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The Use of Force and (the State of) Necessity

Andreas Laursen

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The Use of Force and (the State of) Necessity

Andreas Laursen*

ABSTRACT

At the beginning of the twenty-first century, debates about international law and the use of force have gained new momentum. This is due to the armed conflicts in Kosovo, Afghanistan, and Iraq as well as the publication of two recent security strategies by the U.S. government. These strategies consider the possibility of preemptive use of force and have received considerable criticism from international law scholars. Professor Laursen asks whether the necessity excuse in international law allows for preemptive strikes of the sort envisioned by the U.S. security strategies. Following an examination of the status of the necessity excuse in international law, which finds that necessity is a legitimate part of current international law and under certain circumstances provides an excuse for a state's breach of its obligations, Professor Laursen analyzes whether the necessity excuse may be invoked in the context of the use of force. He concludes that the necessity excuse is not normally available in the case of use of force against "traditional" terrorism. With regard to "new" terrorism, the excuse may be appropriate, but the central issue of "imminence" will remain problematic when considering preemptive strikes.

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A strict observance of the written law is doubtless one of the high duties of a good citizen, but not the highest. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.

Thomas Jefferson¹

Not kennt kein Gebot! (necessity knows no law)

von Bethmann-Hollweg²

1. Robert F. Turner, *State Sovereignty, International Law and the Use of Force in Countering Low-Intensity Aggression in the Modern World*, in DECEPTION AND DETERRENCE IN "WARS OF NATIONAL LIBERATION," STATE-SPONSORED TERRORISM AND OTHER FORMS OF SECRET WARFARE 196 (John Norton Moore ed., 1997).

2. *Addendum to Eighth Report on State Responsibility*, [1980] 2 Y.B. INT'L L. COMM'N 13, 38 n.110, Doc. A/CN.4/318/ADD.5-7; see also BURLEIGH CUSHING RODICK, THE DOCTRINE OF NECESSITY IN INTERNATIONAL LAW 112 (1928) (German Chancellor in speech to German Reichstag August 4, 1914 justifying occupation of Belgium and Luxembourg in order to forestall alleged attack by France against Germany through Belgium and Luxembourg). Also see the editorial comment in the *American Journal of International Law*: "It therefore appears that the Chancellor knew and admitted that the occupation of Belgium and Luxemburg was contrary to international law, but he justified the act by the statement that the German Empire was 'in a state of necessity' and that 'necessity knows no law.'" *Editorial Comment*, 8 AM. J. INT'L L. 877, 880 (1914); see also Jules Basdevant, *Not kennt Kein Gebot: Die Theorie des Notrechtes und die Ereignisse unserer Zeit 1915, Règles Générales du Droit de la Paix*, 58 RC 1936-IV 473, 551-52 (describing the episode as one of 'strategic convenience' and not necessity).

To say that a power is necessary, that it logically results from a certain situation, is to admit the non-existence of any legal justification. Necessity knows no law, it is said; and indeed to invoke necessity is to step outside the law.

Judge Gros³

[International law] rejects the idea that necessity knows no law.

Oscar Schachter⁴

I. INTRODUCTION

Writing in 1986, the distinguished British professor Brownlie lamented that “the use of force is a subject younger lawyers tend to avoid these days.”⁵ Brownlie found that in the 1980s, human rights and the protection of the environment attracted greater attention in spite of the fact that, according to Brownlie, the main threats to human rights and the environment came *inter alia* from the use of force by states. At the beginning of the twenty-first century, debates about international law and the use of force have gained new momentum. Spurred on by the end of the Cold War as well as the armed conflicts in Kosovo (1999), Afghanistan (2001) and Iraq (2003), in addition to the publication of the two recent security strategies by the U.S. government,⁶ international legal scholarship has seen nothing if not an overwhelming resurgence of interest in the regulation of the use of force.

Among the more controversial concepts to involve the *agora* of international legal minds is the theory of pre-emptive use of force. Although some argue that the seeds of the strategy of pre-emptive

3. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, 1971 I.C.J. 16, 339 (June 21) (Gros, J., dissenting).

4. OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 173 (1991).

5. Ian Brownlie, *The United Nations Charter and the Use of Force, 1945-1985* in *THE CURRENT LEGAL REGULATION OF THE USE OF FORCE* 491 (A. Cassese ed., 1986).

6. *National Security Strategy* (Sept. 2002), available at <http://www.whitehouse.gov/nsc/nss.html> (last visited Feb. 23, 2004); *National Security Strategy to Combat Weapons of Mass Destruction*, (Dec. 2002) available at <http://www.whitehouse.gov/news/releases/2002/12/WMDStrategy.pdf> (last visited Feb. 23, 2004). The two Strategies may by themselves be seen “in the tradition of an older debate which received new impetus after the end of the East-West conflict,” i.e. the Cold War. Michael Bothe, *Terrorism and the Legality of Pre-emptive Force*, 14 *EUR. J. INT'L L.* 227, 229-40 (2003).

force may be found in the 1992 "Defense Planning Guidance,"⁷ President Bush first announced the idea when he told graduates at West Point Military Academy, "[O]ur security will require all Americans to be forward-looking and resolute, to be ready for preemptive action when necessary to defend our liberty and to defend our lives."⁸ The President's thoughts have now been codified in the National Security Strategy (NSS):

We will disrupt and destroy terrorist organizations by . . . identifying and destroying the threat before it reaches our borders . . . we will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting preemptively against such terrorists, to prevent them from doing harm against our people and our country.⁹

As is clear from the text just quoted, the drafters of the NSS document perceive "acting preemptively" as being within "our right of self-defense." The legal side of the argument is subsequently elaborated upon.

For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat—most often a visible mobilization of armies, navies, and air forces preparing to attack.¹⁰

7. According to the program *Frontline* from Public Broadcasting Service, "[p]olicy analysts note that there are many elements in the 2002 NSS [National Security Strategy] document which bear a strong resemblance to recommendations presented in Paul Wolfowitz's controversial Defense Planning Guidance draft written in 1992 under the first Bush administration," including the ideas that containment was a relic of the Cold War and the need to use military force to preempt provocations from rogue states with weapons of mass destruction. *Frontline: The Gulf War's Ragged Ending; U.S. Decides on Containment Policy for Iraq*, (PBS television broadcast, Feb. 28, 1991), available at <http://www.pbs.org/wgbh/pages/frontline/shows/iraq/etc/cron.html> (last visited Feb. 9, 2004). On the controversy caused by Wolfowitz's initial draft, see Patrick E. Tyler, *Pentagon Drops Goal of Blocking New Superpowers*, N.Y. TIMES, May 23, 1992, at A14.

8. Press Release, President Bush Delivers Graduation Speech at West Point (June 1, 2002), available at <http://www.whitehouse.gov/news/releases/2002/06/20020601-3.html> (last visited June 13, 2003).

9. *National Security Strategy*, 6 (Sept. 2002), available at <http://www.whitehouse.gov/nss2.html> (last visited Feb. 23, 2004). The National Security Strategy to Combat Weapons of Mass Destruction similarly states that U.S. military forces must have the capability to defend against WMD [Weapons of Mass Destruction] armed adversaries, including "in appropriate cases through preemptive measures." *National Security Strategy to Combat Weapons of Mass Destruction*, *supra* note 6, at 3.

10. *National Security Strategy*, 15 (Sept. 2002), available at <http://www.whitehouse.gov/nss5.html> (last visited Feb. 23, 2004).

Here the NSS document finds that anticipatory self-defense is permissible in international law, which is generally a fair statement, even if not all international law scholars agree. There is, however, a problem of “imminence,” which also may be seen as the distinguishing point between anticipatory self-defense and a preemptive strike, although the NSS document conflates the two concepts. Thus, the document continues, “We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries.”¹¹ The document goes on to describe the new threats, concluding, “[I]n an age where the enemies of civilization openly and actively seek the world’s most destructive technologies, the United States cannot remain idle while dangers gather.”¹² Presidential spokesman Ari Fleischer put it as follows,

Preemptive doctrine, of course, as laid out by the President at West Point and as expounded upon by the Vice President yesterday, says that time is not on America’s side. We don’t have time to wait for them to develop these weapons and attack us without any warning. And therefore, the doctrine of preemption, as the President laid it out, is a way to continue America’s efforts to promote peace around the world by denying them the ability to inflict damage on us.¹³

It may be posited that this is the crux of the matter: The U.S. efforts to broaden the concept of “imminence” are the central legal issue in the new strategy of preemptive use of force. This is what causes some legal scholars to object to the NSS strategy, “*De lege lata*, however, the expansion of the right of anticipatory self-defense proposed in the National Security Strategy is not acceptable.”¹⁴ It is probably fair to assert that the majority of scholars agree with this statement by Bothe.¹⁵ Among the voices of concern is that of the Secretary General of the United Nations, who on September 23, 2003 declared that the logic of using force preemptively “represents a fundamental challenge to the principles on which, however imperfectly, world peace and stability have rested for the last fifty-eight years.”¹⁶

11. *Id.*

12. *Id.*

13. Press Release, Press Gaggle with Ari Fleischer, Crawford Elementary School, Crawford, Texas, (Aug. 27, 2002), available at <http://www.whitehouse.gov/news/releases/2002/08/20020827.html> (last visited Sept. 5, 2002).

14. Bothe, *supra* note 6, at 232.

15. See, for example, Kirgis’ brief comment that if the new U.S. policy reserves the right to act in self-defense even when the terrorist threat is not imminent, the Caroline test—and thus the test under Article 51—would not be met. Frederic L. Kirgis, *Pre-emptive Action to Forestall Terrorism*, ASIL INSIGHTS 1-2 (June 2002), available at <http://www.asil.org/insights/insigh88.htm> (last visited Aug. 19, 2003).

16. U.N. Secretary-General Kofi Annan, Address to the General Assembly, New York (Sept. 23, 2003), available at <http://www.un.org/webcast/ga/58/statements/g2eng030923.htm> (last visited Feb. 25, 2004).

This conclusion raises a number of questions. At a theoretical level, one may consider how the U.S. claims affect the development of international law. Is it advisable to allow for the proposed broadening of the concept of "imminence?" Or is this a dangerous development for international law and society? At a more practical level, it might be asked how the United States would justify a preemptive use of force in a situation where the use of force was found necessary. Put another way: Is the preemptive use of force only legally conceivable under the NSS documents self-defense rubric, which is generally considered to be at odds with international law? Or does international law already provide a more suitable excuse for the use of force in exceptional circumstances? It is suggested that a defense for the use of force might be found in the necessity excuse.

Part II of the present Article sets out the very substantial work on the necessity excuse, which has been carried out the International Law Commission (ILC). Part III examines the opinions of international judicial bodies, of states, and of international legal scholars. Part IV examines the *Gabcikovo-Nagymaros Project* case before the International Court of Justice (ICJ) and analyzes the cumulative conditions of the necessity excuse. Part V addresses the controversial issue of the possibility of excusing the use of force by reference to necessity. This leads to a more specific examination of use of force against terrorism and the necessity excuse. Based on this study, it is concluded that the necessity excuse is not normally available in the case of use of force against "traditional" terrorism. With regard to the "new" terrorism, including terrorism employing weapons of mass destruction, the necessity excuse may be appropriate but the issue of imminence will continue to cause problems in considering preemptive strikes.

II. THE WORK OF THE INTERNATIONAL LAW COMMISSION

Necessity in international law may provide an excuse for a state's breach of its obligation or, in other words, the state of necessity may be a circumstance precluding wrongfulness in the parlance of state responsibility. Throughout the years, necessity has been a controversial and contested concept. It has, however, not attracted much academic examination in its own right. Writing in 1928, in what would seem to be the most recent monograph on the topic, Rodick could not find any earlier attempts to deal critically

with the doctrine of necessity in international law.¹⁷ All this may soon change, though, now that the latest and last Special Rapporteur, James Crawford, has “rescued” the topic of state responsibility.¹⁸ In addition to the work of the ILC, a recent judgment of the ICJ dispelled any doubt about whether the necessity excuse exists in international law. In 1997, in the *Gabcikovo-Nagymaros Project* case, the ICJ held that “the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation.”¹⁹

This section will examine the legal development relating to the status of necessity in international law, specifically the relationship between necessity and the use of force. First, the work at the ILC will be outlined because the most concerted discussions on the issue have taken place over several years under the auspices of the Commission. After examining the treatment of the necessity excuse by various international tribunals, in state responses to the ILC, and by scholars, this section will set out the cumulative conditions of the necessity defense based primarily on the ICJ’s judgment in the *Gabcikovo-Nagymaros Project* case. Finally, it will scrutinize the options for making a claim of necessity when using force generally and against terrorists particularly.

Work on the codification of the international legal rules of state responsibility has taken place in the ILC since its very beginning.²⁰ In 1949, state responsibility was selected as a topic suitable for codification, and in 1953 the U.N. General Assembly (GA) requested that the ILC proceed with the codification of the principles of

17. BURLEIGH CUSHING RODICK, *THE DOCTRINE OF NECESSITY IN INTERNATIONAL LAW* 1 (1928). Basdevant, however, mentions a ‘célèbre brochure’ by Kohler. Basdevant, *supra* note 2, at 551.

