Chapter 2
Necessity and the Use of Force: A Special Regime

Nicholas Tsagourias

Abstract This chapter examines the relevance of the principle of necessity to the international rules on the use of force. It claims that necessity has been the source of the international rules on the use of force which as independent titles manifest themselves in institutional as well as in customary forms. It also claims that the use of force constitutes a special regime of international law which is distinct from the law of state responsibility with which it however interacts.

Keywords Use of force · necessity · self-defence · Pre-emptive and preventive self-defence · Humanitarian intervention · Protection of national abroad · United Nations enforcement action · Customary law · International responsibility · Circumstances precluding wrongfulness · Justifications

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N. Tsagourias (✉)
University of Glasgow, Glasgow, UK
e-mail: Nicholas.Tsagourias@glasgow.ac.uk

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2.1 Introduction

The principle of necessity is deeply ingrained in international law.[1] Indeed, it is a multifaceted principle of international law: it is a source of international rules; a condition for the application of certain international rules as well as a circumstance precluding the wrongfulness of certain acts. On the other hand, for some, its role in international law is rather unsettling. According to Allott, it is the 'most persistent and formidable enemy of a truly human society' which can 'destroy any possibility of an international rule of law.'[2]

In this chapter I will examine the relevance of the principle of necessity to the international rules on the use of force. First, I will trace the role of necessity in this area and discuss its impact on the development of the rules on the use of force. It will be shown in this regard that necessity acted as a source of authority for varied uses of force which subsequently acquired the status of independent legal titles. I will then sketch out the content of such customary and treaty (United Nations Charter) rules on the use of force and explain how they accommodate necessity. Secondly, I will argue that the use of force constitutes a special regime of international law and explain the grounds for such proposition. Following from this, I will examine the relationship between the use of force regime and that of the law of state responsibility. It will be argued in this regard that the two regimes are distinct, but that they interact and complement each other. The chapter will finally discuss the meaning as well as the legal and theoretical implications of the designation of necessity in the law of state responsibility as a circumstance precluding wrongfulness. All in all, the central contention of this chapter is that necessity is

[1] As Roberto Ago noted, the principle 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'. Ago 1980, p. 13.

[2] Allott 1988, pp. 17, 21; Stowell 1921, pp. 392–393: '… 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'.

the source of rules on the use of force which form a special regime that exists and operates side by side with that of state responsibility.

2.2 Historical Overview

'Necessity' refers to a situation of emergency that justifies extraordinary action in order to protect essential interests that are in danger of being irreparably damaged. Such extraordinary action in the case under discussion here would be the use of force. Historically, the doctrine of necessity has been attendant on the right of self-preservation.[3] Self-preservation was a fundamental right of states, perhaps the most important, and encompassed the physical, human and moral preservation of the state. From such a right a number of other entitlements flowed as necessary corollaries, one of which was the use of force.[4] However, the right of self-preservation and its corresponding entitlements made state interaction unpredictable and inherently dangerous.[5] It was thus in the interest of all states to infuse some degree of predictability by prescribing the circumstances under which the right of self-preservation could justify the use of force.

Here entered necessity. 'Necessity' described the conditions that needed to be in place in order to justify the forceful protection by a state of one of its legitimate interests. Depending on the nature of the protected interest or value, the scope of the force employed was also different in nature. For example, if a state was the victim of an attack by another state, or was about to be attacked, or its conservation and development was endangered from external, even remote, threats, that situation would have justified the use of force by way of defence. Indicative in this regard is the fact that the term used to describe such actions was 'legitimate' or 'necessary' defence.[6] When nationals of a state were attacked in another state or

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[3] Rodick 1928; Weidenbaum 1938, p. 105; Stowell 1921, pp. 392–414; Partsch 2000, p. 217.

[4] Vattel 1916, Bk I, Chapter II, para 16; Bonfils 1912, para 242; Kaufmann 1935, pp. 576 et seq; Pradier-Fodéré 1885, p. 382: '[le droit de conservation] comprend tous les droits incidents essentiels pour sauvegarder l'intégrité de l'existence tant physique que morale des Etats: le droit de repousser tout ce qui peut empêcher sa propre conservation et son développement, le droit d'éloigner tout mal présent et de se prémunir contre tout danger de préjudice future, le droit de développer les conditions nécessaires a son existence perfectible.' Giraud 1934, pp. 738–739: 'Les états ont le droit et le devoir d'assurer leur conversation et leur développement. La sauvegarde de ces intérêts justifie alors le recours a la force, alors même que l'état n'est victime d'aucune agression, ou n'est pas sous une menace actuelle d'agression. … Tout état, en vertu de son existence même, a le droit d'exister, de se maintenir, de se développer. Ce droit, qu'on appelle le droit de conservation, est le premier des droits des Etats et le plus absolu. C'est le droit essentiel par excellence.'

[5] Waltz 1959, p. 111.

[6] Fiore 1868, p. 261: 'Le droit de conservation implique d'autres droit secondaires; parmi ceux-ci, non-seulement est compris le droit de repousser toute attaque extérieure contre sa propre conservation, d'ou naît le droit de légitime défense, mais encore celui d'éloigner et de repousser toutes les conditions qui pourraient nuire a sa propre conservation et empêcher le propre perfectionnement.' Stowell 1921, pp. 352–392.

when their lives were endangered, this situation justified their forcible protection. When a state suffered an injury but no redress was available or forthcoming, the situation could justify the use of force by way of reprisals to avenge the wrong and to acquire redress. When innocent people within a state were persecuted, oppressed or suffered other injustices and by doing so a humanitarian necessity was created, the use of force could be justified to put an end to such practices.[7] When the values or principles of the international public order were threatened, the use of force to maintain, restore or vindicate that order was also justified not only in political terms[8] but also in moral terms. Thus, interventions for humanity were undertaken also for 'the purpose of vindicating the law of nations against outrage' because 'it is a basic principle of every human society and the law which governs it that no member may persist in conduct which is considered to violate the universally recognised principles of decency and humanity'.[9]

From the above, a number of points can be made regarding necessity and the use of force. First, necessity was attached to the right of self-preservation. The latter provided the values that deserved protection, whereas necessity provided the threshold that justified their protection by way of force. Second, the assorted uses of force were different in scope because the protectable values also varied. It was not only the physical existence of the state but a host of interests belonging to the political, economic, legal, and social sphere of the state that deserved protection.[10] Third, protectable interests were also those of the international public order; its political interests as well as its fundamental values such as human dignity.[11] Fourth and more importantly, the aforementioned uses of force—legitimate defence, protection of nationals abroad, reprisals, humanitarian intervention, public order enforcement—whose source of authority was necessity, acquired autonomous legal existence[12] and necessity became an additional condition delimiting the application of the referent rule. As Daniel Webster opined in

[7] Stowell 1921, pp. 51–277.

[8] For example, through interventions to protect or restore the *jus publicum europaeum.* See Vagts and Vagts 1992, pp. 313–315; Verosta 1995, pp. 861–863; Stowell 1921, pp. 414–431.

[9] Stowell 1921, pp. 51–52.

[10] See also *LG&E Energy Corp. and Argentine Republic*, ICSID Case No ARB/02/1, Decision on Liability, 2 October 2006, para 251: 'What qualifies as an "essential" interest is not limited to those interests referring to the State's existence. … economic, financial or those interests related to the protection of the State against any danger seriously compromising its internal or external situation, are also considered essential interests'.

[11] In the same vein but with regard to environmental issues see the Separate Opinion of Judge Weeramantry in *Case Concerning the Gabčíkovo-Nagymaros Project* (*Hungary/Slovakia*) Judgment of 25 September 1997, ICJ Rep (1997) p. 118: 'International environmental law will need to proceed beyond weighing the rights and obligations of parties within a closed compartment of individual State self-interest, unrelated to the global concerns of humanity as a whole.'

[12] As Sir William Scott said in *The Gratitudine*, 'necessity creates the law'. Lord Advocate's Reference No. 1 of 2001, Scotland, Appeal Court, High Court of Judiciary, 30 March 2001, 122 ILR 631.

the *Caroline* case 'the act justified by the necessity … must be limited by that necessity and kept clearly within it'.[13]

As independent legal titles such uses of force became part of customary and/or treaty law. They became part of customary law when the relevant state practice was supported by *opinio juris sive necessitates*, the subjective element of custom.[14] International jurisprudence seems to privilege the first element, that is *opinio juris*, which according to the ICJ, is 'a belief that the practice is rendered obligatory by the existence of a rule of law requiring it'.[15] This interpretation of the subjective element of custom cannot however explain the genesis of custom when there is no prior rule or when the practice departs from existing rules. Put differently, it is unable to deal with the proto-normative act[16] which is exactly the issue here where the aforementioned uses of force emerged in a legal void. For this reason, the formula *opinio juris sive necessitates* should be given its full meaning and its two elements (*opinio juris* and *opinio necessitates*) should be treated as mutually empowering but with *opinio necessitates* preceding *opinion juris*. This construction recognises the fact that certain practices may arise out of necessity (*opinio necessitates*) and that it is only later and through repetition that legal conscience (*opinio juris*) develops with reference to these practices, in the sense of being considered as acceptable behaviour.[17] It is only at that moment that a legal proposition prescribing or proscribing certain behaviour is eventually formulated. In the case under discussion here, it recognises the fact that the aforementioned uses of force were initially spontaneous responses to the exigencies of international life and that through time and repetition, they acquired normative acceptance. This was made evident when the area became the subject of legal regulation. For example, the Covenant of the League of Nations did not outlaw war nor did it outlaw uses of force below the threshold of war.[18] Furthermore, the Pact of Paris outlawed war but permitted a broad right of self-defence as well as other uses of force short of war.[19] In sum, with the possible exception of war, customary as well

[13] 30 British and Foreign State Papers, 196–198.

