relevant question now is how it should be reconceived and applied in contemporary international law. I want to conclude with several reflections on this question.

Rethinking the plea of necessity in the twenty-first century requires attention to, among other factors, its contemporary normative rationale, the contextually available international institutions and their efficacy, the degree of normative consensus that might more readily enable a necessity plea in different areas of international law, and the diversity of factual circumstances in which necessity might foreseeably be invoked. A comprehensive consideration of these issues would require a book.<sup>407</sup> Still, it may be feasible at least to set out some core changes to the plea that postwar developments in international law commend.

First, normatively, insofar as classical necessity remains custom, it must be tempered by the recognition that contemporary international law—at least in theory and certainly as progressive development—no longer privileges the state’s preservation for the *state’s* sake. Rather, “Considered 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 principle of normative analysis.”<sup>408</sup>

<sup>404</sup> ALAN M. DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE 161–62 (2003).

<sup>405</sup> See Caron, *supra* note 30, at 858; see also *id.* at 868–70.

<sup>406</sup> Eighth Report Addendum, *supra* note 27, para. 80.

<sup>407</sup> The most recent was published nearly a century ago. BURLEIGH CUSHING RODICK, THE DOCTRINE OF NECESSITY IN INTERNATIONAL LAW (1928).

<sup>408</sup> Jeremy Waldron, *The Rule of International Law*, 30 HARV. J.L. & PUB. POL’Y 15, 21 (2006); see also LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 10 (1995); David Luban, *The Romance of the Nation-State*, in INTERNATIONAL ETHICS 238 (Charles R. Beitz, Marshall Cohen, Thomas Scanlon & A. John Simmons eds., 1985).

International law continues to privilege state interests, but today it is for the sake of the state's constituents. It is for the extent to which states, ideally, promote their people's realization of fundamental values: self-determination, human dignity, the general welfare, personal autonomy, and so forth. In the postwar era, the rationale for necessity in the law of nations—the natural right of states to preserve themselves—has not been mooted. But it has been modified.

North Korea, qua *state*, as represented by Kim Jong-un's autocratic regime, merits no moral weight in modern international law. North Korea's *people* do. States continue to merit moral weight only 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.<sup>409</sup>

In the nineteenth century, Portugal could lawfully take the property of British nationals residing in its territory, despite a treaty with Great Britain prohibiting this appropriation, because of the “necessity of providing for the subsistence of certain contingents of troops engaged in quelling internal disturbances.”<sup>410</sup> Consistent with the law of the era, Herbert Jenner could reasonably and accurately advise the Crown that necessity constituted a defense under the circumstances because “the strict observance of the Treaty would be altogether incompatible with the paramount duty which a Nation owes to itself”<sup>411</sup>—that is, self-preservation, which required Portugal to “us[e] those means, which may be absolutely and indispensably necessary to the safety, and even to the very existence of the State.”<sup>412</sup>

Today, 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 Koreas, international law should condemn, not countenance, any such necessity plea. Similarly, in 1989, had East Germany invoked necessity, citing the imminent peril to its very existence, surely its government, too, should not have been entitled to assert, on the basis of a necessity plea, any right to prevent reunification in order to preserve East Germany's very existence—even if it did so without violating the human rights of its citizens or *jus cogens* norms.<sup>413</sup> Of course, these examples are hyperbolic. But the point of emphasis is more modest: the focus of any necessity plea in the contemporary law of state responsibility should be on human beings as the fundamental unit of normative analysis, not on states as such or for their own sake.

Second, even if contemporary international law distinguishes between the role and definition of necessity in general international law, on the one hand, and its role in fields governed by special rules of international law, on the other, this distinction has not always been respected. Especially in convoluted factual contexts, such as Argentina's financial crisis, it will frequently

<sup>409</sup> Waldron, *supra* note 408, at 24 (footnote omitted).

<sup>410</sup> ILC COMMENTARY, *supra* note 19, at 179, cmt. 4.

<sup>411</sup> 2 MCNAIR, *supra* note 60, at 232.