18. Philip Allott, *State Responsibility and the Unmaking of International Law*, 29 HARV. INT’L L.J. 1, 9 (1988).

19. *Gabcikovo-Nagymaros Project (Hung. v. Slov.)*, 1997 I.C.J. 7, 40 ¶ 51 (Sept. 25) (judgment).

20. On the work of the ILC, see generally IAN SINCLAIR, *THE INTERNATIONAL LAW COMMISSION* (1987) and ARTHUR WATTS, 3 *THE INTERNATIONAL LAW COMMISSION 1949-1998* (1999). On the topic of state responsibility, see generally UNITED NATIONS CODIFICATION OF STATE RESPONSIBILITY (Marina Spinedi & Bruno Simma eds., 1987) and 1 *THE INTERNATIONAL LAW COMMISSION’S DRAFT ARTICLES ON STATE RESPONSIBILITY*, art. 1-35 (Shabtai Rosenne ed., 1991). More recently on the topic of state responsibility, see generally James Crawford et al., *The ILC’s Draft Articles on State Responsibility: Toward Completion of a Second Reading*, 94 AM. J. INT’L L. 660 (2000); *Symposium: The ILC’s State Responsibility Articles*, 96 AM. J. INT’L L. 773 (2002); and *Symposium: State Responsibility*, 10 EUR. J. INT’L L. 339 (1999). On Chapter V of Part 1, see generally Jean J.A. Salmon, *Faut-il codifier l’état de nécessité en droit international?*, in *ESSAYS IN INTERNATIONAL LAW IN HONOUR OF JUDGE MANFRED LACHS* 235 (Jerzy Makarczyk ed., 1984) and S.P. Jagota, *State Responsibility: Circumstances Precluding Wrongfulness*, 16 NETH. Y.B. INT’L L. 249 (1985), and finally Vaughan Lowe, *Precluding Wrongfulness or Responsibility: A Plea for Excuses*, 10 EUR. J. INT’L L. 405 (1999).

international law governing state responsibility.²¹ The initial work of the ILC and of its first Special Rapporteur Garcia Amador was partly based on earlier deliberations under the auspices of the League of Nations and was concentrated on the content of substantive rules of “responsibility of the state for injuries caused in its territory to the person or property of aliens.” In his third report, Garcia Amador discussed necessity:

It is undeniable that great uncertainty surrounds the subject of necessity; in other words, it is a controversial question what circumstances have to attend the imputable act or omission in order that that state of necessity can justify full exoneration from responsibility or extenuate responsibility for the purposes of reparation. Nevertheless, it is precisely and principally because of this uncertainty, and because of the contradictions encountered in diplomatic and other documents, that necessity ought to be mentioned as a defence in the draft. If state of necessity is recognized in international law, as in fact it is, it needs a definition to forestall as far as possible a recurrence of past controversies concerning the circumstances in which it is admissible as a defence.²²

In his sixth and final report as Special Rapporteur, he included the following paragraph 2 to Article 17:

Exonerating and extenuating circumstances:

Likewise, an act shall not be imputable to the state if it is a consequence of a state of necessity involving grave danger and imminent peril threatening some vital interest of the State, provided that the State did not provoke that peril and was unable to counteract it by other means and so to prevent the injury.²³

When Garcia-Amador, in 1961, ceased to be a member of the Commission, a sub-committee chaired by Roberto Ago, who would subsequently be appointed the next Special Rapporteur, recommended that priority be given to the general aspects and rules governing the international responsibility of the state, i.e., general secondary rules of the international law of obligations, without neglecting the experience and material gathered, particularly concerning responsibility for injuries to persons or property of aliens.

21. See Request for the Codification of the Principles of International Law Governing State Responsibility, G.A. Res. 799 (VIII), U.N. GAOR, 8th Sess., at 52, U.N. Doc. A/2630 (1953). For an overview of the ILC work on state responsibility, see the ILC web-site at http://www.un.org/law/ilc/guide/9_6.htm.

22. F.V. Garcia Amador, Special Rapporteur, *Responsibility of the State for Injuries Caused in its Territory to the Person or Property of Aliens, Part II: The International Claim*, Third Report on State Responsibility, ¶ 13, U.N. Doc. A/CN.4/111, reprinted in [1958] 2 Y.B. INT'L L. COMM'N 47, 53, U.N. Doc. A/CN.4/SER.A/1958/Add.1.

23. F.V. Garcia Amador, Special Rapporteur, *Responsibility of the State for Injuries Caused in Its Territory to the Person or Property of Aliens, Reparation of the Injury*, Sixth Report on State Responsibility, U.N. Doc. A/CN.4/134 & Add.1 (1961), reprinted in [1961] 2 Y.B. INT'L L. COMM'N 1, U.N. Doc. A/CN.4/SER.A/1961/Add.1.

As Special Rapporteur, Ago submitted eight reports and an addendum to the last report, dealing *inter alia* with necessity. Ago concluded his extensive survey of necessity with the observation that “the concept of ‘state of necessity’ is far too deeply rooted in the consciousness of the members of the international community and of individuals within States. If driven out of the door it would return through the window, if need be in other forms.”²⁴ In 1980, draft Article 33 was adopted by the ILC.²⁵ Subsequent Special Rapporteurs, Willem Riphagen and Gaetano Arangio-Ruiz, have dealt with Parts Two (Content, forms and degrees of international responsibility) and Three (Settlement of Disputes) of the Draft Articles. Part One, including necessity, was only revisited by the last Special Rapporteur, James Crawford, in 1999.²⁶

Overall, Crawford found that concerns as to the possible abuse of necessity had not been borne out by experience. The ILC, furthermore, found that “on balance, State practice and judicial decisions support the view that necessity may constitute a

24. *Addendum to Eighth Report on State Responsibility by Mr. Roberto Ago*, [1980] 2 Y.B. INT'L L. COMM'N 51, ¶ 53, U.N. Doc. A/CN.4/318/ADD.5-7 [hereinafter *Addendum to Eighth Report*].

25. See *Report of the Int'l L. Comm'n on the Work and Its Thirty-Second Session*, U.N. Doc. A/35/10 (1980), reprinted in [1980] 2 Y.B. INT'L L. COMM'N 1, 26-34, U.N. Doc. A/CN.4/Ser. A/1980/Add. 2 (Part 2) (adopting text and Articles 1-35) [hereinafter *Draft Articles I*].

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

- (a) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and
- (b) the act did not seriously impair an essential interest of the State towards which the obligation existed.

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

- (a) if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law; or
- (b) if the international obligation with which the act of the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the State of necessity with respect to that obligation; or
- (c) if the State in question has contributed to the occurrence of the State of necessity.

Id. art. 33. Note that old Article 33 is embodied in the current Article 25, which has substantially similar language. The text of current Article 25 is found *infra* text accompanying note 28.

26. James Crawford, Special Rapporteur, Second Report on State Responsibility, Int'l L. Comm'n, 51st Sess., at 24-33, ¶¶ 275-91., U.N. Doc.A/CN.4/498/Add.2 (1999).

circumstance precluding wrongfulness under certain very limited conditions” and recommended retaining the content of Article 33 (eventually Article 25) with few alterations, which will be noted in the following when examining the conditions in more detail.²⁷ The Drafting Committee adopted the following new and final wording of the article concerning necessity:

Article 25: Necessity

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

- (a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
- (b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

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

- (a) The international obligation in question excludes the possibility of invoking necessity; or
- (b) The State has contributed to the situation of necessity.²⁸

III. THE STATUS OF NECESSITY

A. *International Decisions Involving Necessity*

As is clear from the extensive review of older practice in Ago's Commentary, the necessity defense has a long pedigree. Of more recent international decisions examining, in one way or another, the necessity excuse, mention should be made of the European Court of Justice (ECJ), which, on occasion, has considered whether the necessity defense existed in Community law. In a 1980 case concerning the illegal sale of concrete reinforcement bars at prices

27. *Id.* at 33, ¶ 291; JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARY 183 ¶ 14 (2002).

28. *Extract from the Report of the International Law Commission on the Work of its Fifty-third Session Regarding the Commission's Draft Articles on Responsibility of States for Intentionally Wrongful Acts*, U.N. GAOR Int'l L. Comm., 56th Sess., Supp. No. 10, at ch. 4 E1, U.N. Doc. A/56/10 (2001), available at http://www.un.org/law/ilc/texts/State_responsibility/responsibilityfra.htm (last visited Sept. 22, 2002) [hereinafter Draft Articles II]. The Draft Articles are also found in CRAWFORD, *supra* note 27, at 178-86.

below the minimum prices laid down in a Commission decision, the defendants, in part, claimed that they found themselves in a state of (financial) necessity;²⁹ they found their conduct "justified by the principle that 'necessity makes the law.'"³⁰ Both the Advocate General and the ECJ dismissed the necessity defense. This was apparently not done because either the Advocate General or the ECJ believed the necessity defense to be absent from Community law.³¹ The court found that since none of the undertakings which complied with the Commission decision was in danger of bankruptcy or liquidation or their existence threatened, it was unnecessary to "examine whether the threat of which they [had] spoken was capable of creating a state of necessity such as to justify their conduct."³² With regard to one of the defendants who had made "an erroneous evaluation of an unfavourable economic situation which was known to all" the ECJ noted "that personal conduct does not entitle it to rely on a state of necessity," thereby implicitly recognizing the existence of the necessity defense in certain circumstances.³³

It may be suggested that the principles behind the necessity excuse were accepted in the *Nachfolger Navigation Case*, although necessity was not explicitly invoked. In this case, the French navy sank a cargo ship, the *Ammersee*, twenty-five nautical miles off the coast, i.e., in international waters. The ship was carrying two hundred tons of dynamite. During a storm, the ship caught fire and the crew abandoned ship. Although the fire subsequently appears to have been extinguished, the French authorities destroyed the ship because it posed a danger to shipping and to installations along the French coast. The case before the Conseil d'Etat concerned a demand by the owners and insurers for compensation. The French court found that the destruction did not violate any principle of international law because the *Ammersee* constituted a "grave and immediate danger" to the safety of the French coast, French territorial waters and

29. Joined Cases 154, 205-06, 226-28, 263-64, 78, 31, 39, 83 & 85/79, S.p.A. Ferriera Valsabbia and Others v. Commission, 1980 E.C.R. 907, *reprinted in* 1981 COMMON MKT. L. REV. 613 (1981).

30. *Id.* at 702 ¶ 142.

31. The Advocate General, Francesco Capotorti, outlined the criteria for the necessity defense as: 'a grave and imminent danger which it is impossible to avoid otherwise than by acting in a manner which, objectively considered, is unlawful.' *Id.* at 660 ¶ 17. He further stressed that "it seems to me indisputable that extreme caution must be exercised in interpreting the concepts, as recognition of the existence of a state of necessity is tantamount to exempting a person from compliance with particular obligations, which may be done only in exceptional cases." *Id.*

32. *Id.* at 702 ¶ 143.

33. *Id.* at 702 ¶ 144; *see also* Case C-235/92, Montecatini S.p.A. v. Comm'n of the Eur. Cmty., 1999 E.C.R. I-4539, I-4542 ("[I]t must be stated that, although a situation of necessity might allow conduct which would otherwise infringe Article 85(1) [now Article 81(1)EC] of the Treaty to be considered justified, such a situation can never result from the mere requirement to avoid financial loss.").

navigation in these waters and "no other measure would have been sufficient to remove the danger."³⁴

In the second *Rainbow Warrior* case, the arbitration tribunal touched upon the question of necessity but seemed unconvinced as to its authority, stating that "Article 33 (now Article 25) . . . allegedly authorizes a State to take unlawful action invoking a state of necessity [and] refers to situations of grave and imminent danger to the State as such and to its vital interests" but also noting that the content of Draft Article 33 was of "controversial character."³⁵

The *LAFICO-Republic of Burundi* arbitral tribunal did not wish to express a view on the propriety of seeking to codify rules on "state of necessity" and the adequacy of the concrete proposals made by the ILC "which [had] been a matter of debate in the doctrine."³⁶

The issue of necessity was also broached in the 1998 *Fisheries Jurisdiction* case at the ICJ.³⁷ Yet, since the decision dealt with the question of ICJ jurisdiction in light of a 1994 Canadian declaration,³⁸ the merits of the case were not discussed in detail.³⁹ Canadian authorities had, however, stated that "the arrest of the *Estai* was necessary in order to put a stop to the overfishing of Greenland halibut by Spanish fisherman"⁴⁰ and, as pointed out by Judge Bedjaoui in his dissenting opinion, Canada had, in various fora,

34. See *Nochfolger Navigation Company Ltd. and Others*, 89 INT'L L. REP. 3, 3-5 (1987).

35. The primary proceedings connected with the *Rainbow Warrior* case were a criminal case argued before the New Zealand High Court on April 22, 1985, followed by a Report by the United Nations Secretary-General, July 6, 1986 and an implementing agreement between France and New Zealand. *Rainbow Warrior (New Zealand v. France)*, 74 INT'L L. REP. 241, 256, 274 (1986). The subsequent case involving the Arbitration Tribunal concerned France's alleged breach of the implementing agreement. *Rainbow Warrior (New Zealand v. France)*, 82 INT'L L. REP. 499, 554 ¶ 78 (1990). For a brief discussion of the case, see generally *Rainbow Warrior (New Zealand v. France)*, 82 INT'L L. REP. 499 and Michael Pugh, *Legal Aspects of the Rainbow Warrior Affair*, 36 INT'L & COMP. L.Q. 655 (1987). See generally Jodi Wexler, *The Rainbow Warrior Affair: State and Agent Responsibility for Authorized Violations of International Law*, 5 B.U. INT'L L.J. 389 (1987).