[14] Mendelson 1999, p. 155; D'Amato 1971. *Lotus* case (*France* v *Turkey*) (Judgment) [1927], PCIJ, Series A, No 10 pp. 28–29; *Asylum* case (Colombia/Peru) Judgment of 20 November 1950, ICJ Rep [1950] 1 at 266; *North Sea Continental Shelf* cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) Judgment of 20 February 1969, ICJ Rep [1969] p. 14, paras 70–81; *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Rep [1986] p. 14, paras 183–209 (hereinafter referred to as *Nicaragua* case).

[15] *North Sea Continental Shelf* cases, para 77.

[16] *Nicaragua* case, para 186. For an opposing view see Dissenting Opinion of Judge Lachs in *North Sea Continental Shelf* cases, pp. 231–232; D'Amato 1971, pp. 47–56, 66–68; Goldsmith and Posner 2005, p. 24; Kopelmanas 1937, p. 151.

[17] *Asylum* case, p. 277; Lauterpacht 1958, p. 380; Mendleson 1999, pp. 268–293; Cassese 2005, pp. 156–160.

[18] Articles 13, 15 and 17 of the Covenant of the League of Nations.

[19] General Treaty for Renunciation of War as an Instrument of National Policy (1928) 94 LNTS 57, Article 1.

as treaty law in the pre-Charter period permitted all of the above uses of force. As far as the post-1945 law on the use of force is concerned, it is defined by customary law and by the UN Charter. The latter prohibits unilateral uses of force[20] except in self-defence,[21] and provides for collective and institutional uses of force.[22] The two bodies of law—customary and UN law—remain distinct, although they interact with, and influence, each other. As a result, the content of their respective rules may differ even if they refer to the same issue.[23]

The preceding discussion provides the backdrop against which the rules on the use of force will be considered in the remainder of this paper. More specifically, it will be shown that necessity and its associated uses of force appear in three guises. First, they take an institutional guise as part of the UN system; second, certain rules on the use of force still remain rooted in customary law but they have also received institutional recognition or indeed formal incorporation; and third, certain rules continue to exist as part of customary law only. In the following lines I will examine each category and the particular uses of force it encompasses in more detail.

2.3 Institutional Necessity and the Use of Force

2.3.1 Threat to the Peace/Breach of the Peace/Act of Aggression (Article 39, UN Charter)

The UN Charter established an institutional framework regulating the use of force by substituting unilateral uses of force with collective ones when certain situations of necessity, as defined by the system, arise. These situations are described in Article 39 UN Charter and include a threat to the peace, a breach of the peace, or an act of aggression. These are generic terms that are interpreted by a central organ, the Security Council. It is not the aim of this paper to review all the events or situations that—according to the Security Council—constitute a threat to the peace, breach of the peace, or act of aggression. What is however important to note is that the Security Council has construed these notions quite dynamically, interpreting them to include inter-state as well as intra-state conflicts, violations of human rights or of humanitarian law, terrorism, and the threat or use of weapons of mass destruction, amongst others.[24]

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[20] Article 2(4) UN Charter.

[21] Article 51 UN Charter.

[22] Chapter VII UN Charter.

[23] *Nicaragua* case, paras 175–178.

[24] Wallenstein and Johansson 2004, p. 18; Osterdahl 1998.

Moreover, decisions as to when a case of institutional necessity arises are made centrally and institutionally, have *erga omnes* validity,[25] and are made against the standard of the purposes of the United Nations. Security Council determinations, even if discretionary, are also constitutive of the designation of the particular situation or event as a case of institutional necessity that may subsequently give rise to institutional action including, if necessary, institutional uses of force.

2.3.2 Institutional Uses of Force (Article 42, UN Charter)

Article 42 of the UN Charter lays down the conditions according to which institutional force can be employed. Such force is necessary if two conditions are fulfilled: first, the non-forcible measures adopted under Article 41 UN Charter have proven to be inadequate, and secondly, the use of force is deemed to be necessary in order to maintain or restore international peace and security. In other words, what justifies institutional force is the need to restore or maintain international peace and security which is probably the most important aim of the UN. The question that immediately arises is whether necessity can also delimit the scope of such institutional force. In principle, the answer should be in the affirmative but any limitation that may exist *in abstracto* is amplified *in concreto* because peace and security are very elastic terms. The laxity concerning the outer limits of institutional force is however redeemed by the fact that the relevant decisions are centralised and institutional. That said, because the UN does not have its own armed forces, the Security Council nowadays authorises states, coalitions of states or other international organisations to use force in cases of emergency and in order to attain its purpose of restoring or maintaining the peace. Authorised uses of force fall within the ambit of institutional necessity described above because, prior to such an authorisation, there is an institutional determination that a case of necessity exists as well as an institutional determination of the necessity to restore or maintain the peace through force. Authorisations can however affect the institutional determination as to whether force is warranted at the particular moment. When the Security Council for example authorises states to take 'all necessary means', this is a general authorisation but the decision as to whether the events at the particular juncture justify the use of force is made by states themselves and not by the Security Council. Authorisations also affect institutional determinations of the scope of such force. In the case of authorisations it is states, not the Security Council, that actually interpret what 'peace' and 'security' mean in the specific instance, and whether they have been restored or maintained. By way of illustration, the Security Council, having determined that

[25] Article 25 UN Charter.

the invasion of Kuwait by Iraq is a breach of the peace,[26] authorised states to take all necessary means to restore the peace and to uphold its resolutions.[27] The decision however as to when to use force or when to terminate such force was taken by the coalition of states in 1991; and, in 2003, the decision as to whether peace and security had been restored or whether further action was required was also taken by the coalition of states.

2.3.3 Self-Defence (Article 51, UN Charter)

The UN Charter recognises the right of states to use force by way of self-defence under certain conditions. First, there should be a prior armed attack[28] and in this regard, the right of self-defence under the UN Charter is narrower than its customary counterpart.[29] Secondly, a state can exercise its right of self-defence until the Security Council takes measures necessary to maintain or restore international peace and security.[30] It thus transpires that states do not have an unfettered right of self-defence under the law of the Charter. This is consistent with the rationale behind the UN regime which is that of institutional control of the use of force triggered by necessity.

That having been said, the Security Council often adopts a two-pronged policy when emergency situations arise that justify self-defence. It affirms the right of states to use force in self-defence but at the same time it takes institutional action under Chapter VII. This means that states can use force in self defence irrespective of the effectiveness of UN measures. For example, when Iraq invaded Kuwait, the SC affirmed the inherent right of individual or collective self-defence whilst, at the same time, it imposed sanctions on Iraq.[31] The same formula was adopted

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[26] SC Res 660 (1990).

[27] SC Res 678 (1990).

[28] *Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations*, GA Res 42/22 (1987); *Nicaragua* case, paras 194–200, 229; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, para 41; *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)*, ICJ Rep (2003), paras 51, 57, 71–72; *Palestinian Wall Advisory Opinion*, para 139; *Case Concerning Armed Activities on the Territory of the Congo* (*Democratic Republic of Congo v. Uganda*) ICJ Rep (2005), paras 143–147. Brownlie 1963, pp. 272–275.

[29] Rather controversially, the ICJ extended this requirement to customary law as well. See *Nicaragua* case, para 195.

[30] 39 NYIL (2008) p. 300 at 304, 311. See also Letter dated 6 December 2001 from the Permanent Representative of the Netherlands to the United Nations addressed to the President of the Security Council, UN Doc S/2001/1171.

[31] Regarding the arms embargo imposed on Rwanda, the SC later lifted it with regard to the government of Rwanda. SC Res 661 (1990).

following the 9/11 attacks where the Security Council affirmed the right of self-defence amid institutional action.[32]

2.4 Customary-Cum-Institutional Uses of Force

2.4.1 Pre-Emptive Self-Defence

Customary international law has always recognised a broader right of self-defence, not only against actual but also against imminent attacks.[33] Pre-emptive self-defence is the gist of the *Caroline* cases, widely accepted as the *locus classicus* of the customary law on self-defence.[34] The official correspondence following this incident affirmed the right of self-defence when there is an imminent danger. According to the American Secretary of State, Daniel Webster, there had to be a 'necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment of deliberation'.[35] The International Military Tribunal for the Far East also recognised the right to use pre-emptive force by upholding the Netherlands' declaration of war on Japan, due to Japan's decision to attack the Dutch colonies, even if there was no actual armed attack at the time of the declaration.[36] As far as the Nuremberg International Military Tribunal is concerned, it implicitly accepted the right of pre-emptive force when it rejected German pleas to that effect regarding their actions in Norway and Russia, due to the absence of an imminent threat of an attack.[37]

Views as to whether pre-emptive self-defence is permitted by the UN Charter have been divided. Whereas parts of the jurisprudence claim that Article 51 of the Charter has suppressed this aspect of self-defence by requiring a prior armed attack, others claim that the Charter preserves the customary right of self-defence in the word 'inherent'.[38]

State practice since 1945 tends to support the view that states can use force against imminent threats of an attack with the 'Six-Day War' as a prime example.[39] At any rate, views about the status of pre-emptive self-defence within

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[32] SC Res 1368 (2001) and SC Res 1373 (2001).

[33] For the distinction between pre-emption (against an imminent attack) and prevention (against a remote attack) see Waltzer 1977, pp. 74–85.

[34] Jennings 1938, p. 92.

[35] 30 British and Foreign State Papers, pp. 196–198.

[36] International Military Tribunal at Tokyo (1948) in: Friedman 1972, pp. 1157–1159.

[37] 41 AJIL (1947) pp. 205–207, 211–213.

[38] Bowett 1958, pp. 182–193; Diss. Op. Schwebel in the *Nicaragua* case, p. 347, para 273. In the *Nicaragua* case the ICJ did not express any view on the issue. See *Nicaragua* case, para 194.

