THE DEFENSE OF NECESSITY IN INTERNATIONAL LAW

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The law of necessity in its early enunciation, is an excuse *in law* from the performance of or for the breach of international obligations, be it under customary law or treaty.

It has not been invariably expressed so however. Not infrequently, it has been said to be a precept *outside* international law, and which while so outside it, supersedes it. Thus, Pufendorf's statement that "it hath no law,"[1] which decades later would find notorious repetition in Chancellor von Bethmann-Hallweg's statement just after Germany had invaded Belgium and Luxemberg in 1914, "(we) are now in a state of necessity, and necessity knows no law."[2]

The Law of Necessity Defined

Jus Necessitatis or the so-called law of necessity, finds an apt expression in the words of Oppenheim, "when the existence or the necessary development of a state stands in unavoidable conflict with such state's treaty obligations, the latter must give way, for self-preservation and development in accordance with the growth and necessary requirements of the nation are the primary duties of every state."[3]

As an exculpatory precept, it traces itself to more than mere expediency. Observance is excused when it has ceased to be morally demandable. It lays claim to a normative order that dictates it apart from the variable necessities of national interests. Thus, that which seriously threatens the very existence and integrity of the state accordingly creates a condition neither foreseen nor intended, that is morally incompatible with the

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1 PUFENDORF, OF THE LAW OF NATURE AND NATIONS, 156 (Kennet and Percivale, trans. 1703).

2 EDMUNDS, THE LAWLESS LAW OF NATIONS 104 (1935); FENWICK, INTERNATIONAL LAW 161-162 (2d. ed. 1934).

3 FENWICK, *supra* at 356 quoting OPPENHEIM, INTERNATIONAL LAW, SEC. 53 (1912). Similar enunciations are made in BIRKENHEAD, INTERNATIONAL LAW, 78 (6th. ed. 1927) and CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS, 73-74 (1953). To Birkenhead, "when there is a just fear of an imminent danger, or rather more strongly, when the vital interests of a state are gravely menaced, the paramount principle of self-preservation comes into play". In turn Cheng, purporting to sum up expressions of the principle in judicial and arbitral decisions, staes, "(i)f there is absolutely no conceivable manner in which a state can fulfill an international obligation without endangering its very existence, that state is justified in disregarding its obligations in order to preserve its existence".

fulfillment of a treaty which thus should render it void or suspend its operation.[4]

A pre-twentieth century publicist's remark that the law of necessity ("Necessity" hereinafter for brevity) seemed to be "in everybody's mouth"[5] is an indication of the early prevalence of the principle. While it has not sustained its popularity, its relevance is undiminished. It has been invoked and is likely to be invoked anew as the ultimate justification for every breach of an international obligation which can find no justification in any other precept of international law. An inquiry is thus directed to whether Necessity subsists in international law, if it ever was, a justification for the breach of international obligations. As such obligations increasingly if not almost invariably, arise from treaties in the present time, a special preoccupation of the inquiry is whether Necessity is a justification for the violation of treaties.[6] The inquiry is not rendered moot by the Vienna Convention on the Law of Treaties[7] which sets down the grounds for the invalidity, termination and suspension of the operation of treaties[8] and to emphasize the exclusive character of the enumeration of such grounds, enjoins in article 42 thereof that the validity of a treaty shall be "impeached only through the application of the present Convention," and its termination, denunciation, the withdrawal of a party thereto, as well as its suspension shall "take place only as a result of the application of the provisions of the treaty or of the present Convention."

In the first place, "the Convention applies only to treaties which are concluded by states after the entry into force of the present Convention with regard to such states,"[9] and leaves the other treaties to the operation of rules whether embodied in the Convention or not, which are applicable independently of the Convention. In the second place, the exclusive enumeration of the grounds in the Convention does not foreclose the inquiry whether Necessity while not expressly mentioned, does underlie the grounds enumerated in the Convention. Neither does the enunciation of the right of self-defense in article 51 of the United Nations Charter[10] render moot the inquiry whether Necessity as a compulsion for a state to take steps in response to a situation which endangers its existence, is a precept of

4 FENWICK, *supra* at 352.

5 PUFENDORF *supra* at 156.

6 Necessity in its extreme manifestation, operates in or as the act of self-defense, whether defensive or anticipatory. The exercise of self-defense nevertheless gives rise to the question whether the compulsion of Necessity under the circumstances, is so fundamental that treaty limitations on the use of force may be ignored. The question involved therefore would still be whether Necessity excuses the breach of a treaty.

7 U.N. Document A/Conf 39/27 (1969), 63 AM. J. INT'L. L. 875 (1969).

8 Articles 42-72.

9 Article 4.

10 59 Stat. 1031, T.S. 993, 3 Bevans 1153. Article 51 provides:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures

international law. Repeated international incidents involving the threat or use of force by states, urged by perceived dangers to their existence which fall short of the conditions set down in article 51 of the United Nations Charter which would entitle a state to the use of force, provoke the question whether Necessity may justify the disregard of article 51 itself. Necessity after all, proclaims a concept of self-defense in its broadest signification—not merely as strict defence to a commended attack as to the validity of which there is no dispute; but also as anticipatory self-defense, manifested in acts or intervention and self-help, which urged they may be by overriding necessity have claims to legality which are problematical.

What may appear as a difficulty in supporting any claim that Necessity is a legal precept as opposed to a mere maxim of politics or national interests, is the fact that in the main, it finds its support in evidence which is considered as a mere subsidiary means for the determination of law, namely, the teachings of publicists.[11] As these teachings have value not insofar as they reflect determinations of what law ought to be but insofar as they purport to evidence a principle as it operates in custom or under treaty, unless Necessity translates itself into grounds recognized in custom or treaty,[12] there is little direct and conclusive support for it in international law.

Necessity According to the Publicists

Pufendorf begins his discourse with the observation that "(t)he case of Necessity is in everybody's mouth, and the Force of it generally acknowledged in the World..." and "(h)ence we commonly say that it hath no law, that it is a supposed or presumptive Exception to all Human Ordinances and Consultations; and that therefore it gives a right of doing things otherwise forbidden."[13] Not any necessity nor necessity by itself discharges a state from an obligation or from the observance of a law. It is only when certain vital interests of a state are threatened, that necessity is said to arise, which by an irresistible compulsion thus urges the taking of measures inspite of any obligation under international law. These vital interests correspond to certain fundamental rights. These rights find expression in the views of publicists in the eighteenth and nineteenth centuries, but which are maintained even by some writers today.[14] These rights, to Hans Kelsen, are stipulated

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taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take any time such actions as it deems necessary to main or restore international peace and security.

[11] Statute of the International Court of Justice, article 38 (1), (d), 56 Stat. 1055, T.S. 993.

[12] Publicists do, as shall be pointed out later, refer to a number of international incidents which purport to reflect state practice. Their true import will be the subject of a later discussion.

[13] PUFENDORF, *supra* at 156.

[14] KELSEN, PRINCIPLES OF INTERNATIONAL LAW 243 (Tucker ed. 1966).

neither by custom nor by treaty. On the contrary, they trace their source to the very nature of the state and the international community. The norms embodying these rights are viewed to "be the ultimate basis and source of positive international law." Accordingly, they demand "a greater obligatory force than the rules of positive international law created by custom and treaties."[15] Such rights are characterized as "inherent," "primordial," and "essential."[16] Although there is no agreement as to the number of these rights, five are generally claimed to exist, namely: the right of existence and self-preservation, the right of equality, the right of property and jurisdiction, and the right of diplomatic intercourse.[17] Westlake, whose view is said to be the "eloquent exception" to the prevailing view of textwriters in international law in favor of the existence of certain fundamental rights of sovereign states, disapprovingly describes such rights as constituting a hierarchical order.[18] To Sir Travis Twiss, these rights divide into two categories, namely, the Primary and Absolute Rights on the one hand and the Secondary and Conditional Rights on the other.[19] Distinction between these two broad categories is made thus:

> Every nation has certain rights with regard to other nations which pertain to its moral being as an Independent Political Body and the enjoyment of which is essential to its existence as such. These rights may be termed Primary and Absolute Rights as they are coordinate with the being of a Nation. and are not dependent upon particular conditions of International Life. There are other rights to which all Nations are entitled, but not under all circumstances, which arise out of the intercourse of Nations with one another, and which cease with the circumstance which gives rise to them.
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> These may be distinguished as Secondary or Conditional Rights, some of them being incident to a state of amity, others being coincident only with a state of war. The Primary or Absolute Rights of Nations rest upon a foundation of Moral Truth, 'the proofs of which are to be referred to some such certain notions' to use the language of Grotius, 'as none can deny without doing violence to his own judgment.' The Secondary or Conditional Rights rest upon a basis of historical fact. The former are inseparably connected with the free Moral agency of Independent Political Bodies, the latter have grown up with the free exercise of the free Moral agency, and with mutual recognition of its consistency with the varying circumstance of International Intercourse.[20]

Fenwick relates a similar classification by the other publicists but he attributes the fundamental, essential and inherent rights interestingly to a source other than some "foundation of Moral Truth". He observes:

> The classical distinction made by the nineteenth century jurists was that between "fundamental", "essential" or "inherent rights of nations

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15 *Ibid.*
16 EDMUNDS, *supra* at 100.
17 BRIERLY, LAW OF NATIONS 50 (6th. ed. 1963).
18 EDMUNDS, *supra* at 100.
19 TWISS, THE LAW OF NATIONS CONSIDERED AS INDEPENDENT POLITICAL COMMUNITIES 178 (1884).
20 *Id.* at 178-179.

> on the one hand, and secondary, derived or contingency rights on the the other. Fundamental rights were rights which by custom had come to be associated with the very fact of membership in the international community. They constituted as it were, the primary conditions of state existence and they were thus so intimately bound up with the international personality of the state as to make the violation of them an offense of the gravest character. They were derived so it was held, by direct inference from the "sovereignty and independence of states which formed the cornerstone of the whole system of international law.[22]

Holland, viewing the traditional absolute-conditional rights dichotomy as unsatisfactory, divides the rights conformably with the categorization followed in private law, namely, the rights of: 1) personal safety, 2) repute, 3) property, 4) jurisdiction (analogous to *patria potestas*), and 5) to protect its subjects wherever they may be.[23] The "right of self-preservation" is an adjective right and "ill-describes" the substantive right of safety and freedom which it presupposes and protects.[24] Holland's departure however, does not go any further, as he shares with the other publicists the position that self-preservation is "the fundamental right of all"[25].

Its preeminence is traced to the position that the international legal order operates within a context of a community of states which assert rights and perform obligations. As the assertion of such rights and the performance of such obligations presuppose the continuing integrity of the personality of the states, the existence and the preservation of a state are said to underlie all the other rights.[26] So viewed as a postulate of the other rights, it underlies all positive rules and custom, and controls and justifies the acts of a state just as "instinct...in the last resort controls all living human organisms."[27]

What may be a more formal restatement of the principle of fundamental rights in the twentieth century is embodied in the "Declaration of the Rights and Duties of Nations" adopted by the American Institute of International Law on January 6, 1916 in Washington. The Declaration provides in pertinent part:

> I. Every nation has the right to exist and to protect and conserve its existence, but this right never implies the right nor justifies the act of the state to protect itself or to conserve its existence by the commission of unlawful acts against innocent and unoffending states. II. Every nation has the right to independence in the sense that it has the right to the pursuit of happiness and is free to develop itself without interference or control from other states, provided that in so doing, it does not interfere with or violate the rights of other states.[28]

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21 FENWICK, *supra* at 145.
22 *Ibid.*
23 HOLLAND, LECTURES ON INTERNATIONAL LAW 100 (Walker and Walker, ed. 1933).
24 *Ibid.*
25 *Id.* at 101; see also TWISS *supra* at 179.
26 FENWICK, *supra* at 145.
27 EDMUNDS, *supra* at 100.
28 Reprinted in FENWICK, *supra* at 143.