36. *Libyan Arab Foreign Investment Company (LAFICO) and The Republic of Burundi*, 96 INT'L L. REP. 282, 318-19 (1991).

37. *Fisheries Jurisdiction Case (Spain v. Can.)*, 1998 I.C.J. 432 (Dec. 4).

38. On May 10, 1994, Canada amended its acceptance of the Court's jurisdiction by submitting a new declaration of acceptance of the compulsory jurisdiction of the Court. See *id.* at 438.

39. Some judges, however, could not help but hint at the real issue:

Was there really no other way than to embarrass the Court, which clearly discerns illegality in Canada's conduct on the high seas, but must nonetheless play Pontius Pilate and wash its hands of the case? This is an unwelcome situation for a Court which knows that it must render justice but cannot do so.

Id. at 537-38 (Bedjaoui, J., dissenting).

40. *Id.* at 443.

invoked "emergency" or even a "state of necessity."⁴¹ Academic writers have debated the merits of the Canadian case and although they disagree as to whether Canada could reasonably have claimed necessity, they appear to agree that the necessity defense does exist.⁴²

Finally, the necessity defense was recently claimed by Guinea in a case before the International Tribunal for the Law of the Sea.⁴³ The facts of the case are as follows: An oil tanker, the M/V *Saiga*, flying the flag of St. Vincent and the Grenadines supplied oil to some fishing vessels in the Exclusive Economic Zone of Guinea.⁴⁴ The *Saiga* was arrested by Guinean customs patrol boats and brought into the port of Guinea. Guinea justifies this action by maintaining that the prohibition in Article 1 of Law L/94/007 "can be applied for the purpose of controlling and suppressing the sale of gas oil to fishing vessels in the customs radius according to Article 34 of the Customs Code of Guinea."⁴⁵ Saint Vincent and the Grenadines, on the other hand, claimed that, "in applying its customs laws to the *Saiga* in its customs radius, which includes parts of the exclusive economic zone, Guinea acted contrary to the Convention."⁴⁶ The tribunal agreed with St. Vincent and the Grenadines and found that "the Convention does not empower a coastal State to apply its customs laws in respect of any other parts of the exclusive economic zone not mentioned above."⁴⁷ It remained, however, for the tribunal to consider "whether the otherwise wrongful application by Guinea of its customs laws to the exclusive economic zone [could] be justified under general

41. *Id.* at 518, 539. Among these fora was a background paper entitled "Background: Greenland Halibut" in which the Canadian government argued that it had "a legal right to take action against the Spanish [which had been] established under the doctrine of necessity." Peter G.G. Davies, *The EC/Canadian Fisheries Dispute in the Northwest Atlantic*, 44 INT'L & COMP. L.Q. 917, 936 (1995).

42. *See, e.g.,* Okon Akiba, *International Law of the Sea: The Legality of Canadian Seizure of the Spanish Trawler (Estai)*, 37 NAT. RESOURCES J. 809 (1997). Akiba concludes that "all the particularly strict conditions for a genuine plea of necessity were in existence when Canada arrested the Spanish vessel *Estai*." *Id.* at 826. Contrary to Akiba's conclusion, Schaefer finds that the assertion that Canada fulfilled the conditions required for claiming necessity "would not likely wash" for a number of reasons, the immediate one being that "Canada in fact helped cause the threat [to the essential interest]." Andrew Schaefer, *1995 Canada-Spain Fishing Dispute (the Turbot War)*, 8 GEO. INT'L ENVTL. L. REV. 437, 447 (1996). Similarly, Davies points out that the Canadian authorities previously had tolerated overfishing by Canadian fishermen and concludes that it is "certainly debatable" whether circumstances of the case justified the invocation of necessity. Peter G.G. Davies, *The EC/Canadian Fisheries Dispute in the Northwest Atlantic*, 44 INT'L & COMP. L.Q. 917, 937 (1995).

43. The M/V "*Saiga*" (No. 2) Case (St. Vincent v. Guinea), 38 I.L.M. 1323 (1999).

44. For a summary of the facts and the case, see *id.* at 1335-36.

45. *Id.* at 1349 ¶ 116.

46. *Id.* at 1350 ¶ 123.

47. *Id.* at 1350-51 ¶ 127.

international law by Guinea's appeal to 'state of necessity.'⁴⁸ After making reference to the *Gabcíkovo-Nagymaros Project* case and the criteria set out therein, the tribunal concluded,

[N]o evidence has been produced by Guinea to show that its essential interests were in grave and imminent peril. But, however essential Guinea's interest in maximizing its tax revenue from the sale of gas oil to fishing vessels, it cannot be suggested that the only means of safeguarding that interest was to extend its customs laws to parts of the exclusive economic zone.⁴⁹

B. States

In the context of the British intervention in Egypt in 1956 in connection with the Suez Crisis, the then legal advisor to the British Foreign Office and member of the ILC, later Judge at the ICJ, Sir Gerald Fitzmaurice described the doctrine of so-called necessity as a "rather back-handed doctrine, since it is founded on the maxim that necessity knows no law, but one to which international law does, nevertheless, within pretty stringent limits, afford recognition."⁵⁰ States have, in their responses to the ILC, exhibited some ambivalence toward the concept of a state of necessity. Mongolia held that the criterion "essential interest" used in the article "not only fails to solve the problem, but may even create new problems."⁵¹ Sweden found that the limitations on the invocation of necessity were "rather vague."⁵² Czechoslovakia expressed the view that the formulations in Draft Article 33, such as "essential interest" and "grave and imminent peril" were "unclear" and that the Draft Article "even extends the concept of a state of necessity to cases where there is no immediate threat to the existence of the State as a sovereign and independent entity." Czechoslovakia further stated that the inclusion of the necessity provision "raises serious doubts, since, with reference to safeguarding an 'essential interest,' it actually enables States to

48. *Id.* at 1351 ¶ 132.

49. *Id.* at 1352 ¶ 135.

50. See Geoffrey Marston, *Armed Intervention in the 1956 Suez Canal Crisis: The Legal Advice Tendered to the British Government*, 37 INT'L & COMP. L.Q. 773, 785 (1988). Special Rapporteur Ago adds that "if the two governments [United Kingdom and France] responsible for the action had invoked the ground of necessity, the absence in this case of the requisite conditions would have been argued against them." *Addendum to Eighth Report*, *supra* note 24, at 76.

51. *Comments from Governments, Mongolia*, [1981] 2 Y.B. INT'L L. COMM'N 76, U.N. Doc. A/CN.4/492 & Add. 1-4.

52. *Id.* at 77; *Comments from Governments, Sweden*, [1981] 2 Y.B. INT'L L. COMM'N 77, U.N. Doc. A/CN.4/492 & Add. 1-4.

violate their international obligations.”⁵³ More recently, the United Kingdom commented that,

[It views] with extreme circumspection the introduction of a right to depart from international obligations in circumstances where the State has judged it necessary to do so in order to protect an interest that it deems “essential.” A defence of necessity would be open to very serious abuse across the whole range of international relations. There is a grave risk that the provision would weaken the rule of law.⁵⁴

C. Scholars

A brief examination of scholarly writing on necessity also reveals doubt. Even among pre-World War II writers unease is evident. Stowell found that “this doctrine of necessity strikes at the very root of international society, and makes the preservation of the separate states of greater importance than the preservation of the community of states.”⁵⁵ Basdevant stressed that the question whether necessity constituted an excuse for not fulfilling an international obligation was much debated among authors.⁵⁶ Waldock described the doctrine of necessity as “a rejection of law,”⁵⁷ and Brownlie was very critical of the necessity defense, seeing it as a relic from previous centuries, as window dressing for *raison d'état* and susceptible to selfish interpretation.⁵⁸ Similarly, Higgins asserted that “it is a concept which cannot be kept within proper bounds.”⁵⁹ Partly based on Krylov’s opinion in the Corfu Channel case, Jiménez de Aréchaga, in

53. *Comments from Governments, Czechoslovakia*, [1983] 2 Y.B. INT’L L. COMM’N 2, U.N. Doc. A/CN.4/362. Similarly, Belorussia SSR found that the provisions “contradicts the essential meaning of the international responsibility of States and are therefore unacceptable.” *Comments from Government, Belorussia*, [1983] 2 Y.B. INT’L L. COMM’N 18, U.N. Doc. A/CN.4/362.

54. *Comments from Governments, United Kingdom*, Int’l L. Comm., 50th Sess., at 87-88, U.N. Doc. A/CN.4/488 (1998). These concerns were repeated in 2001. *Comments from Governments, United Kingdom*, Int’l L. Comm., 53rd Sess., at 32-33, U.N. Doc. A/CN.4/515 (2001).

55. ELLERY C. STOWELL, *INTERVENTION IN INTERNATIONAL LAW* 392-93 (1921).

56. Basdevant, *supra* note 2, at 551. He further states that “Il ne semble donc pas qu’il existe une règle de droit international positif justifiant l’inobservation d’une règle de droit international par l’excuse de nécessité.” *Id.* at 553.

57. C.H.M. WALDOCK, *The Regulation of the Use of Force by Individual States in International Law*, 81 R.C. 542, 461-62 (1952). In the sixth edition of Brierly’s textbook, which was edited by Waldock, it was found that “the doctrine [of self-preservation/necessity] would destroy the imperative character of any system of law in which it applied, for it makes all obligation to obey the law merely conditional.” J.L. BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 404 (6th ed. 1963).

58. IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 42-49 (1963).

59. ROSALYN HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 218 (1963).

1968 wrote that it may be concluded that "there is no general principle allowing the defence of necessity."⁶⁰ More recently, Allott lamented that "among the clearest lessons of our collective experience is that the concept of state of necessity is the most persistent and formidable enemy of a truly human society" and the concept is "enough to destroy any possibility of an international rule of law."⁶¹ Other scholars have, however, accepted necessity as part of international law. Barboza, for example, found that, "purged of some of the erroneous notions which burdened it," necessity is "a useful concept."⁶²

IV. THE *GABCÍKOVO-NAGYMAROS PROJECT* CASE AND THE CUMULATIVE CONDITIONS

Against this background, one can understand that it was with some trepidation that Hungary's advocates pleaded necessity in the *Gabcíkovo-Nagymaros Project* case.⁶³ As it turned out, they need not have worried. In spite of the somewhat ambiguous attitude towards necessity exhibited in previous cases, the ICJ found necessity to be part of customary international law.

Today, after the work of the ILC and the endorsement of the ICJ, it is fair to echo Schachter's observation that international law rejects the idea that necessity knows no law. Decades of study have found that necessity exists in international law and that the best safeguard

60. Eduardo Jiménez de Aréchaga, *International Responsibility*, in *MANUAL OF PUBLIC INTERNATIONAL LAW* 542 (Max Sørensen ed., 1968). He does recognize particular rules making allowance for varying degrees of necessity, but "these cases have a meaning and a scope entirely outside the traditional doctrine." *Id.*

61. Philip Allott, *State Responsibility and the Unmaking of International Law*, 29 *HARV. INT'L L.J.* 1, 17, 21 n.1 (1988).

62. Julio Barboza, *Necessity (revisited) in International Law*, in Makarczyk, *supra* note 20, at 28; see also BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 69 (Grotius Publications Ltd. 1987) (1953). See generally L. Buza, *The State of Necessity in International Law*, 1 *ACTA JURIDICA ACADEMIAE SCIENTIARUM HUNGARICA* 205 (1959). More recently, see G. Marcelo Kohen, *The Notion of "State Survival" in International Law*, in *INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS* 306 (Laurence Boisson de Chazournes & Philip Sands eds., 1999), Roman Boed, *State of Necessity as a Justification for International Wrongful Conduct*, 3 *YALE HUM. RTS. & DEV. L.J.* 1, 4-12 (2000) and Karl Zemanek, *New Trends in the Enforcement of erga omnes Obligations*, 4 *MAX PLANCK Y.B. U.N. L.* 1, 31 (2000).

63. For a brief discussion of the case, see Phoebe N. Okowa, *Case Concerning the Gabcíkovo-Nagymaros Project (Hungary/Slovakia)*, 47 *INT'L & COMP. L.Q.* 688, 689-90 (1998). See also Daniel Dobos, *The Necessity of Precaution: The Future of Ecological Necessity and the Precautionary Principle*, 13 *FORDHAM ENVTL. L.J.* 375, 376 (2002). See generally Mari Nakamichi, *The International Court of Justice Decision Regarding the Gabcíkovo-Nagymaros Project*, 9 *FORDHAM ENVTL. L.J.* 337 (1998).

against abuse of the concept is its codification in the Draft Articles on State Responsibility with appropriate, strictly defined, and cumulative circumscriptions. Additionally, the ICJ emphasized that “the State concerned is not the sole judge” of whether the conditions have been met.⁶⁴ It is to these conditions we now turn.

