



State of Necessity

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Introduction

State of necessity, now known as “necessity” and codified by Article 25 of the International Law Commission’s (ILC’s) Articles on State Responsibility (ASR), is a circumstance precluding the wrongfulness of an otherwise internationally wrongful act. It is traditionally defined as a situation in which the sole means by which a state can safeguard an essential interest from a grave and imminent peril is to sacrifice another state’s interest of lesser importance. The plea is unavailable where the rule from which derogation is sought precludes its invocation, where the state invoking necessity has contributed to peril’s onset, or where the act to safeguard the essential interest is contrary to a peremptory norm. As traditionally understood, the essential interests safeguarded in necessity are state interests, but the ILC included as progressive development in Article 25 ASR the possibility for a state—or several states acting together unilaterally—to safeguard in necessity an essential interest of the international community as a whole. The ILC’s Draft Articles on the Responsibility of International Organizations (DARIO), now also provides as progressive development for the possibility of an international organization, acting in necessity, to safeguard an essential interest of the international community as whole, subject to the organization having the role of protecting the interest in question as well as the other conditions traditionally associated with state of necessity, as set out above, being met. Indeed, initially the ILC considered that an international organization cannot invoke necessity to safeguard its own essential interest (see the section on the ILC’s Draft Articles on Responsibility of International Organizations).

Points of Controversy

Although international courts and tribunals now generally accept necessity in principle as an autonomous customary rule, until recently a pervasive question has been whether it exists as a distinct category. While, like distress, necessity is a situation of relative impossibility, it differs in that necessity does not pertain to the safeguarding of human life, unless it is a question of safeguarding an entire population. Necessity differs from *force majeure* in that the latter is a situation of absolute rather than relative impossibility. Moreover, state of necessity must be distinguished from primary rules in necessity’s image such as military necessity within the law of armed conflict, and indeed all those primary rules providing for derogations from the law in situations of emergency, such as self-defense or permissible human rights derogations. State of necessity—and despite its current abbreviated appellation, necessity—is also to be distinguished from necessity as a condition for the application of a rule. Finally, necessity must be distinguished from pure political, ethical, or other need, although as a legal category it is fair to say that Article 25 ASR covers that circumstance albeit under the strictest of conditions. As a distinct concept, the question has also arisen whether necessity has crossed the normativity threshold. Historically, state of necessity was extremely controversial, initially because it was confounded with self-preservation, which advocates maintained was a “fundamental” right of states, premised on natural law and before which all other rights were to cede. Later advocates of necessity would maintain, this time from a positivist perspective, that the law found its limit in necessity situations: it was implicitly understood that no State would agree to the law’s binding nature when a State was in such circumstances. These perspectives and their critiques are reflected in the early literature referenced below. However, necessity’s fortunes would change, starting in 1980 when ILC Special Rapporteur on State Responsibility, Roberto Ago, reconceptualized state of necessity, arguing in Ago 1980 that rather than being a mere expression of the *raison d’état*, state of necessity was a principle to be associated with a just and equitable application of the law: *summum jus, suma injuria*. For Ago, were state of necessity cast out the door, it would return through

the window; codified, it would be domesticated. ILC members nonetheless considered Ago's proposition highly controversial; a matter to be returned to during the then Draft Articles' second reading process. When that time came, the International Court of Justice (ICJ) had handed down its 1997 *Gabcikovo-Nagymaros* decision (International Court of Justice 1997) in which the Court accepted that, although not applicable to the facts of that case, state of necessity as then provisionally codified by the ILC, was a rule of customary international law; this resulting in today's majority view that although rare and strictly circumscribed, state of necessity is positive law. The literature is henceforth susceptible of division into, on the one hand, a predominantly skeptical majority prior to 1997, and on the other, a predominantly accepting majority afterwards; even if cases remain, at best, rare in upholding necessity on the facts.

Ago, Roberto. *Addendum to the Eighth Report on State Responsibility*. UN Doc. A/CN.4/318/Add.5–7, 29 February, 10 and 19 June 1980. New York: International Law Commission, 1980.

One of the most important works on necessity, which, as indicated above, marks a significant turning point in the concept's fortunes.

International Court of Justice. "Case Concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia): Judgment of 25 September 1997." *ICJ Reports* (1997): 7–84.

As indicated above, one of the most important necessity cases, marking a significant turning point in the concept's fortunes.

The ILC's Work on State of Necessity in the State Responsibility Context

ILC work on international organizations and necessity is detailed under State of Necessity and the Safeguarding of Community Interests. This section is concerned with the ILC's codification of necessity in the state responsibility context.

THE DRAFTING HISTORY

The ILC's work on state of necessity is the starting point for any modern appreciation of the topic. The concept went through several mutations over the course of the ILC's state responsibility project, and the various changes made over time are usefully summarized in Crawford 2002. Early ILC attempts at the codification of the law of state responsibility also provided some discussion of necessity's place in the law of state responsibility, first in the unsuccessful work presented by Special Rapporteur Garcia Amador in his First and Sixth Reports on State Responsibility (Garcia Amador 1956 and Garcia Amador 1961). Roberto Ago reconceptualized state responsibility as a whole and mentioned state of necessity in that process (Ago 1963). This would attract some comment in the ILC at its 686th meeting in 1963 (International Law Commission 1963).

Ago, Robert. *Report by Mr. Roberto Ago, Chairman of the Sub-committee on State Responsibility*. UN Doc. A/CN.4/152, 16 January 1963. New York: International Law Commission, 1963.

Comments on state of necessity made during the discussions on the direction of the State Responsibility Draft (1962–1963). See, in particular, pp. 229, 235.

Crawford, James. *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*. Cambridge, UK: Cambridge University Press, 2002.

Provides a useful table summarizing the drafting history (p. 323), as well as the commentary to Article 25 of the ASR.

Garcia Amador, F. V. *Report on International Responsibility by Mr. F. V. Garcia Amador, Special Rapporteur*. UN Doc. A/CN.4/96, 20 January 1956. New York: International Law Commission, 1956.

First report of Special Rapporteur Garcia Amador containing his tentative initial views on whether state of necessity should be dealt with by the Draft Articles.

Garcia Amador, F. V. *Sixth Report on International Responsibility by Mr. F. V. Garcia Amador, Special Rapporteur*. UN Doc. A/CN.4/134 and Add.1, 26 January 1961. New York: International Law Commission, 1961.

Sixth report of Special Rapporteur Garcia Amador containing his tentative initial views on whether state of necessity should be dealt with by the Draft Articles.

International Law Commission. *Summary Record of the 686th Meeting*. UN Doc. A/CN.4/SR.686, 24 May 1963. New York: International Law Commission, 1963.

Comment from the ILC on Ago's report (Ago 1963). See p. 84.

First Reading

State of necessity was among the circumstances precluding wrongfulness dealt with by the International Law Commission during the first reading process. A 1977 ILC Secretariat Survey mentions cases now taken to illustrate the plea (International Law Commission 1977). In a landmark report, Special Rapporteur Ago introduced state of necessity to the Commission during the ILC's first reading process (Ago 1980). This was then commented upon, firstly with some hesitation by ILC members at the 1,612th through 1,618th meetings in June of 1980 (International Law Commission 1981a) and later by states and in the General Assembly's Sixth Committee: International Law Commission 1981b, International Law Commission 1982, International Law Commission 1983, International Law Commission 1984, International Law Commission 1998, International Law Commission 2000. In the form of Draft Article 33 and related commentary, the ILC then presented state of necessity to the General Assembly (International Law Commission 1980).

Ago, Roberto. *Addendum to the Eighth Report on State Responsibility*. UN Doc. A/CN.4/318/Add.5–7, 29 February; 10, 19 June 1980. New York: International Law Commission, 1980.

Special Rapporteur Roberto Ago's Report to the ILC. One of the most important works on necessity, which, as indicated above, marks a significant turning point in the concept's fortunes.

International Law Commission. “Force majeure” and “Fortuitous Event” as Circumstances Precluding Wrongfulness: Survey of State Practice; International Judicial Decisions and Doctrine. UN Doc. A/CN.4/315, 27 June 1977. New York: International Law Commission, 1977.

While dealing with the related concept of *force majeure*, this study by the ILC Secretariat also refers to cases and incidents best seen as situations of necessity.

International Law Commission. *Report of the International Law Commission on the Work of Its Thirty-second Session*. UN Doc. A/35/10, 5 May–25 July 1980. New York: International Law Commission, 1980.

ILC report on state of necessity to the General Assembly. In most respects an abbreviation of Ago's report.

International Law Commission. “1,612th meeting, 16 June 1980–1,618th meeting, 24 June 1980: State Responsibility: Draft Articles Submitted by Mr. Ago.” *ILC Yearbook* 1980.1 (1981a): 153–183.

Special Rapporteur Roberto Ago’s presentation to the ILC and Member comments. Reveals the highly contentious nature of the concept and susceptibility of abuse.

International Law Commission. *Comments of Governments on Part 1 of the Draft Articles on State Responsibility for Internationally Wrongful Acts*. UN Doc. A/CN.4/342 and Add.1–4; 10 April; 2, 29, 30 June; and 24 July 1981. New York: International Law Commission, 1981b.

Comments and observations of governments on the Draft Articles from 1981.

International Law Commission. *Comments and Observations of Governments on Part 1 of the Draft Articles on State Responsibility for Internationally Wrongful Acts*. UN Doc. A/CN.4/351, Add.1–2 & Add.2/Corr.1, Add.3 & Corr.1, 1 March; 6, 16 April; and 6 May 1982. New York: International Law Commission, 1982.