Flowing from the cardinal character of the right of self-preservation is the principle that when such right is threatened, a necessity arises which in extreme situations would justify the state to commit acts or forego actions which ordinarily would operate as an infraction of the law of nations. What Pufendorf had referred to as the resulting "right of doing many things otherwise forbidden," is expressed likewise by a number of other publicists.

Oppenheim, although with reservations, acknowledges that "it becomes more and more recognized that violations of other States in the interest of self-preservation are excused in cases of necessity."[29] Rivier more categorically expresses it thus:

> When a conflict arises between the right of self-preservation of a State and the duty of that State to respect the right of another, the right of self-preservation overrides the duty. *Primum vivere.* A man may be free to sacrifice himself. It is never permitted to a government to sacrifice the State of which the destinies are confided to it. The government is then authorized, and even in certain circumstances, bound to violate the right of another country for the safety of its own. That is the excuse of necessity. It is a legitimate excuse.[30]

Kaufmann, reflecting the Hegelian influence on the views of the German writers of his age, pushes the operation of Necessity to the extreme when he says that the right of self-preservation marks the limit of the law of treaties in international law.[31]

What cannot be overstressed is that in the classical view, Necessity arises not only when the very existence of the state is menaced but also when other vital rights essential to the existence of the state are threatened. Thus the French writer Despagnet includes among the categories of cases in which the denunciation of treaties is legitimate, the case when the observance of a treaty has become dangerous not only for the political existence of a country but for its economic existence as well.[32] Hall sums up similar views of other writers thus:

> Hefter says that a state may repudiate a treaty when it conflicts with the rights and welfare of the people. M. Hautefeville declares that a treaty containing a gratuitous cession or an abandonment of an essential natural right, such as for example a part of its independence is not obligatory; M. Bluntschli thinks that a state may hold a treaty incompatible with its development to be null, and seems to regard the propriety of the denunciation of the treaties of 1856 of Russia as an open question.[33]

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[29] OPPENHEIM, INTERNATIONAL LAW 257 (1912). See also BIRKENHEAD *supra* note 3 hereof and ALBEMARLE, THE CANONS OF INTERNATIONAL LAW 95-97 (1st ed. 1930).

[30] EDMUNDS, *supra* at 100 quoting RIVIER, PRINCIPES DU DROIT DES GENS, I, 257.

[31] TSENG, THE TERMINATION OF UNEQUAL TREATIES 60 (1933) quoting KAUFMANN, DAS WESEN DES VOLKERRECHTS AND DIE CLAUSULA REBUS SIC STANTIBUS 204.

[32] As cited by Ismet Pasha, the chief Turkish delegate to the Lausanne Conference on Near Eastern Affairs, and reproduced in Woolsey, *The Unilateral Termination Of Treaties,* 20 AM. J. INT'L. L. 349 (1926).

[33] HALL, A TREATISE ON INTERNATIONAL LAW 369-370 (7th. ed. 1917); see also TSENG, *supra* at 64.

Hall adds, while observing the "extravagance which are the logical consequence of these views" that according to Fiore, "all treaties are to be looked upon as null, which are in any way opposed to the development of the free activity of the nation, or which hinder the exercise of natural rights..."[34]

The Normative Basis of Fundamental Rights

The traditional conflict in the area of international law in general between the proponents of natural law and those of positivism is reflected in the variant positions taken by the publicists as to the sources of the so-called fundamental rights. Note for example, Sir Travis Twiss' reference to the "Moral Being" of states based on some Moral Truth" from which the fundamental rights of states are derived as against Fenwick's attribution to custom as one mode by the which the fundamental rights of states had become associated with the fact of membership in the international community.[35] Twiss and Fenwick exemplify the natural law and the positivist schools respectively, in their broad signification.

According to the natural law theory, in its classical form, a state is possessed of certain inherent and fundamental rights from the very fact of existence. Apart from any positive legal order, these rights may be inferred directly from "pure reason," from the law of nature which has "God as its fountainhead" or from such absolutes as the idea of justice and solidarity.[36] What a positivist would view as mere ideology derived from speculative reflection, is to a naturalist a "supersensual source" against which positive law in its attempts at approximation, are more or less and inevitably, imperfect.[37]

The positivists on the other hand would view international law as conventional law; i.e. that which is derived from the will of states expressed either directly in treaties or by tacit agreements, namely custom.[38] Positivism in the words of Lauterpacht, is a "formal statement to the effect that the will of the State is the ultimate and exclusive source of law *pro foro interno te externo.*"[39]

The claim of the positivists to the "scientific" presentation of the law rests on their reliance on law as that which is based on experience whether formally or informally established.[40]

The significance of the positivist view however, is not so much in determining where the so-called fundamental rights have basis, (for at

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[34] *Ibid.*
[35] *Supra,* notes 17-25.
[36] KELSEN, *supra* at 243.
[37] ROSS, A TEXTBOOK OF INTERNATIONAL LAW 94-95 (1947).
[38] *Ibid.*
[39] LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW 43 (1947).
[40] ROSS, *supra* at 95.

this point in time, it merely indicates where the basis ought to be) as in exposing the inherent weakness of the naturalist position. That weakness is in its inability, in invoking some supersensual order" to extend beyond mere assumption or ideological postulation. So long as the conception of a nature operating as a legislative authority, formulating by its rules, a supranormative order, does not admit of empirical proof which positivists would require, the naturalist position must rest on mere fiction, or "on an animistic myth (rather) than (on) a scientific interpretation of facts".[41] It is perhaps to avoid this inherent weakness that a modification has been fashioned of the natural law theory, by asserting that fundamental rights are the necessary presupposition in international law. This position is dismissed by Hans Kelsen as only "another version of the natural law doctrine".[42] He does admit that positive law presupposes some general principles. He points out however, that as legal principles are created and never presupposed by a legal order, such general principles must be in the nature of moral or political principles only and as such cannot impose legal duties or confer legal rights.[43]

The question which arises is whether a moral principle, in order to be considered binding, must directly produce legal duties and confer legal rights. Underlying purposes such as justice, fairness, good faith and more pertinently, existence and development while leaving to positive law which presupposes and which seeks to effectuate them, the conferment of legal rights and the imposition of legal duties, may indeed determine when the legal right may be asserted and when under circumstances incompatible with justice, fairness, etc., it may not. Thus laws are often construed in the light of their underlying purposes and subject to them. Thus also it is not an indefensible position to take that a treaty which by its terms and intendment is designed to promote some underlying purpose which ultimately is the welfare or survival of the parties, may not be enforced under circumstances which would jeopardize a party's existence or impair its welfare. Likewise, cannot a denunciation of the use of force preclude a party from using such force when the preservation of the existence which the denunciation in the first place sought to protect, becomes a necessity? From a consideration that certain specific values or purposes may underlie and control the operation of a treaty, it is only to take a further step to consider that some underlying body of postulates does limit national relation.

There is a more apparent weakness in positivism, however. Even as it stresses that only consent or will is the basis of international law, it fails to explain the binding character of a state's expression of consent

41 KELSEN, *supra* at 244.

42 *Id.* at 245. Curiously, this so-called other version of the natural law theory is attributed by Lauterpacht to Liszt who by his statement that "international law is contract, not statute" has established himself as a positivist. See LAUTERPACHT, *supra* at 53.

43 *Ibid.*

or will in a treaty. What would make a turn-about of will illegal? That a treaty must presuppose norms for its coming into existence, which determine which entities have treaty-making capacity and the conditions that a treaty must meet, is basis for Verdross to conclude the futility of denying *a priori* the possibility of general norms of international law.[44]

The theoretical inadequacy of positivism is perhaps matched by its inability to account for the actual operation of international law. States are, as Brierly points out "continually treated as bound by principles which they cannot, except by the most strained construction of the facts, be said to have consented to, and it is unreasonable, when we are seeking the true nature of international rules, to force the facts into a preconceived theory instead of finding a theory which will explain the facts as we have them."[45] While positivists may confront this position with a claim of implied consent of states, given by the very fact of their applying for recognition, they can so claim only by indulging in a fiction to which they have ironically been wont to reduce the natural theory. In any event, the line which divides the naturalist from the positivist may not be a clear one. One notes Lauterpacht's taking the positivist Liszt to task for submitting to the logical necessity of admitting that "the fundamental principles'.. are not natural law fallacies, but legal notions which in accordance with the logical rule of the excluded third, follow from the very conception of the family of nations and which need not be expressly recognized as law, because without them international law would be impossible."[46] The The doctrinal source from which positivism proceeds has in fact spawned a theory of international law, which in its Hegelian conception of the state as the absolute end of the law, constructs a superior normative order not unlike the supersensual order which naturalitsts hold positive law to be subject.[47] Jellinek and Ihering reflect this view in their theory of auto-limitation. Auto-limitation is positivistic in its premises. It proceeds from the position that the consent of states is the basis of obligation. It goes further however. It conditions the consent to act in the future to the prerogative of the state to withdraw such consent if the obligation thereby assumed becomes contrary to its interests.[48] This view is summed up thus:

> The state must stand above its treaties; the law of coordination which is the basis of international law turns otherwise into subordination. International treaties which are based on the interests of the contracting parties must also, so far as their continuous duration is concerned, be determined by these interests. The only objective rule is the right of self-preservation which is the criterion of the international conduct of states,

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44 Verdross, *Forbidden Treaties in International Law*, 31 AM. J. INT'L. L. 572 (1937).

45 BRIERLY, *supra* at 52; see also LAUTERPACHT, *supra* at 52-53.

46 LAUTERPACHT, *supra* at 53.

47 *Id.* at 43.

48 FENWICK, INTERNATIONAL LAW 59 (3rd. ed. 1948); BRIGGS, THE LAW OF NATIONS; CASES, DOCUMENTS AND NOTES 21, 23 (2d. ed. 1952).

> and which never come into conflict with international law for the simple reason that international law is based on it.[49]

Historically, the dominance of positivism over the natural law theory, which reached its height before the start of the twentieth century, has waned in recent years. What has to some, signified a renaissance of sorts for the naturalist view, was the recognition of a third "source" of international law, namely, the general principles of law as recognized by civilized nations.[50] By itself, the resort to "general principles" as a source other than treaty and custom, is antithetical to the underlying premises of positivism. Whether the resort to general principles does improve the position of the proponents of natural law against the positivists, in the determination of the bases of Necessity, may not be readily made however. Before any attention should be drawn to "general principles" a clearer picture of Necessity is yet to be made as it has been invoked in international relations. Historical incidents in which Necessity has been pleaded as well as judicial and arbitral decisions which have passed upon such a plea should be considered in turn to define further this principle.

Necessity in State Practice

Publicists in their exposition of the principle of fundamental rights refer to historical incidents demonstrating the operation of Necessity. While these incidents do illustrate the content of the principle and the context within which its invocation under varying degrees of propriety, might be plausible, they do not readily submit to the characterization of "general practice accepted as law." That this is so may be inferred from the incidents themselves. Invariably, not one of the incidents stands for the proposition that while a state may under certain circumstances act under an impulse of necessity and justify its actions by such necessity, any other state against whom the former's acts may be directed has in the words of Oppenheim "a duty to admit, suffer and endure every violation done to it in self-preservation."[51] While this fact does have a significant bearing on the determination to characterize Necessity as law in the light of its claim to confer a legal right inspite of its inability to impose the corresponding legal duty, suffice it to state that the state practice represented by these incidents do not evidence a general practice that can be considered with certainty as accepted as law not only by the states invoking it but also by the states who stand to suffer under the former's actions done under necessity. That these incidents illustrate rather than prove Necessity conforms with the publicists' common view of the right of self-preservation as a right "not stipulated by general customary international

[49] LAUTERPACHT *supra* at 46-47, summing up Kaufmann's views in the latter's DAS WESEN DES VOLKERRECHTS UND DIE CLAUSULA REBUS SIC STANTIBUS (1911).