[39] Dinstein 2005, p. 192.

the UN scheme changed radically after the 9/11 terrorist attacks and the US National Security Strategy [US NSS] of 2002.[40] For example, the UN High-Level Panel on Threats, Challenges and Change admitted in its Report that changes in the international security environment may justify pre-emptive action and went on to say that 'a threatened State, according to long-established customary international law, can take military action as long as the threatened attack is imminent, no other means would deflect it, and the action is proportionate'.[41] The UN Secretary-General went even further by saying that 'imminent threats are fully covered in Article 51, which safeguards the inherent right of sovereign states to defend themselves against an armed attack. Lawyers have long recognized that this covers an imminent attack as well as one that has already happened.'[42]

From the above it can be safely said that pre-emptive self-defence is nowadays part of the customary as well as of the UN law on self-defence.[43] Although this may not be controversial anymore, what is of critical importance is how 'imminence' is assessed. Traditionally, the assessment has been made in temporal terms, referring to the proximity of the threat.[44] However, due to the nature of modern threats, 'imminence' is nowadays assessed by taking into account factual as well as temporal factors[45] and refers to the state's capacity to defend itself against an attack by taking into consideration the nature of such prospective attack.

2.4.2 Preventive Self-Defence

Preventive self-defence is the use of force against future and remote threats of an attack. Although it has been part and parcel of the customary law on self-defence,[46] the majority of legal opinion contends that preventive self-defence falls outside the

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[40] US NSS, 6.

[41] *A More Secure World: Our Shared Responsibility*, UN Doc A/59/565 (2004) paras 188 and 189–192; US NSS, 15. Also see Response of the Secretary of State for Foreign Affairs to Second Foreign Affairs Committee, *Report on Foreign Policy Aspects of the War against Terrorism*, Cm 5739, Session 2002–2003, 7: 'It is well established in international law that the right to self-defence applies not only where an attack has occurred but also pre-emptively where an attack is imminent'.

[42] *In Larger Freedom: Towards Development, Security and Human Rights for All*, UN Doc A/59/2005, para 124.

[43] Pre-emptive self-defence has been endorsed by the Dutch government. 39 NYIL (2008) pp. 304, 311–312.

[44] *Case Concerning the Gabčíkovo-Nagymaros Project*, para 54.

[45] Hansard 21 April 2004 cols 370–371; US NSS (2002) 15; Wilmshurst 2006, 963–972, Principle D; Lowe 2004, p. 192.

[46] For a review of classical writers see Reichberg 2007, p. 5.

definition of self-defence as formulated in Article 51 of the UN Charter.[47] Although the ICJ did not express any view on the issue, in the *Armed Activities* case the Court took note of the Ugandan High Command's claim that the use of force by Uganda was necessary to 'secure legitimate security interests' but concluded that Article 51 UN Charter allows a state to take self-defence action within its limited parameters, and not to safeguard security interests.[48]

That having been said, there has been a noticeable change of attitude towards preventive uses of force since '9/11'. For example, the US justified their action against Afghanistan as being 'in accordance with the inherent right of individual and collective self-defence' and 'designed to prevent and deter further attacks on the United States'[49] and, in general, argued for a forward-looking right of self-defence against future threats. The 2006 US NSS states that 'under long-standing principles of self-defence we do not rule out the use of force before attacks occur, even if uncertainty remains as to the time and place of the enemy's attack'.[50]

Such change of attitude is also evident in reactions to preventive uses of force particularly when they are presented as reactions to threats posed by Weapons of Mass Destruction. For instance, although the UN censured Israel for its 1981 bombing of the Osiraq nuclear reactor in Iraq[51] which for Israel was 'an elementary act of self-preservation,' in conformity with 'its inherent right of self-defence, as understood in general international law and as presented in Article 51 of the United Nations Charter',[52] international reaction to the Israeli attack on the Syrian partially constructed al-Kibar nuclear installation in 2007 was virtually inaudible.

The UN on its part takes a more cautious approach to preventive use of force. It dismisses any doctrine of preventive self-defence[53] but, instead, urges states to bring their case to the Security Council, which can authorise preventive action if it

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[47] See Attorney General, Lord Goldsmith, HL Debates 21 April 2004, Vol. 660, c370: 'It is therefore the Government's view that international law permits the use of force in self-defence against an imminent attack but does not authorise the use of force to mount a pre-emptive strike against a threat that is more remote.' Available at: http://www.publications.parliament.uk/pa/ld200304/ldhansrd/vo040421/text/40421-07.htm#40421-07_head0, accessed 4 April 2010. See also the Attorney General's Advice on the Iraq War. Iraq: Resolution 1441, 54 ICLQ (2005) 767, para 3.

[48] *Armed Activities case*, para 148.

[49] Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc S/2001/946.

[50] US NSS (2006), 23. Also US NSS (2002) 15.

[51] SC Res 487 (1981).

[52] Statement before the Security Council by Mr Blum (Israel) S/PV 2280, 12 June 1981, 20 ILM (1981) 970 and 973.

[53] This position has been criticised by the USA, see 99 AJIL (2005) p. 494; US NSS (2006) 9.

satisfies itself that the threat is credible or serious.[54] In sum, the UN acknowledges that preventive action may sometimes be necessary, but tries to place such actions under institutional control because of their potential to threaten international peace and security.[55] Be that as it may, the use of factual as well as of temporal criteria in defining 'imminence' narrows the gap between pre-emptive and preventive self-defence.

2.4.3 Protection of Nationals Abroad

Operations to rescue state nationals facing extreme danger in another state when the local government was unwilling or unable to protect them were rather frequent in the pre-Charter period.[56] Rescue missions were justified under the rubric of self-defence because nationals constitute the human component of a state and their existence is important to states. Such operations are also permitted by Article 51 of the UN Charter because an attack on a national is an attack on the state or, alternatively, because the term 'inherent' in Article 51 UN Charter incorporates the full content of the customary law on self-defence.[57] This view accords with the position of some governments, such as that of the United Kingdom[58] or the Netherlands.[59] State practice also confirms the view that the right of self-defence, either in its customary or its Charter formulation, includes the use of force to protect nationals abroad. Israel, for example, invoked the right of self-defence to justify its rescue operation at Entebbe.[60] In similar vein, the US invoked the 'inherent right of self-defence, as recognised in article 51 of the UN Charter, which entitles the United States to take necessary measures to defend US military personnel, US nationals and US installations'[61] in order to justify their action in Panama in 1981 as well as to justify their actions in Grenada (1983)[62] or Iran (1980).[63] Although rescue operations have often been criticised by the General Assembly and/or the Security Council, such criticisms do not concern their legal status but evolve around issues

[54] *A More Secure World*, UN Doc A/59/565 paras 189–192; *In Larger Freedom*, UN Doc A/59/2005, para 125. This is also the position of the Dutch government. See 39 NYIL (2008) p. 312.

[55] *A More Secure World*, UN Doc A/59/565, paras 189, 191.

[56] Borchard 1915, p. 448; Offutt 1928; Ronzitti 1985.

[57] Bowett 1958, pp. 87–105; Brownlie 1963, pp. 289–301; Waldock, 1952, pp. 485–505. First report on diplomatic protection by John R. Dugard, Special Rapporteur, UN Doc A/CN.4/506, paras 47–60.

[58] 57 BYIL (1986) pp. 617–618.

[59] 39 NYIL (2008) p. 306.

[60] UN Doc S/PV.1939, paras 105–121.

[61] 84 AJIL (1989) pp. 546–548. Also Nanda 1989, pp. 494–525.

[62] Joyner (1984) pp. 131–175.

[63] 80 Dept St Bull (1989) 38.

of proportionality[64] or genuineness, as criticisms of Russia's intervention in Georgia show.[65] The self-defence character of rescue operations is also confirmed by the guidelines for 'Non-Combatant Evacuation Operations' adopted by certain states.[66] According to the British doctrine, if the local government does not grant its consent for such operations, 'intervention to protect UK nationals may be justified on grounds of self-defence (Article 51 of the UN Charter).'[67] In sum, rescue operations are an aspect of self-defence in its customary as well as its Charter formulation.

2.4.4 Use of Force for Humanitarian Purposes

The humanitarian necessity created by massacres or other outrages often led to interventions, not only to protect threatened peoples but also to restore the international order ruptured by such outrages.[68] For instance, the intervention to protect the Greeks living under Ottoman rule was justified 'no less by sentiments of humanity, than by interests for the tranquillity of Europe'.[69] The legal status of humanitarian intervention has been contested under UN Charter law. A strict interpretation of Article 2(4) of the UN Charter seems to prohibit humanitarian interventions.[70] On the other hand, it has been claimed that Article 2(4) permits humanitarian interventions to the extent that they are not against the territorial integrity or political independence of a state; nor against the UN purposes. It is not surprising then that post-Charter state practice is not always unequivocal, with states using various arguments to justify their actions without always invoking the

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[64] GA Res 38/7 (1983) with regard to Grenada and GA Res 44/240 (1989) with regard to Panama.

[65] Independent International Fact-Finding Mission on the Conflict in Georgia (2009) Report, vol. II, pp. 285–289.

[66] Non-combatant Evacuation Operations, Joint Warfare Publication (JWP) 3–11 (2000), at 1–1 available at: http://www.mod.uk/NR/rdonlyres/D0302742-2103-4C9D-9CE8-D6F2E6B1860F/0/20071218_jwp3_51_U_DCDCIMAPPS.pdf, accessed 4 April 2010.

For the US Doctrine see Joint Publication 3-68 Non-Combatant Evacuation Operations (22 January 2007) available at: http://www.fas.org/irp/doddir/dod/jp3-68.pdf.

For Canada see Joint Publication Manual Non-Combatant Evacuation Operations B-GJ-005-307/FP-050 (16 October 2003) available at: http://www.cfd-cdf.forces.gc.ca/websites/Resources/dgfda/Pubs/CF%20Joint%20Doctrine%20Publications/CF%20Joint%20Doctrine%20-%20B-GJ-005-307%20FP-050%20-%20NEO%20Ops%20-%20EN%20(16%20Oct%2003).pdf, accessed 4 April 2010.