Comments and observations of governments on the Draft Articles from 1982.

International Law Commission. *Comments and Observations of Governments on Part 1 of the Draft Articles on State Responsibility for Internationally Wrongful Acts*. UN Doc. A/CN.4/362, 3 January 1983. New York: International Law Commission, 1983.

Comments and observations of governments on the Draft Articles from 1983.

International Law Commission. *Topical Summary, Prepared by the Secretariat, of the Discussion in the Sixth Committee on the Report of the Commission during the Thirty-eighth Session of the General Assembly*. UN Doc. A/CN.4/L.369, 30 January 1984. New York: International Law Commission, 1984.

Comments and observations by the General Assembly’s Sixth (Legal) Committee from 1984.

International Law Commission. *State Responsibility: Comments and Observations Received from Governments*. UN Doc. A/CN.4/488, 25 March 1998. New York: International Law Commission, 1998.

Comments on state responsibility from various governments, following provisional adoption of the Draft Articles in 1996.

International Law Commission. *Topical Summary of the Discussion Held in the Sixth Committee of the General Assembly during its Fifty-fourth Session Prepared by the Secretariat*. UN Doc. A/CN.4/504, 8 February 2000. New York: International Law Commission, 2000.

Comments and observations by the General Assembly’s Sixth (Legal) Committee from 2000.

Second Reading

When necessity was due for consideration by the ILC during the second reading process, attitudes to the plea had changed. In light of the ICJ’s decision in the 1997 *Gabcikovo-Nagymaros* case (International Court of Justice 1997, cited under Post–World War II Cases and Incidents), Special Rapporteur James Crawford was at liberty to note the plea’s controversial, but now ICJ-approved, status as positive law. This left scope for the exploration of possible outer limits to the plea, including whether it might embrace the precautionary

principle and whether it might be invoked to safeguard interests of the international community as a whole (Crawford 1999). ILC debates were more subdued than on the first reading, the plea generally being accepted as positive law (International Law Commission 1999a, International Law Commission 1999b), both before the concept's reformulation by the Drafting Committee (International Law Commission 1999c) and subsequent to that reformulation (International Law Commission 1999d). State comments would, inter alia, address the 1999 Kosovo crisis in relation to necessity (International Law Commission 2001a, International Law Commission 2001b).

Crawford, James. *Second Report on State Responsibility: Addendum*. UN Doc. A/CN.4/498/Add.2, 30 April 1999. New York: International Law Commission, 1999.

Report by Special Rapporteur James Crawford.

International Law Commission. *Summary Record of the 2,591st Meeting*. UN Doc. A/CN.4/SR.2591, 22 June 1999. New York: International Law Commission, 1999a.

ILC debate on state of necessity during second reading process.

International Law Commission. *Summary Record of the 2,592nd Meeting*. UN Doc. A/CN.4/SR.2592, 23 June 1999. New York: International Law Commission, 1999b.

ILC debate on state of necessity during second reading process

International Law Commission. *Summary Record of the 2,605th Meeting*. UN Doc. A/CN.4/SR.2605, 19 July 1999. New York: International Law Commission, 1999c.

Consideration by the Drafting Committee and subsequent ILC debate.

International Law Commission. *Summary Record of the 2,606th Meeting*. UN Doc. A/CN.4/SR.2606, 19 July 1999. New York: International Law Commission, 1999d.

Subsequent ILC debate.

International Law Commission. *Report of the Commission to the General Assembly on the Work of Its Fifty-first Session*. UN Doc. A/CN.4/SER.A/1999/Add.I (Part 2), 3 May–23 July 1999. New York: International Law Commission, 1999e.

ILC Reports to the General Assembly.

International Law Commission. *Report of the International Law Commission on the Work of its Fifty-second Session (2000): Topical Summary of the Discussion Held in the Sixth Committee of the General Assembly during its Fifty-fifth Session Prepared by the Secretariat*. UN Doc. A/CN.4/513, 15 February 2001. New York: International Law Commission, 2001a.

Comments and observations by the General Assembly's Sixth (Legal) Committee. See p. 14, paras. 47–48.

International Law Commission. *State Responsibility: Comments and Observations Received from Governments*. UN Doc. A/CN.4/515 and Add.1–3, 19 March 2001. New York: International Law Commission, 2001b.

Comments and observations by governments on Draft Article 26, State of Necessity (pp. 32–33).

ILC Debates on Third and Final Reading

Only brief mention was made of state of necessity during the ILC’s final reading process, at the 2704th meeting (International Law Commission 2001).

International Law Commission. *Summary Record of the 2,704th Meeting*. UN Doc. A/CN.4/SR.2704, 7 August 2001. New York: International Law Commission, 2001.

Includes a brief mention of state of necessity.

TEXT OF THE DRAFT ARTICLES ON STATE OF NECESSITY

The various draft articles on state of necessity over the course of the ILC’s work on state responsibility (International Law Commission 1980, International Law Commission 1996, International Law Commission 2000, International Law Commission 2001), culminating in the General Assembly’s adoption of the Articles on State Responsibility (ASR) in 2001 (United Nations General Assembly 2001) are detailed below.

International Law Commission. *Report of the International Law Commission on the Work of Its Thirty-second Session*. UN Doc. A/35/10, 5 May–25 July 1980. New York: International Law Commission, 1980.

Text of Part 1, Draft Articles on State Responsibility, as provisionally approved in 1980 (pp. 30–63).

International Law Commission. *Report of the Commission to the General Assembly on the Work of Its Forty-eighth Session*. UN Doc. A/CN.4/SER.A/1996/Add.I (Part 2), 6 May–26 July 1996. New York: International Law Commission, 1996.

Text of Draft Articles as provisionally approved on first reading (pp. 58–73).

International Law Commission. *Report of the International Law Commission on the Work of Its Fifty-second Session* UN Doc. A/55/10, 1 May–9 June and 10 July–18 August 2000. New York: International Law Commission, 2000.

Text of Draft Articles as provisionally adopted by the ILC on second reading (pp. 65–71).

International Law Commission. *Report of the International Law Commission on the Work of Its Fifty-third Session*. UN Doc. A/56/10, 23 April–1 June and 2 July–10 August 2001. New York: International Law Commission, 2001.

Text of Draft Articles with commentary as adopted by the ILC on final reading. The text of Article 25 ASR and its commentary is reproduced here (pp. 31–143).

United Nations General Assembly. Responsibility of States for Internationally Wrongful Acts. G.A. Res. 56/83 adopted on 12 December 2001, Agenda Item 162. UN Doc. A/RES/56/83.

Text of Articles as “noted” by the General Assembly.

Cases and State Practice on Necessity Generally

The most significant cases and incidents up to 2001 are to be found in International Law Commission 2001 (cited under Text of the Draft Articles on State of Necessity) as adopted by the ILC on final reading. A slightly longer compilation is found in R. Ago's "Addendum to the Eighth Report on State Responsibility" (Ago 1980, cited under First Reading). Different views on the cases can be found in the literature, notably in Zemanek and Salmon 1987 (cited under Modern Textbooks) and Cheng 1953 (cited under Extracts on Necessity from Works on Broader Topics). Contemporary cases specific to international investment law are detailed with the literature under the heading Financial Necessity. See also Yamada 2005.

Yamada, Takuhei. "State of Necessity in International Law: A Study of International Judicial Cases." *Kobe Gakuin Law Journal* 34.4 (2005): 107–158.

An article dedicated to an exposition of cases that, in the author's view, can be seen as bearing on necessity.

OLDER CASES AND INCIDENTS

With some exceptions, older judicial decisions and incidents relative to necessity, as detailed in this section, tend to reveal that state of necessity is not always identified as a distinct category, nor indeed is it commonly upheld on the facts. For more on these cases and incidents, see Moore 1898, Moore 1906, "1832 Anglo-Portuguese Dispute," "The Sea Fur Seals Incident," *French Company of Venezuelan Railroads Case*, Judge Anzilotti's dissent in the *Oscar Chinn Case*, the *Société Commerciale de Belgique (SOCOBEL) Case*, and the *Russian Indemnity Case*.

"1832 Anglo-Portuguese Dispute." In *Peace*. Vol. 2 of *International Law Opinions*. Edited by Arnold D. McNair, 232. Cambridge, UK: Cambridge University Press, 1956.

The appropriation, contrary to a treaty, of British property in Portugal in order to feed troops quelling internal disturbances was accepted by the British on the grounds that treaties can be modified when it is "absolutely and indispensably necessary to the safety and even the very existence of the State."

***French Company of Venezuelan Railroads Case. Reports of International Arbitral Awards* 10 (1902): 285–355.**

The France-Venezuela Mixed Commission found that Venezuela could annul a concession contract following the outbreak of civil war on the grounds that its obligation to safeguard its own existence took priority over the contract. An indemnity, in full or in part, was nonetheless owed. The case could be seen alternatively as relative to due diligence.

Moore, John Bassett. "Contraband: Case of the *Neptune* (1797)." In *History and Digest of Arbitrations to Which the United States Has Been a Party*. Vol. 4. By John Bassett Moore, 3843–3885. Washington, DC: Government Printing Office, 1898.

This case is sometimes taken as an early authority for the plea's existence (although its distinction with self-preservation is hard to draw). Necessity must be "absolute and irresistible" or "real and pressing" and not merely imaginary. The plea was not upheld on the facts of the case, which bore on an apprehended famine. The case is also taken as authority for the proposition that compensation is owed when a state has acted in necessity.

Moore, John Bassett. "Destruction of the *Caroline*." In *A Digest of International Law*. Vol. 2. By John Bassett Moore, 409–414. Washington, DC: Government Printing Office, 1906.