[50] ROSS, *supra* at 95.

[51] OPPENHEIM, *supra* at 266.

law or by international agreements" but as originating in the nature of the state or of the international community.[52]

The Caroline Incident

The case of *The Caroline,* among the several incidents often cited by the publicists, stands out as the classic illustration of Necessity in its extreme manifestation as self-defense. It would a full century later be invoked in a number of incidents occuring in the post-U.N. Charter era.[53]

In 1837, during the Canadian rebellion, the Fenian rebels, having taken control of the Navy Island at the Canadian side of the Niagara River, engaged the vessel Caroline to carry provisions from the Schlosser on the American side of the river to the Canadian side in furtherance of the rebellion. A British force crossed the Niagara and destroyed the Caroline, killing two Afericans and wounding several others. It is not clear whether the United States in response, condoned this breach of its territorial sovereignty as a measure of self-protection on the part of the British authorities against a vital danger,[54] or had considered the matter closed without demanding reparations upon the apology of Great Britain.[55] What has, however, been attributed to Secretary of State Webster, as the official position of the United States on the standard against which the British action should be judged was that the measure taken by the British, to be permissible, must have been taken under a necessity "instant, overwhelming, leaving no choice of means and no moment for deliberation."[56]

The British Seizure of the Danish Fleet, 1807

An equally clear case for Necessity is illustrated by the seizure of the Danish fleet by Great Britain in the course of its war with France in 1807. A secret article in the Peace Treaty of Tilsit of the same year, authorized France under certain circumstances to seize the Danish fleet to be used against Great Britain and thus bring Denmark against Great Britain. Having gained access to the secret articles, and viewing Denmark incapable of resisting any pressure from France which had armies in Northern Germany under orders to invade Denmark, Great Britain requested Denmark to surrender her fleet to Great Britain to be returned after the war and undertook to defend Denmark against France. The refusal of Denmark created for Great Britain "a case of necessity in self-defense" and Great Britain seized the Danish fleet.[57]

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52 KELSEN, *supra* at 243.

53 ALBEMARLE, *supra* at 95-97; OPPENHEIM, *supra* at 257-259; HOLLAND, *supra* at 101-102; Krift, *Self-defense and Self-help: The Israeli Raid on Entebbe,* 4 BROOKLYN J. OF INT'L. L., 43, 49 (Fall, 1977).

54 As reported by Albemarle and Holland.

55 As reported by Oppenheim.

56 OPPENHEIM, *supra* at 257-259.

57 *Id.* at 258-259; HOLLAND, *supra* at 102-103.

The Amelia Island Incident, 1817; Intrusions Into St. Mark, 1815; and Into Mexico, 1916-1919

Necessity likewise compelled the entry of American forces into Amelia Island in 1817, then a Spanish territory, to destroy a force of pirates which had occupied it in the name of the insurgent Buenos Aires and Venezuela, to prey on American and Spanish commerce in the area, with Spain being unable or unwilling to drive them off;[58] into St. Mark, within Spanish Florida in 1815, because the Seminole Indians in that territory had raided neighboring United States territory unrestrained by Spain;[59] and into Mexico from 1916 to 1919, to protect American citizens from the disorder ensuing from the Mexican revolution and also to punish violations of American territorial sovereignty.[60]

Wars to Preserve Balance of Power

Necessity likewise urged the effectuation of the so-called theory of the balance of pewer invoked in sixteenth-century Europe, by reason of which wars were waged as compelled by the perceived necessity of preserving the balance of power obtaining at a given time by the prevention of any undue increase in the territory of any state occasioned by marriage, succession, conquest or similar event.[61]

The invocation of Necessity to justify breach of obligations defined not only by customary international law but by specific international agreements are exemplified by the following incidents.

The German Invasion of Belgium and Luxemburg, 1914

By the Treaty of April 18, 1893, Russia, France, Great Britain, Austria and Prussia declared themselves guarantors of the Treaty of Nuetrality entered into between Belgium and the Netherlands on the same date.[62] On August 1, 1914, Germany invaded Belgium and Luxemburg. While *The Caroline* is the classic statement of Necessity in its restrictive sense, Germany's plea of Necessity after its conquest of Belgium and Luxemburg demonstrates the danger which an unfettered resort to the principle can pose to the legal order. Germany sought to justify the breach not merely of some vague duty under customary international law but a clear treaty obligation undertaking the permanent neutrality of the wronged state. Chancellor von Bethmann—Hallweg's justification on the basis of Necessity before the Reichstag on August 4, 1914 has now become historical:

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58 OPPENHEIM, *supra* at 260.
59 HOLLAND, *supra* at 102.
60 OPPENHEIM, *supra* at 260.
61 HOLLAND, *supra* at 103-104.
62 1 DEAK, JESSUP, NEUTRALITY LAWS, REGULATIONS AND TREATIES, 51 (1939).

> Gentlemen, we are now in a state of necessity, and necessity knows no law! Our troops have occupied Luxemburg, and perhaps are already in Belgian soil. Gentlemen, that is contrary to the dictates of international law. It is true that the French Government has declared at Brussels that France is willing to respect the neutrality of Belgium as long as her opponent respects it. We know however, that France stood ready for the invasion. France could wait, but we could not wait. A French movement upon our flanks upon the lower Rhine would have been disastrous. So we were compelled to override the just protest of the Luxemburg and Belgian Governments. The wrong—I speak openly—that we are committing we will endeavor to make good as soon as our military goal has been reached. Anybody who is threatened as we are threatened, and is fighting for his highest possessions, can have only one thought....how he is to hack his way through.[63]

Post-U.N. Charter Incidents;
The Cuban Quarantine

Moved by the transformation by Russia of Cuba into a strategic base by the installation thereat of offensive nuclear missiles, President Kennedy on October 22, 1962, mobilized the armed forces of the United States to prevent the further delivery of the "prohibited material" to Cuba, directing that:

> Any vessel or craft, which may be proceeding to Cuba may be intercepted and may be directed to identify itself, its cargo, equipment and stores and its ports of call, to stop, to lie to, to submit to visit and search, or to proceed as directed. Any vessel or craft which fails or refuses to respond to or comply with directions shall be subject to being taken into custody. Any vessel or craft which it is believed is enroute to Cuba and may be carrying prohibited material or may itself constitute prohibited material, wherever be possible, be directed to proceed to another destination of its own choice and shall be taken into custody if it fails or refuses to obey such directions. All vessels or craft taken into custody shall be sent into a port of the United States for appropriate disposition.
>
> In carrying out this order, force shall not be used except in case of failure or refusal to comply with directions, or with regulations or directives of the Secretary of Defense, issued hereunder, after reasonable efforts have been made to communicate them to the vessel or craft or in case of self-defense. In any case, force shall be used only to the extent necessary.[64]

The United States action was either a threat or use of force, if not against Russia then against Cuba, resort to which is prohibited under article 2(4) if the United Nations Charter, unless in the exercise of self-defense "if an armed attack occurs" pursuant to article 51. *The Caroline*

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63 Reproduced in FENWICK, *supra* at 161-162 citing STOWELL, DIPLOMACY OF THE WAR OF 1914, 445 (1915). Germany's plea of Necessity was of course a mere pretext. Necessity raises a factual issue and the facts did not support Germany's justification. No attack had been launched nor threatened against Germany. Germany had on the contrary declared war against Russia and France and its conquest of Belgium and Luxemberg was but a necessary step to its subsequent thrust into France.

64 Proclamation No. 3504, 47 Dept. Bull. 717 (1962) 27 Fed. Reg. 10401 (1962) reprinted in HENKIN *et al.*, INTERNATIONAL LAW, CASES AND MATERIALS 929 (1980).

principle allows anticipatory self-defense i.e., self defense when injury is threatened but no attack has yet commenced. According to a strict view of the U.N. Charter however, a perceived threat of an armed attack requires a resort to the Security Council and does not justify a resort to anticipatory force by the state which perceives the threat.[65] As no actual armed attack had then been commenced against the United States, the issue drawn was whether the quarantine imposed by the United States was in violation of the United Nations Charter. While the argument was voiced that article 51 did not restrict the customary right of self-defense enunciated as the doctrine of proportionality in *The Caroline* incident,[66] the irrepressible fact was that a preoccupation with the question of "survival" and the irresistible necessity which it raised transcending even the issues of legality, did underlie the American action. Dean Acheson's statement echoes the substance of Chancellor von Bethmann-Hallweg's plea of Necessity. Thus:

> I must conclude that the propriety of the Cuban quarantine is not a legal issue. The power, position and prestige of the United States had been challenged by another state; and law does not simply deal with such questions of ultimate power—power that comes close to the sources of sovereignty. I cannot believe that there are principles of law that say we must accept the destruction of our way of life. One would be surprise if practical men, trained in legal history and thought, had devised and brought to a state of general acceptance a principle condemnatory of an action so essential to the continuation of the pre-eminent power as that taken by the United States last October. Such a principle would be as harmful to the development of restraining procedures as it would be futile. No law can destroy the state creating the law. The survival of states is not a matter of law.[67]

The Entebbe Raid

On July 4, 1976, Israeli troops raided Entebbe airport and freed the crew and passengers of an Air France jet hijacked by members of the Popular Front for the Liberation of Palestine. The hijackers had released a number of hostages; those remaining in their hands were the crew members and Israeli nationals or dual nationals holding Israeli or other passports.[68] Israel launched the raid without any prior referral to the Security Council, such an alternative having been considered futile and productive of delay. It would also have exposed Israel to a charge of bad faith if after making the referral it would have been compelled to launch the raid in any event.[69] It was clear from the outset that the raid would

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[65] JESSUP, A MODERN LAW OF NATIONS 166-167 (1948).

[66] McDougal, *The Soviet-Cuban Quarantine and Self-Defense,* 57 AM. J. INT'L. L. 597, 599-601 (1963).

[67] Remarks by the Honorable Dean Acheson, 57 AM. SOC'Y. INT'L. PROC. 14 (1916).

[68] Krift, *supra,* 4 BROOKLYN J. OF INT'L. L. at 43-46.

[69] Boyle, *International Law in Time Crisis: From the Entebbe Raid To the Hostages Convention,* 75 NW. U. L. REV. 769, 783-785 (1980).

open Israel to the charges of violating articles 2(3)-(4), 33(1) and 51 of the United Nations Charter. There were likewise to be considered a number of General Assembly resolutions which prohibit as a general principle unilateral military intervention for any reason by one state into the territory of another[70] e.g., the Declaration on the Inadmissibility of Intervention,[71] the Declaration on the Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations,[72] and the Definition of Aggression.[73] The threat on the lives of the hostages was however real and imminent. Far more overriding considerations of their survival and that of Israel were determinative of proper action. The situation for Israel was reduced to plain alternatives and the only accepted course is summed up by an interviewer of a member of the crisis-management group created by the Israeli Prime Minister to decide on and direct the Israeli response, thus:

> Permitting the risk of imminent death for the hostages when a raid was possible was viewed as a completely unacceptable alternative to the decision-makers. (Minister of Transportation) Yaokobi stated that the most important shared common denominator within the operative assumptions of the members of the crisis management was survival. The physical survival of approximately one hundred Israeli nationals or dual nationals was perceived to be at stake and with them the very ability of the state of Israel to ensure its own existence. The spirit of the state of Israel was not to surrender its survival or jeopardize its existence in any way.[74]

The Organization of African Unity passed a unanimous resolution condemning the violation of Uganda's territorial sovereignty and sought the passage of a similar resolution where it would have mattered, in the Security Council, which has the primary responsibility for the maintenance of international peace and security. The African-sponsored resolution was not however submitted to a vote in face of a certain United States veto.[75] As it now stands, the legality of the Israeli action has not been determined conclusively by the Security Council. The significance however is in the fact that it has not been condemned either by the Security Council.