[67] JWP 3-51, 4A2. The US doctrine also speaks of self-defence without clarifying whether it refers to the defence of the individual or the defence of the state, supra, A-1. The same applies with regard to the Canadian doctrine, supra, 4–9.

[68] Tsagourias 2001, Chapter 1.

[69] Preamble, Treaty between Great Britain, France and Russia for the Pacification of Greece, 14 BFSP (1826–1827), 632.

[70] *Nicaragua* case, para 268.

humanitarian one.[71] The ambivalent status of this right is best captured by the views of the British Government, according to which humanitarian intervention 'cannot be said to be unambiguously illegal'.[72] Attitudes towards humanitarian interventions seem to be changing in the post-Cold War period. As with other instances that also involve force examined earlier in this section, states either invoke their customary right to use force or ascribe such a right to the UN system. Two revealing examples of the approach just described concern the Allied action in Northern Iraq in 1991 and NATO's action in Kosovo in 1999. The aim of the former was to provide humanitarian assistance to the Kurds and create an exclusion zone to protect them from attacks.[73] According to Anthony Aust, Legal Counsellor at the UK Foreign Office, 'the states taking action in northern Iraq did so in exercise of the customary international law principle of humanitarian intervention'.[74] With regard to NATO's intervention in Kosovo, Belgium argued before the ICJ that NATO's intervention 'is not an intervention against the territorial integrity or independence of the former Republic of Yugoslavia. The purpose of NATO's intervention is to rescue a people in peril, in deep distress. For this reason the Kingdom of Belgium takes the view that this is an armed humanitarian intervention, compatible with Article 2, para 4, of the Charter, which covers only intervention against the territorial integrity or political independence of a State.'[75]

The change of attitude towards humanitarian intervention is also reflected in the official positions of governments[76] and, as far as the UN is concerned, by the introduction of the 'Responsibility to Protect' doctrine [R2P].[77] According to this

[71] For example with regard to India's intervention in East Pakistan (Bangladesh) see Review of the International Commission of Jurists (June 1972) pp. 57–62.

[72] 57 BYIL (1986) p. 619.

[73] SC Res 688 (1991). The resolution was not passed under Chapter VII and did not authorise the use of force.

[74] 62 BYIL (1992) 827. Giving evidence before the Iraq Inquiry, Sir Michael Wood, former Legal Adviser to the Foreign Office, said that Britain had justified the legality of no-fly zones on the basis that they were necessary to avoid a humanitarian disaster and that unlike the US, Britain did not rely on a UN resolution for the legal authority. He also said that the Attorney Generals in 2001, the late Lord Williams of Mostyn and Lord Goldsmith, had raised concerns about the continuing legality of enforcing the no-fly zone because the humanitarian threat had faded. *The Times* 25 November 2009.

[75] *Case concerning Legality of Use of Force (Serlia and Montenegro v Belgium*, Oral Pleadings, Verbatim Record, 10 May 1999, CR 99/15 (10 May 1999).

[76] 63 BYIL (1992) pp. 824–820; 71 BYIL (2000) pp. 643–650; 72 BYIL (2001) pp. 695–696. The position of the Dutch government is more conservative but still recognises that when a humanitarian crisis looms, intervention can be justified on the basis of political or moral arguments even if the legal position is not certain. 39 NYIL (2008) pp. 307–308, 314–316.

[77] 'The Responsibility to Protect' Report of the International Commission on Intervention and State Sovereignty (2001) (hereinafter referred to as R2P). *A More Secure World*, UN Doc A/59/565 (2004) para 199–209; UN Doc A/RES/60/1; 'The Common African Position on the proposed reform of the UN: the Ezulwini Consensus' (7th Extraordinary Session of the AU Executive Council, Addis Ababa, 7–8 March 2005) AU Doc Ext/EX.CL/2 (VII).

doctrine, the international community has responsibility to protect peoples if their state is unwilling or unable to offer protection. Interventions by the international community to protect peoples should be launched when there are gross violations of human rights, there is right authority and right intention and the action is a measure of last resort.[78] Such interventions should ideally be authorised by the Security Council but, if it fails in this regard, it can be substituted by the General Assembly or regional organisations.

By introducing the R2P doctrine, the UN seems to endorse the principles and aims behind humanitarian intervention by simultaneously removing the rather charged language of intervention, and by dressing the action in institutional cloths. Still, the R2P is a political undertaking and not an enforceable obligation, as its (non-) application in the situations of Darfur[79] or Burma[80] shows. From the above, it transpires that an institutional mechanism of intervention in cases of humanitarian necessity has been introduced which hitherto remains untested but which exists alongside the old and tested customary law right of humanitarian intervention.

2.5 Customary Uses of Force

2.5.1 Forcible Reprisals

Forcible reprisals are proportionate responses to violations of international law when other means of redress are not available or forthcoming. Forcible reprisals have been part and parcel of customary law,[81] but the UN Charter seems to have proscribed them.[82] The ICJ on its part has not pronounced on their legality, but in the *Corfu Channel* case, it hinted at the existence of a residual right of forcible

[78] R2P 4.15–4.43; 6.1–6.40.

[79] Report of the High-Level Mission on the situation of human rights in Darfur pursuant to Human Rights Council Decision S-4/101, A/HRC/4/80 9 March 2007 para 76. SC Res 1755 (2007); SC Res 1769 (2007).

[80] When the French Foreign Minister Bernard Kouchner suggested that the United Nations invoke the responsibility to protect the people of Burma, Kouchner's words were met with a deafening silence, New York Times, 13 May 2008, available at: http://www.nytimes.com/2008/05/13/opinion/13iht-edaalder.1.12841976.html, accessed 4 April 2010. See also European Parliament Resolution of 22 May 2008 on the tragic situation in Burma, RC-B6-0244/2008.

[81] *Naulilaa Incident Arbitration Decision* (*Portugal v Germany*) 2 RIAA (1928) p. 1012.

[82] Article 2(4) UN Charter. Declaration on Principles of International Law concerning Friendly Relations, GA Res 2526 (1970). Barsotti 1986, p. 79; Gray 2008, pp. 195–198.

reprisals outside the UN Charter.[83] In another instance, the *Nicaragua* case, the ICJ opined that a state that suffers attacks that do not rise to the level of armed attack for self-defence purposes can take proportional countermeasures without giving further guidance as to whether they also include forcible ones. In the *Oil Platforms* case, however, individual judges expressed different views on the legal status of reprisals. Whilst Judge Elaraby in his Dissenting Opinion admonished the Court for not pronouncing on the (il)legality of reprisals,[84] Judge Simma in his Separate Opinion seems to accept 'proportional countermeasures' of a military nature.[85]

State practice has been more robust in this context, particularly with regard to terrorism where condemnations of a state's forcible responses evolve around issues of proportionality or evidential matters. Hence, Bowett's description of the status of reprisals under the Charter as *de jure* unlawful but *de facto* accepted[86] is still valid; although in my view, there is today a much greater degree of legal acceptability of forcible reprisals. That said, states often treat such actions as a hybrid of self-defence[87]; in a similar vein, Dinstein speaks of 'defensive reprisals'.[88] The reason for aligning reprisals to self-defence is to provide a legal basis for such actions under the Charter, and also to highlight their deterrent character by downplaying their punitive one. Although reprisals share common purposes with self-defence—as for example in forestalling attacks—they should be distinguished therefrom. First, the aim behind reprisals is to induce another actor to cease its unlawful acts. Second, reprisals are reactions to low-level violence whereas self-defence is reaction to grave violence.[89] Third, the reprisal action may not target the source of the initial use of force.

For all of the above reasons, it is submitted here that forcible reprisals are independent titles available to states under customary law and that any 'normative drift' to stretch the meaning of self-defence in order to include reprisals is unnecessary.[90]

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[83] Waldock 1952, pp. 499–503. But see Diss. Op. Krylov in *Corfu Channel* case, ICJ Rep (1949) 3, at p. 77: 'Since 1945, i.e., after the coming into force of the 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. The employment of force in this way, or of the threat of force, is forbidden by the Charter (para 4 of Art. 2)'.

[84] Diss. Op. Elaraby in *Case Concerning Oil Platforms*, para 1.2.

[85] Diss. Op. Simma in *Case Concerning Oil Platforms*, para 15. Judge Kooijmans is rather noncommittal. Diss. Op. Kooijmans, ibid., paras 52 and 62.

[86] Bowett 1972, p. 1.

[87] For example, with regard to US action in Sudan and Afghanistan in 1999 see 93 AJIL (1999) pp. 161–167. For Israel's action against Syria in 2003 see S/PV.4836 (2003) 7; against Lebanon in 2006 see UN Doc. S/2006/515 as well SC Res 1701 (2006).

[88] Dinstein 2005, pp. 221–231.

[89] *Nicaragua* case, para 195. For the 'accumulation of events' theory see Dinstein 2005 pp. 201, 230–231; rejected by Judge Simma. See Diss. Op. Simma in *Case Concerning Oil Platforms*, para 14.

[90] Bethlehem 2004, para 21.

2.6 Use of Force: A Special Regime

2.6.1 Characteristics of the Use of Force Regime

How does the preceding discussion link with the claim made in the introduction that the use of force is a special regime? In order to answer this question I will first provide a definition of the term 'regime' and then I will consider whether the use of force regime conforms to that definition.

Although there are different accounts of, and approaches to, regimes, for the purposes of this paper I will rely on Krasner's widely accepted definition of 'regime' as a set of 'principles, norms, rules and decision-making processes around which actors' expectations converge in a given issue-area of international relations'.[91] The above definition, highlights the normative and procedural features of a 'regime', which not only explain its formation but also its maintenance and development. It should be noted however that regimes are not always formal and institutional constructs; informal arrangements can also qualify as regimes if the necessary convergence of interests as well as attendant rules and procedures exist. And this is particularly pertinent in international law because of the important role ascribed to custom.