Following the UK’s destruction on US territory of a vessel transporting insurgents to Canada, US Secretary of State Webster admitted that had the British been in a situation “of necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment for deliberation,” the incursion may have been justified. Often overlooked is that in Webster’s view this was not the case on the facts, and if it were, the UK should apologize.

“Russian Indemnity Case (Russia v. Turkey): Arbitral Award of 11 November 1912.” *Reports of International Arbitral Awards* 11 (1912): 421–477.

While using the terminology of *force majeure*, the Ottoman Empire claimed that its extremely difficult financial situation rendered it unable to repay its debts to Russia. The Tribunal found that the obligation to execute treaties could yield if the very existence of the state was in danger and if respect of the international obligation was self-destructive; this, according to the Tribunal, not being the case on the facts.

The Oscar Chinn Case (Britain v. Belgium). PCIJ Series A/B, no. 63 (1934).

See Judge Anzilotti’s dissent (pp. 51–53). While Anzilotti acknowledged that Belgium had not in this case pleaded necessity, nonetheless were it (hypothetically) in such a situation, such a plea could be relied upon. On the facts, Anzilotti agreed with the majority. The majority judgment did not pronounce on state of necessity.

“The Sea Fur Seals Incident.” In *British and Foreign State Papers*. Vol. 86, 219–220. London: Great Britain Foreign Office, 1899.

Put forward as an instance of ecological necessity being pleaded: Russia issued a decree prohibiting the hunting of these seals in the high seas off the Russian coast; Russia declaring the temporary measure to be “essentially precautionary [in] character . . . taken under the pressure of exceptional circumstances,” with a view to preserving the animal stocks.

The Société Commerciale de Belgique (SOCOBEL) Case (Belgium v. Greece). PCIJ Series A/B, No.78 (1939).

The Court did not need to pronounce on a passage in the Belgian pleadings, in which Belgium conceded that Greece need not pay its debt if in doing so Greece were to compromise its essential public services.

POST-WORLD WAR II CASES AND INCIDENTS

Cases and incidents following the Second World War more clearly identify necessity as a distinct category, although in the most prominent examples prior to the ICJ’s 1997 *Gabcikovo-Nagymaros* decision (International Court of Justice 1997), either necessity was in fact not invoked or skepticism was expressed in its regard, these being respectively: *The Torrey Canyon* and the *Rainbow Warrior Affair*. Judicial decisions, pleadings, and incidents from 1997 reveal greater explicit acceptance of necessity, but not its application to the particular facts at hand: “Case Concerning the Gabcikovo-Nagymaros Project” (International Court of Justice 1997); *Legality of the Use of Force (Serbia and Montenegro v. Belgium)*; *The M/V Saiga (No.2) Case (Saint Vincent and the Grenadines v. Guinea)*; “Case Concerning Fisheries Jurisdiction (Spain v. Canada)” (International Court of Justice 1998); and, “Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory” (International Court of Justice 2004).

“Case Concerning the Difference between New Zealand and France Concerning the Interpretation or Application of Two Agreements, Concluded on 9 July 1986 between the Two States and Which Related to the Problems Arising from the *Rainbow Warrior Affair*: Decision of 30 April 1990.” *Reports of International Arbitral Awards* 20 (1990): 215–284.

The *Rainbow Warrior* case was decided before the second reading process of the necessity provision (then Draft Article 33) had been undertaken by the ILC. The tr+, not applicable to the case at hand.

International Court of Justice. “Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia): Judgment of 25 September 1997.” *ICJ Reports* (1997): 7–84.

Hungary pleaded “ecological” necessity (Slovakia termed it “financial” necessity) following its suspension and later termination of a 1977 treaty relative to the construction of a system of locks. The Court asserted the customary nature of state of necessity, but rejected Hungary’s plea on the facts. The Court comments on the exceptional nature of the plea, and discusses its various conditions, notably the nature of imminence.

International Court of Justice. “Case Concerning Fisheries Jurisdiction (Spain v. Canada): Judgment of 4 December 1998.” *ICJ Reports* (1998): 432–738.

Canada appeared to plead state of necessity to justify legislation for the conservation of straddling stocks that, in Canada’s view, were threatened with extinction. In its decision, the ICJ did not pronounce, although Judge Bedjaoui referred in his dissenting opinion to Canada’s invocation of “‘emergency’ or even ‘state of necessity’” (p. 518, para. 6).

International Court of Justice. “Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion of 9 July 2004.” *ICJ Reports* (2004): 136–271.

In the *Wall Advisory Opinion*, the ICJ raised necessity *proprio motu*, claiming that Israel could not preclude the wrongfulness of construction of the wall on occupied Palestinian territory on grounds of necessity, as it was not the sole means available to Israel to prevent attacks on its territory and population.

***Legality of the Use of Force (Serbia and Montenegro v. Belgium)*. Oral Pleadings, Verbatim Record, 10 (10 May 1999), CR 99/15.**

Belgium invoked necessity to justify the NATO bombing of Kosovo in 1999. This would not be addressed by the International Court of Justice.

***The M/V Saiga (No.2) Case (Saint Vincent and the Grenadines v. Guinea)*. International Tribunal for the Law of the Sea, Judgment of 1 July 1999.**

The International Tribunal for the Law of the Sea recognized state of necessity as codified by the ILC as a customary rule without upholding the plea on the facts.

***The Torrey Canyon*. Cmnd. 3246. London: Her Majesty’s Stationery Office, 1967.**

One of the most cited incidents in the environmental context. An abandoned Liberian tanker breaking up off the Cornish coast was massively bombarded (with, inter alia, napalm) by British armed forces to prevent pollution damage to the UK coastline. The bombing was met with silence by other states. Ago put this case forward in his 1980 ILC Report (Ago 1980, cited under First Reading) as a hypothetical illustration of where the necessity plea might be applicable.

Encyclopedias, Commentaries, Textbooks, and Courses

Encyclopedias, commentaries, textbooks, and Hague Academy courses are a useful starting point for the consideration of secondary

sources relative to state of necessity.

ENCYCLOPEDIAS AND COMMENTARIES

Both Tanzi 2012 and Heathcote 2010 provide overviews of necessity, the former taking the contemporary approach that necessity reflects custom, and the latter, while acknowledging this to be the dominant view, nonetheless provides some clues as to why it may not necessarily be so.

Heathcote, Sarah. “Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility: Necessity.” In *The Law of International Responsibility*. Edited by James Crawford, Alain Pellet, and Simon Olleson, 491–501. Oxford: Oxford University Press, 2010.

An overview of the cases and issues surrounding necessity as a circumstance precluding wrongfulness, including its treatment by the International Law Commission.

Tanzi, Attila. “Necessity, State of.” In *Max Planck Encyclopedia of Public International Law*. Vol 7. Edited by Rüdiger Wolfrum, 583–587. Oxford and New York: Oxford University Press, 2012.

Concise overview of the concept, including an evaluation of the plea’s conditions of application and the cases. The author considers that international practice and case law provide “substantial authority for the existence of necessity as an autonomous circumstance precluding wrongfulness.” As such, the author’s position reflects the predominant view in respect of necessity today. Available online by subscription.

TEXTBOOKS

Textbooks can be quite neatly divided into several periods: modern texts, which generally provide only a cursory analysis of the plea; post–World War II texts, in which skepticism is frequently expressed in regard to the plea; and older texts, in which more philosophical issues are raised, notably how state of necessity can function in the international legal order.

Modern Textbooks

Modern textbooks tend to provide, at most, a one- or two-page summary of necessity as a circumstance precluding wrongfulness. Shaw 2008 is perhaps representative, providing some cases to illustrate the principle; Crawford and Olleson 2006 deals with necessity and distress together, and focuses on the distinction between the two concepts as well as the possibilities of their abuse. For Brownlie 2008 “necessity as an omnibus category probably does not exist,” although it is in any event tightly circumscribed by the conditions for its invocation posed by the ILC (p. 466); although in its subsequent edition under a different author (Crawford 2012), this text is more accepting of the plea. Lowe 2007 distinguishes necessity from fundamental change of circumstances as a ground for termination and suspension of treaties, and points out that tribunals have yet to establish what is required for the plea to succeed. Zemanek and Salmon 1987 is a textbook providing considerable detail on state of necessity, even if it only deals with pre-1987 cases.

Brownlie, Ian. *Principles of Public International Law*. 7th ed. Oxford: Oxford University Press, 2008.

For this author “necessity as an omnibus category probably does not exist” (p. 466), although it is in any event tightly circumscribed by the conditions for its invocation posed by the ILC.

Crawford, James. *Brownlie’s Principles of Public International Law*. 8th ed. Oxford: Oxford University Press, 2012.

The new edition of Brownlie’s textbook, edited by James Crawford, notes that “it has been doubted whether necessity exists as an omnibus category” (thus cast in the past tense) and that today judicial recognition of the plea tends to be followed by inapplicability to the facts (p. 564).

Crawford, James, and Simon Olleson. “The Nature and Forms of International Responsibility.” In *International Law*. 2d ed. Edited by Malcolm D. Evans, 451–478. Oxford: Oxford University Press, 2006.

The authors deal with necessity and distress together, and focus on the distinction between the two concepts, as well as the possibilities of their abuse. See p. 469.

Lowe, Vaughan. *International Law*. Oxford: Oxford University Press, 2007.

The author distinguishes necessity from fundamental change of circumstances as a ground for termination and suspension of treaties, and points out that courts and tribunals have yet to establish what is required for the plea of necessity to succeed (p. 121).