In the aftermath of the raid, influenced possibly by the success of Israel in avoiding condemnation, a considerable number of states have publicly announced the formation of special commando groups trained to conduct Entebbe-like operations.[76]

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[70] *Ibid.*
[71] G.A. Res. 2131, 20 U.N. GAOR Supp. (no. 15), 11 U.N. Doc. A/6014 (1965).
[72] G.A. Res. 2625, 25 U.N. GAOR Supp. (no. 28), 121 U.N. Doc. A/8028 (1970).
[73] G.A. Res. 3314. 29 U.N. GAOR Supp. (no. 31), 142 U.N. Doc. A/9631 (1974).
[74] Boyle, *op. cit. supra,* note 69 at 793.
[75] *Ibid.*
[76] *Id.* at 822.

The Israeli Raid into Iraq

On June 7, 1981, Israel executed yet another feat. Its planes violated the airspace of Saudi Arabia and proceeded to Baghdad and there destroyed Iraq's nuclear complex built, according to Israel, "to produce atomic bombs that would threaten the survival of the Jewish state." Prime Minister Begin threatened to duplicate the preemptive strike if necessary, declaring, "(w)e shall not allow any enemy to develop weapons of mass destruction turned against us."[77] In its wake, the raid left not only Iraq's nuclear complex in ruins, but also the nagging thought whether, a precedent having been made for preemptive strikes against enemy states developing nuclear weapons, other threatened states may launch their own.[78] The attack however, triggered universal criticism,[79] and it seems quite clear that even under *The Caroline* principle, no necessity operated, "instant, overwhelming, leaving no choice of means, no moment for deliberation."

Necessity According to International Tribunals

The question of the legality of acts executed under the compulsion of necessity, has in a number of occasions reached international tribunals. Almost invariably however, it received treatment in dissenting opinions or in the course of developing a position, that in view of the facts obtaining in the particular case, Necessity is inapplicable. Taken as a whole, the sparse treatment of Necessity in judicial and arbitral decisions makes tor an inconclusive basis in what in any event is a subsidiary means of determining international law. Even as such subsidiary means i.e., as evidence of international law, they reflect no more than what the publicists say; they do not furnish evidence of Necessity as a principle in customary law much less treaty law.

The Oscar Chinn Case[80]

In 1925, Belgium owned sixty percent of UNATRA (Union Nationale de Transports Fluviaux) a company engaged in providing transport services in the Congo. As a result of the world-wide depression, trade in Congo suffered seriously. Belgium to prop up its transport concerns directed them to reduce their charges, undertaking in turn to shoulder temporarily by subsidy schemes any loss resulting to such transport concerns from the reduction of charges. The United Kingdom alleged that the Belgian measure had allowed UNATRA to achieve a *de facto* monopoly of the Congo traffic in violation of the Saint-Germain Convention to which both Belgium and the United Kingdom were parties. By article 1 of the Con-

[77] U.S. News & World Report, June 22, 1981, 20-21.

[78] See interview with Joseph S. Nye Jr., former head of a U.S. State Dept. office responsible for nuclear non-proliferation policy in 1977-79, now a recognized expert on the spread of nuclear weapons, in U.S. News & World Report, *supra* at 23.

[79] U.S. News & World Report, *supra* at 20-21.

[80] P.C.I.J., ser. A/B no. 63, 113 (1934).

vention, the signatory powers undertook "to maintain between their respective nationals and those of states, Members of the League of Nations which may adhere to the...Convention, a complete commercial equality in the territories under their authority..." Article 5, in pertinent part, in turn provides that "(c)raft of every kind belonging to the nationals of the signatory powers and of State Members of the League of Nations, which may adhere to the...Convention, shall be treated in all respects on a footing of perfect equality". The Permanent Court of International Justice before which the dispute was brought, upheld the Belgian measure. Judge Anzilotti dissented. To him the Convention did not merely require the signatory powers to refrain from any measure restricting either the free movement of shipping, or the freedom to carry passengers or cargo, but went further to require the signatory powers to refrain from any measure which, though not interfering with the free movement of shipping or cargo, is of such a nature to render their freedom valueless. He rejected the justification that the measures were taken "to meet the dangers of economic depression, declaring that "(i)t is clear that international law would be merely an empty phrase if it sufficed for a state to invoke the public interest in order to evade the fulfillment of its enegagements."

Judge Anzilotti further held, however:

> The situation would have been entirely different if the Belgian Government had been acting under the law of necessity, since necessity may excuse the non-observance of international obligations.
>
> The question whether the Belgian Government was acting as the saying is, under the law of necessity is an issue of fact which would have had to be raised, if need be, and proved by the Belgian Government. I do not believe that the Government meant to raise the plea of necessity, if the Court had found that the measures were unlawful; it merely represented that the measures were taken for grave reasons of public interest in order to save the colony from the disastrous consequences of the collapse in the prices.
>
> It may be observed, moreover, that there are certain undisputed facts which appear inconsistent with the plea of necessity.
>
> To begin with, there is the fact that, when the Belgian Government took the decision of June 20th, 1931, it chose from among several possible measures—and, it may be added, in a manner contrary to the views of the Leopoldville Chamber of Commerce—that which it regarded as the most appropriate in the circumstances. No one can or does dispute that it rested with the Belgian Government to say what were the measures best adapted to overcome the crisis: provided always that the measure selected were not inconsistent with its international obligations, for the Government's freedom of choice was indisputably limited by the duty of observing those obligations. On the other hand, the existence of that freedom is incompatible with the plea of necessity which by definition, implies the impossibility of proceeding by any other method than one contrary to law.

Judge Anzilotti's statement that necessity implies the impossibility of performance by a method other than one contrary to law contemplates

that the right to demand and the duty to render performance takes into account a range of possibility which limits obligations and ends were the vital interests of the state are endangered.[81] This range of possibility is defined by a supranormative order which controls that normative order under which the performance of an obligation may ordinarily be demanded. It does not therefore coincide with the range of physical or actual possibility which extends itself beyond to allow a state to deliberately commit itself to destruction. But the right to so submit itself is a fundamental right. Just as an individual person may deliberately choose to submit to his destruction but is nevertheless deemed to have the right not to so submit himself but on the contrary to take such steps which because of the compelling character of the urge to survive, may even be in disregard of law, a state while it can choose to perform obligation even if it would mean the impairment of its vital interests, is not expected to do so because of the fundamental character of such interests which it has a right to preserve. The impossibility which Judge Anzilotti refers to is therefore moral impossibility and not physical impossibility. Because it proceeds from an order of norms which, consistent with the natural law theory, is an order higher than positive law, it absolves the state in the same manner and to the same extent that an individual may claim relief from a contract the performance of which has been excused by some rule of municipal law. Because, beyond the pale of moral possibility, the state is compelled by the overriding need to preserve itself to take measures inconsistent with its obligations, impossibility of performance translates itself into the plea of *vis major.*

Necessity as moral impossibility and *vis major* and as distinguished from physical impossibility of performance finds treatment in two other decisions of the Permanent Court of International Justice. A restrictive view of what excuses performance by reason of *vis major* or moral impossibility is likewise made.

The Serbian and Brazilian Loan Cases[82]

According to the terms of the Special Agreement of April 19, 1928, the Court was asked to decide the following questions between the Governments of the French Republic and of the Kingdom of the Serbs, Croats and Slovenes:

> a) Whether as held by the Government of the Kingdom of the Serbs, Croats and Slovenes, the latter is entitled to effect in paper francs the service of its 4% 1895, 5% 1902, 4½% 1906, 4½% 1909 and 5% 1913 loans, as it has done before;
>
> b) Or whether on the contrary, the Government of the Kingdom of the Serbs, Croats and Slovenes, as held by the French bondholders, is under

[81] Spanish Zone of Morocco Claims, Rapport III (1924) 2 UNRIAA, 615 at 644 transl.; cited in CHENG, *supra* at 220-221.

[82] Judgment no. 14 (1929), P.C.I.J., ser. A 20/21, 5, 39-40 and Judgment no. 15 (1929), ser. A 20/21, 93, 120.

> an obligation to pay in gold or in foreign currencies... the amount of the bonds drawn for redemption but not refunded and of those subsequently draws, as also of coupons due for payment but not paid, and of those subsequently falling due for payment...

Upon analogous facts, the issues between the Governments of France and Brazil were framed in similar language.

In the *Serbian Loan* case, the Court held that the promise is each loan was for the payment of "gold francs". It went on to state:

> *Force majeure.*—It cannot be maintained that the war itself, despite its grave economic consequences, affected the legal obligations of the contracts between the Serbian Government and the French bondholders. The economic dislocation caused by the war did not release the debtor State, although they may present equities which doubtless will receive appropriate consideration in the negotiations, and—if resorted to—the arbitral determination for which Article II of the Special Agreement provides.

In its succeeding treatment on impossibility of performance, the Court apparently had in mind physical impossibility of performance. Thus:

> It is contended that under the operation of the forced currency regime of France pursuant to the law of August 5, 1914, payment in gold francs, that is, in specie, became impossible. But if the loan contracts are to be deemed to refer to the gold franc as a standard of value, payments of the equivalent amount of francs, calculated on that basis, could still be made. Thus, when the Treaty of Versailles became effective, it might be said that "gold francs" as stipulated in article 262, of the weight and fineness as defined by law on January 1, 1914, were no longer obtainable, and have not since then been obtainable as gold coin in specie. But it could be hardly be said that for this reason, the obligation of the Treaty was discharged in this respect on the ground of impossibility of performance.

The *Brazilian Loan case* was disposed in the same manner. Thus:

> *Force majeure.*—The economic dislocation caused by the great war has not in legal principle, released the Brazilian Government from its obligations. As for gold payments there is no impossibility because of inability to obtain gold coins, if the promise be regarded as one for the payment of gold value. The equivalent in gold value is obtainable.

While the plea of *vis major* can find no support in allegations of mere economic dislocation, the Permanent Court of Arbitration has implied that performance of obligations under such conditions of grave economic difficulties as would imperil the existence of the state or seriously compromise its internal or international position might excuse performance.