<sup>412</sup> *Id.*

<sup>413</sup> Arguably, the right to self-determination is a *jus cogens* norm under Article 26 of the Articles on State Responsibility.

be tempting to look beyond a *lex specialis* for textual guidance. Article 25 has a prima facie appeal in this regard because of its formulaic character, generality, and abstraction. But because one state's *safeguarded* essential interest will often be another's *seriously impaired* essential interest, a general principle enabling states to shift the loss under exigent circumstances (which would almost invariably be subjectively determined by the invoking state, at least in the first instance) may well be both an invitation to abuse and imprudent as international policy. One alternative as a baseline for necessity—and one more consistent with state practice—would be to allow suspension of an obligation but to require, as a default rule, *ex post* compensation at the traditional level of *restitutio in integrum*,<sup>414</sup> perhaps subject to mitigation, but necessarily based on a standard that would not be subjective and self-judging.<sup>415</sup>

The ILC chose to define necessity in the negative—that is, in terms of the circumstances in which necessity may *not* be invoked—as one of several drafting techniques to emphasize the truly exceptional nature of the plea. Yet Article 25's abstract, open-textured language, such as “essential interest,” “seriously impair,” and “contributed to the situation,” still leaves much to interpretation. Without further exposition, these phrases elide many of the most difficult questions that necessity raises in any legal system,<sup>416</sup> and a fortiori in the international one. It may, for example, be accurate to say, as to the first of these phrases, that the “extent to which a given interest is ‘essential’ depends on all the circumstances, and cannot be prejudged.”<sup>417</sup> But under Article 25, ultimately a decision maker will need to make such a judgment and consider the invoking state's essential interest against another state's (seriously impaired?) essential interest—a de facto choice-of-evils test, which, as I have tried to explain in this essay, is especially problematic in international law. And notwithstanding the ILC's painstaking effort to stress the exceptional nature of necessity, recent state practice raises the prospect that (1) necessity will be less exceptional, and raised more often, than its text suggests, and (2) its textual limits will not be strictly construed, rendering Article 25 susceptible to protean interpretation and application.

By contrast, necessity can be a viable and readily administrable defense within a self-contained regime of special rules and institutions, a *lex specialis*. Typically, this expression refers to a treaty regime in which the parties, *ex ante*, codify and bind themselves to particular rules that establish effective institutions and the requisite, but otherwise elusive, normative consensus. A *lex specialis* may also include an explicit definition of necessity that is designed to be sensitive to the relevant policy objectives in context. Under these circumstances, necessity can be subjected to meaningful interpretation and regulation, and it can be an indispensable part of particular legal regimes. The clearest example in contemporary international law is trade law under the WTO/GATT regime. But that example need not be unique and may well guide the design of future regimes.

In general international law, however, we return to the problem that necessity involves factual circumstances that call for normative judgments in areas of law vigorously contested by

<sup>414</sup> Factory at Chorzów (Ger. v. Pol.), 1928 PCIJ (ser. A) No. 17, Merits, at 47 (Sept. 13).

<sup>415</sup> The equidistance–special circumstances rule may supply a (very rough) analogy. *Cf.* Continental Shelf (Libyan Arab Jamahiriya/Malta), 1985 ICJ REP. 13, para. 65 (June 3).

<sup>416</sup> *Cf.* Bodansky & Crook, *supra* note 36, at 788–89.

<sup>417</sup> ILC COMMENTARY, *supra* note 19, at 183, cmt. 15.

states; and in almost every case, the real question is who—which state, states, or other international actors—should bear the cost occasioned by a violation defended as necessary. Consider three general situations in which necessity has been, or might be, pleaded.

The first is familiar: a state, citing necessity, expropriates the property of foreigners. 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 toward which the relevant 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,<sup>418</sup> then Article 25's definition of necessity adds little to the analysis: customary international law, even in the absence of a BIT, requires payment of prompt, adequate, and effective compensation.

Necessity modifies the analysis only if we assume, as the *LG&E* panel did, that necessity *shifts the loss*. Mindful that one state's "safeguarded" essential interest will often be another's "seriously impaired" essential interest, the real question is therefore whether necessity *should* require foreign investors to bear the loss. Article 25 does not (and should not be revised to) answer this question acontextually. Rather than allow necessity to obscure what is, in reality, a conflict of state interests and values in a legal system without a clear normative hierarchy, we might candidly recognize the competing social interests and values at stake, and then seek a mutually acceptable resolution through more transparent discourse and argument.<sup>419</sup>

Now consider a different, second scenario. Recently, hundreds of thousands of Somali nationals sought shelter and food in Kenya, which, while offering assistance, indicated that it could not absorb refugees indefinitely. A similar situation arose in 1995, when "50,000 Rwandan refugees and local Burundis fled to the border of Tanzania seeking safety."<sup>420</sup> Yet Tanzania, which, just one year earlier, had absorbed some five hundred thousand refugees generated by the 1994 Rwandan genocide, closed its border and refused these new refugees a safe haven—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."<sup>421</sup> Should Tanzania be required by international law to open its borders under the foregoing circumstances? Or should the plea of necessity have obviated what would otherwise have been Tanzania's international obligation to the refugees?