Shaw, Malcolm N. *International Law*. 6th ed. Cambridge, UK: Cambridge University Press, 2008.

Representative of the textbooks, providing some cases to illustrate the principle. See pp. 798–799.

Zemanek, Karl, and Jean Salmon. *La responsabilité internationale*. Paris: Pedone, 1987.

Arguably one of the most comprehensive examinations of necessity following its initial codification as Draft Article 33, *Draft Articles on State Responsibility*. Many cases and incidents are considered, as are its relationship to similar concepts and its conditions of application. The work is skeptical about state of necessity’s status as a rule of customary international law.

Post–World War II Textbooks

Older textbooks of the post–World War II period are more skeptical than recent ones in respect of necessity’s normative status. This is not surprising, as necessity was then more closely made with the discredited natural law concept of the state’s fundamental right of self-preservation, or with the positivist and abused view that “necessity knows no law,” invoked by Germany to violate Belgian and Luxemburg neutrality at the outset of World War I. Arechaga 1968 states that the “situations in which necessity has been invoked forms either a catalogue of serious breaches of international law or of cases susceptible of being explained without an appeal to the doctrine of necessity” (p. 542), and that with state practice being so contradictory, it is not possible to affirm necessity as custom. Sibert 1951, sums up doctrinal views as well as instances of its invocation (mostly from the 19th century), and then draws attention to the subjective nature of essential interests and the arbitrary nature of the plea. An intermediate position is found in Lauterpacht 1955, where the author limits acts in self-preservation to cases of necessity only, by which he means acts necessary in self-defense—this being a broad concept including, for instance, responses to natural disasters (p.298).

Arechaga, Jiminez de. “International Responsibility.” In *Manual of Public International Law*. Edited by Max Sørensen, 531–603. London: Macmillan, 1968.

The author states that the “situations in which necessity has been invoked forms either a catalogue of serious breaches of international law or of cases susceptible of being explained without an appeal to the doctrine of necessity,” and that with state practice being so contradictory, it is not possible to affirm necessity as custom (p. 542).

Oppenheim, Lassa. *International Law: A Treatise*. Vol. 1, *Peace*. 8th ed. Edited by Hersch Lauterpacht. London: Longman, 1955.

Writing in 1955, the author limits acts taken within the putative legal category of self-preservation to cases of necessity only, by which he means acts necessary in self-defense—this being a broad concept including, for instance, natural disasters (p. 298).

Sibert, Marcel. *Traité de droit international public*. Vol. 1. Paris: Dalloz, 1951.

Having summed up doctrinal views as well as instances of the plea’s invocation (mostly from the 19th century), the author draws attention to the subjective nature of essential interests and the arbitrary nature of the plea.

Older Textbooks

Pre–World War II textbooks dealing with necessity are mostly foreign. One of the most influential of the classics is Dionisio Anzilotti’s 1927 course, with G. Gidel’s 1929 French translation being reproduced here as Anzilotti 1999, and in which the author explains that the fundamental right of self-preservation having been discredited, an alternative basis for the necessity plea needs to be found, this being in the author’s view the logic of the legal system itself, pursuant to which a rule ceases to apply in situations of necessity. Another highly influential author, whose work in fact did much to discredit the concept, was Karl Strupp, who advocated a *right* of necessity: see, for instance, Strupp 1930 and the references therein. To counter this and rehabilitate necessity, Ago would insist that necessity is not a right but a mere situation (see Ago 1980, cited under First Reading). Still earlier texts clearly associated necessity with the fundamental (and natural) right of self-preservation, Fiore 1868, for example, traces earlier commentators’ views on the concept, its association with natural law, the Reason of State, and whether there is in fact (as some at the time maintained) a collision of rights, concluding in highly critical terms that, for a series of reasons, including the absence of objective control over whether or not a situation is truly one of necessity, the concept has no place in international law.

Anzilotti, Dionisio. *Cours de droit international*. Translated by G. Gidel. Paris: LGDJ/Editions Panthéon Assas, 1999.

The author explains that the fundamental right of self-preservation having been discredited, an alternative basis for the necessity plea needs to be found, this being in the author’s view, the logic of the legal system itself, pursuant to which a rule ceases to apply in situations of necessity (pp. 508–515).

Fiore, Pasquale. *Nouveau droit international public*. Vol. 1. Translated by P. Pradier-Fodéré. Paris: Durand et Pedone-Lauriel, 1868.

The author traces earlier commentators’ views on the concept, its association with natural law, the Reason of State, and whether there is in fact—as some at the time maintained—a collision of rights in a necessity situation, concluding in highly critical terms that for a series of reasons, including the absence of objective control over whether or not a situation is truly one of necessity, the concept has no place in international law.

Strupp, Karl. *Eléments du droit international public universel, européen et américain*. 2d ed. Vol. 1. Paris: Les éditions internationales, 1930.

The author advocated a *right* of necessity, as opposed to Ago’s view, accepted today, that necessity is a mere situation (p. 342).

The courses of the Hague Academy of International Law (l'Académie de droit international de la Haye), especially the General Courses, offer particular perspectives on, or visions of, international law, some of which, especially in works prior to Ago's 1980 report to the ILC (Ago 1980, cited under First Reading), dealt with state of necessity. The most prominent of these are “L'intervention en matière financière” (Strupp 1972), “Règles générales du droit de la paix” (Basdevant 1968), “Règles générales du droit de la paix” (Cavaglieri 1968), “The Fundamental Principles of International Law” (Schwarzenberger 1955), and “Principes de droit international public” (Sørensen 1968).

Basdevant, Jules. “Règles générales du droit de la paix.” In *Recueil des cours*. Vol. 58. By Académie de droit international de la Haye, 471–692. The Hague: Martinus Nijhoff, 1968.

There may be overriding reasons of politics or morals (i.e., necessity) explaining why one does not act in accordance with the law, but this is nonetheless a breach of international law entailing state responsibility (p. 553). Originally published in 1936.

Cavaglieri, Arrigo. “Règles générales du droit de la paix.” In *Recueil des cours*. Vol. 26. By Académie de droit international de la Haye, 311–586. The Hague: Martinus Nijhoff, 1968.

Opinio juris, understood by the author as consent, is insufficient to sustain state of necessity as a customary rule. A more general critique of necessity is also provided (p. 315). Originally published in 1929.

Schwarzenberger, Georg. “The Fundamental Principles of International Law.” In *Recueil des cours*. Vol. 87. By Académie de droit international de la Haye, 191–386. The Hague: Martinus Nijhoff, 1955.

A section in this general course puts the concept of self-preservation into relation with self-defense, self-help, and necessity (pp. 342–346). Originally published in 1929.

Sørensen, Max. “Principes de droit international public.” In *Recueil des cours*. Vol. 101. By Académie de droit international de la Haye, 1–254. The Hague: Martinus Nijhoff, 1968.

An extract discusses the highly controversial nature of the plea and distinguishes it from related pleas (self-defense, *force majeure*). Sørensen also differentiates the plea from its municipal law counterpart (pp. 219–220). Originally published in 1960.

Strupp, Karl. “L'intervention en matière financière.” In *Recueil des cours*. Vol. 8. By Académie de droit international de la Haye, 1–124. The Hague: Martinus Nijhoff, 1972.

A state must respect its engagements, except in cases of real necessity (p. 64). Originally published in 1925.

Works Dedicated to State of Necessity Generally

In terms of the literature, there are relatively few monographs in English dealing with the plea. Articles dedicated to necessity also remain fairly disparate and, like the more common fleeting references in other texts, today these on the whole accept as given the customary status of the plea (in contrast to pre-1997 works).

EARLY-20TH-CENTURY WORKS ON NECESSITY

Early works dedicated to state of necessity extrapolate from general principles, including those to be derived from domestic law, to construct an international law plea. There is often overlap, indeed sometimes total confusion, with related concepts. Works in this category include Rodick 1928, Weiden 1938, Hazan 1949, and Glaser 1952.

Glaser, Stéfan. “Quelques remarques sur l’état de nécessité en droit international.” *Revue de droit pénal et de criminologie* 32 (1952): 570–602.

Reasoning in terms of general principles, the author considers that state of necessity (which is not always clearly distinguished from self-defense or military necessity) cannot be a justification in international law, but can excuse an actor operating in necessity.

Hazan, Édouard Tawfik. *L’état de nécessité en droit interétatique et pénal international*. Paris: Pedone, 1949.

Having traced the concept’s history, and considered (as of 1949) necessity in some domestic criminal and public law systems, the author takes an expansive approach to necessity in international relations. He concludes that the domestic plea differs from its international application, which is political. Final sections consider necessity as a sanction. This is discussed in relation to the *jus ad bellum* as well as international criminal law.

Rodick, Burleigh Cushing. *The Doctrine of Necessity in International Law*. New York: Columbia University Press, 1928.

Having defined “exceptional necessity” and considered early writers’ views (Grotius, Machiavelli, Hobbes, Puffendorf, Vattel, etc.), this early modern work on state of necessity analyses state practice up to the early 20th century. Consistent with the thinking of the time, what are today considered completely distinct concepts (and indeed today are excluded from the scope of the plea), such as military necessity, are included in the analysis.

Weiden, Paul. “Necessity in International Law.” *Transactions of the Grotius Society* 24 (1938): 105–132.

Acknowledging necessity’s bad reputation, the author seeks to remove some misunderstandings and demonstrate that it is “not subversive, but contributory to an effective working of International Law.” He examines necessity as a general principle found in various domestic systems, at one stage noting that necessity is sometimes regarded as a German doctrine (and indeed that German lecturers in criminal law used to be required to also teach international law).