The Russian Indemnity Case[83]

Even as in the end, the Permanent Court of Arbitration rejects as inapplicable to the facts of the case the plea of impossibility, it admits

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[83] 1 Hague Court Reports 532, at 546-547 (1912); excerpted in CHENG, *supra* at 72 (transl).

in principle that obligations may be extinguished by subjective impossibility or what amounts to moral impossibility. It held thus:

> The exception of *vis major,* invoked as the first line of defense, may be pleaded in public international law as well as in private law; international law has to adapt itself to political necessities. The Imperial Russian Government expressly admits (Reply, p. 33 and note 2) that the obligation of a State to carry out treaties may give way "if the very existence of the State is endangered, if the observance of the international duty is...self-destructive.
>
> ....In support of its plea of *force majeure,* the Sublime Porte has undoubtedly proved that Turkey from 1881 to 1902 was contending with financial difficulties of the utmost seriousness, aggravated by domestic and foreign troubles (insurrection, wars) which forced her to apply a considerable amount of her revenues for special purposes, to submit to foreign control part of her finances, and even to grant a moratorium to the Ottoman Bank, and generally to fulfill her obligations only imperfectly or with delay, or even then, with great sacrifice.
>
> But, it has been proved on the other hand, that during this same period and especially following the creation of the Ottoman Bank, Turkey was able to obtain loans at favorable rates, to redeem others, and finally to pay off an important part of her public debt, estimated at 350 million francs. It would be clearly an exaggeration to admit that the payment (or the raising of tht loan for the payment) of the comparatively small amount of 6 million francs to the Russian claimants, would have imperilled the existence of the Ottoman Empire or seriously compromised its internal or international position. The plea of *force majeure* is therefore inapplicable.

The conditions for and the limitations of the defense of Necessity finds a clearer expression in the case of the Neptune,[84] which was decided by the arbital commission created by the Jay Treaty of 1892 between the United States and Great Britain.[85]

The Case of the Neptune

Pursuant to a general order directing the bringing into British ports of all neutral vessels bound with provisions for ports of the enemy, a British frigate seized in 1795 the American vessel, Neptune, then laden with foodstuff and bound for Bordeaux from the United States. The British released the vessel but retained the cargo, paying over to the owners the invoice value, plus a mercantile profit of ten percent. The owners claimed the difference between what was paid to them and the price which the goods would have fetched in Bordeoux.

The Commission ruled that as the right to seize food as contraband exists in international law only as to places blockaded or beseiged, and Great Britain did not pretend that it had blockaded or intended to blockade

[84] 4 Int. Adj., M.S., 372 (1797).
[85] 1 EXECUTIVE DOCUMENTS OF THE SENATE OF THE UNITED STATES, 375 (1889).

the ports of her enemies, the seizure of the Neptune was illegal. Great Britain's other argument was that it was threatened with a scarcity of provisions at the time the order for the seizure was made. To Commissioner Trumbull:

> The necessity which can be admitted to supersede all laws and to dissolve the distinctions of property and right must be absolute and irresistible, and we cannot, until all other means of self preservation shall have been exhausted, justify by the plea of necessity the seizure and application to our own use of that which belongs to others. Did any such state of things exist in Great Britain in April, 1795? Were any means employed to guard against an apprehended rather than an existing scarcity before the measure in question was adopted? And when a degree of scarcity was felt a few months later in the year was not the obvious and inoffensive measure of offering a bounty on corn imported effectual? It cannot then be presumed that the capture in question was any more to be justified by the plea of necessity than it was by that of right, and I must therefore concluded that the neutral claimant has in this case suffered loss and damage by reason of an irregular and illegal capture.[86]

Commissioner Pinkey echoed the substance of the position taken by Commissioner Trumbull. Thus:

> I shall not deny that extreme necessity may justify such a measure. It is only important to ascertain whether that extreme necessity existed on this occasion and upon what terms the right it communicated might be carried into exercise.
>
> We are told by Grotius that the necessity must not be imaginary, that it must be real and pressing, and that even then it does not give a right of appropriating the goods of others until all other means of relief consistent with the necessity have been tried and found inadequate. Rutherford, Burlamaqui, and every writer who considers this subject at all will be found to concur in this opinion.
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> ...I do not undertake to judge, for I have no sufficient data upon which to judge, whether at the time of issuing these orders there was or there was not reasonable gound for apprehending that sort of scarcity which produces severe national distress or national despondency unless extraordinary measures were taken for preventing it.
>
> But it will not admit of a question that there was no ground for apprehending that such a calamity would happen unless the government resorted to depredations upon neutral trade and seized by violence the property of its friends.[87]

The conditions for and the limitations to the invocation of Necessity as may be deduced from the *Neptune* opinions are thus summed up:[88]

> 1. When the existence of a state is in peril, the necessity of self-preservation may be a good defense for certain acts wihch would otherwise be unlawful.

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[86] 4 Int. Adj., M.S., 372, 433 (1797).

[87] *Id.* at 398-399.

[88] CHENG, *supra* at 71. Cheng's summation and Trumbull's opinion upon which it is based, do not exhaust the situations which to the publicists may properly call

2. This necessity "supersedes all laws," "dissolves the distinctions of property and rights" and justifies the "seizure and application to our own use of that which belongs to others."

3. This necessity must be "absolute" in that the very existence of the state is in peril.

4. This necessity must be "irresistible" in that all the legitimate means of self-preservation have been exhausted and proved to be of no avail.

5. This necessity must be actual and not merely apprehended.

6. Whether or not the above conditions are fulfilled in a given case is a proper subject of judicial inquiry. If they are not, the act will be regarded as unlawful and damages will be assessed in accordance with principles governing reparation for unlawful acts.

Necessity Under General Principles of Law Recognized by Civilized Nations

The coincidence between the manifestations of Necessity in the international plane e.g., self-defense, *force majeure*, impossibility of performance and their counterpart concepts in private law appears to readily draw the conclusion that Necessity in international law is nothing more than the projection of Necessity in private law. Such a conclusion might at least avoid the positivistic rejection of the idea of fundamental rigths derived from some supersensual order, for not being objectively demonstrable. The customary resort by international arbitral tribunals and commissions to principles of private law,[89] and the express sanction for such a practice in the Statutes of both the Permanent Court of International Justice and its successor, the International Justice and its successor, the International Court of Justice, squarely meets the positivistic requirement that a principle is international law only if acceded to by the sovereign will of states expressed either through custom or treaty.

Publicists accordingly, not only borrow the terminology of municipal jurisprudence in their treatment of fundamental rights[90] but acknowledge the "inspiration" that the general principles of international law has had in "the principles of justice accepted as standards of conduct within the state," and the resulting "close analogy" which "the rights and duties of nations...bear to the rights and duties of citizens under municipal law."[91] Rivier conveys more than a simile when he adds that "(t)he excuse of necessity has always been allowed to private persons; *a fortiori* it will not

for the invocation of Necessity. In situations more extreme than the scarcity of food, where the state's response is self-defense. Necessity does not require the exhaustion of legal remedies. According to the Caroline, the necessity must be such as to "leave no choice of means; no moment for deliberation." The Caroline of course is not taken literally to allow acts only done in reflex. It does not however require, beyond the consideration of alternatives, that such alternatives be actually tried and proved futile.

89 HERCZEGH, GENERAL PRINCIPLES OF LAW AND THE INTERNATIONAL LEGAL ORDER, 91-95; see also, LAUTERPACHT, *supra* at 71.

90 Note for example Holland's classification of fundamental rights following the classification of fundamental individual rights in private law, *supra* note 23.

91 FENWICK, *supra* at 143.

be refused to states."[92] The question which confronts the judge of a municipal court is no different from the primary question which Necessity in international law poses, and that is, what basis does the court have in declaring that a norm not expressed in the law is superior to that law, and what particular right does such court have to so declare in the face of the language of the statute.[93] This question of course does not arise at all where Necessity is in the law, embodied as a legal justification. A survey of private law (which does not pretend to be exclusive) reveals a high degree of development of the principle of necessity in municipal law. Criminal law for example, recognizes a number of special defenses grouped under the term "justification" covering acts in self-defense to an actual attack and acts under duress or necessity i.e., compelled by irresistible force or by a threat entailing an immediate or an otherwise not avertible danger to one's self or to one's family members.[94] The counterpart of

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92 EDMUNDS, *supra* at 101.

93 Williams, *The Defense of Necessity*, 6 CURRENT LEGAL PROBLEMS 217, 224 (1953).

94 For Example, section 52 of the German Penal Code provides: 1. No act constitutes an offense if its perpetrator was compelled so to act by an irresistible force or by a threat entailing an immediate and an otherwise not avertible danger to his own or one of his family members' body or life. THE AMERICAN SERIES OF FOREIGN PENAL CODES, THE GERMAN PENAL CODE (Mueller and Buergenthal transl, 1961).

In turn, the JAPANESE PENAL CODE provides:

Article 36. (Self-defense) An act unavoidably done to protect the right of one's self or any other person against imminent and unjust infringement is not punishable....

Article 37. (Necessity for Averting Imminent Danger) An act unavoidably done to avert a present danger to the life, person, liberty or property of one's self or any other person is not punishable only when the injury produced by such act is not out of proportion to the injury which was sought to be averted. However, the punishment of an act which is out of proportion may be reduced or remitted according to the circumstances. SUPREME COURT OF JAPAN, CRIMINAL STATUTES OF JAPAN, 124 (transl. 1968).

The French Penal Code provides:

Article 328. When the homicide, wounding or striking was compelled by the immediate and actual necessity to defend one's self or another, no felony or misdemeanor has been committed. THE AMERICAN SERIES OF FOREIGN PENAL CODES, THE FRENCH PENAL CODE (Moreau and Fueller, transl. 1960).

The Soviet Criminal Code provides:

Article 13. Necessary Defense. Although falling within the category of an act provided for in the Special Part of the present Code, an action shall not constitute a crime if it is committed in necessary defense, that is in protecting the interests of the Soviet State, social interest, or the verson or rights of the defender or of another person against a socially dangerous infringement, by causing harm to the infringer, provided that the limits of necessary defense are not exceeded...

Article 14. Extreme Necessity. Although falling within the category of an act provided for in the Special Part of the present Code, an action shall not constitute a crime if it is committed in extreme necessity, that is in order to eliminate a danger, which threatens the interest of the Soviet State, social interests, or the person or rights of a given person or of other citizens, if in the given circumstances such danger caused is less significant than the harm prevented. RUSSIAN RESEARCH CENTER STUDIES, SOVIET CRIMINAL LAW AND PROCEDURE, 128-129 (Berman and Spindler transl. 1972).

The American Model Penal Code similarly provides:

Section 2.09. Duress

(1) It is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or threat to use, unlawful force against his person or the person of another, which a person of

self-defense to an actual attack in international law is self-defense "if an armed attack occurs" recognized in article 51 of the United Nations Charter. In turn, the justification for an offense committed in response to a threatened or non-avertible danger finds expression in the principles of necessity and propertionality of *The Caroline.*[95] The unwillingness of publicists to justify under Necessity the warding off by a state of a danger to itself in inflicting it upon an innocent state,[96] finds its basis in the case considered as a classic in Anglo-American criminal jurisprudence, *Regina v. Dudley and Stephens.*[97] In this case, the court through Lord Coleridge, in sentencing to death the survivors of a shipwrecked crew who had fed upon the body of one of the passengers to survive, condemned the argument that no crime was committed as "at once dangerous, immoral, and opposed to all legal principles and analogy." As the deceased himself made no threat upon anyone's life, the justification of self-defense or defense of others was held inapplicable. The court rejected the possibility of a principle of necessity which allows the inflicting of harm upon an innocent person.

The disposition of the *Serbian and Brazilian Loan* cases[98] and the *Russian Indemnity* case[99] demonstrates the application of legal concepts such as *force majeure,* impossibility of performance and commercial frustration which are recognized in private law as justifications for the breach of contractual obligations. The holdings in the *Serbian and Brazilian Loan* cases to the effect that economic dislocation caused by the war did not in legal principle release the debtors from their obligations, reflect jurisprudence in private law which excludes from the exculpatory effects of commercial frustration the mere fact that a party may find performance

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reasonable firmness in his situation would have been unable to resist....THE AMERICAN LAW INSTITUTE, MODEL PENAL CODE, PROPOSED OFFICIAL DRAFT (1962).