As far as the use of force is concerned, it has always been an area of immense interest to states because as much as the use of force is a manifestation of state sovereignty it is also an existential threat to states: it can lead to their demise. It is thus an area that warrants regulation and common management in order to contain the destructiveness of the use of force but also direct it towards worthy purposes. In other words it is an area that can give rise to the formation of a regime and that was what gradually happened. Whereas uses of force had started as spontaneous reactions to threats facing states, their regularisation and gradual

[91] Krasner 1983, p. 2; Keohane 1984, pp. 57–56. The concept of regime or more specifically of self-contained regimes entered the international legal vocabulary in the aftermath of the *Teheran Hostages* case where the ICJ described the Vienna Convention on Diplomatic Relations as a self-contained regime. *United States Diplomatic and Consular Staff in Tehran*, (*United States of America* v *Iran*) ICJ Rep (1980), para 86. For a previous case see *Case of the S.S 'Wimbledon'*, PCIJ, Judgment of 17 August 1923, PCIJ, Series A, Judgments, vol. 1, no. 1, pp. 23–24. See also International Law Commission, *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, A/61/10, para 11: '*Special* ("*self-contained*") *regimes as lex specialis*. A group of rules and principles concerned with a particular subject matter may form a special regime ("Self-contained regime") and be applicable as *lex specialis*. Such special regimes often have their own institutions to administer the relevant rules'. Also ibid, para 12. The ILC flirted with the idea of regimes during the drafting of the Articles on State Responsibility [ASR] but later abandoned it. See Third Report on the Content, Form and Degrees of International Responsibility (Part Two of the Draft Articles), by Willem Riphagen, Special Rapporteur, A/CN.4/354 and Corr.1 and Add.1&2; Fourth Report on the Content, Form and Degrees of International Responsibility (Part Two of the Draft Articles, by Willem Riphagen, Special Rapporteur), A/CN.4/366 and Add.1 and Add.1/Corr.1.

acceptance endowed them with normative force. They were thus translated gradually into a set of principles, norms, and rules. It is at this point that a special regime was formed that is, when the subject of the use of force in the international relations of states was transformed from an attitudinal phenomenon to a normative one.[92]

Looking now into the principles, norms and rules of the use of force regime, its principles are those that identify the general purposes of the regime and include the principles of state sovereignty, peace, and justice. Its principles are not different from the principles that define the international order as a whole and this is because the use of force regime, albeit special, is embedded in the international order and adheres to its principles.[93] Moving now to its norms, they indicate standards of acceptable behaviour in light of its principles. In the use of force regime these are, amongst others, the norm on the non-use of force, or that on self-defence. Rules on the other hand are specific prescriptions or proscriptions that derive from norms and in the use of force regime they comprise all the customary and Charter rules on the use of force as mentioned above. As far as the functioning of the use of force regime is concerned in the sense of decision-making and enforcement, it relies on political institutions such as the Security Council as well as on legal ones such as the International Court of Justice and contains decentralised and unilateral methods such as in the form of self-defence or reprisals but also centralised and institutional ones, as in the case of Chapter VII action.

A particular feature of the use of force regime is that it is a composite regime, made up of the UN and the customary sub-regimes on the use of force. The customary one contains the 'codification of behavioural patterns that have arisen spontaneously'[94] and reflects states' contemporary attitudes towards the use of force. Its importance and continuing relevance is explained by the fact that the international order lacks permanent and universal legislative organs that can adapt the law or create new law when circumstances change, whereas revision of the UN Charter is an arduous and lengthy process. The UN sub-regime, on the other hand, is a negotiated one.[95] It sets out the rules, norms and principles pertaining to the use of force and introduces certain mechanisms for its management and enforcement. Although the UN and the customary sub-regime are distinct, they also interact with each other. What makes up the use of force regime, then, is the sum of principles, norms, and rules, as well as management and enforcement mechanisms found in customary and UN law, as they are often moulded by their mutual interaction.

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[92] Puchala and Hopkins 1983, p. 62.

[93] Ibid. pp. 64–65.

[94] Young 1983, p. 102.

[95] Ibid. pp. 99–100.

2.6.2 Use of Force Regime and the Law of State Responsibility

Being a special regime, the question that arises and merits further consideration is how the use of force regime relates to other regimes, and in particular to that of state responsibility, because the latter includes rules on necessity[96] and self-defence[97] and, more importantly, projects itself as a general regime of secondary rules concerning the legal consequences that flow from breaches of international obligations.[98]

In order to answer this question, one needs to consider in the first place how the law of state responsibility views its relationship with other regimes and in particular with the use of force regime. First, Article 55 Articles on State Responsibility [ASR] acknowledges the existence of special regimes by saying that the articles on state responsibility do not apply when issues concerning the existence of a wrongful act or the implementation of responsibility are governed by special rules.[99] Secondly, according to Article 59 ASR, the articles on state responsibility are without prejudice to the UN Charter. This means that the UN can deal with all issues pertaining the use of force, even if they touch upon issues of state responsibility. More importantly, as the Special Rapporteur noted, questions about the lawfulness of certain uses of force fall outside the law of state responsibility. The Rapporteur mentions in this respect of humanitarian intervention and military necessity which, according to him, fall outside the remit of Article 25 ASR on necessity because they concern primary rules.[100] These comments should be read in conjunction with the stipulation inserted in Article 25 ASR, according to which necessity cannot be invoked if the primary rule excludes the possibility of invoking necessity.[101] All of the above support the distinctness of the use of force regime vis-à-vis that of state responsibility and confirm the argument put forward in this paper that necessity is the source of the rules on the use of force which as primary legal titles have already taken into account considerations of necessity. It is indeed for this reason that necessity does not need to be invoked in order to justify the entitlement to use force itself. When a state for example uses force in self-defence, it asserts a right; it does not need to invoke necessity in order to justify its right of self-defence as such.

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[96] Article 25 ASR.

[97] Article 21 ASR.

[98] Crawford 2001, pp. 14–16. *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*, France-New Zealand Arbitration Tribunal, 30 April 1990, 82 ILR, paras 72–75; Linderfalk 2009, p. 53.

[99] In the same vein, the ICJ opined in the *Tehran Hostages* case that the law of diplomatic relations is a special regime and in the *Gabčíkovo-Nagymaros Project* case it made similar comments with regard to the law of treaties. *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary/Slovakia), Judgment of 25 September 1997, para 101.

[100] Crawford 2001, pp. 185–186; *Palestinian Wall Advisory Opinion*, para 140.

[101] Article 25(2)(a) ASR.

More than that, one needs to consider the characteristics of the two regimes and their rationale.[102] To begin with, the use of force regime contains primary rules prescribing or proscribing behaviour whereas the law of international responsibility contains secondary rules ascribing consequences to breaches of primary rules. That said, non-compliance with the rules of the use of force regime does not imply in each and every case that there is a breach of the law or that legal consequences will follow, something which is constitutive of the law of state responsibility as was said above. Whereas it is true that violations of international law involving the use of force may trigger forcible reprisals in order to induce compliance with the law, this is not their exclusive aim; their aim is to also defend the state against further attacks. Regarding pre-emptive or preventive self-defence though, these are reactions to imminent or remote threats of an attack that, at the particular moment, do not constitute an actual breach of international law. The dispensability of 'breach' as condition of the use of force regime is even more pronounced in the Charter sub-regime. What triggers institutional uses of force is a threat to the peace, a breach of the peace, or an act of aggression according to Article 39 of the UN Charter. Whereas the latter two situations may also constitute a violation of international law—namely a violation of Article 2(4) of the UN Charter[103]—this is not the case with regard to 'threats to the peace', because there is no prohibition in international law of threats to the peace per se.

The political character of Security Council determinations under Article 39 and the fact that they are performed by a political organ in a discretionary manner,[104] is another distinguishing trait whereas the determination of a breach in the law of state responsibility is a legal one. Moreover the function of such Security Council determinations is not to pass judgment on the responsibility of a state in legal terms but to bring the situation or event under the Charter provisions on peace and security and to open the way for the adoption of measures provided for in Chapter VII of the UN Charter. Such measures can be coercive or non-coercive, but they are not equivalent to legal consequences as in the law of state responsibility; their aim is to maintain or restore international peace and security. Even if the Security Council determines that an international obligation has been breached, such a finding has no other meaning than the one provided for in Article 39 UN Charter and no other consequences than those provided for in Chapter VII of the Charter. As Kelsen put it, the role of the Security Council is 'not to maintain or restore the law, but to maintain or restore peace, which is not necessarily identical with the law'.[105]

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[102] *Legal Consequences for States of the Continued Presence of South Africa on Namibia* (*South West Africa*) *Notwithstanding Security Council Resolution* 276 (1970), Advisory Opinion, ICJ Rep (1971) p. 2, at paras 118–125; Sep. Op. Onyeama, ibid p. 148; Forteau 2006; Gowlland-Debbas 1994, p. 55.

[103] See for example SC Res 660 (1990) following Iraq's invasion of Kuwait.

[104] Seventh report on State responsibility, by Gaetano Arangio-Ruiz, Special Rapporteur, A/CN.4/446 and Add.1-2, paras 97–98. *Nicaragua* case (1984) para 95; Diss. Op. Schwebel, *Nicaragua* case (1986) 292.

[105] Kelsen 1950, p. 294.

There is also no automaticity between an Article 39 determination and the adoption of measures under Chapter VII. The Security Council may take no action whereas in the law of state responsibility a breach gives rise automatically to legal consequences.