WORKS ON NECESSITY FOLLOWING AGO’S 1980 REPORT

Several works appeared in the early 1980s shortly after the ILC had considered state of necessity, then codified as Draft Article 33. Detailed here, these are: Pilittu 1981, Barboza 1984, and Salmon 1984.

Barboza, J. “Necessity (Revisited) in International Law.” In *Essays in International Law in Honour of Manfred Lachs*. Edited by J. Makarczyk, 27–44. The Hague: Martinus Nijhoff, 1984.

A clear exposition of state of necessity as presented by Roberto Ago to the ILC (see Ago 1980, cited under First Reading) as well as Draft Article 33 as provisionally adopted on first reading by the Commission. The chapter also addresses the broader concept of necessity as it appears in other circumstances precluding wrongfulness; Draft Article 33 representing the *genus* that, in the author’s view, is an admitted cause for the preclusion of wrongfulness; distress, self-defense, and countermeasures being specific forms of necessity.

Pilittu, Paola. *Lo stato di necessita nel diritto internazionale*. Perugia, Italy: Libreria Editrice Universitaria, 1981.

Published following Ago's 1980 report to the ILC on state of necessity (Ago 1980, cited under First Reading), this book of over four hundred pages dedicated to state of necessity considers a vast array of instances of state practice, the views of writers, the concept of state of necessity in times of peace, and necessity in times of war.

Salmon, Jean J. A. “Faut-il codifier l'état de nécessité en droit international?” In *Essays in International Law in Honour of Manfred Lachs*. Edited by Jerzy Makarczyk, 235–270. Institute of State and law of the Polish Academy of Sciences. The Hague: Martinus Nijhoff, 1984.

Notes state of necessity was slow to emerge as a distinct legal concept and compares it to related concepts such as self-defense and self-preservation. Reviews relevant cases and discusses Ago's work. The author doubts that necessity is customary law due to its lack of determinacy (including subjectivity in regard to what constitutes an essential interest) and the lack of compulsory jurisdictional body to adjudicate any necessity claim—something that would enable a degree of objectivity.

WORKS ON NECESSITY FOLLOWING THE 1997 GABCIKOVO-NAGYMAROS DECISION

Following the ICJ's 1997 decision in the *Gabcikovo-Nagymaros* case (International Court of Justice 1997, cited under Post–World War II Cases and Incidents), most authors accept that state of necessity reflects custom: Boed 2000 (implicitly); various contributors to Christakis and Bannelier 2007; Agius 2009; and Gazzini, et al. 2010. Those rare authors who today hesitate about necessity's status tend to do so with respect to how the international legal order reacts to a necessity situation: Is it an excuse or a justification? As such, they do not query necessity's role as positive law: see, notably, Théodore Christakis's contribution in Christakis and Bannelier 2007. Since the 1997 *Gabcikovo-Nagymaros* decision, very few (this contributor being among them) argue that state of necessity is not customary; see Heathcote 2005 and Heathcote 2007. This view has some recent support; see Sloan 2012.

Agius, Maria. “The Invocation of Necessity in International Law.” *Netherlands International Law Review* 56.2 (2009): 95–135.

Examines necessity in relation to the rule of law and concludes that the former presents no affront to the latter.

Boed, Roman. “State of Necessity as a Justification for Internationally Wrongful Conduct.” *Yale Human Rights and Development Law Journal* 3 (2000): 1–43.

Advocates for the insertion into then Draft Article 33 ASR for the possibility for state of necessity to be invoked in order to safeguard a community interest. The author makes his point by reference to the situation of states closing borders to prevent the entry of asylum seekers.

Christakis, Théodore, and Karin Bannelier, eds. *La nécessité en droit international*. Paris: Pedone, 2007.

Bringing together just over twenty contributions, this work considers state of necessity both in international and, to a lesser extent, domestic legal systems, as well as the various manifestations that the broader concept of necessity can take internationally (e.g., proportionality, necessity as expressed in different primary rules).

Gazzini, Tarcisio, Wouter G. Werner, and Ige F. Dekker. “Necessity across International Law: An Introduction.” *Netherlands Yearbook of International Law* 41 (2010): 3–10.

Introduction to a series of articles relative to necessity, notably as it emerges in various fields of international law, sometimes as a distinct primary rule, on occasion as a secondary rule within the meaning of the ASR. The concept is put into relation with fragmentation of international law. The authors of the introduction are of the view that the “principle of state of necessity” is “well established” in customary international law.

Heathcote, Sarah. “State of Necessity and International Law.” PhD diss., University of Geneva, 2005.

Explores state of necessity from various angles, including meaning, history, ILC debates, state practice, invocation to safeguard community interests, and role in the international legal system—namely, just below the normativity threshold as a midwife for new rules of exception in necessity's image—its potential role in the interpretation of primary rules; whether a justification or excuse or, on the other hand, whether state practice is best seen as instance of indifference, consent, or waiver, these being “transactional” or *ad hoc* solutions to a situation of crisis. The thesis concludes that the concept is not a rule of customary international law.

Heathcote, Sarah. “Est-ce que l’état de nécessité est un principe de droit international coutumier?” *Revue belge de droit international* 2007.1 (2007): 53–89.

Ago saw necessity as “spontaneous” law: “driven out of the door it would return through the window.” Inductively however, neither cases nor practice sustain it as custom. Its lack of concretely defined means and ends make it hard to be so. Instead, necessity is a general principle below the normativity threshold, a midwife to particular primary rules (e.g., financial necessity). When true necessity situations arise, the question is not how states will act, but how the law responds (e.g., consent, waiver, or responsibility met with indifference).

Sloan, Robert D. “On the Use and Abuse of Necessity in the Law of State Responsibility.” *American Journal of International Law* 106.3 (2012): 447–508.

The author considers that the ILC provision on state of necessity was adopted “rapidly and almost uniformly, but with scant independent analysis, as a putative codification of international custom,” and goes on to assert that the provision is more progressive development than codification of general international law.

Extracts on Necessity from Works on Broader Topics

A number of references to state of necessity appear in extracts of works relative to other topics, either placing necessity under the umbrella of broader principles or distinguishing state of necessity from particular primary rules of derogation, or indeed from other circumstances precluding wrongfulness. One can cite among these works the following: Anzilotti 1906, Visscher 1970, Cheng 1953, Cannizzaro 2000, Roucouas 2001, Gross and Ní Aoláin 2006, Paddeu 2011, and Venturini 2010.

Anzilotti, Dionisio. “La responsabilité internationale des états à raison des dommages soufferts par des étrangers.” *Revue générale de droit international public* 13 (1906): 5–29, 285–309.

State of necessity is an implicit exception to all rules, for states would not have consented to respecting a norm in relation to situations in which their very survival is in danger.

Cannizzaro, Enzo. *Il principio della proporzionalità nell'ordinamento internazionale*. Milan: A. Giuffrè, 2000.

Part II of this work, which is headed “Proportionality as a Limit for Enforcement Activities” considers inter alia the various types of proportionality expressed by state of necessity as cast by the ILC.

Cheng, Bin. *The General Principles of International Law as Applied by International Courts and Tribunals*. Library of World Affairs 21. London: Stevens, 1953.

Chapter 2 examines self-preservation and, through it, various expressions of necessity, including state of necessity, as a general

principle of law within the meaning of article 38(1)(c) of the ICJ Statute.

Gross, Oren, and Fionnuala Ní Aoláin. *Law in Times of Crisis, Emergency Powers in Theory and Practice.* Cambridge Studies in International and Comparative Law. Cambridge, UK: Cambridge University Press, 2006.

Primarily concerned with the principle of necessity and the primary rules that encapsulate “necessity exceptions,” this book has a short section on state of necessity as codified by Article 25 of the ASR. In it the authors point to the controversy regarding that provision and the need felt within the ILC that it was better to codify, and thus “domesticate” state of necessity than to omit it from the ASR which might facilitate abuse.

Paddeu, Federica I. “A Genealogy of *Force Majeure* in International Law.” *British Year Book of International Law* 82 (2011): 381–494.

An analytical overview of those cases in which necessity and *force majeure* can be confused.

Roucounas, Emmanuel. “L’urgence et le droit international.” Paper presented at the 39th Colloque de Paris of the Société Française de Droit International, 25–27 May, 2000. In *Le droit international et le temps*. Paris: Pedone, 2001.

The author addresses state practice while the ILC’s provision on necessity was undergoing revision in the Commission. He addresses the United Kingdom’s invocation of the plea to justify the Kosovo bombardments of 1999 and Belgium’s invocation of the plea in the *Use of Force* case (*Legality of the Use of Force (Serbia and Montenegro v. Belgium)*), cited under Post–World War II Cases and Incidents), also relative to the Kosovo bombings. The author also considers necessity in relation to the entirely different legal concept of military necessity. See p. 201.

Venturini, Gabriella. “Necessity in the Law of Armed Conflict and in International Criminal Law.” *Netherlands Yearbook of International Law* 41 (2010): 45–78.

Part of a series on necessity in international law found in the same volume of this yearbook, this article deals primarily with the distinct concept of military necessity, but then asks “might necessity justify under the law of peace acts that military necessity would not allow under the law of armed conflict?” (p.74). The author also considers necessity in the context of international criminal law.

Visscher, Charles de. *Théories et réalités en droit international public*. 4th ed. Paris: Pedone, 1970.

Translated into English by P. E. Corbet as *Theory and Reality in Public International Law* (Princeton, NJ: Princeton University Press, 1957). Notes that necessity is no more than a “collision of interests” which brings out the “conflict between the demands of politics on the one hand and law on the other.” The author is highly critical of the concept: lawyers need to be “on their guard against a rehabilitation of the excuse of necessity, which, in spite of all their efforts, would lead to the confusion of politics and law” (p. 283, English trans.).