[95] At page 18 hereof.

[96] EDMUNDS, *supra* at 101; CHENG, *supra* at 74-75.

[97] 14 Q.B.D. 273 (1884); reported in 1 CALKINS, CASES AND MATERIALS ON MICHIGAN CRIMINAL LAW, 329-331.

[98] PCIJ: A 20/21, 39-40, 120 (1929).

[99] 1 H.C.R., 532, 546-547 (1912).

[100] See for example: THE CIVIL CODE OF QUEBEC (e'dition preparee sous la direccion de Yvon Renaud et Jean-Louis Baudevin Guerin, 1978-79) which provides in pertinent part:

> 1202. When the performance of an obligation to do has become impossible without any act or fault of the debtor and before he is in default, the obligation is extinguished and both parties are liberated; but if the obligation be beneficially performed in part, the creditor is bound to the extent of the benefit actually received by him.

The FRENCH CIVIL CODE likewise provides:

> 1148. No damages arise when as a result of an act of God or of a fortuitous event, the debtor was prevented from doing or giving that for which he had obligated himself, or did what was forbidden him.
>
> CRABB, FRENCH CIVIL CODE (1977)

The SOVIET CIVIL CODE contains similar provisions, thus:

> Article 235. *Termination of an obligation through impossibility of performance.* An obligation is terminated through impossibility of performance, if such impossibility has been caused by circumstances for which the debtor is not responsible.

unduly difficult and onerous.[101] The distinction made, however, in the *Russian Indemnity* case[102] between mere economic difficulties and "observance of the international duty which is self-destructive" and "which would have imperilled the existence of the Ottoman Empire or seriously compromised its internal or international position," corresponds to the inquiry that is made by municipal courts in private law which covers the degrees of seriousness that at one end may not excuse performance and at the other extreme necessitates its excuse. Commercial frustration as it is commonly expressed, considers impossibility which excuses performance not only as strict impossibility, but also as impracticability by reason of extreme and unreasonable difficulty, expense, injury and loss which performance would involve. Performance of the contract under such circumstances, would be deemed performance in a situation not contemplated by the parties, and after the whole purpose of the contract had been frustrated by the intrusion of a set of circumstances which represent a change so fundamental as to strike at the very root of the contract.[103]

While resort to municipal law might avoid the theoretical weakness of the naturalist position, it just as inevitably and as soon confronts its own. While the live dispute between those who construe "general principles of law recognized by civilized nations" as general principles of private law, and those who construe it as general principles of international

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Article 222. *Fault as a condition for liability for the breach of the obligation.* A person who fails to perform an obligation or who performs it in an improper manner is financially liable only if fault is present (intent or negligence) except in cases specied by law or by contract. Absence of fault is proved by the person who has breached the obligation.

UNIVERSITY OF MICHIGAN, CIVIL CODE OF THE RUSSIAN FEDERATED SOCIALIST REPUBLICS, 56, 59 (Gray and Stults transl. 1965).

Indian law is expressed in 2 RAMACHANDRAN, THE LAW OF CONTRACT OF INDIA 1204-1205 (1971), thus:

> The relief is given by the court on the ground of subsequent impossibility when it finds that the whole purpose or basis of the contract was frustrated by the intrusion, or occurrence of an unexpected event or change of circumstances which was beyond what was contemplated by the parties at the time when they entered into the agreement....When such an event or change of circumstances occurs which is so fundamental as to be regarded in law as striking at teh root of the contract as a whole, it is the court which can pronounce the contract to be frustrated and at an end.

English law is enunciated in 9 HALSBURY'S LAWS OF ENGLAND 321 (4th ed)

101 4 CANADIAN ENCYCLOPEDIC DIGEST (ONTARIO) 123-125 (2d.) citing Lieberman v. Roseland Theatre Ltd. (1956) 1 D.L.R. 342 (N.S.); 9 HALSBURY'S LAWS OF ENGLAND 321 (4th ed.) citing Davis Contractors Ltd. v. Fareham UDC, (1956) AS 696 (1956) 2 All E.R. 45 HL; Greenway Bros. Ltd. v. S.F. Jones and Co., (1915) 32 TLR 184; Blythe and Co. v. Ricahrds Turpin and Co., (1916) LJKB 1425; Twentsceh Overseas Trading Co. Ltd. v. Uganda Sugar Factory Ltd., (1944) 114 JPPC 25.

102 (1912) 1 H.C.R. 532, 546-547.

103 4 CANADIAN ENCYCLOPEDIC DIGEST (ONTARIO) 123-125 (2d. ed.); 9 HALSBURY'S LAWS OF ENGLAND 313-314 (4th ed.); 2 RAMACHANDRAN, THE LAW OF CONTRACT OF INDIA 1204-1205 (1971) citing Satyabrata Ghose v. Mugneeram Bazar and Co., AIR 1954 SC 44.

law,[104] as well as the difficulty of determining the extent and degree of acceptance within municipal systems which a general principle must have before it can be considered as one "recognized by civilized nations"[105] do pose restraints on an approach that would establish the status of Necessity in international law on the basis of its acceptance and conception in municipal law as a general principle, neither establishes as serious a theoretical obstacle as the subsidiary character of this third "source" of international law. Whether article 38(1) (c) of the Statute of the International Court of Justice establishes such a third or without doing so, merely sets down an additional body of rules to be applied by the international court, the fact remains that "general principles" are to be resorted to only when neither custom nor treaty provides a rule of law to resolve a given controversy. The *travaux preparatoiries* reveal the determination of the drafters that the international court chould not hold itself helpless to decide a controversy because of the silence of both treaty and custom, for by so declining, it would be perpetrating a "denial of justice."[106] There is a logical implausibility in holding that a principle of private law which has only a subsidiary validity i.e., may be resorted to only when neither treaty nor custom provides the applicable rule of law, can operate to terminate, suspend or excuse the violation of an operative and subsisting treaty or customary obligation.

Verdross does find a reasonableness in this argument "as far as it applies to non-compulsory norms" arguing that "a compulsory norm cannot be derogated either by customary or treaty law."[107] The question that is drawn however, is, "compulsory" in what legal order? If the norm is compulsory in international law, the norm might override treaty or customary law, if compulsory norms were to operate at all. But if the norm is compulsory in municipal law, resort to it must still be conditioned on the absence or silence of an operative or subsisting treaty. There remains

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[104] Tunkin, for example, expresses the view of Soviet writers that "general principles" refer to general principles of international law. TUNKIN, DAS VOLKERRECHT DER GEGENWART 126, 126-127 (Wolf transl 1963) as reproduced in HENKIN et al., *supra* at 77-78. Lauterpacht on the other hand takes the position that "general principles of law" refer to general principles of private law. LAUTERPACHT, *supra* at 69-70.

[105] Herczegh takes a liberal view of the requirement "recognized by civilized nations." thus:

> For this reason, we are inclined to pronounce the statement that the criterion of recognition does not amount to saying that all states ought to be acquainted with the legal principle in question, the less so because principles of law formulated in an identical way, may have different contents in different systems of law As Laslo Buza states, what is decisive is not "whether the principle in question is familiar to the civilized states, but the fact whether it is known in the legal systems of the states directly concerned....It follows from the principle of sovereignty that only principles of law and legal rules are binding on a state, which have been adopted as such by that state. If the municipal law of a state has adopted the legal principle in question, it has accepted it as binding also on the scale of international law by virtue of the presumptive will of the state." HERCZEGH, *supra* at 42.

[106] LAUTERPACHT, *supra* at 42.

[107] Verdross, *supra* at 573.

thus the difficulty in having such a norm supersede treaty or custom, when such norm in municipal law cannot even be resorted to because of the existence of such treaty or custom. There remains in other words, the inconsistency in the condition of being both compulsory and subsidiary. Necessity cannot negotiate the distance between private law and international law via article 38(1)(c) without abandoning the "supersensual order" (which the survey of municipal laws shows to be not external to but really provided for expressly in private law) which makes it compulsory in municipal law. As what it would have to leave behind gives it its compulsory character, it must, if it has to operate in the international plane more than as a mere simile, have its own supersensual order in international law. This leaves Necessity seemingly as the naturalists more plausibly explain it i.e., not as a rule of a higher law which has "God as its fountainhead" but as the necessary presupposition of the international legal order or as a rule which is derived or presumed from the nature of states or of the international community of states upon which as a part of a body of postulates, international law is built.[108] But while this reasoning might compel the acknowledgment that international law has underlying postulates or as Verdross has been pointed out to more conservatively conclude, that the possibility of such norms cannot be denied *a priori,* it does not aid in determining what these postulates really are, their precise dimensions and the conditions of and the limitations to their invocation and operation. It is this vagueness that has caused the initial doubt whether Necessity is after all within the realm of law and not without it. Statements that it "hath no law" or that "it knows no law" reveal aptly the extremes of invocation and thus of abuse that it is susceptible to. It in fact engenders an unfettered determination of what is rendered necessary on the part of a menaced state on the basis of its national interests. A susceptibility to a determination so wide and free ranging rubs it of its normative character and reveals itself as a mere "maxim of politics." If it is nevertheless compelling inspite of the uncertainty as to its legal character, it is because it operates in an international context where the supremacy of national interest over the restraints of international law remains undiminished. It is this disposition of Necessity to be either a legal norm or a mere doctrine of national interest or politics that has led one writer to abandon the categorization based on either and to place it under a seemingly conceptually-contradictory category of its own, namely, the "Lawless Law of Nations."[109] Since imprecision or uncertainty is the problem, one would wonder why states if they do have overriding fundamental rights. have not crystallized what these are, by defining them in some preamble or in the very text of their agreements to serve as instructions in the determination of the extent of their international obligations, rather than leave them to be deduced or generalized from presumed purposes of the legal system as a

[108] FENWICK, *supra* at 145.
[109] EDMUNDS, *supra* at 104-105.

whole. Such an explicit demonstration of underlying postulates would serve primarily to give legal support to a doctrine which at present stands merely on naturalist assumptions, the importance being in controlling its operation, whether it operates as a legal norm or merely as an instinct or an overriding tendency operating in some realm of "lawless"[110] law which states cannot resist, involving as it does a question of survival. In this situation, the need to support Necessity in international law becomes less important than controlling it apart from considerations of what its bases are at the outset. The task of law thus, as Westlake would view it, would be to tame it.[111]

The inquiry thus turns to present international law with the object not so much of determining whether it supports Necessity as a legal norm as of determning whether it controls it. International law, by controlling Necessity, has necessarily defined it.