In the *Gabcíkovo-Nagymaros Project* case, the ICJ based its analysis on the conditions enumerated by the ILC in the 1980 Draft Article 33. Outlining the conditions, the ICJ held:

In the present case, the following basic conditions set forth in Draft Article 33 are relevant: it must have been occasioned by an “essential interest” of the State which is the author of the act conflicting with one of its international obligations; that interest must have been threatened by a “grave and imminent peril”; the act being challenged must have been the “only means” of safeguarding that interest; that act must not have “seriously impair[ed] an essential interest” of the State towards which the obligation existed; and the State which is the author of that act must not have “contributed to the occurrence of the state of necessity”. Those conditions reflect customary international law.⁶⁵

In taking as its point of reference Draft Article 33, the ICJ diverged slightly from the new ILC draft.⁶⁶ In the following examination, however, the point of departure will be the most recent and final Article 25:

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* . . .⁶⁷

According to the Draft Article on necessity, the conduct not in conformity with an international obligation must be the “only means of warding off” the peril; “the peril must not have been escapable by any other means, even a more costly one, that could be adopted in compliance with international obligations.”⁶⁸ The ICJ found that Hungary had other means than suspending and abandoning works under the 1977 treaty with Czechoslovakia, even though—“and this is not determinative of the state of necessity”—these other means (for example, water purification) would “have been a more costly

64. *Gabcíkovo-Nagymaros Project* (Hung. v. Slov.), 1997 I.C.J. 7, at 40, ¶ 51 (Sept. 25).

65. *Id.* at 40-41, ¶ 52.

66. The court, for example, reiterates that the balancing of interests is *vis á vis* “the State towards which the obligation existed.” As will be further elaborated upon below (see discussion, *infra* note 69), the most recent ILC draft expanded this weighing of interest in light of *erga omnes* obligations.

67. Draft Articles II, *supra* note 28.

68. See *Report on Work of the 32nd Session*, [1980] 2 Y.B. INT’L COMM’N 33 [hereinafter *Report on 32nd Session*]. According to Roberto Ago, the conduct must “truly be the only means.” *Addendum to Eighth Report*, *supra* note 24, at 20, ¶ 55.

technique.”⁶⁹ As mentioned above, the International Tribunal for the Law of the Sea found that “it cannot be suggested that the only means of safeguarding that interest [Guinea’s interest in maximizing its tax revenue from the sale of gas oil to fishing vessels] was to extend its customs laws to parts of the exclusive economic zone.”⁷⁰

... for the State to safeguard an essential interest . . .⁷¹

Since any invocation of necessity can only be conceived of in conditions of an absolutely exceptional nature, it naturally follows that the interest that is protected by breaching an international obligation must be essential. According to both Ago’s and the ILC’s 1980 reports the interest should, however, not be limited to the very existence of the state.⁷²

What more exactly can be said to constitute “an essential interest” for a state is somewhat harder to spell out in generalities. The ILC decided that “it would be pointless to try to spell [essential interests] out any more clearly and to lay down pre-established categories of interests.”⁷³ It would depend on the circumstances and the totality of the conditions in which the state found itself in the particular case.⁷⁴ Similarly, the ILC, in its final Commentary, found that “the extent to which a given interest is ‘essential’ depends on all the circumstances, and cannot be prejudged.”⁷⁵ In 1980, some broad categories were nonetheless suggested: the existence of the state, its political or economic survival, the continued functioning of its essential services, the maintenance of internal peace, the survival of a sector of its population, the preservation of the environment of its territory or a part thereof.⁷⁶ The 2001 Commentary lists similar

69. Gabcíkovo-Nagymaros Project (Hung. V. Slov.), 1997 I.C.J. 7, at 42-43, ¶ 55.

70. The M/V “Saiga” (No. 2) Case (St. Vincent v. Guinea), 38 I.L.M. 1323, 1352, ¶ 135 (1999).

71. Draft Articles II, *supra* note 28.

72. *Addendum to Eighth Report, supra* note 24, at 19, ¶ 12.

73. *Report of the I.L.C.*, [1980] 2 Y.B. INT’L L. COMM’N 49, ¶ 32.

74. *Addendum to Eighth Report, supra* note 24, at 19, ¶ 12.

75. CRAWFORD, *supra* note 27, at 183, ¶ 15.

76. *Addendum to Eighth Report, supra* note 24, at 14, ¶ 2. Curiously, Ago finds not so different an enumeration of categories “of little use” to help determine a specific situation. *Id.* at 19, ¶ 12 n.24. It may be noted that first Ago and then the ILC provided their examples of essential interests in the beginning of the Commentary and Report respectively to illustrate the difference between necessity and other categories of Chapter V: ‘Circumstances precluding wrongfulness’ and not when discussing essential interests. Ago, however, indicates in a footnote that the examples provided are “often invoked in this context as ‘essential’ or ‘particularly important’ interests of the State.” *Id.* at 14, ¶ 2 n.4. The ICJ picked from the selection when finding the natural environment an essential interest. Gabcíkovo-Nagymaros Project (Hung. V. Slov.), 1997 I.C.J. 7, 41, ¶ 53.

interests as potentially essential.⁷⁷

Although the state claiming to have acted in a state of necessity must be able to point to an essential interest under threat, it would seem that reference to one of the broad categories just outlined would suffice. Such a conclusion seems to be supported by the ICJ in the *Gabcíkovo-Nagymaros Project* judgment. In this case, the court quickly acknowledged that the concerns expressed by Hungary for its natural environment “related to an ‘essential interest’ of [Hungary], within the meaning given to that expression in Article 33” of the 1980 ILC Draft.⁷⁸ Justifying this, the court referred to the inclusion of “the preservation of the environment” in the ILC report and to its own findings in the 1996 Nuclear Weapons Advisory Opinion concerning “the great significance that [the ICJ] attaches to respect for the environment, not only for States but also for the whole of mankind.”⁷⁹

One may add that it may be difficult for an international judicial authority to overrule or second-guess the claim of a state, save if it were completely disingenuous. This attitude may be seen reflected in the following dictum from the International Tribunal for the Law of the Sea, considering that maximizing a country’s tax revenues may be important but hardly essential: “*however essential* Guinea’s interest in maximizing its tax revenue from the sale of gas oil to fishing vessels, it cannot be suggested that the only means of safeguarding that interest was to extend its customs laws to parts of the exclusive economic zone.”⁸⁰ This would indicate that the actual judicial test with regard to the interest under threat is not its “essential” character but rather the presence of one or more of the additional cumulative conditions, in particular the graveness and imminence of the peril and the question of own fault.

An interesting question is whether essential interest may include events that do not have a direct impact on the state claiming to act under necessity. This appears to be what Belgium was arguing when it claimed before the ICJ that “necessity is the cause which justifies the violation of a binding rule in order to safeguard, in face of grave and imminent peril, *values* which are higher than those protected by the rule which is breached.”⁸¹ Although referring explicitly to Article 33, the Belgian advocate provided the court with a definition of necessity where “values” is substituted for “essential

77. CRAWFORD, *supra* note 27, at 183, ¶ 14.

78. *Gabcíkovo-Nagymaros Project* (Hung. V. Slov.), 1997 I.C.J. 7, 41, ¶ 53.

79. *Id.* (referring to Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 241, 242, ¶ 29).

80. The M/V “*Saiga*” (No. 2) Case (St. Vincent v. Guinea), 38 I.L.M 1323, 1352 ¶ 135 (emphasis added).

81. See Uncorrected Transcript of Belgium’s Oral Pleadings (Serb. & Mont. v. Belg.), CR 99/15 (May 10, 1999), available at <http://www.icj-cij.org>, (last visited Sept. 22, 2002) (emphasis added).

interest.” The Commentary of Ago and the ILC Report both appear to accept such an interpretation of “essential interest” although the wording of Article 33 does not bear this out.⁸² However, both of the narratives address interventions for humanitarian purposes “such as saving the lives of nationals or foreigners threatened” or interventions in cases of “grave and imminent danger . . . simply to people.”⁸³ Citing these examples, Verwey wrote that

[It] must be assumed therefore, that the ILC, when it was drafting Article 33 within the context of a document on State responsibility, may have lost sight of acts of a State aimed at safeguarding essential interests of a non-national nature, without intending to exclude the potential applicability of the principle of necessity to such acts.⁸⁴

The latest re-drafting would appear to follow these considerations. Paragraph 1(a) now reads “safeguard an essential interest against a grave and imminent peril” as opposed to the original 1980 version: “safeguarding an essential interest of the State against a grave and imminent peril.”⁸⁵

. . . against a grave and imminent peril; and . . .⁸⁶

Although the final article adopted by the ICL only stipulates that the peril which threatens the essential interest must be “grave” both Ago’s commentary and the 1980 ILC Report point out that the peril must be “extremely grave.”⁸⁷ In addition, the threat to the essential interest must be “imminent,” “representing a present danger,” “at the actual time.”⁸⁸ This is also reflected in the 2001 Commentary according to which the “peril has to be objectively established and not merely apprehended as possible.”⁸⁹ Beyond these somewhat general observations, the Commentary and Report are rather parsimonious.

The ICJ held that peril evokes the idea of “risk” and that the peril has to be established “at the relevant point in time” and, hence, not be a mere “possibility.”⁹⁰ The court, however, added that a peril

82. *Essential State Interest, in Addendum to Eighth Report, supra* note 24, at 51; *Report of the International Law Commission, Essential Interest of the State, reported in* [1980] Y.B. INT’L L. COMM’N 49, ¶ 32, U.N. Doc. A/35/10 (adopted by the ILC) [*hereinafter Essential Interest of the State*].

83. *Addendum to Eighth Report, supra* note 24, at 43, ¶ 69; *Essential Interest of the State, supra* note 80, at 41, ¶ 23.

84. W.D. Verwey, *Humanitarian Intervention under International Law*, 32 NETH. INT’L L. REV. 357, 413 (1985).

85. Draft Articles I, *supra* note 25, art. 33.

86. Draft Articles II, *supra* note 28.

87. *Addendum to Eighth Report, supra* note 24, ¶¶ 13, 19, at 43; *Essential Interest of the State, supra* note 80, ¶ 33, at 48.

88. *Essential Interest of the State, supra* note 80, ¶ 33, at 48.

89. CRAWFORD, *supra* note 27, ¶ 15, at 183; *see also* 1997 I.C.J. 92, ¶ 54, at 42.

90. Gabcikovo-Nagymarcos Project (Hung. V. Slov.), 1997 I.C.J. 92, ¶ 54, at 42.

appearing in the long term may well be imminent if the realization of the peril “however far off [temporally] it might be, is not thereby any less certain and inevitable.”⁹¹ Similarly, the 2001 Commentary holds that “a measure of uncertainty about the future does not necessarily disqualify a state from invoking necessity, if the peril is clearly established on the basis of the evidence reasonably available at the time.”⁹² As pointed out by both the International Court and by the ILC, long-term predictions and prognoses are particularly pertinent to questions concerning threats to, for example, the environment.⁹³ Although not spelled out by the court, it is possible to discern what is termed the “precautionary principle” from international environmental law in the court’s deliberations.⁹⁴ However, although Hungary had some “uncertainties,” about the potential ecological impact of the Gabčíkovo-Nagymaros project, such concerns, serious as they were, were insufficient to establish the objective existence of a “peril” in the context of the necessity defense.⁹⁵

(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.⁹⁶

The interest which is protected by the international obligation breached due to the state of necessity “must obviously be inferior to” the threatened essential interest of the State claiming necessity and,

91. *Id.* In the concrete case, the court found that although an “essential interest”, i.e. the environment, was involved, the threat in the case of Nagymaros was neither grave nor imminent. *Id.* ¶ 55, at 42-43, and in the case of the Gabčíkovo sector not imminent, its graveness untold. *Id.* ¶¶ 56-57, at 43-46.

92. CRAWFORD, *supra* note 27, ¶ 16, at 184.

93. *Id.*

94. According to the Rio Declaration, Principle 15, the precautionary principle holds that:

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

U.N. Conference on Environment and Development, Rio Declaration on Environment and Development, U.N. Sales No. E.73.II.A.14 (1992), available at <http://www.unep.org/Documents/Default.asp?DocumentID=78&ArticleID=1163> (last visited Feb. 22, 2004). Cameron and Abouchar find that the 1992 U.N. Conference on Environment and Development “marked the full emergence of the precautionary principle in international law. Through participation in negotiations, signature and ratification of treaties, states have widely acknowledged the existence of the principle as a principle of international law.” James Cameron & Juli Abouchar, *The Status of the Precautionary Principle in International Law*, in *THE PRECAUTIONARY PRINCIPLE IN INTERNATIONAL LAW: THE CHALLENGE OF IMPLEMENTATION* 51-52 (Davis Freestone & Ellen Hay eds., 1996).