Necessity as a Justification or as an Excuse

A number of articles address the question of whether necessity, either within the broader context of other circumstances precluding wrongfulness or by reference to domestic legal systems, is best seen as a justification or an excuse. Some of these arguments are already dealt with in the literature specific to state of necessity in international law (e.g., Heathcote 2005 or Agius 2009, both cited under Works on Necessity Following the 1997 *Gabcikovo-Nagymaros* Decision); others bear on comparative (domestic) criminal law work, such as Foriers 1951, in which the author argues in favor of necessity’s recognition in domestic criminal law systems, discussing

at length the question of necessity as an excuse or attenuating circumstance as opposed to a justification. Other works include Eser 1976, Lowe 1999, Christakis 2007, and Heathcote 2011.

Christakis, Théodore. “Les ‘circonstances excluant l’illicéité’: Une illusion optique?” In *Droit du pouvoir, pouvoir du droit: Mélanges offerts à Jean Salmon*. Edited by Nicolas Angelet, Olivier Corten, Eric David, and Pierre Klein, 223–270. Brussels: Bruylant, 2007.

This chapter argues, inter alia, that rather than being a circumstance precluding wrongfulness in the literal sense, state of necessity is an extenuating circumstance: it excludes or attenuates responsibility of the author rather than wrongfulness of the act. In the author’s view, this is revealed by the *Corfu Channel* case (1949), as well as other cases, such as *CMS Gas Transmission Company v. Argentine Republic* (cited under Cases on Financial Necessity).

Eser, Albin. “Justification and Excuse.” *American Journal of Comparative Law* 24.4 (1976): 621–637.

Distinguishes and discusses the justification of an act from excusing an actor; refers to instances of necessity in domestic law as both (as, for instance, in the German Penal Code).

Foriers, Paul. *De l’état de nécessité en droit pénal*. Brussels: Bruylant, 1951.

Discusses at length necessity’s role as either a justification or excuse in domestic criminal law systems.

Heathcote, Sarah. “State Omissions and Due Diligence: Aspects of Fault, Damage and Contribution to Injury in the Law of State Responsibility.” In *The ICJ and the Evolution of International Law: The Enduring Impact of the Corfu Channel Case*. Edited by Karine Bannelier, Théodore Christakis, and Sarah Heathcote, 295–314. London: Routledge, 2011.

Argues that the *Corfu Channel Case* did not endorse necessity: the Court condemned self-help outside the confines of the UN Charter. It was moreover, *Albania’s* actions (failure to cease its due diligence breach), rather than the UK’s own “situation of necessity,” that constituted an extenuating circumstance for the UK’s breach of the prohibition on intervention.

Lowe, Vaughan. “Precluding Wrongfulness or Responsibility: A Plea for Excuses.” *European Journal of International Law* 10.2 (1999): 405–411.

In the light of then ongoing discussion of the Draft Articles on State Responsibility in the ILC, the author, inter alia, argues by illustration that formulating necessity as an excuse rather than as a justification (a circumstance precluding wrongfulness), would lead to lesser disregard of the law (p. 406).

Works on Necessity in Specific Contexts

Necessity is increasingly being treated within the ambit of specific areas of international law, some of the prominent ones being listed below.

HUMAN RIGHTS DEROGATIONS AND STATE OF NECESSITY

Few works have dealt with this topic, presumably because the universal human rights instruments would appear to exclude on a proper interpretation of the primary norm the possibility of invoking necessity in their regard—these instruments containing their own

derogations clauses. This point is made in Ryngaert 2010. Nonetheless, there might be scope for the invocation of necessity in relation to one regional human rights instrument, as discussed in Ouguergouz 1994.

Ouguergouz, Fatsah. “L’absence de clause de dérogation dans certains traités relatifs aux droits de l’homme: Les réponses du droit international général.” *Revue Générale de Droit International Public* 98.2 (1994): 289–336.

The derogations clauses in the two 1966 Covenants have the effect of excluding the possibility for states to invoke state of necessity. On the other hand, nothing in the African Charter on Human and Peoples’ Rights precludes such a possibility, but it is for the state invoking necessity to prove it, and it must be objectively verified.

Ryngaert, Cedric. “State Responsibility, Necessity and Human Rights.” *Netherlands Yearbook of International Law* 41 (2010): 79–98.

Part of a series of articles on necessity, this article argues that human rights treaties’ own primary rules of derogation and restriction are “arguably exhaustive” of the necessity-informed exceptions to conventional human rights rules. The possibility of necessity’s invocation to safeguard human rights as a means of protecting the fundamental interests of the international community as a whole is also examined.

THE USE OF FORCE, INCLUDING AGAINST TERRORISTS, AND STATE OF NECESSITY

Historically, state of necessity has been closely associated with the use of force, notably for the purpose of self-preservation. Since the adoption of the UN Charter, for a time, it was thought that it might only be the prohibition on grave uses of force—aggression—which being *jus cogens*, could not attract the plea. However, the literature is now polarized, given, on the one hand, that the entire prohibition—grave and less grave uses of force—is generally considered as *jus cogens*, thereby excluding necessity altogether as justification for forcible action, and at the other extreme, the view that since the attacks on 11 September 2001, force can be used against terrorists where the conditions for self-defense, as traditionally understood, are not necessarily met. The latter is not generally expressed in terms of a new exception to the prohibition on the use of force—a state of necessity—but rather, in essence, as state of necessity enabling an expansion of self-defense itself. The ILC’s ultimate view is that whether state of necessity can be invoked to justify force depends on an interpretation of the primary rule in question. It is arguably fair to say that the insinuation to be drawn from the final Commentary to Article 25 is that the primary rule does indeed exclude necessity. The literature that specifically addresses state of necessity and the use of force includes Espada 1987, Schachter 1989, Laursen 2004, Tsagourias 2010, Corten 2010, Gaja 2007, and Gutiérrez-Espada 2009.

Corten, Olivier. *The Law against War: The Prohibition on the Use of Force in Contemporary International Law*. Translated by Christopher Sutcliffe. Oxford and Portland, OR: Hart, 2010.

The author considers instances in which necessity has been invoked or alluded to as a justification for the use of force (some of these being, as the author points out, police measures), and concludes that these are unpersuasive as illustrations of necessity precluding the wrongfulness of forcible action, thereby comforting the existence of the prohibition on the use of force as a peremptory norm both in relation to grave and less grave uses of force.

Espada, Cesáreo Gutiérrez. *El estado de necesidad y el uso de la fuerza en derecho internacional*. Madrid: Tecnos, 1987.

Given that during the first reading process, the ILC was somewhat hesitant regarding the possibility of invoking state of necessity in respect of a use of force, the author considers the circumstance precluding wrongfulness in relation to minor or lesser uses of force (those falling short of an aggression).

Gaja, Giorgio. “La possibilité d’invoquer l’état de nécessité pour protéger les intérêts de la communauté internationale.” In *Droit du pouvoir; pouvoir du droit: Mélanges offerts à Jean Salmon*. Edited by N. Angelet, O. Corten, E. David, and P. Klein, 417–424. Brussels: Bruylant, 2007.

Considers the ASR’s inclusion of necessity as a justification for safeguarding community interests. Although this is a general assessment, the author specifically comments on the plea’s possible invocation to justify humanitarian intervention, reasoning that if humanitarian intervention is lawful, no scope for necessity exists; alternatively, if unlawful, necessity cannot be invoked, since such intervention involves force and is consequently contrary to a norm of *jus cogens*.

Gutiérrez-Espada, Cesáreo. “Politico-Legal Reflections on International Terrorism and Preclusions from Wrongfulness.” In *International Legal Dimensions of Terrorism*. Edited by Pablo Antonio Fernández-Sánchez, 75–90. Boston and Leiden, The Netherlands: Martinus Nijhoff, 2009.

The author, who has written broadly in Spanish on state of necessity, argues here that in light of the difficulty of relying on self-defense, necessity could play a useful role regarding responses to terrorism, where, for instance, attacks are from nonstate actors are only imminent or fall short of acts of aggression. As the Articles on State Responsibility are open to revision, the ILC should clarify this matter.

Laursen, Andreas. “The Use of Force and (the State of) Necessity.” *Vanderbilt Journal of Transnational Law* 37.2 (2004): 485–526.

The author considers that state of necessity, while not available against traditional terrorist actors, may be available to excuse forcible action against the “new” form of terrorists (i.e., post-2001).

Schachter, Oscar. “The Lawful Use of Force by a State against Terrorists in Another Country.” *Israel Yearbook on Human Rights* 19 (1989): 209–231.

The author reads into Ago’s work and the ILC’s subsequent Commentary on then Draft Article 33, the possibility for a state, which cannot act within the parameters of self-defense, to excuse its forcible action on grounds of necessity.

Tsagourias, Nicholas. “Necessity and the Use of Force: A Special Regime.” *Netherlands Yearbook of International Law* 41 (2010): 11–44.

As a justification, state of necessity finds expression in primary rules on the use of force (such as self-defense), but necessity can also operate as a circumstance precluding wrongfulness to excuse an actor, “for example, if a state uses force other than in self-defense or reprisal against a non-state actor located in another state without the latter’s consent” (p. 40).