Some examples will illustrate the points made above. The first example concerns the Security Council reaction to the invasion of Kuwait by Iraq. The Security Council's determination in Resolution 662 (1990) that the annexation of Kuwait by Iraq was null and void was made in the context of its finding in Resolution 660 (1990) that the invasion constitutes a breach of the peace as well as in the context of its task to restore international peace and security. All subsequent measures adopted by the Security Council also need to be considered within such a context. This is the case for example with the establishment of a Compensation Commission[106] after the Security Council demanded that Iraq should accept its liability under international law for its actions.[107] The Security Council did not in this case and contrary to appearances make a legal determination of responsibility. As the Well Blowout Control Claim Panel opined, the Security Council's determination of Iraq's liability was executive in character and therefore within the Council's powers in peace and security.[108] In another instance, the Security Council established the International Criminal Tribunal for the former Yugoslavia[109] and the International Criminal Tribunal for Rwanda[110] to try individuals accused of committing genocide, crimes against humanity or war crimes, having determined in previous resolutions that the violations of international law in Rwanda and Yugoslavia constituted a threat to international peace and having reminded parties of their international law obligations and of the individual responsibility for such violations.[111] However, the Security Council established the tribunals as part of its tasks in peace and security. As the Appeals Chamber of the ICTY opined, the Security Council 'resorted to the establishment of a judicial organ in the form of an international criminal tribunal as an instrument for the exercise of its own principal function of maintenance of peace and security, i.e., as a measure contributing to the restoration and maintenance of peace in the former Yugoslavia'.[112] The Security

[106] SC Res 687 (1991) para 16.

[107] SC Res 686 (1991). Iraq gave it consent to that resolution. See UN Doc S/22320 (1991). In Resolution 674 (1990) Iraq was only reminded 'that under international law it is liable for any loss, damage or injury arising in regard to Kuwait and third States, and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait by Iraq.' SC Res 674 (1990) para 8.

[108] Report and recommendations Made by the Panel of Commissioners Appointed to review the Well Blowout Control Claim, S/AC.26/1996/5/Annex para 67. Heiskanen 2002, p. 255. Contra see Graefrath 1995, p. 1.

[109] SC Res 808 and 827 (1993).

[110] SC Res 955 (1994).

[111] For example SC Res771 (1992), SC Res 819 (1993); SC Res 918 (1994).

[112] *Prosecutor* v *Dusko Tadić aka Dule*, Decision on the defence motion for interlocutory appeal on jurisdiction, Decision of 2 October 1995, para 38.

Council's aversion to legal determinations and to asserting legal responsibility is also evinced by its reluctance to classify a situation as an act of aggression.[113] Aggression cuts across many areas of international law. In the law of state responsibility it constitutes a serious breach of international law and entails serious legal consequences. In the use of force regime it falls within the prohibition on the use of force and also within the competence of the Security Council under Chapter VII. Aggression can also give rise to individual criminal responsibility. How aggression is defined and who determines its existence have serious legal and political consequences. The Security Council has been entrusted with the power to determine whether an act of aggression has been committed but in order to avoid the host of consequences that its determination may invite, it prefers to qualify such an act as a breach of the peace.[114] In doing so, it steers clear of the need to identify the party responsible for the act of aggression or the need to take any action at all. Even in cases where the Security Council has mentioned in a resolution that a particular state has committed acts of aggression, the determination was not under Article 39 and as for the consequences, either there were no consequences in their broader sense of Chapter VII measures or, if there were, they did not correspond to the seriousness that the use of the word aggression implies.[115]

What transpires thus from the above is that, although Security Council action under Chapter VII may resemble action provided for in the law of state responsibility, in particular when the Security Council declares that a certain situation is unlawful, or calls upon states not to recognise unlawful situations, or requests that states should cease illegal activities, or decides on issues of liability and compensation, the nature and rationale of Security Council determinations and action is different from that in the law of state responsibility. These determinations are made within the framework in which the Security Council operates, which is not that of responsibility but of restoring or maintaining international peace and security. Furthermore, any obligations that Security Council measures impose on states are by virtue of the UN Charter, not by virtue of the law of state responsibility.[116] In addition, measures under Chapter VII are not sanctions in the legal sense of the

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[113] Diss. Op. Schwebel, *Nicaragua* case, para 60: 'Moreover, while the Security Council is invested by the Charter with the authority to determine the existence of an act of aggression, it does not act as a court in making such a determination. It may arrive at a determination of aggression—or, as more often is the case, fail to arrive at a determination of aggression—for political rather than legal reasons. However compelling the facts which could give rise to a determination of aggression, the Security Council acts within its rights when it decides that to make such a determination will set back the cause of peace rather than advance it. In short, the Security Council is a political organ which acts for political reasons. It may take legal considerations into account but, unlike a court, it is not bound to apply them'.

[114] SC Res 660 (1990) with regard to Iraq's invasion of Kuwait.

[115] See for example, with regard to South Africa SC Res 387 (1976), SC Res 571 (1985), SC Res 577 (1985); and with regard to Israel see SC Res 573 (1985).

[116] Article 25 UN Charter. Also Sep. Op. Onyeama in *Legal Consequences for States of the Continued Presence of South Africa on Namibia* (*South West Africa*) *Notwithstanding Security Council Resolution 276* (*1970*), ICJ Rep (1971) p. 2, at 148.

term; that is, institutional and coercive measures against a state that has breached an international obligation with the aim of enforcing the law.[117] The aim of such measures is to restore or maintain the peace, not to restore the law—which can nevertheless be restored incidentally. Neither are Chapter VII measures equivalent to countermeasures as defined in the law of state responsibility.[118] Countermeasures are unilateral actions directed against a state that has committed a breach of an international obligation, but their aim is to obtain cessation of the act, or reparation; that is, to achieve the legal consequences that flow from the breach,[119]whereas the aim of Security Council measures is to maintain or restore the peace.

Regarding the supervisory and enforcement mechanisms provided for in the use of force regime, they are more concerned with the management of crises in order to maintain peace and security rather than with attributing responsibility or determining legal consequences. It is for this reason that the Security Council, may restrict the legal rights of a state if that is deemed necessary to maintain international peace and security: irrespective of any breach. For example, the Security Council imposed an arms embargo on the whole of Yugoslavia in 1991 following the outbreak of hostilities[120] but it did not lift it with regard to Bosnia and Herzegovina although that state claimed that the arms embargo affected its right to defend its people against genocide.[121] The UN's concern in that instance was to contain the conflict in Yugoslavia.

Also, the SC may take a gradualist and more nuanced approach to events by first adopting non-coercive measures in order to contain the impact of certain events on international peace and security even if these events involve breaches of the peace, or violations of Article 2(4). That was for example the initial reaction to Iraq's invasion of Kuwait.[122] Security Council measures may also apply generally to all states if that is deemed necessary to maintain or restore the peace.[123] In contrast, the law of state responsibility is more monolithic in that, with the exception of serious breaches, any breach gives rise automatically to the same consequences which target the defaulting state.

Yet, on other occasions, the United Nations may even be receptive to events that at first glance appear to be outside its own rules on the use of force, as the

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[117] Kelsen 1950, p. 733.

[118] Article 22 ASR.

[119] *Gabčíkovo-Nagymaros Project* paras 83–85.

[120] SC Res 713 (1991).

[121] *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* [*Bosnia and Herzegovina v. Yugoslavia* (*Serbia and Montenegro*)] Order of 8 April 1993, ICJ Rep (1993) p. 3 at pp. 6–8; *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* [*Bosnia and Herzegovina v. Yugoslavia* (*Serbia and Montenegro*)] Order of 13 September 1993, ICJ Rep (1993) p. 326, at p. 328 and para 41; Report of the Secretary-General Pursuant to General Assembly Resolution 53/35: The Fall of Srebrenica, A/54/549, paras 99–102.

[122] SC Res 660 (1990) and SC Res 661 (1991).

[123] SC Res 1267 (1999).

Organisation's attempts, mentioned above, to incorporate elements of the customary law on the use of force, reveal; as well as the UN's involvement in ostensibly unlawful situations as that following the 2003 invasion of Iraq.[124]

Although there are differences between the two regimes which support their distinctness, this is not to say that there are no points of contact as well. All regimes interact with the environment which surrounds them, and all exhibit elements of openness and closure.[125] The two regimes—state responsibility and use of force—do not exist and operate in total isolation from each other but interact and even complement each other in many different ways without however losing their distinctness.

One area where the two set of regimes interact but also diverge is with regard to enforcement. A violation of the rules on the use of force may give rise to state responsibility and trigger demands for cessation, non-repetition or reparation, on the one hand[126]; on the other, such a violation can also trigger the use of force regime in the form of either UN action or state action (as self-defence). As far as UN action is concerned, it can be political but also legal. Political action refers to action taken by the Security Council or the General Assembly culminating in the use of force under Chapter VII. UN action may also trump the operation of the state responsibility regime by virtue of Article 59 ASR and Article 103 UN Charter, something that demonstrates the differences between the two regimes.

As far as legal action is concerned, it mainly refers to judicial action by the International Court of Justice. The ICJ is not only the primary judicial organ of the UN and therefore competent to enforce the rules of the UN sub-regime on the use of force, but it is also an institution of the international society that can be seized by all of its members, and can adjudicate on the basis of customary law. This was what happened in the *Nicaragua* case for example, where the ICJ performed its adjudicatory function under the customary law on the use of force because the UN regime did not apply to the case due to jurisdictional restrictions. In sum, the ICJ has overall competence with regard to the use of force regime.[127] Thus, when it pronounces on the illegality of a particular use of force and then goes on to

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[124] SC Res 1483 (2003).

[125] Judge Simma takes a more strict approach. See Simma 1985, p. 117: 'a "self-contained regime" would then be a subsystem which is intended to exclude more or less totally the application of the general legal consequences of wrongful acts, in particular the application of countermeasures normally at the disposal of the injured party.' See also Simma and Pulkowski 2006, p. 483. According to Crawford, if regimes should be hermetically closed 'there cannot be, at the international level, any truly self-contained regime'. Crawford 2002, p. 880. Also see 'Fragmentation of International Law: Difficulties arising from the diversification and expansion of International Law', Report of the Study Group of the International Law Commission Finalized by Martti Koskenniemi, A/CN.4/L.682, para 152 (5).

[126] Articles 30–31 ASR.