As a way to minimize human rights violations, Roman Boed suggests, as a rule, 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.<sup>422</sup> At first blush, Boed's proposal sounds morally appealing. But it is quixotic 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 therefore close its borders—at least absent financial and other assistance from the international community, in the interest of which Tanzania, according to the argument, should act. Once again, the point of emphasis is that the real or ultimate question raised by necessity turns out to be in large part about who, or which state

<sup>418</sup> Articles on State Responsibility, *supra* note 19, Art. 27(b).

<sup>419</sup> Cf. *North Sea Continental Shelf (FRG/Den.; FRG/Neth.)*, 1969 ICJ REP. 3, 67 (sep. op. Jessup, J.).

<sup>420</sup> Boed, *supra* note 11, at 2.

<sup>421</sup> *Id.* at 2. Comparable situations arose in *Jordan and Macedonia*. *Id.* at 2–3 & n.4.

<sup>422</sup> *Id.* at 3.

or states, should bear the cost. Even the most altruistic and wealthy state will at some point privilege its own interests over the seriously impaired interests of another state or the international community as a whole.<sup>423</sup>

As a final example, imagine 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 so diverting the floodwaters, it exacerbates flooding in Azania, the lower riparian state, and that, as a consequence, Azania sustains infrastructure damages in the amount of \$4 billion. Here again, it is difficult to imagine that Ruritania would refrain from diverting the waters even if, to paraphrase Article 25, the serious impairment of Azania's essential interests outweighs the grave and imminent peril to Ruritania's essential interests by a factor of one thousand. This example and the somewhat crude utilitarian analysis may well be simplistic. But it suffices to clarify a basic point: that the issue is which state, or to what extent each state, should bear the loss. The rubric of necessity, along with its formulation in Article 25, tends to obscure this simple fact.

The upshot of these examples is not (necessarily) that necessity, as a general defense, has no place in contemporary international law; it is that we need to be cautious about its codification and consequences. Article 25, as written and construed in the ILC Commentary, precludes the responsibility of the invoking state. It operates as a defense based on a structure that, in effect, requires an analysis redolent of the choice-of-evils paradigm in national law. This paradigm proves both incongruous and problematic in international law. It is also (apparently) inconsistent with the Articles on State Responsibility's general perspective on CPWs. As suggested above, one alternative would be to treat necessity, insofar as it states a default conduct rule, as an excuse requiring compensation at the traditional level, *restitutio in integrum*, subject, however, to a decision rule allowing for equitable adjustment *ex post*. Treating it this way may well encourage or facilitate more subtle, contextually sensitive judgments about the scope or validity of the defense in diverse circumstances. I do not mean to propose this alternative blithely as either sufficient in itself or obviously correct. I only mean to suggest that further reflection on this issue, among others, is needed.

Because contemporary international law is not a unified and integrated system (it is commonplace today to describe it as "fragmented"),<sup>424</sup> a strong qualification is in order before concluding: it would clearly be an error to suppose that *necessity*, as a word that appears in many and diverse fields of international law, has the same meaning in each.<sup>425</sup> The focus of this essay has been on necessity in the law of state responsibility, and it is in that context that I have sought to appraise the status, practical operation, value, and limits of Article 25. The analysis may or may not have implications for other contexts.

Necessity in international law pertains, first and foremost, to states, the traditional and still the principal subjects of international law. I doubt that this situation will change in the near

<sup>423</sup> See Articles on State Responsibility, *supra* note 19, Art. 25.

<sup>424</sup> E.g., Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595, 597 (2007).

<sup>425</sup> See *Towne v. Eisner*, 245 U.S. 418, 425 (1918).

future, and it is far from clear that we would welcome any such development.<sup>426</sup> Nevertheless, there can be no question that the advent of human rights law and the exponential growth of new institutions, regimes, and processes have changed the particular conception of the state in the classical law of nations—and with it the propriety of a necessity defense that traditionally focused on the state qua state rather than on human beings. This and related changes compel sustained reflection before general international law adopts a defense authorizing exceptions to international obligations in what is, already, a characteristically unstable legal system.<sup>427</sup>

<sup>426</sup> The state may be the greatest threat to human rights, but it is also the most effective and reliable guarantor of those rights. MICHAEL IGNATIEFF, *WHOSE UNIVERSAL VALUES? THE CRISIS IN HUMAN RIGHTS* 19–20 (1999).

<sup>427</sup> Cf. *CMS Gas Transmission Co.*, *supra* note 25, para. 317 (“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.”).