ECOLOGICAL NECESSITY

Seen by Ago as an area in which state of necessity is likely to find ready application, state practice in the field is not unknown. The question of the precautionary principle’s place in relation to state of necessity has been addressed by the courts in some jurisdictions (such as France) under domestic law, and internationally by Special Rapporteur James Crawford in the Second Addendum to his “Second Report” to the ILC, although its inclusion was not later retained by the ILC (Crawford 1999, cited under Second Reading). The broader literature on international environmental law sometimes addresses this topic; the references provided here being works confined to the relationship between state of necessity and the environment. These are Dobos 2002 and Fitzmaurice 2010.

Dobos, Daniel. “The Necessity of Precaution: The Future of Ecological Necessity and the Precautionary Principle.” *Fordham Environmental Law Journal* 13 (2002): 375–408.

The evolutionary character of international environmental law is such that while state of necessity may not have accommodated the precautionary principle in 1989 when Hungary suspended its treaty, and to justify it, inter alia, invoked necessity in the *Gabcikovo-Nagymaros* case, it should do so today. The author is highly critical of the ICJ's strict reading of state of necessity as excluding scope for the precautionary principle.

Fitzmaurice, Malgosia. “Necessity in International Environmental Law.” *Netherlands Yearbook of International Law* 41 (2010): 159–192.

A considered review of state practice and cases in the area, culminating in a consideration the *Gabcikovo-Nagymaros* case. The article then seeks to identify the elements making up environmental or ecological necessity and addresses the question of whether it might embrace the precautionary principle. The article concludes that practice will be scarce and that there is a need for an impartial arbiter of any necessity claim.

FINANCIAL NECESSITY

The Argentinean financial crisis of 2001–2002 prompted a series of arbitrations, mostly before ICSID (International Centre for Settlement of Investment Disputes) tribunals, against Argentina and in which that state has pleaded an inability to fulfill its commitments under the relevant bilateral investment treaties (BITs) on grounds of necessity. One of the principal issues in these cases has been the relationship between emergency clauses (non-precluded measures, or NPM clauses) in the various BITs and the general rule of customary international law of state of necessity. It should be pointed out that, like ecological necessity, financial necessity had already been identified in 1980 by Special Rapporteur Roberto Ago as a fertile area in which the plea was susceptible of finding application. It had indeed arisen in some earlier cases: to the extent that it can be regarded as dealing with necessity, the *Russian Indemnity* award, as well as in the *Gabcikovo-Nagymaros* case, to the extent that in the latter Slovakia claimed that Hungary's plea of ecological necessity was in fact a plea of financial necessity. One can note further that some of the earlier literature had also dealt with the topic. Reinisch 1995 and Qureshi 2010 are two general references.

Qureshi, Asif H. “A Necessity Paradigm of ‘Necessity’ in International Economic Law.” *Netherlands Yearbook of International Law* 41 (2010): 99–136.

Taking a very broad understanding of necessity, this article considers calamity's role in international economic law generally, including international monetary and financial law, international trade law, and international development law.

Reinisch, August. “Debt Restructuring and State Responsibility Issues.” In *La dette extérieure/The External Debt*. Edited by Dominique Carreau and Malcolm N. Shaw, 537–605. Boston and Dordrecht, The Netherlands: Martinus Nijhoff, 1995.

An interesting, and relatively early, discussion of cases, codification, and state practice relative to the invocation of state of necessity for nonpayment of debts.

Literature on the Argentinean Financial Crisis and Necessity

As indicated, a number of articles focus on state of necessity and the Argentinean crisis of 2001–2002, among which one can note Waibel 2007, Rudolf and Hüfken 2007, Thjoernelund 2009, Desierto 2009–2010, Reinisch 2010, Alvarez-Jimenez 2010, Vinuales 2008, Subramanian 2012, and Martin 2012. A bibliography of works on international investment law, including articles on state of necessity in this context, can be found at Professor Andrew Newcombe's Bibliography of Books, Articles and Reports on the Investment Treaty Arbitration website.

Alvarez-Jimenez, Alberto. “Foreign Investment Protection and Regulatory Failures as State’s Contribution to the State of Necessity under Customary International Law: A New Approach Based on the Complexity of Argentina’s 2001 Crisis.” *Journal of International Arbitration* 27.2 (2010): 141–177.

The author addresses the Argentinean financial crisis in comparison to other crises in Asia, Russia, and Brazil in order to evaluate regulatory failures as contribution to injury within the meaning of Article 25(2)(b) of the ILC’s Articles on State Responsibility.

Desierto, Diane A. “Necessity and ‘Supplementary Means of Interpretation’ for Non-precluded Measures in Bilateral Investment Treaties.” *University of Pennsylvania Journal of International Law* 31.3 (2009–2010): 827–934.

Desierto demonstrates that the rules of treaty interpretation are such that the customary rule of necessity cannot be used as a means of interpretation of Article XI (the non-precluded measures provision) of the US-Argentina BIT.

Martin, Antoine. “Investment Disputes after Argentina’s Economic Crisis: Interpreting BIT Non-precluded Measures and the Doctrine of Necessity under Customary International Law.” *Journal of International Arbitration* 29.1 (2012): 49–70.

The author considers the reasoning of recent Annulment Committees in respect of awards involving Argentina, and in which state of necessity was invoked, focusing in particular on the reasoning relative to the relationship between state of necessity as a customary rule and the non-precluded measures (or emergency) provisions found in BITs.

Newcombe, Andrew, ed. *Professor Andrew Newcombe’s Bibliography of Books, Articles and Reports.*

A bibliography of works on international investment law, including articles on state of necessity in this context.

Reinisch, August. “Necessity in Investment Arbitration.” *Netherlands Yearbook of International Law* 41 (2010): 137–158.

A succinct overview of the important issues, including a consideration of the relationship between the economic emergency clauses and state of necessity under general international law.

Rudolf, Beate, and Nina Hüfken. “International Decisions: Joined Cases Nos. 2 BvM 1–5/03 & 2 BvM 1–2/06. 60 *Neue Juristische Wochenschrift* 2610 (2007).” *American Journal of International Law* 101.4 (2007): 857–865.

The authors deal with German Federal Constitutional Court decisions relative to whether a state may invoke necessity under public international law against private individuals in proceedings covered by domestic private law.

Subramanian, S. R. “Too Similar or Too Different: State of Necessity as a Defence under Customary International Law and the Bilateral Investment Treaty and their Relationship.” *Manchester Journal of International Economic Law* 9.1 (2012): 68–91.

The article examines how the customary rule of necessity can play a prominent role in the interpretation of bilateral treaty provisions.

Thjoernelund, Marie Christine Hoelck. “State of Necessity as an Exemption from State Responsibility for Investments.” *Max Planck Yearbook of United Nations Law* 13 (2009): 423–479.

After setting out the nature of and conditions for state of necessity under general international law, tests the three ICSID cases against Argentina—*CMS Gas Transmission Company v. Argentine Republic*; *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic*; and *Sempra v. Argentina*—against those conditions.

Vinuales, Jorge E. “State of Necessity and Peremptory Norms in International Investment Law.” *Law and Business Review of the Americas* 14 (2008): 79–103.

Taking as its starting point investment law decisions on state of necessity, this article explores how necessity can in fact protect peremptory norms as a type of essential interest.

Waibel, Michael. “Two Worlds of Necessity in ICSID Arbitration.” *Leiden Journal of International Law* 20.3 (2007): 637–648.

The author examines ICSID’s first two decisions (which were later the subject of annulment proceedings) brought against Argentina as a result of that state’s financial crisis (*CMS Gas Transmission Company v. Argentine Republic* and *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic*), and analyzes the differences between the two decisions in respect of state of necessity.

Cases on Financial Necessity

Many cases are still pending against Argentina following its financial crisis of 2001–2002. A list of pending International Centre for Settlement of Investment Disputes (ICSID) cases can be found online. ICSID cases that have already been decided and that discuss necessity are also generally available online. Where indicated, these cases are also available in International Legal Materials. Some cases are not listed on the ICSID website, and links to these cases are provided below. The cases that have been decided are *CMS Gas Transmission Company v. Argentine Republic*; *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic*; *Enron Creditors Recovery Corporation and Ponderosa Assets, L.P. v. Argentine Republic*; *Sempra Energy International v. Argentine Republic*; *Continental Casualty Company v. Argentine Republic*; *Impregilo S.p.A. v. Argentine Republic*; *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. The Argentine Republic*; *Total S.A. v. Argentine Republic*; *El Paso Energy International Company v. The Argentine Republic*; *EDF International S.A., SAUR International S.A., and León Participaciones Argentinas S.A. v. Argentine Republic*; *BC Group Plc v. The Republic of Argentina*; and *National Grid Plc v. The Argentine Republic*.

BC Group Plc v. The Republic of Argentina.

UNCITRAL Final Award, 24 December 2007. A UNCITRAL case against Argentina that discusses necessity.

***CMS Gas Transmission Company v. Argentine Republic.* ICSID Case No. ARB/01/08.**

Award, 12 May 2005; *International Legal Materials* 44.5 (September 2005), 1205–1263. Decision on Annulment, 25 September 2007; *International Legal Materials* 46.6 (November 2007): 1136–1157.

***Continental Casualty Company v. Argentine Republic.* ICSID Case No. ARB/03/09.**

Award, 5 September 2008. Decision on Annulment, 16 September 2011.

***EDF International S.A., SAUR International S.A., and León Participaciones Argentinas S.A. v. Argentine Republic.* ICSID Case No. ARB/03/23.**

Award, 11 June 2012.

***El Paso Energy International Company v. The Argentine Republic.* ICSID Case No. ARB/03/15.**

Award, 31 October 2011.

***Enron Creditors Recovery Corporation and Ponderosa Assets, L.P. v. Argentine Republic.* ICSID Case No. ARB/01/3.**

Award, 22 May 2007. *Enron Creditors Recovery Corporation v. Argentine Republic*, ICSID Case No. ARB/91/3, Decision on Annulment, 30 July 2010.