[127] For example in the *Oil Platforms* case where the Court said that it will determine whether the use of force was lawful or unlawful, 'by reference to international law applicable to this question, that is to say, the provisions of the Charter of the United Nations and customary international law.' *Oil Platforms*, para 42.

determine legal consequences, it performs functions according to the law of state responsibility. Recalling once more the *Nicaragua* case, the Court having established that the US had breached its obligation not to use force, went on to demand cessation of the unlawful acts and the making of reparations.[128] That having been said, when the ICJ performs its adjudicatory functions under the UN regime it needs to operate within the confines of the UN Charter, due to the fact that it is also a UN organ. Thus, and however hard the Court tries to preserve the legal and judicial character of its functions, it may have to accept certain limitations—particularly when its powers come into contact with the powers of other UN organs, such as those of the Security Council.[129] This is because the SC and the ICJ, as primary UN organs, are co-equals and both have responsibility in peace and security. As a result, while the SC and the ICJ can 'perform their separate but complementary functions with respect to the same events',[130] often the ICJ shows deference to the Security Council, the political organ.[131]

Another area where the two regimes connect but also diverge is with regard to the attribution of acts. Acts of state organs or agents are attributed to that state for purpose of the law of state responsibility as well as of the use of force. For example, an attack by the military forces of a state is attributed to that state which can thus become the target of the self-defence action. Another common criterion is that of 'effective control'. As the *Nicaragua*[132] and the *Armed Activities* cases,[133] show, the acts of entities over whom a state exercises effective control are attributed to that state. For example, an armed attack by a parastatal organisation under the effective control of a state is attributed to that state, which becomes the target of the self-defence action. In the *Bosnia Genocide Convention* case the ICJ affirmed the validity of the 'effective control' test for the law of state responsibility[134] and opined that, unless proven otherwise, this test applies uniformly to all instances of wrongful conduct. As the Court said, 'the rules for attributing alleged internationally wrongful conduct to a State do not vary with the nature of the wrongful act in question in the absence of a clearly expressed *lex specialis*'.[135] Certain judges however called for a more nuanced approach to the 'control' test

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[128] *Nicaragua* case, p. 149; *Palestinian Wall Advisory Opinion*, pp. 201–202.

[129] *Nicaragua* case (Jurisdiction) ICJ Rep (1984) 392 at para 94–95; *Lockerbie* case, (Provisional Measures), para 43: 'the Court considers that, whatever the situation previous to the adoption of that Resolution (748 of 1992), the rights claimed by Libya under the Montreal Convention cannot now be regarded as appropriate for protection by the indication of provisional measures'.

[130] *Nicaragua* case (1984) para 95.

[131] *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (*Libya v. United Stats and United Kingdom*), ICJ Rep (1992) 114.

[132] *Nicaragua* case, paras 109–115.

[133] *Congo v. Uganda*, paras 157, 160.

[134] *Bosnia Genocide* case, paras 402–415.

[135] Ibid. para 401.

due to the different circumstances under which a wrongful act can be committed.[136]

The similarities however between the use of force regime and that of international responsibility as far as attribution is concerned end here because of the different needs to which each regime responds. This is evident for example with regard to uses of force by non-state actors. The effective control test due to the high degree of control it requires is not able to capture the different ways in which non-state actors are linked to states or the different degrees of organisation that non-state actors enjoy. As a result, non-state actors can cause immense damage for which no-one would be held accountable. For this reason, according to the use of force regime, a state can use force by way of self-defence against another state that exercises overall control over a non-state actor that mounted an attack[137]: or against the state that supports or tolerates such non-state actor that mounted an attack[138]. The US action against Afghanistan following the '9/11' attacks[139] provides evidence of the view that self-defence can be directed against a state that harbours non-state actors. As the UK Attorney General also stated, self-defence can be used against those 'who plan and perpetrate [terrorist] acts and against those who harbour [terrorists] if that is necessary to avert further such terrorist acts'.[140]

The divergence between the two regimes can also be explained by their different rationales. Conceptually, the law of state responsibility is based on the distinction between private and public (state) conduct. That is why it tries to establish a direct link between the wrongful act and a state. Put differently, the law of state responsibility needs to establish whether there is state conduct in order to determine whether a breach of an international obligation has been committed by that state giving rise to its responsibility. The law of state responsibility however takes a more nuanced approach to the state as an institution and the degree of control it can exercise over private or public entities. That is why it provides for different types of responsibility depending on the degree and type of state involvement. Such nuanced approach is offset by the existence of internal (state) or external (international) mechanisms, for example human rights, humanitarian law, criminal law mechanisms, which can hold such non-state entities accountable for violations of international or national law. In contrast, the use of force regime prescribes the situations under which the use of force is lawful. It emphasises the

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[136] Diss. Op. of Vice President Al-Khasawneh, *Bosnia Genocide* case, paras 36–39.

[137] *Prosecutor* v *Duško Tadić* case No. IT-94-1-A, Judgment of Appeal Chamber, 15 July 1999, paras 118–141.

[138] Simma 2002, p. 802. See also *Nicaragua* case, Diss. Op. Schwebel, ibid., para 176 and Diss. Op. Jennings, ibid. 543; Schachter 1989, p. 218.

[139] Letter Dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the president of the Security Council. UN Doc S/2001/946 (2001); US NSS (2002) at 5; *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks upon the United States*, (2004), 326.

[140] 75 BYIL (2004) p. 823. For an overview of states' attitudes see Murphy 2002, p. 41.

harm that gives rise to lawful uses of force whereas the law of state responsibility puts emphasis on the author of the act. For this reason, traditionally, the use of force regime allowed uses of force against private actors with the *Caroline* case mentioned above being the most well-known example. However, after 1945, it became *par excellence* state-oriented as the ICJ jurisprudence reveals.[141] For the use of force regime however, the state is viewed as an institution that exercises power over people and territory and is endowed for this reason with affirmative rights and duties. Put differently, the state is seen as a collectivity making up an undivided whole. In this sense the use of force regime takes an undifferentiated approach to the state, contrary to the law of state responsibility which is more discerning in this respect. As a result, the use of force regime does not contain intermediary rules dealing with non-state actors as the law of international responsibility does, also, for the additional reason that force as an act is monolithic and its exercise in most cases affects a state. Consequently, for the use of force regime all harmful acts are attributed to the state from whose territory they emanate unless that state is not implicated in any way therein or the author of the harm is de-territorialised. In the latter case, these non-state actors become the targets of the use of force. Thus, attribution in the use of force regime does not have the narrow and specific meaning that it has in the law of state responsibility but is a general concept commensurate to the abstract and formal conception of the state in the use of force regime. UN uses of force prove the points made above. The UN can use force or authorise such force against states that pose a threat to international peace even when such a threat involves actions by 'non-State actors it harbours or supports; or whether it takes the form of an act or omission'.[142] Furthermore, the Security Council has confirmed the right of a state to use force by way of self-defence against a state that is not the actual author of an attack but from which the attack emanates. For example, in response to the '9/11' attacks, the Security Council recognised the US right to self-defence against Afghanistan[143] even if the links between Al-Qaeda and Afghanistan were not such as to make the latter the author of the attack; but instead Afghanistan was the territory from where Al-Qaeda mainly operated. At no point did the Security Council try to ascertain whether the acts were attributable to Afghanistan by using any of the attribution criteria found in the law of state responsibility. If a state is not implicated at all, then it is that non-state actor that will be targeted. This was the case with regard to the 2006 Israeli action in Lebanon. Following attacks by Hizbollah emanating from Lebanon, Israel used defensive force but claimed that its action was against Hizbollah, not

[141] *Palestinian Wall Advisory Opinion*, supra, para 139; Contra Sep. Op. Higgins ibid. paras 33–34; Sep. Op. Kooijmans, ibid. paras 35–36 and Decl. Burgenthal, ibid. para 6. Also *Congo v Uganda*, para 146. Contra Diss Op. Kateka, ibid. para 34 and Dis. Op. Kooijmans, ibid. para 28.

[142] *A More Secure World*, para 193.

[143] SC Res 1368 (2001) and SC Res 1373 (2001).

against the state of Lebanon, because of the latter's lack of involvement.[144] If the attribution criteria found in the law of state responsibility were to apply in this instance, not only would Israel have been unable to respond to the attacks but also no state responsibility would have arisen to the extent that no connection between Hizbollah and Lebanon was established with regard to the attacks, and Lebanon did not fail in its duty of due diligence. To sum up, whereas there is a certain overlap between state responsibility and the use of force on the issue of attribution, each regime has its own rationale and therefore they diverge in many respects.

Another area where the two regimes interact is with regard to uses of force that fall outside the use of force regime. In this case a state can be exonerated if its forcible action satisfies the conditions of necessity formulated in the law of state responsibility; namely that there is a grave danger, the act is the only way to safeguard an essential interest of the acting state, and does not impair an essential interest of the other state or of the international community.[145] In the *Palestinian Wall* Advisory Opinion, for example, the Court, having dismissed Israel's argument that the wall is a measure of self-defence, examined on its own motion 'whether Israel could rely on a state of necessity, which would preclude the wrongfulness of the construction of the wall' but was not convinced that 'the construction of the wall along the route chosen was the only means to safeguard the interests of Israel against the peril which it has invoked as justification for that construction.'[146]

Certain examples of uses of force that can be exonerated by necessity are uses of force by peacekeepers which are neither in self-defence nor authorised by the Security Council; uses of force similar to that in the *Torrey Canyon* incident[147] where the British bombed the ship in order to burn off the oil and prevent a possible environmental disaster; or uses of force in reaction to terrorist attacks that are not in self-defence or reprisals. For example, Turkey invoked something approximating necessity in order to justify its incursion of the Iraqi territory in its fight against militant Kurds operating from within Iraq. In a letter to the President of the Security Council, Turkey spoke of the importance it ascribes to Iraq's sovereignty as well as to its own sovereignty but, in view of Iraq's lack of authority in the northern part of the country, Turkey felt obliged to take measures 'imperative to its own security' that 'cannot be regarded as a violation of Iraq's sovereignty'.[148] Also, in 2007, the Turkish Parliament passed a motion authorising

[144] Identical letters dated 12 July 2006 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc S/2006/515. Israel's right of self-defence has been recognised by the UK, Peru, Denmark, France, Argentina although they raised concerns about the proportionality of the action. S/PV.5489 (14 July 2006). It has also been recognised by the UN Secretary-General, S/PV.5492 (20 July 2006).