95. Gabčíkovo-Nagymaros Project (Hung. V. Slov.), 1997 I.C.J. 7, ¶ 54, at 42.

96. Draft Articles II, *supra* note 28.

consequently, "cannot be one which is comparable and equally essential to the foreign State concerned."⁹⁷ As the 2001 Commentary notes, "the interest relied on must outweigh all other considerations, not merely from the point of view of the acting state but on a reasonable assessment of competing interests."⁹⁸ During the recent review, the Special Rapporteur, James Crawford, proposed an amendment of Article 33(1)(b), adjusting it to conform with contemporary international law which includes obligations *erga omnes*.⁹⁹ This proposal has been codified in the reference to "the international community as a whole." Boed, in arguing for exactly such an amendment, noted that the bilateral paradigm, which was evident in the original wording, "fails to account for the advent of human rights law from the middle of the twentieth century and the resulting creation of *erga omnes* obligations."¹⁰⁰

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 . . .* ¹⁰¹

In some cases, the international obligation in question may, explicitly or by inference, exclude a plea of necessity. This is particularly the case in regard to certain humanitarian obligations.¹⁰² Below, it will briefly be considered whether the U.N. Charter, by

97. *Addendum to Eighth Report, supra* note 24, ¶ 15, at 20. In the words of the ILC, "[t]he interest sacrificed on the altar of 'necessity must obviously be less important than the interest it is thereby sought to save.'" *Essential Interest of the State, supra* note 80, ¶ 35, at 50. The ICJ found that there was "no need" to consider this criteria since Hungary had already failed other parts of the necessity test. *Gabcikovo-Nagymaros Project (Hung. V. Slov.)*, 1997 I.C.J. 7, ¶ 58, at 46.

98. CRAWFORD, *supra* note 27, ¶ 17, at 184.

99. See Crawford, *supra* note 26, ¶ 290, at 32; see also James R. Crawford, *Responsibility to the International Community as a Whole*, 8 IND. J. GLOBAL LEGAL STUD. 303, 306 (2001) ("[I]t seems clear that there are standards of conduct in international law that cannot be reduced to the interstate realm.").

100. Roman Boed, *State of Necessity as a Justification for International Wrongful Conduct*, 3 YALE HUM. RTS. & DEV. L.J. 1, 19 (2000). Addressing the specific issue of the use of necessity to justify a state's closure of its borders in face of a large number of asylum seekers, Boed suggests that, with the new wording,

[T]he interest of the international community in having non-refoulement honored, then, could possibly outweigh the interest of a single state in closing its borders to protect an essential interest and, in consequence, necessity would not be available to justify border closure in the face of an influx of asylum-seekers.

Id. at 41.

101. Draft Articles II, *supra* note 28.

102. CRAWFORD, *supra* note 27, ¶ 19 at 185.

explicitly allowing for one exception to the ban on use of force, implicitly excluded any other exceptions.

(b) The State *has contributed* to the situation of necessity.¹⁰³

The State claiming to be acting under a state of necessity “must not itself have provoked” the situation or have helped “by act or omission to bring it about.”¹⁰⁴ In the case before the ECJ mentioned previously, the court noted that one defendant had made “an erroneous evaluation of an unfavourable economic situation which was known to all” and, thus, the court noted “that personal conduct does not entitle it to rely on a state of necessity.”¹⁰⁵ Similarly, in the *Gabcikovo-Nagymaros Project* case, the court concluded that Hungary could not rely on a state of necessity because “it had helped, by act or omission to bring it about.”¹⁰⁶ In the case of the Kosovo conflict and the use of force against the Federal Republic of Yugoslavia, Belgium has, as noted, for its defense in front of the ICJ, in part, relied on the necessity excuse.¹⁰⁷ Brownlie and Apperley seem to have found such a defense precluded because the “crisis in Kosovo originated in the deliberate fomenting of civil strife in Kosovo and the subsequent intervention by NATO States in the civil war. In such conditions those States responsible for the civil strife and the intervention are estopped from pleading humanitarian purposes.”¹⁰⁸

V. PEREMPTORY NORMS AND NECESSITY: THE USE OF FORCE AS A POSSIBLE DIFFERENTIATION?

A. Background

The weariness and concern often expressed about the necessity excuse are primarily due to the past, and potential future, abuse of the excuse, particularly involving the use of force.¹⁰⁹ This concern

103. Draft Articles II, *supra* note 28.

104. *Essential Interest of the State*, *supra* note 80, ¶ 34, at 50; *Gabcikovo-Nagymaros Project* (Hung. V. Slov.), 1997 I.C.J. 7, ¶ 57, at 45-46. The court found that this, also, precluded Hungary from relying on a state of necessity excuse.

105. Joined Cases 154, 205-06, 226-28, 263-64, 78, 31, 39, 83 & 85/79, S.p.A. Ferriera Valsabbia and Others v. Commission, 1980 E.C.R. 907, *reprinted in* 1981 COMMON MKT. L. REV. 613, 702, ¶ 144.

106. *Gabcikovo-Nagymaros Project* (Hung. V. Slov.), 1997 I.C.J. No. 92, ¶ 57, at 46.

107. See Uncorrected Transcript of Belgium's Oral Pleadings, *supra* note 81.

108. Ian Brownlie & C.J. Apperley, *Kosovo Crisis Inquiry: Memorandum on the International Law Aspects*, 49 INT'L & COMP. L.Q. 878, 903 (2000).

109. Jean J.A. Salmon, *Faut-il codifier l'état de nécessité en droit international?*, in Makarczyk, *supra* note 20, at 258.

was reflected in the dissenting opinion of Judge Krylov in the *Corfu Channel* case, where he wrote that since the coming into force of the U.N. Charter, "the so-called right of self-help, also known as the law of necessity (*Notrecht*) which used to be upheld by a number of German authors, can no longer be invoked. It must be regarded as obsolete."¹¹⁰

In his review of the positions taken by authors of scholarly works, Ago found that writers who opposed necessity as being part of international law, partly did so due to practical considerations based on the outright abuses of the necessity excuse by some governments.¹¹¹ Ago and the ILC sought to allay the fears of abuse by observing "an outright rejection of the idea that a 'plea of necessity' could absolve a State of the wrongfulness attaching to an act of aggression committed by [that] State."¹¹² In the proposed Article 33, this was done by stipulating that necessity may not be invoked as a ground precluding wrongfulness if the breached obligation arose from a peremptory norm. The fact that the reference to peremptory norms in the final version has been given its own article (Article 26) does not seem to change the substantial issue.¹¹³ Additionally, the necessity excuse is also not available if the obligation being breached excludes the possibility of invoking necessity. As for the latter, one may ask whether the U.N. Charter, by explicitly allowing for one exception to the ban on use of force, i.e., self-defense under Article 51, implicitly excluded any other exceptions, including necessity. Ago asserted that it does not logically follow from the inclusion of Article 51 that the intention was to absolutely exclude other circumstances precluding wrongfulness.¹¹⁴

110. The *Corfu Channel Case* (Eng. v. Alb.), 1949 I.C.J. 77 (April 9); see also Josef Mrázek, *Prohibition of the Use and Threat of Force: Self-Defense and Self-Help in International Law*, XXVII CAN. Y.B. INT'L L. 81, 107 (1989) (observing of Draft Article 33, "[t]he standpoint of the International Law Commission calls into question the peremptory character of the principle of the non-use of force. The right of necessity must not be misused to undermine the stability of international legal order").

111. *Addendum to Eighth Report*, *supra* note 24, ¶ 71, at 47. Ago paraphrased the critical position as follows:

[W]e are opposed to recognizing the ground of necessity as a principle of general international law because States use and abuse that so-called principle for inadmissible and often unadmittable purposes; but we are ultimately prepared to grant it a limited function in certain specific areas of international law less sensitive than those in which the abuses we deplore usually occur.

Id. ¶ 76, at 50.

112. *Addendum to Eighth Report*, *supra* note 24, ¶ 79, at 51.

113. Article 26 states "Compliance with peremptory norms: Nothing in the Chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law." Draft Articles II, *supra* note 28.

114. *Addendum to Eighth Report*, *supra* note 24, ¶ 59, at 41.

More interesting and controversial is the general question whether the use of force is prohibited by a peremptory norm. Ago devoted a substantial part of his Commentary to the question of use of force and the necessity excuse. He asserted that the prohibition on the use of force in international relations found in Article 2(4) of the U.N. Charter not only covers "aggression," i.e., the most serious use of force, but also other less serious acts besides those which merit being classified as acts of aggression.¹¹⁵ Hence, whereas Ago acknowledged that even uses of force that are "circumscribed in magnitude and duration" and carried out for "limited purposes" and "without true aggressive intentions" are prohibited, he questioned whether all uses of force are prohibited by a peremptory norm. He found that to claim that all uses of force are prohibited *jus cogens* "might be to expand beyond what is at present accepted by the legal conviction of States, either the concept of 'aggression' or the concept of 'peremptory norm' as defined in article 53 of the Vienna Convention on the Law of Treaties."¹¹⁶

The 1980 ILC Report echoes Ago's findings; "It remained to consider the problem of the possible existence of conduct which, although infringing the territorial sovereignty of a State, need not necessarily be considered as an act of aggression or not, in any case, as a breach of an international obligation *jus cogens*."¹¹⁷ Like Ago, the ILC maintained that it is for the organs charged with interpreting the U.N. Charter to determine whether the differentiation is valid.¹¹⁸ As is evident from the quotes, Ago employed very careful language, although it is clear from the context that he believed the differentiation of the prohibition of use of force into two categories was possible. Ago "hesitated to ascribe the same force of *jus cogens* as must, in our view, be accorded to the prohibition of aggression."¹¹⁹

115. *Id.* ¶ 58, at 40-41.

116. *Id.* ¶ 59, at 41. Article 53 of the Vienna Convention defines a peremptory norm as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted . . ."

117. *Essential Interest of the State*, *supra* note 80, ¶ 23, at 43; *see also* STANIMIR A. ALEXANDROV, SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW 108 (1996) ("According to such definitions [aggression as any illegal use of force], since the use or threat of force is allowed only in self-defense or if decided upon by a competent organ of the United Nations, every other use of force should be considered aggression. Such proposals, however, ignore the views that not every unlawful use of force is necessarily aggression."). Alexandrov does, however, warn against adopting the doctrine of necessity due to the risk of reviving theories of self-preservation. *Id.* at 182 n.298.

118. *Essential Interest of the State*, *supra* note 80, ¶ 24, at 45.

119. *Addendum to Eighth Report*, *supra* note 24, ¶ 66, at 44.

A few scholars have built on the foundation provided by Ago and the ILC.¹²⁰ Ronzitti emphasized the requirement for a peremptory norm in Article 53 of the Vienna Convention, i.e., that the norm must be accepted as peremptory by the international community of states as a whole. Based on this, he found that the "peremptory rule banning the use of force does not exactly coincide with the corresponding rule contained in Art. 2(4) of the U.N. Charter," or, in other words, some uses of force, although prohibited under Article 2(4) are not prohibited by a peremptory norm.¹²¹

Raby, considering the use of force to protect nationals, found that "the considerable number of states which claim that the right of intervention is valid, as well as the numerous writers who think likewise, demonstrate that intervention to protect nationals cannot certainly be seen as a violation of a norm of *jus cogens*."¹²² He went on to point out that a state cannot consent to the violation of a peremptory norm: "Therefore, if an intervention to protect nationals constituted a violation of a rule of *jus cogens*, the territorial state's consent to such an intervention would be an irrelevant consideration in assessment of the operation's legality. However, there is unanimity among states and writers that an intervention by consent is legal, by virtue of that consent alone."¹²³

Conversely, however, one might argue that it is misplaced to speak of consent to a violation of a *jus cogens* norm. Fundamentally, the norm is not violated if the intervention is consensual. As stated by Schachter:

[W]hen a recognized government invites foreign armed forces to assist it in maintaining internal security, the foreign troops would not, as a rule, be used "against the territorial integrity" or "political independence" of the inviting State nor would their role normally be inconsistent with any of the purposes of the United Nations. If those stated conditions are met, there is no violation of Article 2(4).¹²⁴

120. See Ole Spiermann, *Humanitarian Intervention as a Necessity and the Threat or Use of Jus Cogens*, 71 NORDIC J. INT'L L. 523, 535-42 (for recent comments on this issue).

121. Natalino Ronzitti, *Use of Force, Jus Cogens and State Consent*, in THE CURRENT LEGAL REGULATION OF THE USE OF FORCE 150 (A. Cassese ed., 1986); see also NATALINO RONZITTI, RESCUING NATIONALS ABROAD THROUGH MILITARY COERCION AND INTERVENTION ON GROUNDS OF HUMANITY 74-75 (1985).

122. Jean Raby, *The State of Necessity and the Use of Force to Protect Nationals*, XXVI CAN. Y.B. INT'L L. 253, 267 (1988); see also Albrecht Randelzhofer, *Article 2(4)*, in THE CHARTER OF THE UNITED NATIONS, A COMMENTARY 106, ¶ 55, at 125 (Bruno Simma ed., 1994) (referring to Raby's article, Randelzhofer's commentary of U.N. Charter dismisses argument that concept of necessity can provide valid basis for protective measures involving use of force).