***Impregilo S.p.A. v. Argentine Republic.* ICSID Case No. ARB/07/17.**

Award, 21 June 2011.

***LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic.* ICSID Case No. ARB/02/1.**

Decision on Liability, 3 October 2006; *International Legal Materials* 46.1 (2007): 40–76. Annulment proceedings pending.

***National Grid Plc v. The Argentine Republic.* 1:09-cv-00248-RBW.**

UNCITRAL Award, 3 November 2008. A UNCITRAL case against Argentina that discusses necessity.

***Sempra Energy International v. Argentine Republic.* ICSID Case No. ARB/02/16.**

Award, 28 September 2007. The emergency clause in the BIT was interpreted in the light of customary international law contained in the BIT. Decision on Annulment, 29 June 2010; *International Legal Materials* 49.5 (September 2010): 1441–1475.

***Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. The Argentine Republic.* ICSID Case No. ARB/03/19.**

Decision on Liability, 30 July 2010. See also *AWG Group Ltd. v. The Argentine Republic*, UNCITRAL, which was administered by ICSID.

***Total S.A. v. Argentine Republic.* ICSID Case No. ARB/04/1.**

Decision on Liability, 27 December 2010.

State of Necessity and the Safeguarding of Community Interests

Despite being advanced as progressive development, for some this is a more attractive plea than state of necessity as traditionally formulated, for it assumes a community consensus on what constitutes an essential interest, thereby diminishing necessity's subjectivity. Writers have addressed the issue from the perspective of certain bodies of rules, such as the environment, human rights, and the use of force, including Gaja 2007 (cited under Use of Force, Including against Terrorists, and State of Necessity), with particular reference to humanitarian intervention. In a notable contribution published in 2000, the matter was addressed in relation to refugee and human rights law (Boed 2000, cited under Works on Necessity Following the 1997 *Gabcikovo-Nagymaros* Decision.) Following the 1997 *Gabcikovo-Nagymaros* decision (International Court of Justice 1997, cited under Post–World War II Cases and Incidents), works are now also addressing it in relation to international organizations within the context of the Draft Articles on the Responsibility of International Organizations (DARIO). Works that, to a greater or lesser extent, address the topic include Fitzmaurice

2010, Ryngaert 2010, and Reinisch 2006.

Fitzmaurice, Malgosia. “Necessity in International Environmental Law.” *Netherlands Yearbook of International Law* 41 (2010): 159–192.

One page of this article, already noted above (cited under Ecological Necessity), comments on the move away from bilateralism that can be traced to as early as the late 19th century; namely “The *Sea Fur Seals* Incident” (cited under Older Cases and Incidents).

Reinisch, August. “Editorial: How Necessary Is Necessity for International Organizations?” *International Organizations Law Review* 3.2 (2006): 177–183.

Sets out the ILC’s initial codification of necessity in its draft on international organizations’ responsibility, and highlights the difficulties of international organizations not being able to invoke the plea when their own essential interests are threatened; then Draft Article 22 codifying as progressive development the possibility of organizations safeguarding only essential interests of the international community as a whole.

Ryngaert, Cedric. “State Responsibility, Necessity and Human Rights.” *Netherlands Yearbook of International Law* 41 (2010): 79–98.

As noted in the citation for this work under Human Rights Derogations and State of Necessity, the second part of this article considers necessity as a means of safeguarding human rights as a fundamental interest of the international community as a whole.

The ILC’s Draft Articles on Responsibility of International Organizations

The ILC’s Special Rapporteur on the Responsibility of International Organizations (Gaja 2006, Gaja 2009, Gaja 2011), as well as the Commission itself (International Law Commission 2006, International Law Commission 2009), addressed necessity, notably for the purpose of safeguarding community interests, on a number of occasions during the DARIO’s drafting.

Gaja, Giorgio. *Fourth Report on Responsibility of International Organizations*. UN Doc. A/CN.4/564, 28 February 2006. New York: United Nations, 2006.

Fourth Report of Special Rapporteur. See pp.13–18, paras. 35–46.

Gaja, Giorgio. *Seventh Report on Responsibility of International Organizations*. UN Doc. A/CN.4/610, 27 March 2009. New York: United Nations, 2009.

Sixth Report of Special Rapporteur. See pp. 23–24, paras. 67–71.

Gaja, Giorgio. *Eighth Report on Responsibility of International Organizations*. UN Doc. A/CN.4/640, 14 March 2011. New York: United Nations, 2011.

Eighth Report of Special Rapporteur. See p. 24, paras. 68–71.

International Law Commission. *Report of the International Law Commission: Fifty-eighth Session*. UN Doc. A/61/10. New York:

United Nations, 2006.

ILC report to the General Assembly. See Article 22, pp. 272–275.

International Law Commission. *Report of the International Law Commission: Sixty-first Session*. UN Doc. A/61/10. New York: United Nations, 2009.

The text of the Draft Articles and Commentaries as provisionally adopted on first reading by the Commission is included in this report; Draft Article 24 pertains to necessity (Special Rapporteur Gaja had originally introduced the draft article as Article 22). See Article 24, p. 26 and pp. 105–108.

DRAFTING COMMITTEE REPORTS, COMMENTS BY GOVERNMENTS AND INTERNATIONAL ORGANIZATIONS, AND DRAFT ARTICLES AND COMMENTARIES

Being considered within a set of Draft Articles on the responsibility of international organizations, the ILC is here envisaging the situation in which an act in necessity is undertaken by an international organization rather than a state. During the process of consideration, some amendments would be made by the Drafting Committee (International Law Commission 2006b, International Law Commission 2011d) and comments received by governments and international organizations (International Law Commission 2005, International Law Commission 2006a, International Law Commission 2007, International Law Commission 2011b, International Law Commission 2011c, International Law Commission 2012) before adoption by the ILC of the Draft Articles in 2011 (International Law Commission 2011a). In respect of the latter, one can note the reinsertion into the provision relative to necessity of scope for the plea to operate as traditionally conceived; namely, for the safeguarding of a state's own particular interest, in addition to the possibility for an organization to safeguard an essential interest of the international community as a whole. In this case, however, the article provides that the state in question for whom the organization acts must be one of the organization's members. This insertion of the traditional aspect of the necessity plea was absent from the plea as put forward by the ILC in its 2009 report *Text of the Draft Articles on Responsibility of International Organizations Adopted by the Commission on First Reading with Commentaries Thereto* (International Law Commission 2009).

International Law Commission. *Responsibility of International Organizations: Comments and Observations Received from Governments and International Organizations*. UN Doc. A/CN.4/556, 12 May 2005. New York: International Law Commission, 2005.

Comments by governments and international organizations on 12 May 2005. See “Necessity as a Circumstance to Preclude Wrongfulness” (pp. 40–42).

International Law Commission. *Responsibility of International Organizations: Comments and Observations Received from Governments and International Organizations*. UN Doc. A/CN.4/568, 17 March 2006. New York: International Law Commission, 2006a.

Comments by governments and international organizations on 17 March 2006. See “Circumstances Precluding Wrongfulness—Necessity” (pp. 8–9).

International Law Commission. *Responsibility of International Organizations: Titles and Texts of the Draft Articles Adopted by the Drafting Committee on 31 May 2006*. UN Doc. A/CN.4/L.687, 31 May 2006. New York: International Law Commission, 2006b.

Drafting Committee report on 31 May 2006. See Article 22, p. 3.

International Law Commission. *Responsibility of International Organizations: Comments and Observations Received from*

International Organizations. UN Doc. A/CN.4/582, 1 May 2007. New York: International Law Commission, 2007.

Comments by international organizations on 1 May 2007. See Draft Article 22, p. 18.

International Law Commission. *Text of the Draft Articles on Responsibility of International Organizations Adopted by the Commission on First Reading with Commentaries Thereto.* New York: International Law Commission, 2009.

Note the absence of the necessity plea that was reinserted in the Draft Articles adopted on Second Reading in 2011 (International Law Commission 2011a).

International Law Commission. *Draft Articles on the Responsibility of International Organizations, with Commentaries: 2011.* New York: International Law Commission, 2011a.

Note insertion of the traditional aspect of the necessity plea, which was absent from the Draft Articles adopted on First Reading in 2009 (International Law Commission 2009).

International Law Commission. *Responsibility of International Organizations: Comments and Observations Received from Governments.* UN Doc. A/CN.4/636, 14 February 2011. New York: International Law Commission, 2011b.

Comments by governments on 14 February 2011. See Draft Article 24—Necessity, pp. 23–24.

International Law Commission. *Responsibility of International Organizations: Comments and Observations Received from Governments: Addendum.* A/CN.4/636/Add.1, 13 April 2011. New York: International Law Commission, 2011c.

Comments by governments on 13 April 2011. See General Comments: Mexico, p. 14.

International Law Commission. *Responsibility of International Organizations: Texts and Titles of Draft Articles 1 to 67 Adopted by the Drafting Committee on Second Reading in 2011.* UN Doc. A/CN.4/L.778, 30 May 2011. New York: International Law Commission, 2011d.

Drafting Committee report on 30 May 2011.

International Law Commission. *Topical Summary of the Discussion Held in the Sixth Committee of the General Assembly during Its Sixty-sixth Session, Prepared by the Secretariat: Addendum.* UN Doc. A/CN.4/650/Add.1, 20 January 2012. New York: International Law Commission, 2012.

Comments in the General Assembly's Sixth Committee on 20 January 2012. See p. 6.

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