[145] Article 25 ASR.

[146] *Palestinian Wall* Advisory Opinion, para 140.

[147] Ago 1980, para 35.

[148] Letter dated 24 July 1995 from the Chargé d'Affaires of the Permanent Mission of Turkey to the United Nations addressed to the President of the Security Council, UN Doc S/1995/605 (24 July 1995). Gazzini 2006, pp. 205–206.

cross-border military action in northern Iraq. During the debates on the motion (which was adopted with an overwhelming majority), many legislators spoke of the need to respond to terrorist attacks that endanger Turkey's security.[149]

2.6.3 Necessity as a Circumstance Precluding Wrongfulness

This brings us to another issue which merits consideration: namely, the meaning as well as the consequences of the designation of necessity in the law of state responsibility as a 'circumstance precluding wrongfulness'.[150] One approach to necessity as a circumstance precluding wrongfulness is that it entails acts justified by the law; therefore, legal acts. For example, with regard to NATO's action in Kosovo, certain states invoked necessity as justification of the action. More specifically, Belgium invoked before the ICJ necessity 'which justifies the violation of a binding rule in order to safeguard, in the face of grave and imminent peril, values which are higher than those protected by the rule which has been breached.'[151] The British representative to the UN also stated that '[i]n these circumstances, and as an exceptional measure on grounds of overwhelming humanitarian necessity, military intervention is legally justifiable'.[152] The position of the Dutch government is equally telling. It seems to invoke necessity when it discusses humanitarian intervention, for example when it says that intervention as a last resort may be necessary in order to prevent or end a possible act of genocide even if the law is uncertain but this needs to be read in accordance with the views of the Advisory Council on International Affairs and the Advisory Committee on Issues of Public International Law contained in the Advisory Report on Humanitarian Intervention which the Dutch government has adopted, and according to which the duty to promote human rights 'forms the basis for the further development of a customary law justification for humanitarian intervention without a Security Council mandate.'[153]

Be that as it may, an interpretation of necessity as justification alludes to primary rules, not secondary ones as in the law of state responsibility, because a rule that justifies an act committed under certain circumstances prescribes a form of conduct which is condoned by the law. Also, the reason for justifying the specific act, the existence of a state of necessity, has already been accounted for in

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[149] Deputy Prime Minister Cemil Çiçek told parliament: 'We have proposed this motion for the peace and welfare of our country. After accepting this motion, we will do what is necessary for the country's interests'. Available at: http://www.todayszaman.com. See also *Washington Post*, 18 October 2007.

[150] Article 25 ASR; *Gabčíkovo-Nagymaros Project*, para 51; Gardner 2007, Chapters 4 and 6; Lowe 1999, p. 405; Johnstone 2004–2005, p. 127; Christakis 2007, pp. 45–63.

[151] *Legality of Use of Force* (*Yugoslavia* v *Belgium*), Oral Pleadings, Verbatim Record, 10 May 1999, CR 99/15 (May 10, 1999).

[152] UN Doc S/PV.3988 (24 March 1999).

[153] 39 NYIL (2008) pp. 307–308.

the rule; it is not a distinct consideration applying after the breach as in the law of state responsibility. Such an interpretation of necessity as justification coincides then with the approach taken in this paper, according to which necessity has justified certain uses of force which subsequently became independent titles in their own right.

Another way of looking at necessity as a circumstance precluding wrongfulness is as an excuse. In this case, the initial use of force is illegal per se but excused because it is a consequence of the existence of a state of necessity. The difference from the previous interpretation is that in the latter case there is a *prima facie* breach which is excused whereas in the former there is no breach at all. Still, the crux of the matter is whether what is excused is the act or the author's responsibility. If it is the act that is excused, one may safely say that no breach has been committed[154] because an act that is performed under certain circumstances—a state of necessity—is not legally objectionable. In this case, the excuse plays a similar role to that of justification, as explained above, and alludes to primary rules. If excuse, however, means that the author of the act does not incur responsibility, it is only then that secondary rules are involved because it is only then that a determination is made that there is a breach, but that no consequences will flow.[155]

The ILC's position concerning the nature of circumstances precluding wrongfulness is rather ambivalent; *prima facie* it appears that the enumerated circumstances are justifications but the underlying notion informing circumstances precluding wrongfulness is that of excuses.[156] The latter approach is the correct one in view of the ILC's distinction between primary and secondary rules. According to this construction, necessity can relieve a state of responsibility for using force that falls outside the rules of the use of force regime. For example, if a state uses force other than in self-defence or reprisal against a non-state actor located in another state without the latter's consent, and in doing so it breaches its obligation to respect the sovereignty of that state, its responsibility will be excused if the use of force satisfies the conditions of necessity under the law of state responsibility. Self-defence as a circumstance precluding wrongfulness plays a similar role. As was said above, the use of force in self-defence is a primary right. Self-defence as a circumstance precluding wrongfulness though can preclude the responsibility of a state for any incidental breach of its obligations in the exercise of its primary right to self-defence. For example, it can excuse the responsibility of the defending state for breaching the territorial sovereignty of another state when it uses defensive force against non-state actors located within that state, or when it

[154] As Ago 1980, p. 179 noted 'while the act was certainly not in conformity with an international obligation, it could not be described as wrongful if the precluding of wrongfulness was the result of a state of necessity'.

[155] *Gabčíkovo-Nagymaros Project*, para 101: '… even if a state of necessity is found to exist, it is not a ground for the termination of a treaty. It may only be invoked to exonerate from its responsibility a State which has failed to implement a treaty'.

[156] Crawford 2002, pp. 160–162; *Gabčíkovo-Nagymaros Project* para 48.

breaches a treaty obligation, for example to provide arms to a state that has initiated an attack.

Such uses of force excused by necessity provoke however another set of questions. The first is whether the prohibition on the use of force is a peremptory norm since necessity cannot be invoked as a circumstance precluding wrongfulness with regard to peremptory norms.[157] In the current state of international law, there is no definite list of peremptory norms and the lack of agreement as to the content of such norms is reflected in the drafting of Article 53 of the 1969 Vienna Convention on the Law of Treaties where the term appeared for the first time, as well as in the drafting of the articles on state responsibility. For example, Special Rapporteur Ago denied that all conduct infringing a state's territorial sovereignty is a breach of a peremptory norm.[158] At any rate, the general tenure is that the prohibition on the use of force is not such a norm in contrast to aggression that it is.[159]

The second set concerns the issue of declarations of illegality. In order for necessity to function as a circumstance precluding wrongfulness, there must be an initial declaration of illegality; but such declarations are neither obligatory nor common in international law. Take for example the case of NATO's intervention in Kosovo, where statements of illegality were met by other statements invoking the legality of the action, whereas a large number of states or commentators were more concerned with the moral or political aspects of the incident. The ICJ also was not able to declare on the legality of the action due to jurisdictional issues.

This raises an important question: that is, whether necessity can ever act as an excuse for uses of force because more often than not, a declaration of illegality is not made, with the actors in most cases taking a more nuanced approach; and, above all, because actions taken by invoking necessity usually create a precedent which, if repeated, can give rise to custom.[160] It should be recalled here what was previously said about custom: that, prior to any *opinio juris*, it is necessity that generates practice constitutive of custom. It thus becomes apparent that necessity can probably act as an excuse only with regard to random uses of force that are not supported at all in law, or are not supported by strong political or moral justifications. The 'illegal but justified' or 'illegal but legitimate' declarations concerning NATO's action in Kosovo fail to achieve what they purport to do.[161] As Franck admits, 'the distinction between what is justified (exculpated) and what is excusable (mitigated) is so fine as to be of pure (yet also considerable) academic interest'.[162] It is my view that the distinction is nevertheless important and its legal

[157] Article 26 ASR.

[158] UN Doc A/CN.4/318/Add.5-7 (1970), para 59.

[159] See for example Crawford 2002, p. 246.

[160] Roberts 2008, p. 179.

[161] Independent International Commission on Kosovo, *Kosovo Report: Conflict, International Response, Lessons Learned* (2004); Koskenniemi 1999, p. 159; Simma 1999, p 1. It should be emphasised that what is argued here applies only to those that treat humanitarian action under the necessity rubric.

[162] Franck 2002, p. 191.

implications are very serious because the distinction concerns the genesis as well as the status of legal rules.

2.7 Conclusion

In order to summarise the main points made in this chapter, it was first claimed that necessity is the source of authority of the rules on the use of force but these rules have subsequently become independent entitlements as part of customary or UN Charter law, whereby necessity lost its proto-normative function. Secondly, it was claimed that the use of force constitutes a special regime in international law; it is an issue-specific regime that includes its own principles, norms, and rules as well as management and enforcement mechanisms. Thirdly, it was argued that the use of force regime, because of its features and rationale, is distinct from that of the law of state responsibility but interacts therewith in certain areas. Such interaction is however conditioned by the principles and rules of the use of force regime. The law of state responsibility also offers a second level of enquiry with regard to uses of force falling outside the regime. In this case, necessity can function as a circumstance that precludes the wrongfulness of the initial use of force. The argument proposed here is that necessity in this regard can only excuse responsibility; however, due to the state of international law, the line between excuse and justification is very fine.

As a final point, it should be said that the designation of the use of force regime as a special regime should not be viewed as an affront to the unity of international law. That unity is not material or monolithic but manifests itself in the normative background against which regimes are created and operate. Hence, the use of force regime is not separate from international law; it is embedded in international law but exhibits its particular features because of the different needs and expectations of its participants in this area of international relations.

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