123. Raby, *supra* note 122, at 268; see also RONZITTI, *supra* note 121, at 86-88.

124. SCHACHTER, *supra* note 4, at 114.

Schachter further found that “the distinction drawn by the Commission appears to be in keeping with the views generally expressed on the peremptory character of the rule against force.”¹²⁵

One may inquire whether developments subsequent to 1980, the date of Ago’s Commentary, have clarified the issue. First, there is no doubt that international law recognizes a gradation of the use of force with some uses being less grave than others. One may distinguish between “the most grave forms of the use of force (those constituting an armed attack) and other less grave forms.”¹²⁶ The ICJ, however, quoted the ILC with approval to the effect that “the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*.”¹²⁷ In the 1987 Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, it is emphasized that “[n]o consideration of whatever nature may be invoked to warrant resorting to threat or use of force in violation of the Charter.”¹²⁸ Similarly, during the most recent reexamination of the Draft Article on necessity, both the Special Rapporteur and the ILC expressed that, in their views, the prohibition on the use of force is a peremptory norm.¹²⁹ Likewise, some authors have criticized the differentiation proposed by Ago and the 1980 Commission.¹³⁰

The question of use of force and necessity attracted particular interest and concern in 1999 due to the debates over humanitarian intervention. In his review of Ago’s Commentary, Crawford found that the differentiation—between the peremptory status of some aspects of the rules relating to the use of force and the non-peremptory status of other aspects—raised complex questions “beyond the scope of the draft article,” and he emphasized the

125. *Id.* at 171.

126. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 191 (June 27).

127. *Id.* at 190. This was supported by both Nicaragua and the United States in their respective submissions. *Id.*

128. Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, G.A. Res. 42/22, U.N. GAOR, 42nd Sess., Annex, § 1, art. 3, U.N. Doc. A/RES/42/22 (1987). Recall that Ago’s point of departure was a recognition that even the “less grave” use of force violated the Charter.

129. According to the Special Rapporteur, rules relating to the use of force referred to in Articles 2(4) and 51 of the Charter certainly rank among peremptory norms of international law. Crawford, *supra* note 26, ¶ 286. According to the ILC, “it was generally agreed that the rules governing the use of force in the Charter were *jus cogens*.” Report of the Int’l Law Comm’n on the Work of Its Fifty-Fourth Session, ¶ 375, U.N. Doc. A/54/10, Supp. No. 10 (1999).

130. See, e.g., Jean J.A. Salmon, *Faut-il codifier l’état de nécessité en droit international?*, in Makarczyk, *supra* note 20, at 235.

distinction between “primary” and “secondary” rules.¹³¹ With regard to this latter distinction, it was pointed out that “it is one thing to define a rule and the content of the obligation it imposes, and another to determine whether that obligation has been violated and what should be the consequence of the violation.”¹³² Based on the distinction, it was stipulated that the question of humanitarian intervention is “not one which is regulated, primarily or at all, by article 33.”¹³³ Interpreting this distinction, it can be concluded that the final Article 25 does not and cannot act as a source of authority for humanitarian intervention or for use of force against terrorists.

In response to a suggestion by the Netherlands, the Special Rapporteur, however, presented a somewhat equivocal comment on this issue. The Netherlands, in brief, suggested that Chapter V concerning circumstances precluding wrongfulness should include an article on humanitarian intervention.¹³⁴ In his comment, the Special

131. Crawford, *supra* note 26, ¶¶ 275-91, at 24; James Crawford, First Report on State Responsibility, U.N. GAOR, 15th Sess., at 4, ¶¶ 12-18, U.N. Doc. A/CN.4/490 (1998) (distinguishing between primary and secondary rules).

132. *Id.*

133. Crawford, *supra* note 26, ¶¶ 275-91, at 287. The distinction was present in Ago’s Commentary as well, and has been reiterated in several cases. Ago pointed out that the answer

[D]epends primarily on the interpretation to be placed on certain provisions of the Charter, an instrument of conventional origin, or, in other words, on certain primary rules enunciated in that instrument. The task of deciding what that answer will be therefore rests with the various organs responsible for such interpretation, and not with a draft concerning the definition of “secondary” rules on international responsibility on which the Commission is working.

Addendum to Eighth Report, supra note 24, ¶ 66, at 44. In the France—New Zealand arbitration tribunal in the *Rainbow Warrior* case, France and New Zealand disagreed on the question of which branch of general international law should be given primary emphasis in the determination of the primary obligations of France. New Zealand held that the customary law of treaties should decide, while France favored the customary law of state responsibility. The tribunal found that both the customary law of treaties and the customary law of state responsibility were relevant and appropriate. The fundamental provision of *pacta sunt servanda* “is applicable to the determination whether there have been violations of that principle . . .” *Rainbow Warrior* (New Zealand v. France), 82 INT’L L. REP. 548-50, ¶¶ 72-75 (1990). On the other hand, “the legal consequences of a breach of a treaty, including the determination of the circumstances that may exclude wrongfulness . . . are subjects that belong to the customary Law of State Responsibility.” Similarly, in the *Gabcikovo-Nagymaros Project* case the ICJ established that a state of necessity does not terminate a treaty but may be “invoked to exonerate from the responsibility of the State which failed to implement the treaty.” Thus, the court implicitly held that the (primary) rules of treaty termination are found in the law of treaties and not in the (secondary) rules of state responsibility. *Gabcikovo-Nagymaros Project* (Hung. v. Slov.), 1997 I.C.J. 7, at 63, 101.

134. See *State Responsibility: Comments and Observations Received from Governments: Netherlands*, U.N. GAOR, 56th Sess., at 30, U.N. Doc. A/CN.4/515 (2001).

Rapporteur first pointed out the distinction between primary and secondary rules, emphasizing that Chapter V does not deal with substantial law issues. He then added, "Cases not otherwise provided for may be dealt with in accordance with the criteria in article 26 (necessity) [now Article 25]."¹³⁵ The most reasonable interpretation of this comment would seem to be the following: In light of the previous discussion about humanitarian intervention and necessity, the Special Rapporteur appears, again, to have said, "Look, this is not an issue we are going to decide here. Maybe specific cases can be excused under the necessity defense, maybe not. You try to see whether the criteria fit in each individual case." Indeed, in the Final Commentary, it was pointed out that "the question whether measures of forcible humanitarian intervention, not sanctioned pursuant to Chapters VII or VIII of the Charter of the United Nations, may be lawful under modern international law, is not covered by article 25."

The last re-reading by Crawford and the ILC, thus, does not address the question upon which Ago wanted to shed light.

[W]hether or not the wrongfulness, which is in principle accepted as undeniable, of any such action might, by way of exception, be precluded where the State which committed it is able to show that it acted on a real "state of necessity," with all the conditions for the recognition of the existence of that circumstance being fulfilled.¹³⁶

Against this background, it would be fair to conclude that Crawford and the ILC found that necessity was not an appropriate framework for addressing the question of humanitarian intervention, or, more generally, exceptions to Article 2(4) of the U.N. Charter. In other words, necessity cannot function as a source of authority. The ILC did not, however, disown Ago's Commentary as such. If one accepts this rendition of the relationship between Ago's and Crawford's

In connection with this chapter, which deals with circumstances precluding wrongfulness, the Netherlands would draw attention to the debate currently under way, for example, in the Security Council about the concept of humanitarian intervention. This is because humanitarian intervention, without prior authorization by the Security Council and without permission from the legitimate Government of the State on whose territory the intervention takes place, can be seen—in exceptional situations, because of large-scale violations of fundamental human rights or the immediate threat of such violations—as a potential justification for an internationally wrongful act, namely the actual or threatened use of force if this is required for humanitarian ends and satisfies a series of conditions. The Netherlands takes the view that an article containing such a ground for justification should be included.

Id.

135. James Crawford, Special Rapporteur, Fourth Report on State Responsibility, Int'l L. Comm'n, 56th Sess., Addendum, at 4, U.N. Doc. A/CN.4/517/Add.1 (2001).

136. *Addendum to Eighth Report, supra* note 24, ¶ 61, at 42.

commentaries, it is not precluded to attempt to justify the use of force under the necessity excuse, although such a justification may not be accepted by, for example, the ICJ. The necessity excuse can, however, only be sought and invoked as an excuse *ex post facto* and not as a source of authority.

B. Practice

The necessity excuse appears to have been put forward as justification in at least three cases of use of force in international relations. First, in 1960, Belgium dispatched a contingent of troops to Congo less than two weeks after the Republic of Congo became independent. Subsequent to independence, mutinies broke out and European residents were perceived to be at risk. In the Security Council, the Belgian Minister of Foreign Affairs said that Belgium had been forced by necessity to take this purely humanitarian action.¹³⁷ The debate in the Security Council primarily concerned the facts, and no principled discussion took place about the legality or otherwise of Belgium's justification. Ago, however, noted as "not unimportant" that there was "no denial of the principle of the plea of necessity as such."¹³⁸

Second, following the conclusion of the Gulf War in 1991 and throughout the 1990s, Turkey has conducted numerous operations

137. *Id.* ¶ 64, at 43. In the Security Council, the Belgian representative argued among other things that:

[T]he intervention of Belgium [sic] metropolitan troops is thus justified, first by the total inability of the Congolese national authorities to ensure respect for fundamental rules which must be observed in any civilized community and by the Belgian government's sacred duty to take the measures required by morality and by public international law.

U.N. SCOR, 16th Sess., 873d mtg., at 35, U.N. Doc S/PV. 873 (1960), available at <http://unbisnet.un.org>

[And further that] it is justified by the complete absence of interference by the Belgian Government in the internal affairs of the Republic of Congo

Id.

[And finally that] the Belgian Government can only interpret the statement just made by Mr. Hammarskjöld as recognition of the material necessity for Belgian military intervention in the Congo, and indeed as an implicit acknowledgement of the legality of the action my country was compelled to take in order to protect its nationals and in the interest of the Congo and the international community at large. This intervention, which was, I believe I have shown, imperative and unavoidable, is strictly proportional to the objective in view [law].

Id. at 36.

138. *Id.*

against Kurdish groups, primarily the Kurdish Workers Party (PKK), in northern Iraq without the authorization of the Iraqi government. Initially, the Turkish operations consisted of air strikes and small troop incursions.¹³⁹ Iraq protested these incursions in letters to the Security Council.¹⁴⁰ In the autumn of 1992, thousands of Turkish troops crossed into Iraq and by November 1, 20,000 troops were in northern Iraq.¹⁴¹ In 1995, Turkey launched Operation Steel during which, on March 20, a massive Turkish military force crossed into Iraq to eliminate several guerrilla strongholds of the PKK. An estimated 35,000 troops supported by tanks and combat airplanes took part.¹⁴² The incursion was alleged to be in response to a March 18 PKK attack on Turkish troops in South West Turkey. After the attack, the PKK forces retreated back into Iraq. The Turkish Prime Minister Tansu Ciller described the aim of the operation to be “to rip out the roots of the terror operations aimed at our innocent people.”¹⁴³ A White House spokesman, on March 20, said that the administration understood “Turkey’s need to deal decisively” with the terrorists, and on March 21, the U.S. State Department spokesman said that Turkey was not in violation of international law if it used necessary and appropriate force to protect itself. The French foreign minister, however, condemned the attack as a violation of Iraq’s sovereignty.¹⁴⁴ The Iraqi foreign ministry spokesman said on March 22 that the operation was “a violation of Iraq’s sovereignty” and the EU troika (France, Germany, and Spain) traveled to Turkey and

139. See Douglas Jehl, *U.S. Puts Mild Pressure on Turks to End Attacks*, L.A. TIMES, Aug. 9, 1991, at A11; *Turkey Tells Why Its Troops Are in Iraq*, WASH. POST, Aug. 9, 1991, at A18 (Turkish spokesman observing that “[t]his is not a war. This is just an operation against terrorists”).

140. See Letter dated 13 October 1991 from the Permanent Representative of Iraq, U.N. SCOR, 46th Sess., U.N. Doc. S/23141 (Oct. 14, 1991), available at <http://unbisnet.un.org> (registering the protest of Iraq); Letter dated 16 October 1991 from the Permanent Representative of Iraq, U.N. SCOR, 46th Sess., U.N. Doc. S/23152 (Oct. 17, 1991), available at <http://unbisnet.un.org> (complaining of “further violations committed by Turkish aircraft against the territorial integrity and national sovereignty and security” of Iraq).

141. *Turkish Campaign Routs Kurdish Rebels; Iraqi Kurds Aid Action*, FACTS ON FILE, Dec. 31, 1992, at 967; see also Caryle Murphy, *Turkish Army Presses Offensive in Iraq; Troops Escalate Fight Against Kurdish Rebels; Iraqi Kurds Help Reluctantly*, WASH. POST, Oct. 25, 1992, at A29.

142. See generally Nicole Pope, *The Turkish Invasion of Northern Iraq*, 497 MIDDLE EAST INT’L 3 (1995); Nicole Pope, *A Deal with Iraq’s Kurds?*, 498 MIDDLE EAST INT’L 7 (1995).