Necessity under the United Nations Charter

In its manifestation as self-defense, Necessity finds confirmation in article 51 of the Charter. It finds confirmation as well in its character as the naturalists would view it. Self-defense is an "inherent" right. It is in the restrictions on its exercise that article 51 has crucial significance. Jessup wrote in 1948:

> This restriction in Article 51 very definitely narrows the freedom of action which states had under international law. A case could be made out for self-defense in the traditional law where the injury was threatened but no attack had yet taken place. Under the Charter, alarming military preparations by a neighboring state would justify resort to the Security Council, but would not justify resort to anticipatory force by the state which believed itself threatened.[112]

By its plain terms article 51 disallows even the doctrine of necessity and proportionality enunciated in *The Caroline.* Conformably, the International Court of Justice had the occasion to declare in the *Corfu Channel Case* that intervention and self-help were the "manifestation(s) of a policy of force...such as cannot...find a place in international law.[113]

Whether the restriction in article 51 has been effective draws an inquiry which however is beyond the scope of this paper. It would suffice to say that historically it has not. On the theoretical level, it has not foreclosed claims to a right of traditional self-defense made hand in hand with the premise that the Charter "important (as it is) does not purport to cover the entire field of international law."[114] Conformably, McDougal

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110 *Ibid.*
111 LAUTERPACHT, *supra* at 49.
112 JESSUP, *supra* at 166.
113 I.C.J. 4, 33, 35 (1949).
114 Christol and Davis, *Maritime Quarantine: The Naval Interdiction of Offensive Weapons and Associated Material to Cuba, 1962,* 57 AM. J. INT'L. L. 525 (1963).

brands as "factitious" any reading of article 51 to restrict the customary right of self-defense.[115]

A supportive position is drawn from a contrary premise. It has been claimed also that even if article 51 restricts the traditional notion of self-defense, it is not impervious to change. Thus it has been claimed that "(l)aw in the twentieth century, no more than modern science, can be expected to stand still, especially in the developing area of international relation,"[116] According to this position, actual armed attack, which conditions the resort to force or threat of force in article 51, must admit of a broader meaning in the nuclear age where because the actual launching of the missiles would allow the barest time for self-defense, a state should be allowed to take measures as early as the installation of such missiles in strategic areas.[117] To be sure, it was not the installation as such of the missiles in Cuba that was considered the "aggression" but the fact that by extending her nuclear thrust to the western hemisphere, even as the United States had long before extended her own in the eastern hemisphere, Russia had disrupted the status quo.[118] For if by merely installing the missiles in Cuba, Russia had properly provoked the American response, then the earlier installation by the United States of its own missiles near the Russian borders would have deserved an identical response. This position in fact indorses the right to restructure or to reconstrue law in the light of changed circumstances. It entails necessarily the view that when the law does not keep abreast of the times, an unprecedented situation may in fact operate, where no "settled rule" should be deemed at hand to deal with it, because the existing law no longer provides the answer.[119] Perceptions of a situation operating in a legal void, calls to mind early characterization of Necessity as a law of itself or as a precept which operates in some legal void. Thus it is said that it "hath no law." This fact is regardless of what international law then said or did not say, national interests compelled the United States action. And if in the process, the legal justifications attempted had the effect of destroying article 51, it might be that Necessity might be its own excuse, even to override the very restrictions directly placed on it. While the temptation to end with this conclusion may be great, one cannot conclude that Necessity because of its character, cannot be limited, without admitting that states are not masters of their own wills. It should be a more defensible conclusion to make that since

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115 McDougal, *The Soviet-Cuban Quarantine and Self-Defense,* 57 AM. J. INT'L. L. 597, 599-560.

116 Meeker, *Defensive Quarantine and the Law,* 57 AM. J. INT'L. L. 515 (1963).

117 *Ibid.*

118 See Christol and Davis, *supra* at 525-526.

119 See Meeker, *supra* at 57 AM. J. INT'L. L. 515:

> We see change going on everywhere. Change is the product of new circumstances and the response to new conditions in the international environment. It cannot be surprising that no settled law was ready at hand to deal with the situation created by the clandestine Soviet introduction of strategic missiles into Cuba in 1962.

after all, those who argue in favor of a right of self-defense beyond what article 51 on its face allows, do so via a process of interpretation or construction with the object of apprehending the intent behind or the contemplation of article 51, the invocation of Necessity inspite of the language of article 51 is due to a failure of article 51 to proscribe more categorically the use of force except under the conditions which sets forth, and not because states, in the end, are powerless to put limitations on the concept and operation of Necessity.

The Status of Necessity Under the Vienna Convention on the Law of Treaties

In its manifestation other than self-defense, does present international law recognize Necessity as an excuse for the non-performance or violation of a treaty obligation? Publicists reviewed earlier as well as the Permanent Court of Arbitration in the *Russian Indemnity case* have held that a treaty obligation gives way when the vital interests of a state are endangered or where performance would be "self-destructive,[120] much in the same manner that in private law according to the principle of frustration the performance of a contractual burden is excused when such a performance would be impracticable by reason of extreme or unreasonable difficulty.

As stated earlier, the inquiry is not foreclosed by article 42 of the Vienna Convention on the Law of Treaties which underscores the exclusive character of the enumeration of the grounds in the Convention for the invalidity, termination and suspension of treaties, but is on the contrary directed to the question whether Necessity underlies any of the grounds enumerated.

1. *Right of denunciation and withdrawal implied from the nature of the treaty*

There are treaties like those establishing territorial boundaries, which by their very nature do not allow the inference that the parties contemplated that either party may escape from its obligations by unilateral action.[121] Conversely, there are those which because they relate closely to the sur-

[120] To be sure, treaties the observance of which would visit upon the obligor the dire consequences contemplated by Necessity, would not be too many. For the purpose of this paper, it should suffice however to consider that they are conceptually possible. These may refer to treaties which by their terms require a state to impair its defenses or its ability to defend itself, or to abandon a substantial area of territory which is indispensable to its economic survival. These may refer likewise to treaties directing the discharge of some great financial burden to the sacrifice of the obligor's ability to serve more vital interests e.g., to feed or attend to its population at the height of a great famine or other calamity.

[121] See for example, article 62 (2) (b) of the Vienna Convention which provides:

> A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:
>
> ....
>
> b) if the treaty establishes a boundary;
>
> ....

vival and self-preservation of the parties, are understood to be sensitive to political necessities, and thus allow either party to withdraw based on its sole perception of what national interests demand. Thus a treaty of alliance does not bar a party from shifting political alignment or from espousing a neutral line.

This may happen for example when a neutral state which had bound itself by a treaty of alliance with a group of states for protection against another group, subsequently considers that its safety is assured by withdrawing itself from the area of confrontation, especially when the erstwhile enemy has become more powerful and has agreed to respect the neutrality of the state that has withdrawn. Most treaties of alliance do expressly provide for a unilateral right of withdrawal, but it has been considered that such right may be implied.[122] It is submitted that such a right may likewise be implied in agreements entailed by or collateral to a treaty of alliance, such as a military base agreement. As the maintenance of a military base of a former ally would still subject the state that had withdrawn to the attack of the erstwhile common enemy, the purpose of withdrawing from the area of confrontation by breaking away from the treaty of alliance would be set at naught. Traditionally such a withdrawing party may invoke the necessity of self-preservation as a justification for its unilateral withdrawal. Under article 56(1)(b) of the Vienna Convention, the right of withdrawal may be implied from the nature of the treaty. In turn, article 31(1) provides that, "(a) treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

If unilateral withdrawal is expressly precluded, the other pertinent grounds to be dealt with presently might be resorted to.

2. *Supervening impossibility of performance*

Article 61 of the Vienna Convention in pertinent part provides:

> 1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

To recall, the *Serbian and Brazilian Loan Cases* (1929) and the *Russian Indemnity Case* (1912), translate the plea of Necessity into a plea of impossibility of performance. The Permanent Court of International Justice in the loan cases and the Permanent Court of Arbitration in the indemnity case, rejected the plea of absolution against the standards of subjective impossibility. The Permanent Court of International Justice

122 ELIAS, THE MODERN LAW OF TREATIES, 186 (1974).

in the Loan Cases however, went on to hold both the Serbian and Brazilian Governments' reliance on physical impossibility are equally misplaced.[123]

According to the commentary of the International Law Commission, article 61 envisages the type of case exemplified by the "submergence of an island, the drying up of a river or the destruction of a dam or hydro-electric installation indispensable to the execution of a treaty."[124] Article 61 would thus seem to restrict the the defense of impossibility of performance to objective or physical impossibility. By its intendment, it precludes the plea of subjective or moral impossibility. While article 61 therefore clearly restricts the application of Necessity expressed as impossibility of performance, whether the Convention on the whole does so, requires an inquiry into the other pertinent grounds. As the International Law Commission itself explained, "(c)ases of supervening impossibility are *ex hypothesi* cases where there has been a fundamental change in the circumstances existing at the time when the treaty was entered into," although it ultimately considered that "juridically, 'impossibility of performance' and 'fundamental change of circumstances' are distinct grounds for regarding a treaty as having been terminated and should be kept separate."[125] Before considering "fundamental change of circumstances," one other ground should be looked into.

3. *Treaties conflicting with a peremptory norm of general international law*

Article 53 of the Vienna Convention provides:

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of international law. For the purpose of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole, as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

In turn, article 64 provides that "(i)f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."

What underlies the concept of *jus cogens* is the naturalist idea of a necessary law which states must observe,[126] and which for that reason

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[123] It held that as the obligation specifies payment in gold francs taken as a standard of value, the obligation was not dissolved by the impossibility of procuring gold francs in specie, and that war itself despite its economic consequences did not affect the obligations of the borrower

[124] U.N. Conference on the Law of Treaties, Official Records, 1st, 2nd, Session, Vienna, March 26-May 24, 1968, April 9-May 22, 1969, p. 128.

[125] *Ibid.*

[126] Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 AM. J. INT'L. L. 55, 56 (1966).

operates to limit the hitherto unrestricted contractual freedom of states.[127] What has been described as a "semi-vertical legal system" which the concept implies, calls to mind what the naturalists consider as a hierarchy of overriding rights, which constitute a reigning "supersensual" order in international law.[128] If self-preservation is an overriding right, would it therefore be a basis of a peremptory norm e.g., that treaties impairing the vital interests of a state are void, from which no derogation is allowed? Verdoss relates the concept of *jus cogens* with "general principles prohibiting states from concluding treaties *contra bonos mores.* More significantly he states:

> To this problem. the decisions of the courts of civilized nations nations give an unequivocal answer. The analysis of these decisions shows that everywhere such treaties are regaded as being *contra bonos mores* which restrict the liberty of one contracting party in an excessive or unworthy manner or which endanger its most important rgihts.
>
> This and similar formulas prove that the law of civilized states starts with the idea that demands the establishment of a juridical order guaranteeing the rational and moral coexistence of the members. It follows that all those norms of treaties which are incompatible with this goal of all positive law—a goal which is implicitly presupposed—must be regarded as void.[129]

What Verdross alternatively refers to as a state's most important right or its moral task, coincides with the fundamental rights which to the naturalists originate in the nature of the State and the international community. While a conceptual congruence may therefore be conceivable between the naturalist's "supersensual" order which overrides international law and the "necessary law" which underlies the concept of *jus cogens,* article 53 of the Vienna Convention does not make it a necessary one. Rather than abandon to a state the unilateral determination of what overriding rights or norms the observance of its treaties would compromise, article 53 requires that the peremptory norms which would discharge a party from its treaties, are those which are "recognized by the international community of states as a whole." Even by acknowledging the reign of some necessary law article 53 confirms the underlying premise of Necessity as the naturalists formulate it, it denies to a state the act of unilateral plea of Necessity i.e., the unilateral determination of what vital interests are overriding, which in its operation would clearly be destabilizing and destructive of the legal order. In this sense, article 53 may therefore be viewed as confirmatory and yet restrictive.

It may seem inconceivable that a state would actually conclude with another a treaty which at the outset is destructive of its fundamental rights.

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127 ROZAKIS, THE CONCEPT OF JUS COGENS IN THE LAW OF TREATIES, 1 (1976).

128 *Id.* at 24.