143. KESSING’S RECORD OF WORLD EVENTS 40473 (1995).

144. 55 FACTS ON FILE 217 (1995); see also *France Condemns Turkish Offensive against Kurds in Iraq*, AGENCE FRANCE-PRESSE, Mar. 21, 1995, available at 1995 WL 7781954. The French Foreign Minister Alain Juppe said that “Turkey . . . has to respect the basic principles of human rights, democracy and the right to self-defense.” *Id.* The French, who chaired the rotating EU presidency, did not find that Turkey respected these principles. *Id.*

urged the Turks to end the offensive.¹⁴⁵ Subsequently, the critique of Turkey's actions increased and the relationship between Europe and Turkey deteriorated.¹⁴⁶ Finally, on May 4, the Turkish Defense Minister, Mehmet Golan, announced that all 35,000 Turkish troops had left northern Iraq.¹⁴⁷ As early as the beginning of the summer of 1995, Turkey had, however, resumed its recurrent incursions, and Iraq continued to complain to the U.N. Security Council.¹⁴⁸

Beyond general statements, Turkish authorities have been rather parsimonious when it comes to presenting any legal justifications for the frequent forays into Iraq. As pointed out by Gray, spokespersons of the U.S. Administration appeared to have articulated more consistent legal arguments than the Turks themselves.¹⁴⁹ As a matter of fact, Libya responded to the claim by the United States that the Turkish action was taken in self-defense, calling it an act of aggression.¹⁵⁰ Turkey replied to the Libyan accusations by stressing that Turkey was "resorting to legitimate measures which are imperative to its own security [and which] cannot be regarded as a violation of Iraq's sovereignty."¹⁵¹ These measures were taken because "Iraq ha[d] been unable to exercise its authority [and, hence] Turkey cannot ask the government of Iraq to

145. See KEESING'S, *supra* note 143, at 40474; see also Shada Islam, *Europe's Stern Warning*, 497 MIDDLE EAST INT'L 4 (1995).

146. On March 27, the German foreign Minister, Mr. Kinkel announced that a \$100 million government subsidy to Turkey had been suspended because of the possibility that the offensive would drag on. The EU foreign ministers on April 10 issued a joint statement which called on Turkey to withdraw "without delay." The ministers, however, also acknowledged the gravity of "terrorist problems" facing Turkey. KEESING'S, *supra* note 143, at 40552. The U.S. Secretary of State similarly stated that U.S. and international support would be forthcoming only if troops were promptly withdrawn and the Council of Europe passed a resolution that would suspend Turkish membership unless it showed significant progress toward ending its military operations in Iraq. 55 FACTS ON FILE 315 (1995).

147. KEESING'S, *supra* note 143, at 40563.

148. See, for example, the "strong condemnation" of Turkey's territorial incursions issued by the Council of the League of Arab States. Letter dated 24 September 1996 from the Permanent Observer for the League of Arab States, U.N. SCOR, 51st Sess., U.N. Doc. S/1996/796 (Sept. 26, 1996), available at <http://unbisnet.un.org>. See also the incursion initiated on May 13, 1997, which was condemned by the League of Arab States and the Coordinating Bureau of the Movement of Non-Aligned Countries. Identical Letters dated 14 June 1995 from the Charge d'Affaires A.I. of the Permanent Representative of Iraq, U.N. SCOR, 52d Sess., U.N. Doc. S/1997/461 (June 16, 1997), available at <http://unbisnet.un.org>.

149. CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 104 (2000).

150. Letter dated 12 July 1995 from the Charge d'Affaires A.I. of the Permanent Mission of the Libyan Arab Jamahiriya, U.N. SCOR, 50th Sess., U.N. Doc. S/1995/566 (July 12, 1995), available at <http://unbisnet.un.org>.

151. Letter dated 24 July 1995 from Charge d'Affaires A.I. of the Permanent Mission of Turkey, U.N. SCOR, 50th Sess., U.N. Doc. S/1995/605 (July 24, 1995), available at <http://unbisnet.un.org>.

fulfill its obligations under international law, to prevent the use of its territory for the staging of terrorist acts against Turkey.”¹⁵² Scholars, too, appear inclined to treat the incursions as self-defense, although they find them unacceptable. Alexandrov, for example, concludes that “the reaction of the international community made it clear that the self-defense justification was found unacceptable and that Turkey’s action had pre-emptive and punitive purpose.”¹⁵³

In spite of the fact that the United States volunteered the right of self-defense as a justification for the Turkish actions, the Turkish statements, few as they are, would appear more consistent with a claim of necessity.¹⁵⁴ One reason why necessity comes to mind when reading the Turkish letters to the Security Council is the emphasis placed on the fact that Iraq, since 1991, has been unable to exercise its authority over the northern part of the country.¹⁵⁵ Under the circumstances, Turkey found that its resort to “measures imperative to its own security [the incursions into Iraq] originating from the principle of *self-preservation and necessities*, cannot be regarded as a violation of Iraq’s sovereignty.”¹⁵⁶

Overall, one may briefly examine whether the Turkish incursions fulfill the criteria for a state of necessity. It can certainly be argued that terrorist cross-border attacks may threaten an essential interest. This issue will be addressed below. Whether the specific situation in southeast Turkey is serious enough to constitute

152. *Id.* In later letters to the Security Council, Turkey emphasized that it “continues to stand for Iraq’s rights as a sovereign State” and pointed to the inability of the Iraqi authorities “to exercise [their] authority over the northern parts of [their] territory” which “continues to provide room for frequent violations of Turkish borders and territory in the form of terrorist infiltrations.” Identical letters dated 3 January 1997 from the Permanent Representative of Turkey, U.N. SCOR, 52d Sess., U.N. Doc. S/1997/7 (Jan. 3, 1997), available at <http://unbisnet.un.org>; see also Identical Letters dated 16 July 1997 from Charge d’Affaires A.I. of the Permanent Mission of Turkey, U.N. SCOR, 51st Sess., U.N. Doc. S/1997/552 (July 18, 1997), available at <http://unbisent.un.org>.

153. STANIMIR A. ALEXANDROV, *SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW* 181 (1996).

154. See also Dinstein, who categorizes the Turkish actions under “extra-territorial law enforcement,” which, as discussed previously, covers the situations where armed bands or terrorists operate from a certain territory but without the complicity of the territorial sovereign, i.e. what is here referred to as necessity. YORAM DINSTEIN, *WAR, AGGRESSION, AND SELF-DEFENCE* 218 (3d ed. 2001).

155. See, e.g., Letter dated 24 July 1995 from Charge d’Affaires A.I. of the Permanent Mission of Turkey, *supra* note 151. Identical Letter dated 27 June 1996 from the Charge d’Affaires A.I. of the Permanent Mission of Turkey, U.N. SCOR, 51st Sess., U.N. Doc. S/1996/479 (July 2, 1996), available at <http://unbisent.un.org>; Identical Letters dated 3 January 1997 from the Permanent Representative of Turkey, *supra* note 152.

156. Identical Letters dated 27 June 1996 from the Charge d’Affaires A.I. of the Permanent Mission of Turkey, *supra* note 155 (emphasis added). It should be noted that the necessity defense is only applicable if an otherwise wrongful act has been committed, i.e. the violation of Iraqi sovereignty.

a grave and imminent peril is, of course, debatable. Turkey claimed that "every day, many innocent citizens of Turkey have lost their lives and suffered incalculable damage because of the violent terrorist attacks coming from Iraqi territory."¹⁵⁷ Also debatable is the question of whether the only way to deal with the situation is through military means. Conversely, the fact that the incursions have continued over most of a decade would indicate that military means in and of themselves are unsuccessful. The question of whether the incursions seriously impair a countervailing essential interest is closely tied to the issue of whether the use of force is possible under the necessity excuse. Hence, an answer to this question depends on how one views this latter problem as discussed above.

Finally, one may ask whether Turkey had contributed to the situation of necessity. It is certainly possible to argue that the political and bureaucratic intolerance and suppression of the Kurdish minority, caused by the perceived threat to the unity of the Turkish Republic, have pushed some Kurds to armed resistance, including the use of terrorism. This argument would, however, run afoul of the, by now, generally accepted principle that no excuse exists for the use of terrorism. More plausibly, perhaps, one could argue that the reason the Iraqi government is unable to exercise its authority in the north is the imposition of no-fly zones, patrolled by the United States and United Kingdom. The planes are stationed in Turkey and, hence, the no-fly zones can only operate with Turkish approval and assistance. In one of its letters, however, Turkey stress that it "bears no responsibility" for the situation in northern Iraq.¹⁵⁸

The third case in which the necessity excuse appears to have been put forward as justification occurred in 1999. Belgium, again, in part relied on the necessity excuse for justification of use of force, this time before the ICJ. Having been charged by the Federal Republic of Yugoslavia with *inter alia* "taking part in the bombing of the territory of the Federal Republic of Yugoslavia . . . in breach of its obligation not to use force against another State," Belgium primarily claimed that the NATO intervention was "entirely legal" and "compatible with Article 2, paragraph 4 of the Charter."¹⁵⁹ Belgium, however, in the alternative raised the state of necessity justification in case the court remained unconvinced that humanitarian intervention as described by Belgium was justified by international law. Although explicitly

157. Identical Letters dated 3 January 1997 from the Permanent Representative of Turkey, *supra* note 152. Turkey further argued that the terrorist attacks constituted a threat to regional peace and security. Identical Letters dated 16 July 1997 from Charge d'Affaires A.I. of the Permanent Mission of Turkey, *supra* note 152.

158. Identical Letters dated 3 January 1997 from the Permanent Representative of Turkey, *supra* note 152.

159. See Uncorrected Transcript of Belgium's Oral Pleadings, *supra* note 81.

referring to Draft Article 33, Belgium offered the following, different definition of necessity: A state of necessity is the cause which justifies the violation of a binding rule in order to safeguard, in face of grave and imminent danger, values which are higher than those protected by the rule which has been breached.¹⁶⁰

Belgium alluded briefly to the balancing of interests: "What rule has been breached? We do not accept that any rule has been breached. However, for the sake of argument, let us say that it is the rule prohibiting the use of force." Subsequently, the question was asked: "What are the higher values which this intervention attempts to safeguard? They are rights of *jus cogens*, It is the collective security of an entire region." Later the Belgian representative added: "The Court is dealing with an intervention to save an entire population in peril, a population which is the victim of severe, widespread violations of its rights, rights which have the status of a norm of *jus cogen*."¹⁶¹

It should be pointed out that Belgium's reply was given in the context of a hearing about preliminary measures. Yugoslavia delivered applications against ten NATO member states to the court and only Belgium and the United Kingdom, in part, addressed the substantive law underlying the dispute during the hearings concerning preliminary measures. Belgium, however, neither addressed the modalities and cumulative conditions of necessity nor related to the complicated question of use of force under necessity, including Ago's differentiation. At the present time, it is unknown whether the court will rule on the merits. On March 16, 2004, the court announced public hearings to take place between April 19 and 23. The purpose of the scheduled hearings is to hear the parties' oral statements on the preliminary objections.¹⁶²

C. Necessity and Terrorism

When addressing various aspects of the issue of terrorism in the 21st century, it appears both sensible and necessary to distinguish between what might be termed "traditional" terrorism, the terrorism known to the world from the 1970s through the 1990s, and what has variously been termed "the new terrorism" or "megaterrorism."¹⁶³ Whatever the designation, this new terrorism is recognizable by the

160. See *id.*

161. See *id.*

162. I.C.J. Press Release, Legality of Use of Force (Mar. 16, 2004), available at http://212.153.43.18/icjwww/ipresscom/ipress2004/ipresscom2004-13_yall_20040316.htm (last visited Mar. 18, 2004).

163. See generally THE NEW TERRORISM: ANATOMY, TRENDS AND COUNTER-STRATEGIES (Andrew Tan & Kumar Ramakrishna eds., 2002); RICHARD FALK, THE GREAT TERROR WAR (2003).

infliction of mass casualties or mass destruction/disruption of property or infrastructure. This distinction is particularly prudent when reviewing the legal literature from the late twentieth century, which when dealing with terrorism, in most cases, did not consider mass casualty terrorism.

1. "Traditional" Terrorism and Necessity

In his 1991 book *International Law in Theory and Practice*, based on his Hague Academy Lectures, Oscar Schachter discussed the options for using force against terrorists.¹⁶⁴ For the most part, these were thoughts developed after the Hague Lectures in 1982.¹⁶⁵ He first analyzed self-defense as legitimization for using force against terrorists but found that the legal limits of self-defense may preclude the use of force in some cases, particularly where the host state is not substantially involved and, second, where the terrorist attack has not yet taken place but involves a grave threat.¹⁶⁶ Based on this, Schachter queried whether a state injured or threatened by terrorist attacks can use force.

When considering necessity in this context, which is Schachter's purpose, one may wonder how a state already injured by an attack can consider the state of necessity. As pointed out above, necessity addresses a situation of "grave and imminent" danger to an essential interest. Hence, necessity cannot be invoked by an injured state, i.e., after the danger has materialized. The explanation is to be found in Schachter's assumption that the terrorist attack form part of a pattern of attacks.¹⁶⁷ The question is whether the necessity excuse

164. SCHACHTER, *supra* note 4, at 162-73.

165. See, e.g., Oscar Schachter, *The Extraterritorial Use of Force Against Terrorist Bases*, 11 HOUS. J. INT'L L. 309 (1989).

166. SCHACHTER, *supra* note 4, at 169.

167. *Id.* at 164. Some, however, have disputed Schachter's conclusion in this regard. Dinstein develops quite an expansive notion of self-defense, originally consisting of four categories. The third dealt with the cases where "the employment of force within the territory of another state directed against individuals in retribution for acts committed by them—on their own responsibility—without the complicity of the government concerned." Yoram Dinstein, *A Survey of Self-Defense in International Law*, in CHARLES S. THOMAS, A TREATIES ON INTERNATIONAL CRIMINAL LAW, VOLUME I, CRIMES AND PUNISHMENT 273, 279 (M. Cherif Bassiouni ed., 1973). "The terrorist raids continue to be armed attacks—even if conducted from, and not by, another State [and] self-defence is permitted inside the territory of another State . . . against the guilty terrorists rather than the ineffective local government." Yoram Dinstein, *Terrorism and Wars of Liberation Applied to the Arab-Israeli Conflict: An Israeli Perspective*, 3 ISRAEL Y.B. HUM. RTS. 78, 90 (1973). Dinstein further argues that "[a] government that is unable to repel terrorists must not try to display unwanted powers when the victim implements the law." *Id.* at 91. Although he acknowledges that this scenario occasionally is called "necessity," he preferred the designation "execution." *Id.* Dinstein found and finds that "the distinction between self-defence and necessity . . . is

provides a vehicle for dealing with such terrorist attacks that form part of a pattern.

The first question is whether a terrorist attack would threaten an essential interest. Schachter argued terrorist acts which “take lives, disrupt internal order or interfere with essential services” would qualify as threats to essential interests.¹⁶⁸ As noted above, it would appear difficult to challenge a state’s assertion, within reasonable limits, that a certain act or omission threatens its essential interests.

If this is accepted, the central condition under Article 25 would be the gravity of the threat to the essential interest. Indeed, a national interest may arguably become essential if the threat is grave enough. This is in harmony with Schachter’s assumption the terrorist attacks in question are “sufficiently grave to jeopardize the essential interest of the State in protecting its citizens and political order.”¹⁶⁹ Furthermore, according to Schachter, the threat would have to go beyond “acts of a sporadic character that cause occasional harm and inconvenience.”¹⁷⁰ Terrorist attacks such as those which took place on September 11 or attacks involving some form of a weapon of mass destruction (WMD) would doubtlessly reach the required level. In addition, it may be argued that the accumulation of a series of attacks also might be one way of reaching a sufficient level of seriousness. This is in agreement with Schachter’s assumption of “a pattern of attacks.” Against this observation, one may inquire whether, based on principled considerations, an emergency response such as necessity is correct or adequate for a systematic problem.

artificial. . . the use of cross-border counter-force against armed bands is historically tied to the subject of self-defence, and there is no reason to cut that umbilical cord.” DINSTEIN, *supra* note 154, at 217. Schachter, responding to an earlier edition of Dinstein’s book containing the same argument, answers that the umbilical cord “has already been cut by two international legal bodies—the International Court and the International Law Commission.” SCHACHTER, *supra* note 4, at 172. He has, however, changed the title of the sub-category of self-defense which encompasses this situation to “extra-territorial law enforcement.” DINSTEIN, *supra* note 154, at 213-21. Along similar lines, Murphy argues that “there is nothing in Article 51 . . . that requires the exercise of self-defense to turn on whether an armed attack was committed directly by another state.” Sean Murphy, *Terrorism and the Concept of “Armed Attack” in Article 51 of the U.N. Charter*, 43 HARV. INT’L L.J. 41, 50 (2002). Gaja, however, asserts that such a “condition may be taken as implicit.” Giorgio Gaja, *In What Sense Was There an “Armed Attack”?*, available at http://www.ejil.org/forum_WTC/ny-gaja.html (last visited Jan. 12, 2002); see also *Position Paper of Australian Section of the International Commission of Jurists on the Appropriate Response of the UN to the Attacks on the USA*, available at http://www.ejil.org/forum_WTC/messages/17.html (last visited Oct. 13, 2002) (“It is clear that where another state . . . provides bases or refuge for the attackers, the state under attack, or threat of attack, may use armed force against that other State in exercise of the right of self defence.”).

168. SCHACHTER, *supra* note 4, at 170.

169. *Id.*

170. *Id.* at 171.

As it turns out, there appear to be several structural problems connected to the application of the necessity excuse to a systematic problem, such as a pattern of attacks. The whole discourse about patterns of attacks is reminiscent of similar arguments in the context of self-defense, the accumulation of events theory according to which several "small" attacks which each in their own right would not amount to an "armed attack" under Article 51, can, nevertheless, be treated as an armed attack when taken together. As pointed out by Gray, the ICJ does not appear to have dismissed the theory out of hand.¹⁷¹ Hence, a pattern of attacks may arguably add up to an armed attack under certain conditions. In the case of necessity, the grave and imminent danger, which may trigger the invocation of the necessity excuse, would not seem to be the function of a possible previous series of attacks. The necessity response is an emergency response to deal with the immediate grave peril at hand, not the five previous attacks during the past six months in addition to the imminent attack. That the state considering invoking the state of necessity has been the victim of previous attacks would not seem to add anything towards fulfilling the cumulative conditions in Article 25.

The fact that Schachter based his discussion on the occurrence of several or a pattern of terrorist attacks indicates that the problem is systemic, which causes further problem in regard to the necessity excuse. As international law has developed, particularly through the twentieth century, an increasing range of issues and problems are now regulated by international law, be it customary or conventional. Rodick informed us that some questions concerning extraterritorial jurisdiction once were legitimated by necessity: "The plea of necessity has also been employed to excuse the action of a state in assuming criminal jurisdiction over aliens in respect to acts not committed within its territory." Rodick mentioned "counterfeiting of currency, plotting against its ruler," and "Russia, Greece and Mexico [have] gone even further and declared that circumstances of exceptional necessity will excuse the action of a state in providing for the punishment of serious extraterritorial offences against their subjects." These bases for jurisdiction are today known as the protective or security principle and the passive personality principle respectively.¹⁷² Ago, too, provided an example of how a situation originally dealt with under necessity today is explicitly regulated:

171. CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 108 (2000).

172. BURLEIGH CUSHING RODICK, THE DOCTRINE OF NECESSITY IN INTERNATIONAL LAW 35 (1928). *See, e.g.*, IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 303-04 (4th ed. 1990).

The lesson of the *Torrey Canyon* incident did not go unheeded. In view of the fact that such incidents might recur at any time, it seemed essential to ground the right of the coastal State to take protective measures on positive rules which would be more precise than the mere possibility of relying on a "state of necessity" as a circumstance precluding the international wrongfulness of certain measures taken on the high seas.¹⁷³

International security and the use of force are regulated under the U.N. Charter. It has often been argued that the inoperability or poor functioning of the collective security system grants greater authority for states to use force than was allowed under the Charter rules. Such arguments have, however, been refuted by the ICJ. In this context, one may also quote the following excerpt from ICJ President Winiarski's dissenting opinion:

The intention of those who drafted it was clearly to abandon the possibility of useful action rather than to sacrifice the balance of carefully established fields of competence, as can be seen, for example, in the case of the voting in the Security Council. It is only by such procedures, which were clearly defined, that the United Nations can seek to achieve its purposes. It may be that the United Nations is sometimes not in a position to undertake action which would be useful for the maintenance of international peace and security or for one or another of the purposes indicated in Article 1 of the Charter, but that is the way in which the Organization was conceived and brought into being.¹⁷⁴

The perceived problems pertaining in particular to the functioning of the Security Council were again raised in the context of the Kosovo crisis and, albeit in a different form, in the recent case of Iraq. As recently pointed out by Crawford and the ILC, the state of necessity excuse cannot be invoked as a source of authority; it does not provide an adequate framework for authorizing the use of force for example in the context of humanitarian intervention. A similar conclusion must apply to potential use of force against terrorism. As pointed out above, however, the state of necessity may provide an ad hoc excuse, as opposed to a source of authority, for exceptional threats to essential interests. A systematic problem concerning a pattern of attacks would, however, appear to be at odds with this function of the necessity excuse.

2. "New" Terrorism and Necessity

Although the so-called "new" terrorism does not by definition involve weapons of mass destruction (WMD), a scenario involving such weapons is often what comes to mind. As pointed out initially in

173. *Addendum to Eighth Report, supra* note 24, ¶ 36, at 29.

174. Certain Expenses of the United Nations, 1962 I.C.J. 151, 230 (July 20) (dissenting opinion of President Winiarski).

this Article, the U.S. Administration's interpretation of self-defense, which includes preemptive attacks on terrorists, lacks support in current international law. In lieu of a reasonable self-defense argument, the necessity excuse may provide a legal basis for a forceful response to a single imminent attack against a large number of people. Romano has advocated the potential use of the doctrine of necessity in case of use of force against such threats.¹⁷⁵ Depending on the circumstances and assuming that the use of force is not completely ruled out under Article 25, the cumulative conditions would appear fulfilled if a real and immediate threat of deployment of WMD could be established. There would certainly be a grave peril to an essential interest and balancing of interests would also come out on the side of the state threatened by a WMD attack.

A hypothetical legal advisor from the U.S. State Department might, however, encounter problems when attempting to fit a preemptive strike under the necessity excuse. As in the case of self-defense, the question of imminency remains central. Article 25 speaks of a "grave and imminent peril." As mentioned, the ICJ has determined that the peril has to be established "at the relevant point in time" and, hence, not be a mere "possibility."¹⁷⁶ If, however, the realization of the peril is certain and inevitable, the peril may still be said to be imminent even if the realization will only come about in the long term.¹⁷⁷ Similarly, the 2001 Commentary explains that "a measure of uncertainty about the future does not necessarily disqualify a state from invoking necessity, if the peril is clearly established on the basis of the evidence reasonably available at the time."¹⁷⁸ As pointed out by both the ICJ and the ILC, long-term predictions and prognoses are particularly pertinent to questions concerning threats to, for example, the environment.¹⁷⁹ As outlined above, the court implicitly employed the precautionary principle in the *Gabcikovo-Nagymaros Project* case.

However, as observed by Bothe in the context of self-defense, transferring the precautionary principle to the field of legitimization of the use of force provides for a "weird" conclusion: "in case of

175. John-Alex Romano, *Combating Terrorism and Weapons of Mass Destruction: Reviving the Doctrine of a State of Necessity*, 87 GEO. L.J. 1023, 1025 (1999).

176. *Gabcikovo-Nagymaros Project*, (Hung. v. Slov.), 1997 I.C.J. 7, 42, ¶ 54.

177. *Id.* In the concrete case, the court found that although an "essential interest," i.e. the environment was involved, the threat was in the case of Nagymaros neither grave nor imminent, *id.* at 42, ¶ 55, and in the case of the *Gabcikovo* sector not imminent, its graveness untold, *id.* at 42-43, ¶¶ 56-57.

178. CRAWFORD, *supra* note 27, ¶ 16, at 184.

179. *Id.*

uncertainty, strike.”¹⁸⁰ This reading of how the precautionary principle might function in the legal regime regulating the use of force may be too mordant.

One might ask whether the legal concept of imminence might be adjusted. The NSS document may be seen to anticipate the problems arising *vis à vis* international law and proposes that “[w]e must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries.”¹⁸¹ This proposal is based on the assertion that if and when an attack by terrorists or a rogue state employing WMD becomes imminent in the conventional sense, it is too late to react. This proposal is not *prima facie* unreasonable even if the exact legal modalities and practical implications have to be studied and debated. However, *lex lata* the bottom line is that a preemptive attack as envisioned by the NSS and other documents goes beyond the bounds of the necessity excuse. If the imminence requirement were fulfilled, however, the necessity excuse would appear to be suitable as a legal excuse for using force against terrorists attempting to deploy WMD.

VI. CONCLUSION

That a state of necessity under certain circumstances may be invoked in order to preclude wrongfulness of breaching an international obligation is undoubtedly part of contemporary international law. The justification is, however, reserved for extraordinary cases, something the ILC in part emphasized by deliberately phasing the provision in Article 25 of the Draft Articles on state responsibility in the negative.

When considering whether the necessity excuse can be invoked in case of use of force against terrorists, several complications arise: first, whether force can be employed with reference to necessity. Ago and the ILC found, in 1980, that limited uses of force probably were not prohibited by a peremptory norm and, hence, compatible with the necessity excuse. Indications are that today, all use of force is prohibited by a *jus cogens* norm, although this is not entirely clear. The terrorist threat would, next, have to fulfill the cumulative conditions in Draft Article 25. One problem, which has not been addressed, is the balancing of interests where the interest behind the obligation breach must “obviously be inferior to” the interest of the state invoking necessity. One may argue that the essential interest under threat must be very substantial indeed in order to outweigh the use of force against another state.

180. Michael Bothe, *Terrorism and the Legality of Pre-emptive Force*, 14 EUR. J. INT’L L. 227, 232 (2003).

181. *National Security Strategy*, *supra* note 10, at 15.

However, in order for the threat to reach the required level of seriousness, one may have to anticipate systemic threats, such as a pattern of terrorist attacks as proposed by Schachter. To address a systemic problem with an ad hoc response, however, causes difficulties both concerning the specific conditions and more general principled considerations. Conceptually, to respond to a systemic threat with an exceptional ad hoc response, such as the necessity excuse, in many ways appears to be an oxymoron. In sum, it would seem that, even if force is not excluded under the necessity excuse, conventional terrorism cannot be addressed under the state of necessity.

This leaves the issue of unconventional terrorism with a single massive attack against a large number of victims. Again assuming that the use of force is not ruled out as a given, a threatened terrorist attack employing unconventional weapons would appear to fulfill the cumulative conditions for resorting to the necessity excuse. The idea of preemptive attacks as presented in the NSS document would, however, go beyond what might be excused by reference to necessity.