129 Verdross, *Forbidden Treaties in International Law,* 31 AM. J. INT'L. L. 571, 573-575 (1937).

Yet the application of article 53 would contemplate such a situation.[130] It might seem that if a treaty of such consequence were in fact entered into the grounds for withdrawal would find apt support in the other articles of the Vienna Convention, such as article 48 (Error), article 40 (Fraud), or article 52 (Coercion of a state by the threat or use of force). It would seem however that article 53 can operate to invalidate a treaty independent of the circumstances of its conclusion. Verdross cites examples of treaties which because of their substance and apart from the conditions of conclusion may be considered to be in breach of some peremptory norm. Thus:

> 1. An international treaty binding a state to reduce its police or its organization of courts in such a way that it is no longer able to protect at all or in an adequate manner, the life, the liberty, the honor or the property of men in its territory....
>
> 2. An international treaty binding a state to reduce its army in such a way as to render it defenseless against external attacks. It is immoral to keep a state as a sovereign community and to forbid it at the same time to defend its existence....
>
> 3. An international treaty binding it to close its hospitals and schools, to extradite or sterilize its women, to kill its children, to close its factories, to leave its fields unploughed, or in other ways to expose its population to distress....
>
> 4. An international treaty prohibiting a state from protecting its citizens abroad. But a treaty is valid if it confers the protection of its citizens upon another state, for in this case the care for the welfare of human beings in question is undertaken by another subject of international law....[131]

A state may conclude a treaty with another, which at the outset and by its terms does not endanger its fundamental rights or vital interests. No peremptory norm has been violated at the inception of the treaty, nor one has emerged subsequently. However, conditions external to the treaty may have changed thus making the observance of the treaty destructive to a party. Again, for example, a treaty of alliance for defensive purposes is not illegal under any law. Moreover, as its main purpose is self-defense, it protects rather than endangers the fundamental right of self-preservation of the parties. However if the balance of power has shifted against that alliance so that the withdrawal to neutrality by one of the parties would be the only workable recourse to preserve its existence, would that state be able to withdraw if the right to withdraw is expressly denied by the treaty,[132] under the claim that the performance of the treaty although

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[130] It provides in pertinent part that "(a) treaty is void *if at the time of its conclusion,* it conflicts with a peremptory norm of general international law." (underscoring provided).

[131] Verdross, *Forbidden Treaties in International Law, supra* at 574, 575.

[132] See ELIAS, *supra* at 186. The right to withdraw from a treaty of alliance may be implied from the object and purpose of such treaty, provided there is no evidence of the parties intention to the contrary.

not its terms would be in conflict with a peremptory norm? This situation apparently is neither within article 53 nor within article 61. In 1915, Greece, bound to Serbia under a 1913 treaty, to aid the latter should it be attacked, notwithstanding such treaty, refused to aid Serbia, as the war which such aid would have dragged Greece into, was to Greece of an unexpected and uncontemplated proportion. Greece's plea was *rebus sic stantibus.*[133]

4. *Rebus sic stantibus*

The more commonly held view of the doctrine of *rebus sic stantibus* (so long conditions remain as they are), is that of a term implied into treaties, that the obligation which they impose terminates (or gives a party a right to terminate) when a fundamental change takes place in the circumstances obtaining at the conclusion of such treaties, the continuance of which formed a condition to the continuing validity of such treaties.[134] The juridical bases of the doctrine however, reach beyond the implied term principle. Developing at the same time as the implied theory, but diametrically opposed to it, the doctrine of fundamental rights of states, likewise furnished the basis for *rebus sic stantibus.*[135] David, thus points out that "(i)ndeed, a minority group of writers in the nineteenth century rejected the implied term doctrine and pripagated instead a doctrine based on an extrinsic right of unilateral termination. According to this view, a treaty obligation may be terminated unilaterally following changes in conditions that make performance of the treaty injurious to a list of fundamental rights—existence, self-preservation, independence, growth and development, all of which may be summarized under the title of 'rights of necessity'."[136] However, if it does exist at all, the opposition between the implied term and the rights of necessity doctrines, is ignored by many. Thus, the unilateral right to terminate when the fundamental rights are endangered has been viewed as implied into a treaty. To Fenwick:

> It would be generally accepted that it is an implied condition of every treaty that it be morally possible of fulfillment, which may be interpreted as meaning that a state cannot be expected to sacrifice its very existence to uphold its treaty obligations.[137]

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133 FENWICK, *supra* at 358.

134 Hill lists some of these bases as follows, "(1) because of a relation between the change of circumstances and the original intentions or wills of the parties to the treaty, (2) because fulfillment of the treaty after the change of circumstances is injurious to a fundamental right of a state party to a treaty, (3) because the change of circumstances frustrates the object of a treaty, (4) because fulfillment of a treaty becomes impossible because of the change of circumstances, (5) because the change of circumstances affects adversely the interests of a party which the treaty was meant to promote and (6) because certain changes of circumstances by their very nature affect the obligations of a treaty." HILL, THE DOCTRINE OF REBUS SIC STANTIBUS IN INTERNATIONAL LAW, 8 (1934).

135 *Ibid.*

136 DAVID, STRATEGY OF TREATY TERMINATION, 19 (1975).

137 FENWICK, *supra* at 355.

He attributes to Oppenehim moreover, the expression of the principle that when the "necessary development of a state stands in unavoidable conflict with such state's treaty obligations, the latter must give way, for self-preservation and development in accordance with the growth and necessary requirements of a nation are the primary duties of every state."[138]

The German jurisconsult Jellinek's treatment of the *clausula,* underscores the overriding character of fundamental rights:

> Whenever the observance of international law is found to be in conflict with the existence of the state, the rule of law retires to the background, because the state is put higher than any particular rule of law.... International law exists for the states and not states for international law.[139]

Changes which are fundamental or vital justifying a plea of *rebus sic stantibus* have been summed up thus: those which—

> ...Take away the very foundation of the engagement or its vital *raison d'etre;*
>
> Threaten or cause the sacrifice of a state's development or its vital requirements for political or economic existence to the execution of a treaty, that is, make performance impracticable except at an unreasonable sacrifice;
>
> Are inconsistent with the right of self-preservation, or incompatible with the independence of the state;
>
> Modify essentially the political relations which produced political treaties, as for example, treaties of alliance;
>
> Make a treaty inapplicable, or actually impossible of fulfillment.[140]

At least one judicial decision reflects the tendency of combining the implied term and the rights of necessity theories in applying *rebus sic stantibus.* The Swiss Federal Court in the case *Lucern vs. Aargau* (1882), held:

> There is no doubt that treaties may be denounced unilaterally by the party under obligation, if their continuance is incompatible with its vital interests as an independent commonwealth or with its fundamental purposes, or if there has taken place such a change of circumstances as, according to the apparent intention of the parties, constitued at the time of its creation, an implied condition of its continued existence.[141]

It is not difficult to see how a view that equates fundamental change with the impairment of vital interests, as a state party would determine, expands considerably the application of the doctrine of *rebus sic stantibus.* A doctrine such as Necessity which at the extreme would allow a state to disregard its obligations as its national interests dictate, would if un-

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[138] *Ibid.,* citing, I OPPENHEIM, sec. 559.

[139] LAUTERPACHT, *supra* at 47, citing JELLINEK, ALLGEMEINE STAATSLEHRE, 377 (3rd. ed. 1914).

[140] Woolsey, *The Unilateral Termination Of Treaties,* 20 AM. J. INT'L. L. 346, 349-350 (1926).

[141] Excerpted in DAVID, *supra* at 53; see also HILL, *supra* at 53-54.

fettered deny to treaties their juridical character. Thus if the doctrine so construed should be a rule of law at all, in the sense of a norm which stabilizes rather than impairs the social or political order, it should be delimited and regulated. That the International Commission took it to task to do so reflects its appreciation of the destructive potential of the doctrine of *rebus sic stantibus,* and it would not be an exaggeration to say that such potential is derived from the doctrine of Necessity which express itself in the doctrine of *rebus sic stantibus.*

The limitations are embodied in article 62 of the Vienna Convention, which provides in pertinent part:

> 1. A fundamental change of circumstances which has occured with regard to those existing at the time of the conclusion of a treaty, and which was not foressen by the parties, may not be invoked as a ground for terminating or withdraying from a treaty unless:
>
> (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
>
> (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty....

To be sure, article 62 does not exclude Necessity as a basis of *rebus sic stantibus,* or as the Convention would refer to it, fundamental change of circumstances. The broad terms of the article in fact allow the inference that article 62 has combined the various theories purporting to provide the juridical bases for *rebus sic stantibus,* the net consequence being that it is "much stricter than any other particular theory that can be quoted in its support."[142] While "fundamental change" is as susceptible to a broad interpretation as "vital interests," the Convention nevertheless imposes a meaningful limitation by reducing *rebus sic stantibus* into a mere ground for terminating a treaty to be invoked in accordance with the procedure set forth in article 64 ("Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty). It is not, as the traditional notion of an overriding necessity would otherwise allow, to be considered as a ground for the unilateral disregard of a treaty.

CONCLUSION

If the inquiry were a factual one, it would suffice to say that Necessity is invoked in the national interest, in answer to the question, what accounts for Necessity. If national interest is its own excuse, a defense purporting to be some legal norm such as Necessity, would be a superfluity. But as acts done in the national interest are nevertheless justified in law by states, Necessity, when it is invoked, is claimed to be some legal norm. When it is said that "it hath no law," it is only to underscore its overriding character, and reference is nevertheless made to a superior normative order which

proclaims it. The question thus is, is there a right of Necessity i.e., to invoke Necessity to justify the breach of obligations?

Two approaches may be taken. One is to hold it to its claims, the position that Necessity lies in a normative order above and thus outside international law. An inquiry into the reality of such a superior order would however be necessarily steeped in uncertainty and speculation. A modification of this approach avoids its consequences by viewing Necessity as an excuse *in law* and not above or external to it. The inquiry is thus directed to Necessity's enunciation in treaty or customary law, whether express or implied as underlying postulates.

State practice however, both by reason of infrequency and an absence of a showing of *opinio juris* is inconclusive. On the other hand, it may be possible to infer specific postulates from particular treaties. But a doctrine such as Necessity, which purports to override international obligations in general under given circumstances, must rest on postulates which underlie the whole international legal order. Beyond compelling the acknowledgment that the possibility of general norms of international law "cannot be denied *a priori*," logic does not specify what these norms are. Necessarily, the search for underlying postulates would be as susceptible to imprecision as an outright reliance on some supersensual order would be to speculation.

The alternative approach is to accept Necessity as it is factually i.e., that it is invoked in the national interest, and then view any international law that may be developed in regard to it, as no more than efforts to regulate or limit it. By defining Necessity, international law does not create, originate or even account for it, for Necessity is invoked in the national interest apart from what the law provides. International law would however establish it *as law*...within and subject to specified limitations. Thus the United Nations Charter does not create the right of self-defense; it declares it as "inherent." It so restricts the inherent right however to situations in which the exercise would have been indisputably valid in any event, in customary law, i.e., in the event an armed attack occurs. A constriction is thus effected of a concept of self-defense which under Necessity would have allowed even intervention, self-help or anticipatory measures. In its extreme manifestation therefore, Necessity comes closer in international law to suppression than to limitation. In its "inherent" character, however, it finds confirmation.

In its other manifestation, Necessity finds acknowledgment in the Vienna Convention. A necessary law which expresses itself in peremptory norms, is assumed. The determination however of what these norms are is restricted to what is accepted and recognized by the international community of states as a whole. It likewise recognizes that there are fundamental values which a state is nit to be lightly assumed to waive by the language of its treaties. Where the circumstances have changed so as to

make performance incompatible with such values, the Convention allows the invocation of "fundamental change of circumstances." Again, however, certain conditions must be met, the main being, procedures for invocation and the settlement of ensuing controversies. Unilateral action may no longer be effected. What may therefore be described as a confirmation in the Vienna Convention, is at the same time, a limitation.